

## **THE RBS RIGHTS ISSUE LITIGATION**

### **CLAIMS TO LEGAL ADVICE PRIVILEGE AND LAWYERS WORKING PAPERS PRIVILEGE**

#### **THE LITIGATION**

1. On the 8 December 2016 Hildyard J<sup>1</sup> refused RBS's claim to privilege in respect of Interview Notes of which the claimants sought specific discovery and inspection. This fell to be decided in the claim by RBS shareholders to statutory remedies pursuant to provisions of the Financial Services and Markets Act 2000 to recover substantial investment losses incurred further to the collapse of RBS shares on the grounds that the prospectus for the Rights Issue was not accurate or complete.

#### **THE NATURE OF THE DOCUMENTS**

2. The claimants sought specific disclosure and inspection of the transcripts, notes or other records of interview ("the Interview Notes") conducted by RBS of employees and ex-employees. They were created as part of (1) RBS's investigation undertaken in respect of its response to two US Securities and Exchange Commission subpoenas relating to RBS's sub-prime exposure and (2) as part of RBS's investigation into allegations made by a former employee of certain of RBS Greenwich's marketing practices.
3. 124 individuals had been interviewed across a number of divisions, locations and levels of seniority. Each interviewee was told that the Interview Notes would be and kept confidential and would be subject to what was described to them as "attorney-client privilege". RBS authorised each of the interviewees to participate in the interviews.
4. RBS 's evidence was that the only documents in existence within the two categories were summaries of the interviews prepared variously by in-house and external lawyers as well as non-lawyers within the RSB Group Secretariat.

#### **THE CLAIM TO PRIVILEGE**

5. RBS resisted disclosure on the ground that all of the Interview Notes were subject to legal advice privilege or alternatively (in respect of all but the Interview Notes prepared by RSB Group Secretariat for which such privilege was not asserted) that they were lawyers' privileged working papers.

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<sup>1</sup> (2016) EWCH 3161(Ch)

6. RBS did not assert that the Interview Notes were part of a communication between RBS and its lawyers in which advice was sought or given. It did not suggest that the interviewees were themselves seeking or being provided with legal advice.
7. RBS asserted that under English law as well as US law, that any communication by an employee who is authorised to communicate with a legal adviser for the purpose of his or her employer seeking legal advice is privileged and that it is no part of the test that the communication consist of instructions rather than information. Its case was that the communication of factual information gathered by or for the purpose of being provided to its lawyers is privileged provided that the person providing and communicating the information was authorised to do so by RBS.

### **THE OBJECTION TO THE CLAIM**

8. The Claimants submitted that the claim to privilege was misconceived. They argued that the communication of ***factual information*** by an employee of the company to the legal adviser is not privileged and that legal advice privilege only covers communications between a client and his lawyer for the purpose of the lawyer giving and that client seeking or receiving legal advice.
9. Thus, it matters not they argued if factual information is gathered and communicated by that person to his employer's lawyer with the authority and at the request of the client and its lawyers and even if the client is that person's employer.

### **THE LAW**

10. It was common ground between the parties that the leading authority for the purposes of RBS's claim under English law was Three Rivers (No.5) However, Hildyard J described it as "a controversial decision" and its controversy in the present case was as to its scope.
11. Having reviewed the case law he concluded that the Court of Appeal in that case (by which he was bound) had refused to accept the bank's primary argument that in order to give full and modern effect to legal advice privilege in the context of a claim to it by a corporation, a corporation's employees cannot be treated as third parties for the purpose of privilege.
12. Instead the court had concluded that in a corporate context information gathered from an employee is no different for this purpose from information gathered by third parties, even if the information is collected by or in order to be shown to a solicitor to enable fully informed advice to be given to that solicitor's client who was the corporate entity.
13. RBSs sought to distinguish its case on the facts by principally submitting that Three Rivers (No.5) concerned material that was only "preparatory" to rather

than qualifying as privileged communications, whereas the Interview Notes fell into the category of “direct communications” of information by an authorised employee or ex-employee to the corporation’s legal adviser.

14. The attempt failed. Although Hildyard J acknowledged that the facts of *Three Rivers (No 5)* “were out of the ordinary”, he concluded that the decision was not confined to its particular facts but was based on principles of general application which “despite considerable criticism in some quarters”<sup>2</sup> remained binding in English law.

## **THE CRUX OF THE MATTER**

15. The essential question is - does either the fact of authority to participate in an information gathering process, as in the RBS case, or the fact that the Interview Notes record a direct communication, distinguish the present case from *Three Rivers (No.5)* and suffice to justify the employees and the former employees being treated in such circumstances as “the client” or a qualifying emanation of the client rather than “third parties”?
16. To this question the court answered “No.” The “client” for the purpose of privilege consists (1) only of those employees authorised to seek and receive legal advice from the lawyer and (2) that legal advice privilege does not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

## **THE ALTERNATIVE ARGUMENT- “LAWYERS’ WORKING PAPERS”.**

17. At common law such papers are privileged under the legal professional privilege doctrine.<sup>3</sup>
18. The rationale is that otherwise if not so it would give away to the party requesting disclosure a clue as to the advice which had been given by the lawyer and give them the benefit of the professional opinion which had been formed.
19. Putting it shortly if the document “betrays” the legal advice given to the client it will be privileged.

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<sup>2</sup> See the analysis at paragraphs 61 and 62 of the Judgment and the judge’s view that it may be in a suitable case the Supreme Court “will have to revisit the decision and perhaps the fundamental question as to whether and to what extent the distinction between legal advice privilege and litigation privilege on which *Three Rivers (No.5)* ultimately rests, is justified and appropriate.”

<sup>3</sup> *Lyell v Kennedy (No.3)* (1884) 27 Ch D 1.

20. Given that the Interview Notes did not attract privilege RBS had to show some attribute of or addition to the Interview Notes to show that they were not *verbatim* transcripts or that revealed from an evident process of selection the trend of legal advice being given, and as such triggered their protection as lawyers' working papers.
21. The evidential burden of showing the "betrayal" rested on RBS given that the burden of proving the privilege rests upon the party claiming it.<sup>4</sup>
22. Ultimately the matter was an evidential one. However, "because a claim for privilege is an unusual claim in the sense that legal advisers to the party claiming privilege are judges in their own client's cause, the Court must be particularly careful to consider how the claim for privilege is made out."<sup>5</sup>
23. In short the claim that these amounted to "lawyers' working papers" failed because at best they were only capable of disclosing a lawyer's "train of inquiry". This fell short of the requirement to show that they reflected or gave a clue as to the trend of legal advice being sought and or given.
24. The court rejected RBS's final submission that the law of the US applied and not English law. Without considering the full analysis of the ruling, in short the court having recognised that the US appeared to provide the protection claimed it was clear on the law as applied to the facts that English law was the applicable law as the *lex fori*.

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**20 December 2016**

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<sup>4</sup> West London Pipeline v Total (2008) EWHC 1729 (Comm).

<sup>5</sup> Neuberger J (as he then was) Bank of Austria v Price Waterhouse (unreported 16 April 1997) as quoted in Sumitomo (2001) EWCA Civ 1152.