

# Client Alert

## Legal Privilege in a Transactional Context: *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd and Ashurst LLP*

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The High Court in England has recently ruled on the question of whether, in the context of a proposed public takeover, the instructions given to a firm of lawyers to provide confirmations about the availability of funds to a third party were protected from disclosure in subsequent proceedings.<sup>1</sup> Ruling that the instructions were privileged, Mrs Justice Moulder's judgment provides a helpful recapitulation of how legal privilege may apply to communications involving lawyers and their clients in a transactional context.

### The Dispute

The claims brought by Raiffeisen Bank International AG ("**RBI**") arose out of the proposed takeover of Asia Resource Minerals plc ("**ARM**") by Asia Coal Energy Ventures Ltd ("**ACE**"). The transaction at the heart of the dispute involved ACE purchasing the shares in ARM and certain loan assets which were held by RBI. PT Sinar Mas Multiartha TBK ("**SM Multiartha**") provided financing to ACE in connection with the transaction and was represented by Ashurst LLP ("**Ashurst**").

ACE and RBI entered into a sale and purchase agreement (the "**SPA**") which contemplated an escrow arrangement under which the maximum amount due to the seller (\$85 million) would be held in escrow and released on the satisfaction of certain conditions precedent.

The SPA also acknowledged that Ashurst had confirmed to RBI that it (Ashurst) had received irrevocable instructions to hold \$85 million in its client account pending transfer to the escrow agent, and to execute the transfer once the escrow agreement had been signed. Ashurst issued a confirmation in these terms, which was expressed to be governed by English law, to RBI (the "**Confirmation**").

Although the shares in ARM were transferred and paid for, a dispute arose in relation to the loan rights and the balance of the purchase price was not paid. RBI brought proceedings against ACE for breach of contract

<sup>1</sup> [2019] EWHC 3 (Comm) (the "**Judgment**").

and against Ashurst for misrepresentation in respect of the Confirmation and breach of a duty of care to RBI.

RBI applied for specific disclosure from Ashurst of the underlying instructions which SM Multiartha had given in relation to the Confirmation. In response, Ashurst asserted that it was not entitled to disclose the instructions, on the basis that they were protected by Legal Advice Privilege (which its client, SM Multiartha, had refused to waive).

## Legal Advice Privilege

Legal Advice Privilege has been defined as covering: “...all communications made in confidence between solicitors and their clients for the purpose of giving or obtaining legal advice even at a stage when litigation is not in contemplation.”<sup>2</sup>

As to the scope of “legal advice” for the purposes of attracting privilege, “legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.”<sup>3</sup>

Accordingly, the key elements of a claim to Legal Advice Privilege are: (a) confidential communication; (b) between lawyer and client; and (c) for the purpose of giving or obtaining legal advice/advice in the relevant legal context.

## The Judgment

RBI advanced two principal arguments as to why Legal Advice Privilege did not apply to the instructions given to Ashurst:

- First, the instructions were not confidential because Ashurst was asked by its client, SM Multiartha, to enter into a legal relationship with RBI and to state what instructions had been given to Ashurst. Therefore, RBI argued, SM Multiartha had authorised Ashurst to disclose the instructions or had waived any privilege in respect of them.
- Secondly, the nature of the instructions could not attract privilege because Ashurst was doing no more than a bank does (i.e., confirming that funds had been remitted and would be held to certain instructions).

In reaching her decision, Mrs Justice Moulder focused on whether the instructions were (a) confidential, and (b) made in the “relevant legal context.”

### Confidentiality

The Judge held that the instructions remained confidential. Properly analysed, SM Multiartha had not instructed Ashurst to tell RBI what its (SM Multiartha’s) instructions were. Rather, the instructions were “to enable Ashurst to give an independent confirmation, for which Ashurst was solely liable, regarding the holding of the funds and their subsequent payment” (emphasis added).<sup>4</sup> Accordingly, Ashurst was not acting as its client’s agent; it was providing independent and legally binding representations on its own behalf to RBI in order to allow the transaction to be completed.

Moreover, the Judge observed that “the question is what authority the client has given to his solicitors.”<sup>5</sup> As to this, the client’s “underlying instructions do not cease to be confidential merely because the client

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<sup>2</sup> *Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610. Per Lord Rodger at paragraph 50.

<sup>3</sup> *Balabel v Air India* [1988] Ch 317 at 330, cited with approval by Lord Carswell in *Three Rivers (No 6)*.

<sup>4</sup> Paragraph 39 of the Judgment.

<sup>5</sup> Paragraph 40 of the Judgment.

authorises his solicitor to divulge information which has passed in the course of confidential communications.” In the Judge’s view, SM Multiartha had not authorised Ashurst to disclose communications containing the underlying instructions.

It followed that there had been no loss of confidentiality – a pre-requisite for a general waiver of privilege – in the underlying instructions.

### *Relevant legal context*

Mrs Justice Moulder also rejected RBI’s submissions that the underlying instructions were not advice in the “*relevant legal context*”.

In doing so, she distinguished Ashurst’s position from that of a bank authorised to hold sums of money and to give a confirmation. The Judge held that “*Ashurst in advising SM Multiartha on the transaction, and in particular the transfer of the funds, is applying its legal knowledge and advising the client on a legal matter, namely how best to safeguard the interests of SM Multiartha in paying away funds in order to complete the acquisition.*”<sup>6</sup> Accordingly, the Judge found the relevant context – advising SM Multiartha in relation to the financing – to be inherently legal. Moreover, even if the documents containing the instructions did not themselves contain advice on matters of law, they would be part of the “*continuum of communication*” between lawyer and client in the relevant legal context.<sup>7</sup>

## **Conclusions**

The Judgment provides a helpful reminder of the key principles of Legal Advice Privilege, particularly in a transactional context.

First, confidentiality is a necessary – although it is not a sufficient – requirement for any communication to be capable of being privileged. A general loss of confidentiality in respect of an otherwise privileged communication is typically fatal to any claim to privilege.

Secondly, the communication must be between a lawyer and their client. In line with the controversial leading authority on this point, in a corporate context the ‘client’ is limited to those authorised to obtain legal advice on its behalf.<sup>8</sup> Communications with non-client employees (and other third parties) will, therefore, generally not be privileged, save in certain circumstances.<sup>9</sup>

Thirdly, for a communication to be privileged, it must be “*for the purpose of giving or obtaining legal advice*”; and legal advice extends to what should prudently and sensibly be done in a relevant legal context. Once the relevant legal context has been established, “*where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach...*” to the relevant communications.<sup>10</sup>

Finally, caution is required in relation to confirmations from solicitors to parties other than their clients. It should be carefully analysed in such cases whether the client is merely authorising the solicitor to disclose specific information received from the client, or whether in fact the authorisation extends to disclosing the underlying instructions.

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<sup>6</sup> Paragraph 55 of the Judgment.

<sup>7</sup> Paragraph 57 of the Judgment.

<sup>8</sup> *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 5)* [2003] Q.B. 1556.

<sup>9</sup> For example, where Litigation Privilege applies, or where the non-client acts as an agent (i.e., only transmitting the privileged communication between lawyer and client), or where there can be said to be a common interest between the client and the non-client in the subject matter of the privileged communication, or a limited waiver of privilege in favour of the non-client. See also our previous client alerts: <https://www.milbank.com/en/news/a-victory-for-legal-privilege-in-cross-border-investigations.html>; and <https://www.milbank.com/en/news/privilege-in-cross-border-investigations-and-litigation.html>.

<sup>10</sup> *Balabel v Air India* [1988] Ch 317 at 330.

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