Litigation & Arbitration Group

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Client Alert

Case Law Update: Legal Professional Privilege

4 November 2020

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In several recent judgments in cases centring on complex commercial and regulatory disputes, the High Court has grappled with a number of important aspects of legal professional privilege under English law. Certain of these decisions, and their implications for parties to such disputes, are highlighted below.

Litigation privilege: sole or dominant purpose

In the latest judgment in the long-running disclosure dispute between Frasers Group plc (formerly Sports Direct International plc) ("**SDI**") and the Financial Reporting Council Ltd (the "**FRC**"),[1] the High Court has considered the requirement for a communication to be made for the sole or dominant purpose of conducting litigation in order for litigation privilege to apply.

Background

By way of brief reminder, English litigation privilege covers confidential communications between clients or their lawyers and third parties for the purpose of obtaining information or advice in connection with litigation, provided three conditions are met: (i) the litigation must be in progress or reasonably in contemplation, (ii) the litigation must be adversarial, not investigative or inquisitorial, and (iii) the communications must have been made for the sole or dominant purpose of conducting that litigation.[2]

FRC v Frasers Group concerned a notice issued by the FRC to SDI requiring the production of certain documents in connection with an investigation into SDI's former auditors, Grant Thornton UK LLP ("**GT**"), in accordance with the FRC's investigatory powers under the Statutory Auditors and Third Country Auditors Regulations 2016.

SDI sought to withhold three reports produced by its tax advisers, Deloitte LLP, and provided by SDI to GT (the "**Deloitte Reports**"), from disclosure to the FRC on grounds of litigation privilege. The Deloitte Reports contained advice on a new or revised structure for the VAT arrangements of one of SDI's subsidiaries ("**SDR**"), following receipt of a communication from the French tax authorities which SDI argued led SDR to conclude that the old VAT structure would be subject to challenge leading to tax litigation.

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[1] The Financial Reporting Council Ltd v Frasers Group plc [2020] EWHC 2607 (Ch).
[2] Three Rivers DC v Bank of England (No 6) [2004] UKHL 48.

SDI contended that, at the time the Deloitte Reports were produced, SDR expected to be involved in adversarial tax litigation in respect of its old VAT structure and the purpose of engaging Deloitte was to protect SDR's position in relation to that litigation.

Were the Deloitte Reports produced for the sole or dominant purpose of litigation?

Although the parties advanced extensive arguments about whether litigation was sufficiently in contemplation at the time the Deloitte Reports were produced, Lord Justice Nugee considered that the key question in this case was whether the Deloitte Reports had been produced *for the sole or dominant purpose of conducting litigation*.[3]

Referring to the Court of Appeal's judgment in WH Holding Ltd v E20 Stadium LLP,[4] which confirmed that litigation privilege encompasses communications for the purpose of obtaining evidence or advice for the conduct of the litigation, including as regards the prospects of success, the Judge concluded that the Deloitte Reports were not produced for the sole or dominant purpose of litigation:[5]

- The Judge identified various hypothetical purposes which would fall within the scope of litigation privilege, including providing or obtaining evidence for the litigation and taking advice on the subject matter of litigation, the merits of litigation, or how to conduct or settle litigation.[6]
- On the evidence, however, none of these applied. The purpose of the Deloitte Reports was to recommend and explain a new or revised structure for SDR's VAT arrangements, not to assist in litigation concerning the old VAT arrangements.[7]
- The Judge also commented that, even if a party expects a new or revised tax structure will likely be subject to challenge (and that there will be litigation), advice on implementing or revising the structure is "*not primarily advice as to the conduct of the future possible litigation*", but "*primarily advice as to how to pay less tax*" or to avoid administrative inconvenience.[8]

The Judge did not go on to determine whether the other requirements for litigation privilege applied – i.e. that adversarial litigation was reasonably in contemplation. Even assuming them in SDI's favour, however, his conclusion that the Deloitte Reports were not produced for the sole or dominant purpose of litigation meant that the documents were not protected from disclosure by litigation privilege.[9]

Foreign in-house lawyers

In a recent judgment in PJSC Tatneft v Gennady Bogolyubov and others,[10] the High Court addressed the question of whether legal advice privilege applies to communications with foreign in-house lawyers even when privilege may not apply in their home jurisdiction.

In brief summary, English legal advice privilege applies to confidential communications between a client and its lawyer made for the dominant purpose of giving or obtaining legal advice.[11]

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[3] FRC v Frasers Group, paragraph 27.
[4] [2018] EWCA Civ 2652.
[5] FRC v Frasers Group, paragraph 30.
[6] Ibid, paragraphs 32 and 33.
[7] Ibid, paragraph 38.
[8] Ibid, paragraph 36.
[9] Ibid, paragraph 30.
[10] [2020] EWHC 2437 (Comm).
[11] The application of the dominant purpose test was recently confirmed by the decision of the Court of Appeal in The Civil Aviation Authority v Jet2.Com Ltd [2020] EWCA Civ 35.

Background

The claimant ("**Tatneft**") asserted a claim to legal advice privilege over confidential communications for the purpose of requesting or giving legal advice between its employees/officers and members of its internal legal department, based in Russia. One of the defendants ("**IK**") subsequently challenged Tatneft's right to withhold these documents from production to other parties.

The basis for IK's application was, in summary, that Russian in-house lawyers are not members of the Russian Bar (advocates) and Russian law "advocates secrecy", which was said to be equivalent to the English law of privilege, does not apply to in-house lawyers. IK argued that, under English law, legal advice privilege only applies to professionally qualified and regulated lawyers (including in-house lawyers) and this extends to foreign lawyers only if they are "*appropriately qualified*".[12]

Decision on the approach to communications with foreign in-house lawyers

Mrs Justice Moulder reviewed a number of cases in which the courts had considered the application of legal advice privilege to foreign lawyers and identified several relevant principles:

- The courts have treated foreign lawyers "*as a separate category and justifying a different approach*" to English lawyers, extending legal advice privilege to foreign lawyers without regard to national standards or regulations.[13]
- The courts are concerned with protecting a party who wishes to take legal advice and will consider the "*function*" of the relationship between the client and the foreign lawyer and not the "*status*" of the lawyer in determining whether legal advice privilege applies.[14]
- Whether the foreign lawyer's communications would be privileged under the law of their home jurisdiction is not relevant to the question of whether English law privilege applies.[15]

The Judge concluded that there were good reasons for the distinct treatment of foreign lawyers. If the court was required to consider national standards or regulations to determine whether legal advice privilege applied, this would lead to uncertainty and it would also raise issues of comity.[16] Indeed, on the evidence, applying a narrower interpretation of legal advice privilege for foreign lawyers would lead to particular unfairness and inconvenience in Russia, as a large proportion of lawyers working in Russia are not advocates admitted to the Russian Bar.[17]

Although the authorities did not address the position of foreign in-house lawyers, it is clear that legal advice privilege applies to communications with English in-house lawyers.[18] It also follows logically from the overall approach not to interrogate the regulation of foreign lawyers in the context of legal advice privilege that in-house lawyers should be included within that privilege.[19]

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[12] Tatneft v Bogolyubov & ors, paragraph 18.
[13] Ibid, paragraphs 26 and 42.
[14] Ibid, paragraph 36.
[15] Ibid, paragraphs 37 to 38.
[16] Ibid, paragraph 47: "*In my view it would lead to uncertainty (and thus inconvenience) if, even where the relationship of lawyer and client subsists, the court had to go further and examine particular national standards or regulations in order to determine whether in a particular case a party was protected from the disclosure of his communications with his lawyer. It would also raise issues of comity if the court were obliged to express views on the qualifications and regulation of foreign lawyers.*"
[17] Ibid, paragraphs 49 and 55.
[18] Ibid, paragraph 51.
[19] Ibid, paragraph 53.

The Judge therefore concluded that the only requirement for legal advice privilege to attach to communications with a foreign lawyer is that "*they should be acting in the capacity or function of a lawyer*".[20] Accordingly, foreign parties to English litigation may find reassurance in this judgment that, provided they otherwise satisfy the requirements for legal advice privilege to apply, communications with their in-house lawyers should be protected from disclosure and the English court will not seek to interrogate the regulation of, or standards applying to, the foreign lawyer in their home jurisdiction.

Scope of the iniquity exception

The general rules of legal professional privilege are subject to an established public policy exception, known as the iniquity exception, which applies where documents have been created for a criminal or fraudulent purpose. In such circumstances, a party may not rely on legal professional privilege to withhold disclosure of the documents. The scope of this exception was recently considered by the High Court in Barrowfen Properties Ltd v Girish Patel and others.[21]

The case concerned, amongst other things, a claim by Barrowfen Properties Ltd ("**Barrowfen**") against a former director, Girish Patel ("**GP**"). In particular, Barrowfen claimed that, in breach of his duties as a director, GP had (i) improperly removed a shareholder from the register of members and denied that they were a shareholder, (ii) forged a letter of resignation from another director and resisted that director's attempts to reinstate himself, (iii) forged a letter of resignation by trustees of a shareholder trust, (iv) improperly written up the register of members in a manner which allowed GP to vote on behalf of other shareholders at shareholder meetings, and (v) designed and implemented a plan to place Barrowfen into administration in order to enable GP to purchase its principal asset. Barrowfen also advanced various claims against its former solicitors, Stevens & Bolton LLP ("**S&B**").

In the course of the proceedings, Barrowfen issued an application challenging the defendants' right to withhold disclosure of documents containing legal advice which S&B had provided to GP and another defendant. Barrowfen relied on the iniquity exception as one of the grounds for this application. It was therefore necessary for the court to consider two issues: (i) the scope of the iniquity exception – i.e. whether it covers breaches of a director's statutory duties, and (ii) the relevant standard of proof.

As regards the scope of the exception, the Judge, Tom Leech QC, noted that it is "*well-established that the exception is not confined to crime or fraudulent misrepresentation*".[22] The Judge referred to BBGP Managing General Partner Ltd v Babcock & Brown Global Partners,[23] in which allegations of breach of fiduciary duties by a director and agents of the claimant company were found to be sufficient to engage the iniquity exception, concluding by analogy that "*the iniquity exception is engaged where breaches of sections 172 to 175 and 177 of the Companies Act 2006 are alleged against a director and the allegations involve fraud, dishonesty, bad faith or sharp practice or where the director consciously or deliberately prefers his or her own interests over the interests of the company and does so 'under a cloak of secrecy'*".[24]

As regards the standard of proof that applies when deciding whether the iniquity exception applies, following Addlesee v Dentons Europe LLP[25] and Kuwait Airways Corpn v Iraqi Airways Co (No 6),[26] the Judge considered that for documents over which there is a claim to legal advice privilege there must be a strong prima facie case of fraud or other misconduct and where litigation privilege is claimed there must be a very

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[20] Ibid, paragraph 57.
[21] [2020] EWHC 2536 (Ch).
[22] Ibid, paragraph 33.
[23] [2011] Ch 296.
[24] Barrowfen v Patel and ors, paragraph 35.
[25] [2020] Ch 243.
[26] [2005] 1 WLR 2734.

strong prima facie case.[27] In neither case is it necessary to establish iniquity on a balance of probabilities, but to demonstrate a very strong prima facie case of iniquity for the purpose of compelling disclosure of documents subject to litigation privilege the court must be "*satisfied that the threshold is comfortably exceeded and that the case is one which falls at the very end of the continuous spectrum*".[28]

Applying those principles to the facts of the case, the Judge concluded that (i) there was a strong or very strong prima facie case in respect of the allegations that GP had breached his duties as a director, and (ii) the iniquity exception was engaged as the conduct alleged amounted variously to fraud (in a wide sense), dishonesty or bad faith, or sharp practice, or the director consciously or deliberately preferring his interests over those of the company "*under a cloak of secrecy*".

The defendants were, therefore, required to disclose to Barrowfen all documents created for the purpose of giving or receiving legal advice, or containing legal advice, provided by S&B to GP and/or the other defendant, and relating to the subject matter of the claims.

Litigation privilege in a regulatory context

Finally, a recent decision in the context of insolvency proceedings may potentially have relevance for the sometimes complex question of when, in a regulatory investigation, legal proceedings can be said to be in contemplation such that litigation privilege may be available.

In addition to the common law definition of litigation privilege, a statutory definition exists in respect of disclosure to the Financial Conduct Authority ("**FCA**"), pursuant to section 413 of the Financial Services and Markets Act 2000 ("**FSMA**"). This provides (amongst other things) that communications between a professional legal adviser, their client and any other person made "*in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings*" are protected from disclosure to the FCA.

When the FCA seeks to require the production of documents pursuant to its statutory investigatory powers, the question often arises whether and, if so, at what point legal proceedings are in contemplation and, therefore, whether the documents can be withheld on the basis of litigation privilege under section 413 FSMA.

In The Financial Conduct Authority v Carillion plc (in liquidation),[29] the High Court considered, in the context of insolvency proceedings, whether the issue by the FCA of a Warning Notice to Carillion plc ("**Carillion**") engaged section 130(2) of the Insolvency Act 1986 ("**IA 1986**"), which prevents a party from commencing, without leave of the court, an "*action or proceeding*" against a company that is subject to a winding-up order or in respect of which a provisional liquidator has been appointed.

Before the FCA may take certain action pursuant to FSMA, such as imposing a financial penalty against a regulated person or entity, its Regulatory Decisions Committee ("**RDC**") must first issue a Warning Notice setting out the action the FCA proposes to take. The decision by the RDC to issue a Warning Notice is based on recommendations from the FCA Enforcement team which carries out investigations. Following issue of a Warning Notice, the recipient has an opportunity to make representations to the RDC (to which the Enforcement team may respond), or to make an expedited reference to the Upper Tribunal, before the RDC decides whether or not to continue with the proposed action and issue a Decision Notice.

In FCA v Carillion, the FCA was considering issuing a Warning Notice to Carillion, a company in liquidation, in respect of proposed sanctions for breach of the Listing Rules and/or the EU Market Abuse Regulation. In determining whether the court's permission was required, it was necessary for the court to decide whether the Warning Notice is a "proceeding" for the purpose of section 130(2) IA 1986, which required

[27] Barrowfen v Patel and ors, paragraphs 36 to 40.
[28] Ibid, paragraph 40.
[29] [2020] EWHC 2146.

consideration of (amongst other things) "*both the nature of the decision and the procedure used*" by the FCA/RDC.[30]

Concluding that the court's permission under section 130(2) IA 1986 was required, ICC Judge Jones commented that "*the nature of the decision and the process applied by the Upper Tribunal, as by the FCA/RDC, 'cries out' as a 'proceeding'*".[31] The Judge identified the various stages and features of the FCA/RDC's decision-making process and concluded that "*[a]ll of these are features of 'proceedings'*".[32]

Although the case concerned a different statutory provision and specific insolvency law issues, the findings may nonetheless be relevant to the interpretation of section 413 FSMA and the application of litigation privilege in the context of regulatory investigations. In particular, the analysis in the judgment is at least suggestive that the issue of a Warning Notice may well constitute "*legal proceedings*" for the purposes of that section (and adversarial litigation under the common law definition of litigation privilege). Indeed, the FCA itself highlighted that there could be potentially wide-reaching implications for other aspects of FSMA, although it is not clear from the judgment whether the FCA considered this to extend to section 413.[33]

[30] Ibid, paragraph 79.
[31] Ibid, paragraph 82.
[32] Ibid, paragraph 83.
[33] Ibid, paragraph 3.

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