

# Important High Court decision on Legal Professional Privilege

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There has been an important decision on legal professional privilege in internal investigations in the context of the *RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch). Mr Justice Hildyard, in the English High Court found that transcripts, notes or other records taken during an internal investigation, which were undertaken by RBS's external and in-house lawyers and said to summarise interviews with RBS employees ("the Interview Notes") were disclosable to private litigants who are bringing claims against RBS and its former management.

A key practical consequence is that financial institutions and other organisations may need to re-visit the basis on which such investigations are conducted, to reduce the risk of inadvertently assisting hostile third parties in their claims against the organisation.

We understand that the decision may be the subject of a "leapfrog" appeal over the Court of Appeal, directly up to the Supreme Court.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors

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## Background

Legal advice privilege applies only to the confidential continuum of communications between lawyer and client created for the purposes of giving or receiving legal advice. Working papers privilege protects documents which, although not necessarily communicated by or to a client, would give the recipient of the papers a clue to the advice which had been given by the lawyer and giving them the benefit of the lawyer's professional opinion.

Litigation privilege applies to all communications (whether between lawyer/client or involving third parties) in respect of which, at the time the document was created, litigation was in "reasonable prospect", provided that the documents were created for the "dominant purpose" of the litigation. RBS did not claim litigation privilege over the Interview Notes.

## Legal advice privilege

Hildyard J rejected RBS's claim for legal advice privilege. The Judge followed the (controversial) judgment of the Court of Appeal in *Three Rivers (No 5)* [2003] QB 1556 that "information from an employee stands in the same position as information from an independent agent". The individuals interviewed were providers of information as employees and not clients. The Interview Notes were not therefore communications that could attract legal advice privilege.

Hildyard J declined to rule on the definition of client within a corporate entity but left open the possibility that "only individuals singly or together constituting part of the directing mind and will of the corporation can be treated for the purpose of legal advice privilege as being, or being a qualifying emanation of, the 'client'." He continued, "only communications with an individual capable in law of seeking and receiving legal advice as a duly authorised organ of the corporation should be given the protection of legal advice privilege." Although the introduction of the concept "duly authorised organ of the corporation" could lead to further uncertainty, the practical effect of Hildyard J's judgment may be to conflate the

definition of client for the purposes of *Three Rivers (No 5)* with the well-known concept of "directing mind and will" found elsewhere in company law.

## Working papers privilege

Hildyard J also rejected RBS's claim for working papers privilege. He was not persuaded by a pro forma annotation on the Interview Notes to the effect that they reflected the "mental impressions" of counsel, or the evidence put forward by RBS to support the claim for privilege. However, he endorsed the following guidance from the US Supreme Court case *Upjohn Co et al. v United States et al* (1981) 449 U.S. 383 as to what evidence might support a claim of WPP:

...notes of the interviews as containing what [the lawyer] considered to be the important questions, the substance of the responses to them, [the lawyer's] beliefs as to the importance of these, [the lawyer's] beliefs as to how they related to the inquiry, [the lawyer's] thoughts as to how they related to other questions.

## Conflict of Laws and Discretion to Prevent Disclosure

Hildyard J also declined to apply US law under which (he assumed) the Interview Notes would be privileged. The judge applied the conventional approach that an English Court in English litigation will apply English law to issues of privilege, regardless of strong connections that the individuals concerned or the case generally might have had with another jurisdiction. Further, while the Court has discretion to prevent disclosure and inspection, or impose conditions, Hildyard J was not persuaded that there were exceptional circumstances justifying that approach.

## Key Learning Points

- RBS continues the recent trend in English Courts towards a very strict approach to legal professional privilege in the context of internal investigations, as also demonstrated by the recent judgment in *Astex Therapeutics Limited v Astrazeneca AB* [2016] EWHC 2759.

- The English law of legal professional privilege is now considerably narrower than equivalent rules in the US.
- Despite the guidance given by Hildyard J as to how notes of interviews could be protected by working papers privilege, it seems very difficult to satisfy this in practice.
- In order to meet the new test proposed by Hildyard J for the definition of a client as synonymous with a corporate entity's "directing mind and will", it is advisable that the board of directors pass a resolution which formally delegates power to a specified internal body to administer the internal investigation, to seek and receive legal advice and to act on that advice. That internal body would then constitute the client for legal advice privilege purposes. This could be a standing delegation applicable to all investigations, as opposed to delegation on a case by case basis.
- A number of solutions could be envisaged, including not taking any contemporaneous notes of interviews, or simultaneously recording legal impressions and advice in any interview memorandum.
- However, these give rise to considerable practical issues. The reality is that organisations undertaking internal investigations face a real risk that notes of interviews will be disclosable both to regulators and in any subsequent litigation. It is more important than ever to design and manage investigations with these risks in mind.

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