

Client Alert

Case law update: legal professional privilege in a regulatory context – who decides?

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In a recent judgment in A v B and The Financial Reporting Council,¹ the English High Court addressed the question of who, in the context of responding to a statutory disclosure notice from a regulatory authority, should assess whether documents are privileged and can therefore be withheld from disclosure. Is it the regulated entity required to respond to the statutory notice, or its client to whom the documents in question (and privilege) belonged?

Background

B is the former auditor of a retailer, A. B was the subject of an Audit Enforcement Procedure investigation by the Financial Reporting Council Ltd (the “**FRC**”) into its audit of A’s 2018 financial statements. In the course of that investigation, the FRC issued statutory notices to B requiring the provision of certain documents in accordance with its investigatory powers under the Statutory Auditors and Third Country Auditors Regulations 2016 (“**SATCAR**”).

The FRC’s investigatory powers

Under SATCAR, the FRC is entitled to issue a statutory notice requiring the provision of information by a statutory auditor “*for any purpose related to inspecting or investigating statutory audit work*”.² If a recipient of such a notice fails to comply with its requirements, the FRC may enforce the notice by making an application to the court.³ Failure to comply with a notice may also be an offence under SATCAR.⁴

There is, however, a specific carve-out in SATCAR for privileged material: there is no obligation “*to provide any information or create any documents which the person would be*

¹ [2020] EWHC 1491 (Ch). Unless otherwise stated, paragraph references are to paragraphs in the judgment.

² Paragraph 1(1) of Schedule 2 to SATCAR.

³ Paragraph 2 of Schedule 2 to SATCAR.

⁴ Paragraph 5 of Schedule 2 to SATCAR.

*entitled to refuse to provide or produce... in proceedings in the High Court on grounds of legal professional privilege”.*⁵

The proceedings

The notices issued by the FRC to B covered, amongst other things, certain documents in B’s possession that had been provided to B by A on the basis of a limited waiver of privilege for the purposes of B’s audit function. A dispute arose between A and B as to whether those documents were covered by legal professional privilege and therefore whether B should withhold them from the FRC. By the time of the hearing, there were six documents which A contended should be withheld by B, but which B did not accept were privileged.

A informed B that it did not consent to disclosure of its privileged documents and sought declarations from the court to the effect that B was obliged to withhold production of the documents to the FRC on the grounds of A’s assertion of privilege.

Both B and the FRC argued that the court should not grant any declaratory relief. Separately, B commenced a counterclaim against A (to which the FRC was not party) for declaratory relief to determine the privilege status of the six contested documents.

The FRC accepted that B was not required to produce any documents which were covered by legal professional privilege. This followed the Court of Appeal’s recent decision in Sports Direct International plc v The Financial Reporting Council,⁶ which confirmed (overturning the first instance decision) that there is no “infringement exception” which might override an otherwise legitimate claim to legal professional privilege.⁷ In addition, neither B nor the FRC argued that the provision of documents by A to B caused the loss of any privilege that might have existed in those documents.

Decision on declaratory relief

Mr Justice Trower refused to grant the declaration sought by A as it would not resolve, or provide an effective mechanism for resolving, the substantive issue in dispute, namely the

⁵ Paragraph 1(8) of Schedule 2 to SATCAR.

⁶ [2020] EWCA Civ 177.

⁷ Sports Direct concerned a notice issued by the FRC to Sports Direct requiring the production of certain documents in connection with an investigation into its former auditors, Grant Thornton UK LLP. Sports Direct sought to withhold 40 documents from disclosure to the FRC on grounds of legal professional privilege. The FRC argued that, although the documents were protected by legal professional privilege, they were subject to an exception in the case law which meant that disclosure of the documents to the FRC would not infringe Sports Direct’s privilege. The FRC contended that the case law recognised an exception to legal professional privilege in circumstances where (i) the request for information was made by a regulator, (ii) the regulator is bound by duties of confidentiality in its use of the information, and (iii) the holder of the privilege is not at risk of an adverse finding as a result of the use of the information by the regulator. At first instance, the judge accepted the FRC’s submissions and held that the production of the 40 privileged documents to the FRC would not infringe Sports Direct’s privilege. Sports Direct appealed this decision. The Court of Appeal considered the case law in detail and concluded that there is no basis for the “infringement exception” argued by the FRC and overturned the first instance decision.

status of the six documents.⁸ This issue would be resolved in the counterclaim. The declaration sought by A merely addressed procedural issues as to whether B should make its own assessment of the privilege status of the documents or simply defer to A's assertion of privilege.

Furthermore, the declaration sought by A did not accurately reflect the true legal position as regards the obligations and entitlements of A and B.⁹ The Judge made several observations in this regard:

- The entitlement not to disclose privileged documents belongs to B as the party otherwise obliged to provide the information under SATCAR. It “*derives from the privileged nature of the information or document as a matter of fact and law*”, not from B's belief that the document is privileged or from the mere assertion of privilege by A.¹⁰
- B's obligations to A derive from the terms of its relationship, including the terms of the limited waiver on which the documents were provided by A to B. Although it was open to A and B to agree terms as to maintaining legal professional privilege, “*it would require clear words for B to be obliged by its own relationship with A to maintain a claim to privilege on the basis of nothing more than a mere assertion by A that a privilege exists*”.¹¹
- B was not “*simply exercising a ministerial function*” in its response to the FRC's notice in respect of the documents over which A asserted privilege. It had its own interests to protect, including its relationship with the FRC and its obligation to comply with the notice.¹²
- Requiring B to withhold documents from production to the FRC on the basis of A's assertion of privilege would be inconsistent with the SATCAR enforcement regime, which allows the FRC to apply to court in the event of failure to comply with the notice.¹³
- B is the party on whom the duty to disclose has been imposed by the statutory notice. B is therefore the proper party to determine whether the documents in issue are privileged. A's rights in this regard are protected by the terms of its relationship with B, under which it may have recourse against B for any erroneous determination on privilege.¹⁴ The Judge considered it likely that B was under a duty to tell A about the statutory notice, and did not think it was realistic to consider that an auditor would not engage with their client before making disclosure.
- The proper way to determine any disagreement on disclosure is in proceedings between A and B. This also has the practical advantage of both parties to the proceedings having

⁸ Paragraphs 61-64.

⁹ Paragraph 65.

¹⁰ Paragraph 67.

¹¹ Paragraph 69.

¹² Paragraph 70.

¹³ Paragraph 71.

¹⁴ Paragraph 72.

seen the documents in issue. B will have its own interests to protect and may also have relevant evidence to adduce on the underlying substantive issue of privilege.¹⁵

- Finally, it will often be preferable for the FRC to obtain documents from B rather than A. A may no longer have the documents in question and the FRC may also wish to see the document as it appears on the relevant audit file.¹⁶

Counterclaim

In a separate judgment on B's counterclaim, the Judge addressed the question of whether any of the six documents in issue between A and B were protected from disclosure on the grounds of legal professional privilege.

Five of the documents were said by A to be protected by legal advice privilege. These comprised two minutes of meetings of A's executive corporate governance group which were drafted by A's general counsel, minutes of A's board meeting which were originally drafted by an external law firm, a risk register which was prepared by A's general counsel, and a draft chairman's script containing a comment in track changes from A's external lawyers. The section of the judgment addressing the sixth document, which was said by A to be protected by litigation privilege, has been redacted.

The Judge concluded that it would be appropriate to redact the comment from A's external lawyers in the draft chairman's script, but otherwise held that the five documents did not disclose any legal advice (notwithstanding the involvement of lawyers in their preparation) and agreed with B that privilege did not attach to the documents.

Conclusion and practical considerations

This judgment provides helpful guidance as to the court's approach to disclosure of a third party's documents pursuant to a regulator's statutory powers in the course of an investigation. In particular, it is the responsibility of the party required to respond to the statutory notice (i.e., the disclosing party) to conduct its own privilege assessment (notwithstanding that it may not know the circumstances in which the document in question was created); and the proper forum for resolution of any disagreement is in proceedings between the disclosing party and the third party (i.e., its client, or former client, in an audit context).

It remains to be seen whether this judgment will have any application in other regulatory regimes or, indeed, in civil litigation. It would nonetheless be prudent to factor the risk of effectively handing control of disclosure to a third party when providing privileged documents to that party on the basis of a limited waiver. In particular, a party sharing documents on the basis of a limited waiver of privilege should consider the extent to which the terms of any retainer provide protections against disclosure to others (including regulatory authorities), such as an obligation to give notice of any disclosure request and to consult on the response

¹⁵ Paragraphs 74 to 77.

¹⁶ Paragraph 78.

to that request. In any event, it would be good practice to make clear, and confirm by agreement where possible (and at the time of providing the documents) that this is subject to certain requirements on the receiving party, including notification of any disclosure requests, consultation on the response to such requests, and taking steps to preserve privilege.

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