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Litigation & Arbitration Group

Client Alert

Legal professional privilege and the risks of collateral waiver: *PCP Capital Partners v Barclays Bank Plc*

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In a judgment delivered shortly before the start of the trial of the claims brought by PCP Capital Partners ("**PCP**") against Barclays Bank Plc ("**Barclays**"), the High Court held that legal professional privilege had been waived by Barclays over all contemporaneous legal advice received relating to particular transactions in 2008 to raise capital.[1]

The court held that certain references to legal advice in witness statements and submissions made by Barclays amounted to reliance on the advice and gave rise to a collateral waiver over all other communications involving legal advice relating to the transactions (which would otherwise have been protected as privileged). Moreover, the fact that (unusually) certain documents held to have been relied on by Barclays had already ceased to be privileged (as a result of their deployment by the Serious Fraud Office ("**SFO**") in previous criminal proceedings) did not mean that Barclays could rely on the documents in the present proceedings without it giving rise to the collateral waiver.

The judgment is not only an important reminder of the risks of collateral waiver, but also of the additional layers of complexity to protecting privileged material which can arise when the background to the civil litigation is regulatory enforcement action.

Background

Current civil proceedings

PCP had brought proceedings against Barclays in relation to the bank's efforts to raise capital from private investors during the 2008 financial crisis. At the time, the state of Qatar and related entities (the "**Qataris**") offered to invest £2 billion in Barclays, whilst PCP (which represented a consortium including investors from Abu Dhabi) agreed to invest £3.25 billion. In the proceedings, PCP alleges that Barclays represented to it that PCP would get "*the same deal*" as the Qataris; and that this representation was knowingly false because, in addition to the expressly declared fees, the Qataris received a further £280 million, allegedly disguised as consideration payable for advisory services pursuant to certain written advisory services agreements (the "**ASAs**").

[1] PCP Capital Partners v Barclays Bank Plc [2020] EWHC 1393.

Criminal proceedings

Prior to the civil proceedings, the SFO brought criminal charges against Barclays and four senior executives, following an investigation in relation to the same matters (the "**Criminal Proceedings**"). The charges against Barclays were dismissed in 2018 and the executives were acquitted following a retrial. However, during the SFO's investigation, Barclays agreed to provide certain documents to the SFO, expressly on the basis of a "*limited waiver of privilege*", the terms of which included that the SFO could use the documents for its investigation and related criminal proceedings. The SFO subsequently used a number of those documents in the criminal trial of the executives, including referring to them in open court. As a result, the privilege previously attaching to such documents was lost (referred to then as the "**Open Documents**").

PCP's disclosure application

The main thrust of PCP's claim is that the ASAs were shams to disguise additional consideration paid by Barclays for the Qataris' investment. Against this, Barclays relied on a number of witness statements that included (at the very least) references to the receipt of (internal and external) legal advice in the context of drafting and approving the ASAs. Such references included, for example: "*I was aware that* [the ASAs] *were drafted by the lawyers. I took comfort from their involvement*"; and "*I am certain that if anything had been proposed at the meeting which created a problem from a legal perspective,* [the lawyers] *would have said so.*"[2]

PCP applied for disclosure of all communications concerning the ASAs. Barclays resisted the application on the basis that the documents were covered by legal professional privilege. PCP argued first that the references to legal advice in Barclays' witness evidence were sufficient to constitute a waiver of privilege; and second, that the scope of the waiver must extend to all otherwise privileged communications relating to the ASAs (i.e., by virtue of the principles concerning collateral waiver of privilege).

In response, Barclays made four submissions:

- On a proper application of the relevant legal principles, there was no waiver at all (referred to by the Judge as "*the Basic Point*");
- Even if there otherwise would have been a waiver, it did not arise here because all the references were to the Open Documents and, since they lost their privileged status as a result of having been deployed in the Criminal Proceedings, no waiver could result from their deployment in the present proceedings ("*the Timing Point*");
- Even if Barclays failed on the Basic Point and the Timing Point, such that there was a waiver, the scope of the documents sought was too wide ("*the Scope Point*"); and
- In any event, the order sought by PCP was disproportionate and inappropriately burdensome on Barclays at this stage, given the trial was imminent ("*the Proportionality Point*").[3]

Legal principles

In relation to the initial question of whether waiver had taken place, Waksman J started from the propositions that, first, the reference to the legal advice must be sufficient and second, the party waiving must be relying on that reference in some way to support or advance its case on an issue that the court has to decide.[4] Accordingly, neither a purely narrative reference to the giving of legal advice, nor a bare reference to the fact that legal advice was given, will constitute waiver, provided there is no element of reliance.

Waksman J then turned to what he described as "*the vexed question which still confounds the law of privilege, namely the idea that, quite apart from reliance, waiver cannot arise if the reference is to the "effect"*

[2] *Ibid.,* paragraphs 30 and 44.
[3] *Ibid.,* paragraph 19.
[4] *Ibid.,* paragraph 48.

of the legal advice as opposed to its "contents"."[5] Having interpreted (and partially distinguished) one of the principal authorities for this (i.e., the Court of Appeal decision in Marubeni v Alafouzos[6]), the Judge held as follows (with emphasis added): "*in my judgment the correct approach to applying the content/effect distinction is this: the application of the content/effect distinction, as a means of determining whether there has been a waiver or not, cannot be applied mechanistically. Its application has to be viewed and made through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise. To be clear, this means that in a particular case, the fact that only the conclusion of the legal advice referred to is stated as opposed to the detail of the contents may not prevent there being a waiver.*"[7]

Once a waiver is established, the question of whether *further* privileged documents should be disclosed arises.[8] Here, the task for the court is to decide the issue or "*transaction*" which the waiver concerns (taking a realistic approach, so as to avoid either artificially narrow or wide outcomes): once this has been identified, all privileged materials falling within that issue or transaction must be produced. The transaction analysis is driven by the concept of fairness: a party cannot 'cherry pick' from its privileged material in order to paint a partial or misleading picture of the relevant legal advice.

(i) The Basic Point

Waksman J noted that the references to legal advice in the Barclays witness statements were not made casually or by accident; rather, he considered that the deployment of the advice *"can only be designed to improve Barclays' case on the issues surrounding the ASAs*." For example, when one witness stated that he "*took comfort*" from the fact that lawyers were involved in drafting the ASAs, Waksman J considered that this could only mean that the lawyers were approving what was being done as a legitimate transaction (and not a disguised commission). This analysis equally applied to the other references to the advice in the various witness statements and submissions. Moreover, it made no difference if the statements were framed in negative terms (e.g., "the lawyers did not advise X was unlawful", as opposed to saying "the lawyers advised X was lawful"): rather the "*examination of waiver has to be concerned with what on a fair and objective analysis is the substance of what is being asserted about the legal advice referred to and its purpose - and not its form*".[9] Accordingly, subject to the Timing Point, the Judge considered that waiver had occurred.

(ii) The Timing Point

As a starting point, Waksman J rejected "*the underlying premise which is that a once-privileged document which has lost that status where it has been deployed on one occasion has therefore become irrelevant from a privilege point of view, thereafter and for all purposes*".[10] He also refused to accept Barclays' arguments based on the specific factual circumstances of the Open Documents: in particular, it was not relevant that a third party (i.e., the SFO) had deployed the documents in the Criminal Proceedings, as the privilege had belonged to Barclays and it had given a limited waiver in the knowledge that some or all of those documents would be used at trial. Accordingly, the fact that the Open Documents had lost their privileged status by the time of Barclays' witness evidence in the present proceedings did not prevent references to them from constituting a waiver (and, therefore, giving rise to issues of collateral waiver).

(iii) The Scope Point

Given it was determined there had been a waiver, Waksman J then considered the scope of this waiver, explaining that, in "*relying on all the references to legal advice to make its compendious point about the*

[5] *Ibid.,* paragraph 50.
[6] [1986] WL 408062.
[7] [2020] EWHC 1393, paragraph 60.
[8] *Ibid.,* paragraph 85.
[9] *Ibid.,* paragraph 97.
[10] *Ibid.,* paragraph 102.

lawfulness of the ASAs" it was not open to Barclays *"to argue for some much narrower transaction or transactions*." As a result, considerations of fairness required that the relevant transaction is the legal advice in relation to the ASAs.

(iv) The Proportionality Point

Dealing briefly with this point, Waksman J did not accept the application had been brought too late given that the amended witness statements were submitted only a few weeks prior to the application, nor that the exercise of disclosure of the remaining privileged documents in respect of the ASAs would take a disproportionate amount of time and costs, in circumstances where the litigation was of a "*mammoth scale*".

Conclusion

In his conclusion, Waksman J left open the possibility of Barclays avoiding the consequences of the waiver by withdrawing its reliance on the privileged material.[11] However, regardless of whether Barclays elects to adopt this approach, the decision is of interest to clients, and financial institutions in particular, for two principal reasons.

First, when considering whether to deploy references to legal advice in support of one's case, it is highly important to assess the risks of such a strategy. In doing so, careful consideration needs to be given to whether a Court may view the references to legal advice as sufficient to warrant broader disclosure of the legal advice relating to the 'transaction' in question. To this end, the distinction between 'content' and 'effect' of the legal advice may not be conclusive and, therefore, consideration should be given to the *purpose* and extent of *reliance* on the advice referred to.

Second, this decision demonstrates that, notwithstanding the disclosure of certain privileged documents in earlier criminal proceedings or regulatory investigations, the subsequent deployment of the same documents in civil proceedings may risk collateral waiver in relation to a broader set of privileged communications.

[11] *Ibid.*, paragraph 129.

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