Milbank

March 15, 2017

CONTACTS

Charles Evans
Partner
+44-20-7615-3090
cevans@milbank.com

Tawfiq Rangwala
Partner
+1-212-530-5587
trangwala@milbank.com

William Charles
Associate
+44-20-7615-3076
wcharles@milbank.com

Brent Culpepper
Associate
+1-212-530-5626
bculpepper@milbank.com

Litigation & Arbitration Group Client Alert:

Privilege in cross-border investigations and litigation: Implications of *The RBS Rights Issue Litigation* in the English High Court

Although the laws relating to legal professional privilege in England and attorney-client privilege in the US share a common underlying policy rationale, they have developed in different ways, resulting in important differences in scope. These different rules present challenges to corporates subject to internal or regulatory investigations or those involved in litigation where there are disclosure obligations which must be met. The question of whether a document, which is privileged in the US, must be disclosed in another jurisdiction, thereby impairing or circumventing the claim to privilege in the US, can be of critical importance, particularly given that the spectre of US private civil actions hangs over many investigations where there is a US angle.

The difference between the scope of privilege in the US and in England has been highlighted in the recent decision of Mr Justice Hildyard in *The RBS Rights Issue Litigation* (the "**Judgment**").[1] In essence, the Judge held that English legal advice privilege ("**LAP**") did not cover notes – including notes prepared by US attorneys – of interviews with employees and ex-employees, conducted in the course of internal investigations, including in connection with subpoenas from the US Securities & Exchange Commission (the "**US SEC**"). Moreover, the Judge reached this conclusion despite recognizing that the notes would likely be protected from disclosure by attorney-client privilege in the US.

It had been hoped that the UK Supreme Court would have the opportunity to consider the Judgment and to clarify the law but, following the settlement of a substantial part of the case, RBS's appeal has been withdrawn.

[1] [2016] EWHC 3161 (Ch).

BACKGROUND TO THE JUDGMENT

In proceedings brought by shareholders in connection with RBS's 2008 rights issue, RBS claimed LAP over the notes of interviews which were conducted by or on behalf of RBS with 124 current and former employees (the "**Notes**").

- The interviews took place in the context of two internal investigations: one was in connection with two subpoenas from the US SEC (relating to RBS's sub-prime mortgage exposures), while the other concerned certain allegations made by a former employee (concerning the marketing of CDOs).
- The majority of the Notes were prepared by RBS's in-house or external US and/or English lawyers.[2]
- There was no dispute that RBS authorised each of the interviewees to participate in the relevant interviews, or that the interviewees were told that the Notes would be confidential and subject to what was described to them as "*attorney-client privilege*".

RBS claimed that the Notes were protected from disclosure by LAP and/or the related privilege which attaches to "*lawyers' working papers*".[3] RBS also argued that the Court should apply privilege under US law, on the basis that the engagement or instructions under which the Notes came into existence had the "*closest connection*" with the US.[4]

LEGAL CONTEXT

Under English law, LAP attaches to all confidential communications between lawyers and their clients (0r their agents) for the purpose of giving or obtaining legal advice. The (related) privilege which covers "*lawyers' working papers*" may attach to lawyers' drafts, memoranda and other working papers, made by the lawyer for his own use in advising his client or for his client's use.

The controversial Court of Appeal decision known as *Three Rivers (No 5)* remains the leading authority on LAP and, in particular, how the client is to be identified within a corporate context.[5] This remains the case despite the decision being the subject of a significant amount of academic and judicial criticism.

[2] A small sub-set were prepared by non-lawyers within the RBS Group Secretariat (see paragraph 19 of the Judgment).
[3] RBS did not seek to argue that the (wider) protection from disclosure under English law litigation privilege (or its US counterpart, work product protection) applied.
[4] Paragraph 137 of the Judgment.
[5] *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)* [2003] Q.B. 1556.

In *Three Rivers (No 5)*, the Court of Appeal approved a highly restrictive approach to identifying the 'client' in a corporate context, finding that the 'client' was limited to those authorized by the corporate to obtain legal advice on its behalf. As a result, the Court of Appeal held that, in a corporate context, information gathered from non-client employees is no different from information obtained from third parties, even if the information is collected by, or in order to be shown to, a lawyer to enable legal advice to be given to that lawyer's client (*i.e.*, the corporate): neither would be subject to LAP because in each case the information-gathering would not constitute a confidential communication between lawyer and client.

In seeking to overcome the difficulties presented by *Three Rivers (No 5)*, RBS argued that where an individual, with the authority of the corporate seeking legal advice (*i.e.*, RBS (as the 'client')), communicates factual information to (and at the request of) the corporate's legal advisers, in confidence and for the purposes of enabling the corporate to obtain legal advice, then that communication should be treated as if the individual were part of the 'client', and therefore protected by LAP.[6]

THE JUDGMENT

In rejecting RBS's arguments, the Judge followed *Three Rivers (No 5)* and held 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 does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer*."[7] The employees and ex-employees were, therefore, only "*providers of information as employees and not clients*" and the Notes were not subject to LAP since they "*were not communications between client and legal adviser*."[8]

As to whether the Notes were privileged as lawyers' working papers, the starting-point for the Judge's analysis was that the interviews themselves were not privileged communications and that a verbatim note or transcript of a non-privileged interview would also not be privileged.[9]

Therefore, for the Notes to be protected as privileged lawyers' working papers, RBS had to "*demonstrate some attribute of or addition to the relevant* [Notes] *which distinguishes them from verbatim transcripts or reveals from an evident process of selection the trend of legal advice being given*...".[10]

[6] Paragraph 80 of the Judgment.
[7] Paragraph 91 of the Judgment.
[8] Paragraph 93 of the Judgment.
[9] See, for example, *Property Alliance Group Ltd v RBS (No 3)* [2015] EWHC 3341 (Ch), per Birss J at 24.
[10] Paragraph 105 of the Judgment (emphasis added).

The Judge concluded that, on the evidence before the Court, RBS had failed to demonstrate any such attribute or addition. Rather, the evidence which had been submitted by RBS was only "*conclusory in nature*" and "*based on the assumption that it follows from the fact the* [Notes] *were not verbatim that therefore they must contain legal input or selection justifying the claim to privilege.*"[11] This, as well as RBS's attempt to rely on the annotation that the Notes reflected the "*mental impressions*" of the lawyers, was insufficient to substantiate the claim to privilege.[12]

What was required was evidence that the Notes reflected or provided "*a clue as to the trend of legal* ***advice***" (emphasis in the original), and there was a "*real difference*" between this and merely reflecting "*a train of inquiry*."[13] In commenting on the types of evidence which might have substantiated RBS's privilege claim, Mr Justice Hildyard noted that "*examples of the sort of detail which might be offered*" were set out in a US Supreme Court Judgment, which referred to evidence of the inclusion in interview notes of "*what I* [*i.e.*, the lawyer] *considered to be the important questions, the substance of the responses to them, my beliefs as to the importance of these, my beliefs as to how they related to the inquiry, my thoughts as to how they related to other questions. In some instances they might even suggest other questions that I would have to ask or things that I needed to find elsewhere.*"[14]

The evidence submitted by RBS did not contain such details and, accordingly, the Judge found that the Notes were not privileged lawyers' working papers and they fell to be disclosed to the claimants.

US LAW: THE KEY DIFFERENCES

As noted above, RBS had also argued that the Court should apply the US attorney-client privilege, on the basis that US law had the closest connection with the engagement pursuant to which the Notes were created.[15] Although the Judge rejected this argument in favour of the traditional rule that, in English proceedings, English law should apply to questions of privilege (*i.e.*, as the *lex fori*), he recognized that "*it does appear likely… that under US law the* [Notes] *would be privileged.*"[16]

Attorney-client privilege under US law covers confidential communications between attorneys and their clients which are for the purpose of giving or receiving legal advice. It applies to internal investigations where a significant purpose (but it need not be the

[11] Paragraph 125(1) of the Judgment.
[12] Paragraphs 123(4) and 125(3) of the Judgment.
[13] Paragraph 126 of the Judgment.
[14] *Upjohn Co et al. v United States et al.* (1981) 449 U.S. 383, at footnote 8. The case is referred to in the Judgment in the course of considering the particular US law relevance of the annotation referring to "*mental impressions*" of counsel. See paragraphs 123(4) and 125(2) of the Judgment.
[15] Paragraph 137 of the Judgment.
[16] Paragraph 139 of the Judgment (emphasis added).

only purpose) of the investigation is to obtain or provide legal advice. Further, attorney-client privilege applies to communications with employees (or, in certain cases, former employees to the extent issues covered in the interview are within the scope of the former employee's job description) who are involved in providing information to a corporate's counsel for the purposes of the corporate obtaining legal advice.[17] Unlike English LAP, attorney-client privilege attaches to communications between any employee and attorneys representing the corporate and does not focus on a core client group or any particular constituency within the corporate that is designated to give instructions or to receive advice.

Attorney-client privilege, furthermore, will sometimes cover communications between attorneys and third parties working on the investigation, which are made at the direction of counsel and in order to enable counsel to provide legal advice (and interviews conducted by non-lawyers may be privileged if the interviewers are acting as agents of counsel).

Some of the Notes were prepared for an investigation which was undertaken in connection with two subpoenas from the US SEC. These Notes may thus also be privileged under the attorney work product doctrine. This is broader than its English equivalent, litigation privilege[18], and covers material prepared by or at the request of counsel, if it is prepared in connection with, or in anticipation of, litigation.

Importantly, whereas for the purposes of English litigation privilege the anticipated proceedings must be "*adversarial*" in nature[19], rather than investigative or inquisitorial, in the US the commencement of an investigation by a governmental body or regulatory authority is typically sufficient for there to be the threat of litigation and, therefore, for the attorney work product doctrine to apply. Further, English litigation privilege only arises where there is a real likelihood, rather than a mere possibility, of litigation.

[17] *Gruss v. Zwirn*, 276 F.R.D. 115, 124 (S.D.N.Y. 2011).

[18] Litigation privilege applies to confidential communications between clients or their lawyers (on the one hand) and third parties (on the other), or other documents created by or on behalf of the client or his lawyer, for the dominant purpose of obtaining information or advice in connection with litigation, provided that such litigation must be in progress or contemplation.

[19] *Three Rivers District Council and Others v The Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48, per Lord Carswell at paragraph 102. There is uncertainty as to when litigation privilege applies in the context of regulatory proceedings. A tribunal exercising judicial or quasi-judicial functions which are adversarial in nature (such as the Upper Tribunal) is likely to meet the test, but a purely administrative fact-finding process is unlikely to be considered sufficiently adversarial. However, litigation privilege may apply where an authority issues a notice setting out its case against the company under investigation (for example, *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6).

CONCLUSIONS AND PRACTICAL ADVICE

The Judgment has significant implications for corporates conducting cross-border internal investigations. In recent years, the UK regulators have been increasingly willing to challenge claims to privilege and the Judgment is likely to embolden them in this approach. The Judgment is also likely to be of particular concern to corporates involved in litigation or regulatory investigations in the US, given the possible impact that the disclosure of documents in English proceedings may have on the ability to maintain privilege over such documents in US proceedings.

Against this background, over and above standard measures for protecting privilege in investigations, there are a number of practical steps which may be taken in order to increase the prospects of maintaining privilege over interview memoranda, particularly where there is a reasonable possibility that English litigation may be initiated or that English regulators may commence an investigation:

- **Cross-border implications**: In general, given the different approaches to legal privilege between major jurisdictions, careful consideration should be given at the outset of any investigation concerning which jurisdictions are likely to be involved, including in relation to any subsequent litigation. This issue should be kept under review throughout the investigation.

- **Litigation privilege**: Where disclosure of documents is sought (or likely to be sought) in England, whether in the course of litigation or a regulatory investigation, in order to support a claim for privilege under English law, particular attention should be paid to whether and, if so, when and how litigation privilege may apply, given its wider scope and the limitations on LAP. For example, there is likely to be merit in a corporate: (i) recording and analysing all communications with, and actions taken by, the relevant regulatory authority in order to seek to determine the point at which the investigation may properly be categorised as "*adversarial*"; and (ii) analysing, and keeping under review, the earliest point(s) at which it can be said that relevant litigation, in whatever forum and jurisdiction, can be said to be in contemplation.

- **Identifying the 'client'**: More generally, corporates under investigation should determine, and keep under review, those individuals properly identifiable as the 'client', in light of the test in *Three Rivers (No 5)*, to act as the channel for requesting and receiving privileged legal advice.

- **Preparing interview memoranda**: Care should be taken to ensure that documents are drafted so as to avoid potential disclosure, or with the recognition that they may potentially be disclosed, in English proceedings, which may impair the ability to assert privilege over those documents in other jurisdictions. In relation to investigation interviews with non-client employees and ex-employees, any notes or memoranda of these interviews should be carefully prepared to identify legal advice or, at least, the trend of legal advice. Whilst there is current-

ly only limited authority on this issue, the following steps may be beneficial (particularly where litigation privilege is, or is likely to be, unavailable):

- Interviews should be conducted by external counsel in the presence of the employee and a representative of the 'client'.
- External counsel should prepare any interview memoranda on the basis that they must include counsel's thoughts and impressions, sufficient to identify the trend of legal advice (any transcript or verbatim note of the interview is very unlikely to be privileged).
- Whilst not determinative of the issue under English law, it may be of some benefit to record at the outset of any interview memorandum that it contains legal advice and (if that is the case) that it has been prepared in connection with anticipated, pending or threatened litigation (or other adversarial proceedings).
- It may also be beneficial for a single memorandum to cover a number of interviews (although it will still be necessary for the memorandum to include counsel's thoughts and impressions, sufficient to identify the trend of legal advice).
- From a US perspective, at the beginning of any interview conducted in connection with a corporate's investigation, counsel should consider carefully if there is a risk that production of the interview memoranda will be required in the UK, and adjust any warning to the interviewee regarding privilege to account for such a risk (*e.g.*, an amended *Upjohn* warning).

- **Advice**: Overall, corporates under investigation in the US, where the facts of the investigation appear reasonably likely to extend to other jurisdictions, would be well-advised to retain counsel with a clear understanding of cross-border privilege issues.

LITIGATION & ARBITRATION GROUP

Please feel free to discuss any aspects of this Client Alert with your regular Milbank contacts or any of the members of our Litigation & Arbitration Group.

If you would like copies of our other Client Alerts, please visit our website at www.milbank.com and choose “Client Alerts” under “News.”

LONDON
10 Gresham Street, London EC2V 7JD

Tom Canning	tcanning@milbank.com	+44-20-7615-3047
Charles Evans	cevans@milbank.com	+44-20-7615-3090
Julian Stait	jstait@milbank.com	+44-20-7615-3005

NEW YORK
28 Liberty Street, New York, NY 10005

Wayne M. Aaron	waaron@milbank.com	+1-212-530-5284
Antonia M. Apps	aapps@milbank.com	+1-212-530-5357
Thomas A. Arena	tarena@milbank.com	+1-212-530-5828
George S. Canellos Global Head of Litigation	gcanellos@milbank.com	+1-212-530-5792
James G. Cavoli	jcavoli@milbank.com	+1-212-530-5172
Scott A. Edelman *Firm Chairman*	sedelman@milbank.com	+1-212-530-5149
Christopher J. Gaspar	cgaspar@milbank.com	+1-212-530-5019
David R. Gelfand	dgelfand@milbank.com	+1-212-530-5520
Joseph S. Genova	jgenova@milbank.com	+1-212-530-5532
Robert C. Hora	rhora@milbank.com	+1-212-530-5170
Atara Miller	amiller@milbank.com	+1-212-530-5421
Sean M. Murphy	smurphy@milbank.com	+1-212-530-5688
Daniel Perry *Practice Group Leader*	dperry@milbank.com	+1-212-530-5083
Tawfiq S. Rangwala	trangwala@milbank.com	+1-212-530-5587
Stacey J. Rappaport	srappaport@milbank.com	+1-212-530-5347
Fiona A. Schaeffer	fschaeffer@milbank.com	+1-212-530-5651
Jed M. Schwartz	jschwartz@milbank.com	+1-212-530-5283

Alan J. Stone	astone@milbank.com	+1-212-530-5285
Errol B. Taylor	etaylor@milbank.com	+1-212-530-5545
Fredrick M. Zullow	fzullow@milbank.com	+1-212-530-5533

WASHINGTON, DC
International Square Building, 1850 K Street, NW, Suite 1100, Washington, DC 20006

David S. Cohen	dcohen2@milbank.com	+1-202-835-7517
Andrew M. Leblanc	aleblanc@milbank.com	+1-202-835-7574
Michael D. Nolan	mnolan@milbank.com	+1-202-835-7524
Aaron L. Renenger	arenenger@milbank.com	+1-202-835-7505

LOS ANGELES
2029 Century Park East, 33rd Floor Los Angeles, CA 90067-3019

Robert J. Liubicic	rliubicic@milbank.com	+1-424-386-4525
Jerry L. Marks	jmarks@milbank.com	+1-424-386-4550
Mark C. Scarsi	mscarsi@milbank.com	+1-424-386-4580