

UPDATE

## It's my privilege – or is it?

Update prepared by Chantal Barrett (Counsel, Guernsey)

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A look at who is the 'client' for the purposes of Legal Advice Privilege in Guernsey following the decision in *The RBS Rights Issue Litigation* [2016].

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In December 2016, the English High Court ruled that notes, transcripts and other documents relating to witness interviews in the course of an internal investigation by RBS were not covered by legal advice privilege notwithstanding the fact that they had been prepared by in-house and external counsel.

Under English law, confidential communications between a legal adviser and his client which are created for the purpose of giving or receiving legal advice are privileged and the Court cannot order the disclosure of those communications to third parties. This is known as Legal Advice Privilege (LAP) and Guernsey case law confirms that identical principles apply in this jurisdiction.

It should be noted that although they are often confused, LAP is entirely separate from Litigation Privilege which can exist outside of the client-solicitor relationship in relation to any documents or communications which have been produced for the dominant purpose of obtaining advice in relation to litigation, obtaining or collecting evidence for the litigation, or obtaining information which may assist in obtaining or collecting such evidence.

The interviews in the RBS case were carried out with current and former bank employees in response to two US Securities and Exchange Commission subpoenas and allegations made by a former employee against RBS. In later litigation, RBS shareholders sought disclosure of the records of these interviews and RBS refused, claiming that the documents were covered by LAP.

The Court decided the issue by applying a narrow interpretation of the definition of 'client' as consistent with the (heavily criticised) 2004 Court of Appeal decision in *Three Rivers (No 5)*. The Court held that only communications with those employees within the bank whose role was to obtain and receive legal advice was covered by LAP and, crucially, this did not extend to communications with other employees who had material information that the lawyers needed in order to give the legal advice.

The combination of these two decisions produces a controversial result. It is in the public interest that individuals and companies are able to obtain full and proper legal advice and in order to give such advice, the lawyers need access to all of the relevant information available. Clients need to feel safe in giving such information to their lawyers in the knowledge that it will not subsequently be revealed to others. This is the very basis of the principle of LAP.

The effect of these decisions is to significantly erode the scope of the protection given by LAP in English law. It will not be uncommon that the information needed by a company's lawyers to provide legal advice will not be held by those individuals within the company (often at board level) given the role of obtaining legal advice. People at various levels of the organisation including 'the shop floor' may have been involved and will hold material information which needs to be gathered before the advice can be given. The effect of the RBS case is that whilst the eventual advice will be privileged, the investigation (and any notes produced during that investigation) will not - even when conducted by lawyers. The result has been criticised as uncommercial and it was widely expected that RBS would appeal direct to the Supreme Court

although it has now been confirmed that in fact no such appeal will be brought because the disputed documents are no longer relevant to the underlying dispute.

Neither this decision (or that of the *Three Rivers* case which preceded it) is binding in any sense on a Guernsey Court. The fact that both decisions are controversial and have been heavily criticised make it less likely that a Guernsey Court would necessarily come to the same conclusion if faced with this issue. As ever, Guernsey law has the advantage of being able to take account of the case law of other common law jurisdictions and would take note of the fact that in the 13 years since *Three Rivers* was decided, Australia, Singapore and Hong Kong have all declined to follow the reasoning of the Court of Appeal in that case.

That being said, unless and until the RBS case is successfully appealed or the issue comes before the Guernsey courts for determination, the most prudent advice is that companies should be very cautious when creating documents and recording interviews for the purposes of internal investigations because of the danger of creating disclosable (and potentially damaging) documents, even where in-house or external counsel are involved in the process. The best advice is that, wherever possible, the contents of such documents should be restricted to the facts and should avoid any commentary thereon which could be used against the company in the future.

## Contacts

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