

When will communications with regulators be privileged?

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In the recent interlocutory judgment of *Property Alliance Group Limited v Royal Bank of Scotland PLC*, that will be of interest to accountants, the courts have provided useful guidance on the question of whether communications with regulators will be privileged in subsequent proceedings.

Although the facts of this case do not relate to accountancy firms, the principles established in the judgment are potentially highly significant for the profession. The Claimant ("PAG") in this ongoing case is a property developer with a portfolio worth about £200 million. Between 2004 and 2008 it entered into four swaps with the Royal Bank of Scotland ("RBS") which used GBP LIBOR as a reference rate. Following investigations brought by numerous regulators across the world, RBS admitted misconduct in relation to the Japanese Yen and Swiss Franc LIBOR rates, but not in respect of GBP. PAG's case is that in proposing GBP LIBOR as a reference, RBS impliedly represented that it was not manipulating the rates for its own benefit.

The hearing

PAG's case is predicated on establishing that RBS did indeed manipulate GBP LIBOR. In order to do this, PAG needs to see (so it argued) documents created by RBS as part of its internal investigation into the LIBOR scandal. At a CMC in November 2014, RBS was ordered to disclose internal reports, reviews and summaries relating to the allegations of LIBOR misconduct. RBS duly disclosed a number of such high-level documents, but objected to PAG inspecting the majority of them on the grounds of privilege. PAG challenged the claims to privilege. In summary, RBS objected to inspection of three different categories of disclosed document:

Documents created for a special RBS committee, the Executive Steering Group, which was at the centre of RBS's investigations into LIBOR rigging, in respect of which RBS asserted legal advice privilege ("the ESG Documents"); Communications passing between RBS and the FSA (and/or their lawyers) in the context of the FSA's investigation into LIBOR which resulted in the bank being fined £87.5 million. These documents were marked "without prejudice" and constituted negotiations in connection with the FSA's Final Notice. RBS asserted without prejudice privilege over these documents ("the Without Prejudice Communications").

Documents shared with regulators by RBS over which legal advice privilege and/or litigation privilege was otherwise asserted. PAG contended that privilege had been waived by the act of these documents ("the Waiver Documents") being shared.

Decision

The judge was not satisfied that RBS's claim to legal advice privilege in respect of the ESG Documents was correctly made. He ordered the ESG Documents to be produced to the court for a judge to consider the documents;

In respect of the Without Prejudice Communications, the judge held that although something analogous to without prejudice privilege would attach as a matter of principle to communications between the FCA and a firm, if the firm i.e RBS puts in issue before a court the basis on which a Final Notice against the firm was produced which RBS had, then those communications should be inspected.

The judge applied similar reasoning in ordering inspection of the Waiver Documents. He held that RBS could not have it both ways, relying on absences from regulators' findings as indicating the limits of its misconduct while at the same time objecting to inspection of what it put to those regulators. Inspection of the Waiver Documents was also therefore ordered.

Conclusion

This judgment confirms that communications with a regulator might benefit from without prejudice privilege (or equivalent in a regulatory context), so long as the party asserting that privilege does not seek to rely on the documents in question. Similarly, privileged documents disclosed to a regulator might retain their privileged status. However, if in separate litigation the party puts in issue matters relevant to those communications the privileged status might be lost. The implications of this for accountants are clear: should a firm seek to rely on the outcome of a Financial Reporting Council ("FRC") investigation in litigation they risk losing the privilege that might otherwise exist over communications with the FRC.

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