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Litigation & Arbitration Group Client Alert: Bank Ordered to Disclose Privileged Documents in LIBOR-related Civil Proceedings

The English High Court has determined that if a firm, in subsequent civil proceedings, puts in issue the basis of published findings against it by the FCA, that firm will risk being required to disclose privileged material on which those findings were based.

The most recent decision of Mr Justice Birss in the case of Property Alliance Group Limited ("**PAG**") v Royal Bank of Scotland Plc ("**RBS**")[1] has a number of wide-ranging implications for firms wishing to claim privilege over documents created as part of internal and external regulatory investigations.[2]

The most important aspect of the Court's decision relates to the circumstances in which the content of privileged material, including 'without prejudice' communications generated as part of settlement discussions with regulators, may be ordered to be disclosed to a third party in subsequent civil proceedings.

BACKGROUND

On 6 February 2013, the UK Financial Services Authority ("**FSA**") (as the FCA was then known)[3] published a Final Notice recording its detailed findings that RBS had "*undermined the integrity of LIBOR*",[4] as a result of misconduct that had occurred in relation to RBS' Japanese yen ("**JPY**"), Swiss franc ("**CHF**") and US Dollar LIBOR

[1] [2015] EWHC 1557 (Ch).

[2] Although not discussed in this Client Alert, the Court's decision also includes obiter dictum that "*it would not be unreasonable for a lawyer to approach claims to privilege on the basis that the litigation privilege and legal advice privilege overlap*" (see paragraph 49 of the judgment).

[3] From 1 April 2013, the FSA's relevant responsibilities were assumed by the Financial Conduct Authority ("**FCA**").

[4] See paragraph 5 of the Final Notice.

submissions between January 2006 and March 2012 (the "**Final Notice**"). Consequently, the FSA imposed a penalty of £87.5 million on the bank. This penalty was discounted from £125 million due to RBS having "*agreed to settle at an early stage of the FSA's investigation*".[5]

PAG subsequently brought proceedings against RBS in the English High Court claiming that it had been mis-sold four interest rate swaps by RBS between 2004 and 2008. Each of those swaps was referenced to the 3 month Pound Sterling ("**GBP**") LIBOR rate. PAG contends that, in proposing LIBOR as a reference rate for those swaps, RBS had impliedly represented that it was not manipulating that rate for its own ends.[6] PAG now alleges that representation to have been false. In its Defence, RBS denies misconduct in the setting of GBP LIBOR, including 3 month GBP LIBOR,[7] relying on the fact that "*there have been no regulatory findings of misconduct on the part of RBS in connection with GBP LIBOR*".[8]

The most recent judgment of the English High Court in the proceedings concerns an interim application by PAG for the disclosure of various categories of documents over which RBS had claimed legal privilege.[9]

'WITHOUT PREJUDICE' SETTLEMENT NEGOTIATIONS WITH THE FCA

In an important decision,[10] following detailed examination of the FCA's enforcement process,[11] the Court endorsed RBS' prima facie right to withhold inspection of any communications passing between RBS and the FSA which were marked 'without prejudice' and occurred in connection with the settlement negotiations regarding the issue of the Final Notice:[12]

[5] See paragraph 2, *id*.

[6] In ***Graiseley Properties v Barclays Bank*** [2013] EWCA Civ 1372, the Court of Appeal held that an allegation based on implied misrepresentation relating to LIBOR in this way is properly arguable.

[7] In the same proceedings, RBS formally admitted misconduct relating to JPY and CHF LIBOR.

[8] See paragraph 260(3)(b) of RBS' Defence.

[9] There are limited circumstances in which a Court may look behind a party's claim to privilege, all of which require it to have become clear to the Court that the evidence on which the claim to privilege is based may be incorrect or, alternatively, that the character of the documents over which privilege has been claimed has been misrepresented (see ***West London Pipeline v Total*** [2008] EWHC 1729 (Comm)).

[10] This is the first reported case in which a court has opined on the subject of a whether 'without prejudice' privilege can be claimed over settlement negotiations with the FSA/FCA.

[11] See paragraphs 63-80 of the judgment.

[12] The FCA supported RBS' submissions in this regard and made its own written submissions to the Court (see paragraph 82 of the judgment).

> *"...a firm the subject of an FCA investigation has the right to withhold inspection of communications which were part of genuine settlement discussions between that firm and the FCA. That right applies before the FCA, the Upper Tribunal and in civil litigation with a third party".*[13]

Although this principle appears, at first glance, to be analogous to the 'without prejudice' rule, the Court imposed two important qualifications. The first of these is unremarkable, simply providing that the characterisation of communications as being 'without prejudice' cannot prevent the FCA from acting on information contained in those communications (for example, by investigating previously undisclosed issues).[14] However, the second qualification is more disconcerting, stipulating that:

> *"if the firm puts in issue before a court the basis on which the Final Notice was produced, then in those circumstances justice demands that the communications which led to the Final Notice be disclosed."*[15]

In the instant case, as noted above, RBS' Defence relies, in part, on the positive assertion that the Final Notice did not contain any finding of misconduct in relation to GBP LIBOR. PAG contended, and the Court agreed, that it did not necessarily follow that RBS had, in fact, been exonerated of any misconduct in relation to GBP LIBOR: RBS was, therefore, ordered to produce the 'without prejudice' documents in issue for inspection.[16]

The Court's reasoning appears to have been based upon the controversial notion that the Final Notice was the product of settlement negotiations, rather than a full and complete investigation by the FSA and, as such, the information on which it was based could not necessarily be deemed to be wholly reliable or complete.[17] However, this view does not appear to take account of a firm's ongoing obligation to deal with regulators in an "*open and cooperative way*", including by disclosing "*anything of which that regulator would reasonably expect notice*".[18] There is no equivalent obligation in civil proceedings.

[13] See paragraph 99 of the judgment.

[14] See paragraph 100, *id*.

[15] *Id*.

[16] This disclosure was made subject to a four week grace period, as requested by the FCA.

[17] This is contrasted with the position that "*when a civil case settles following without prejudice negotiations, there is no reasoned judgment on which one of the settling parties might subsequently rely*". See paragraphs 90-92 of the judgment.

[18] Principle 11 of the FCA's Principles for Businesses.

It remains to be seen whether RBS (or, indeed, the FCA) has any appetite to challenge the Court's conclusions. For the time being, the Court has created a situation in which firms contemplating settlement negotiations with regulators must consider whether to request that any eventual settlement documentation contains affirmative statements acknowledging the absence of evidence on any number of topics that might be the subject of civil claims in the English courts.[19] Of course, regulators are unlikely to be receptive to such requests.

DOCUMENTS PRODUCED PURSUANT TO NON-WAIVER AGREEMENTS

The Court also determined that, in principle, RBS was entitled to maintain its claim to privilege over documents which had been shown or provided to regulators[20] (and, in one case, handed over to regulators) pursuant to non-waiver agreements. This was despite the fact that the non-waiver agreements contained a 'carve-out' which enabled each regulator to share documents with other third parties (such as other governmental or regulatory agencies) and/or to make that material public or to disclose it further.[21]

Whilst this is a welcome clarification of the efficacy of non-waiver agreements in such circumstances,[22] the wording of the Court's judgment suggests that the position may have been different if any regulator had already exercised its right, pursuant to the 'carve-out', to share the information in question with a third party.[23] Interpreted in this way, the decision leads to an unsatisfactory result whereby the entitlement to privilege may be determined by arbitrary factors. It remains to be seen how the Courts will approach this issue in the future (but it may be that the issue will necessarily be determined on a case-by-case basis).

[19] There is no real concept of 'without prejudice' privilege in the US: although there is a rule of evidence stating that settlement discussions are inadmissible, this does not means that settlement discussions are not discoverable during the disclosure phase of proceedings.

[20] These regulators included the US Commodity Futures Trading Commission, the US Securities and Exchange Commission, the US Department of Justice and the Attorneys General of various US states. Despite the lack of a non-waiver agreement with the Japanese Financial Services Agency ("**JFSA**"), the Court did not view this as material on the basis that the one relevant document provided to the JFSA had been given on the same basis as had been agreed with the other regulators.

[21] The relevant English law provides that, although confidentiality is an essential pre-condition for privilege, that confidentiality can sometimes be maintained in a document despite the fact that it has been disclosed to a limited number of third parties: ***Gotha City v Sotheby's (No.1)*** [1998] 1 W.L.R. 114.

[22] Whilst the concept of limited waiver of privilege has previously been accepted by the English courts (see ***Berezovsky v Hine & Ors*** [2011] EWCA Civ 1089), this is the first reported case in which it has been held to apply to non-waiver agreements with regulators.

[23] See paragraph 113 of the judgment.

In the event, the Court determined that RBS' claim to privilege pursuant to the non-waiver agreements was, once again, defeated by the fact that RBS sought to rely on the absence of findings by regulators (in this case, regulators other than the FCA) in relation to GBP LIBOR, stating that RBS *"cannot on the one hand rely on absences from the regulators' findings as indicating the limits of its misconduct and yet on the other hand seek to maintain as privileged what it put to* [the regulators]".[24]

LIMITATIONS OF LEGAL ADVICE PRIVILEGE

One further important aspect of the Court's judgment relates to a number of documents connected to RBS' Executive Steering Group ("**ESG**"). The ESG played a central role in the various investigations into the extent of RBS' own LIBOR misconduct and benefited from the significant involvement of RBS' external legal advisers, Clifford Chance, including their attendance at ESG meetings.

RBS had claimed legal advice privilege over documents connected to the ESG. However, the validity of that claim was dependent upon the nature of the ESG's function: RBS could only claim legal advice if ESG's *sole* function had been to receive legal advice.

Due to the fact that RBS' descriptions of the role of the ESG were inconsistent and, on occasion, referred to the ESG conducting tasks more administrative in nature than the receipt of legal advice, the Court concluded that it was not satisfied that RBS had provided sufficient information to justify its claims to legal advice privilege in respect of the ESG documents. Therefore, RBS was ordered to produce the ESG documents to the Court to enable a proper determination of privilege to be made.

This aspect of the judgment acts as a critical reminder to ensure that issues of privilege are kept front-of-mind when considering the function of internal committees in the context of an internal investigation.

CONCLUSION

The convergence of issues in this case has required the Court to consider a number of important questions regarding the proper application of the doctrine of privilege to the disclosure of material relating to historic regulatory proceedings. Aspects of the Court's reasoning may have left its conclusions open to challenge. However, unless or until such a challenge is made, the Court's decision is likely to have wide-reaching implications for firms defending civil claims in the wake of regulatory settlements and needs to be considered at the outset of an internal investigation by a firm.

[24] See paragraph 114, *id*.

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