

# RBS, regulatory investigations and a narrow application of legal advice privilege: the risks for accountancy firms and corporations

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## The limits of privilege in corporate investigations

In a recent decision in the ongoing RBS Rights Issue Litigation, the High Court held that interviews between the bank's employees and the bank's lawyers held in the course of an internal investigation were not covered by legal advice privilege because the employees were not "the client" for privilege purposes. The narrow scope of legal advice privilege means that corporations (which will include medium to large accountancy firms) need to reassess how they carry out internal investigations to avoid generating non-privileged notes and communications which may later become disclosable in litigation or as part of a regulatory investigation.

## Background

The RBS Rights Issue Litigation is the collective name for numerous claims brought against the ailing bank by former and current shareholders who purchased shares in the £12bn rights issue just months prior to the bank's £45bn Government bail out in 2008.

In the course of the litigation, RBS had resisted the disclosure and inspection of transcripts, notes or other records of employee interviews on the basis that they were subject to legal advice privilege or alternatively that these interview notes were lawyers' privileged working papers.

## Legal advice privilege

The purpose of legal advice privilege is to enable a client seeking advice to place unrestricted confidence in their lawyer. In order for it to apply, the communication must be: (i) confidential, (ii) between a client and the client's lawyer, and (iii) come into existence for the purpose of giving or receiving legal advice.

RBS argued that as the interview notes recorded a communication between a lawyer and a person authorised by RBS to give instructions to its lawyers, those communications were privileged. It submitted that any communication by an employee who is authorised to communicate with a legal adviser for the purpose of their employer seeking legal advice is privileged on the basis that the employee should be treated as if he/she were part or an emanation of the client. The bank also sought to argue that US law should apply in any event as that was the jurisdiction in which the instructions to conduct the interviews were "most closely connected".

The Claimants argued that the communication of factual information by a company employee to the company's legal adviser was not privileged as it was not a communication between a client and its lawyer for the purpose of the lawyer providing legal advice to the client. The question of whether the employee was authorised by the company to communicate with its lawyer was irrelevant.

The Claimants relied on the leading authority for legal advice privilege, *Three Rivers (No.5)*, in which the Court of Appeal had concluded that, in a corporate context, information gathered from an employee is no different from information obtained from 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. Such information is not protected by legal advice privilege and could only be protected if brought within litigation privilege.

## The Court's finding

The Court did not accept RBS's attempt to classify its employees or former employees as "the client" or "a qualifying emanation of the client" rather than third parties. Further, it confirmed that legal advice privilege did not extend to information provided by employees and ex-employees to or for the purpose of being placed before a lawyer.

The Court therefore upheld the *Three Rivers (No.5)* decision and RBS's claim to the protection of legal advice privilege for the interview notes failed, as did its claim for privilege to extend to its lawyers' working papers. It also confirmed that English law would apply to this matter, and it was therefore irrelevant that the documents would, under US law, have been

regarded as privileged.

## Commentary

The decision in the RBS Rights Issue Litigation will have an impact for all sizeable accountancy corporations gathering and collecting information as part of any internal investigation. Careful thought needs to be given at the outset of the investigative process as to how information is gathered, the manner in which that information is recorded and by whom.

The following points may be helpful:

- "The client" for the purposes of legal advice privilege is confined to the individuals within the corporation that seek and receive legal advice from the lawyer. "Who is the client?" in a corporate context is open to interpretation. It is likely that in-house legal counsel and those holding senior positions on the board would be "the client" when liaising with external lawyers. It is doubtful, however, whether senior officials outside this close-knit group would be save where it is obvious from the circumstances that they are personally seeking legal advice on behalf of the corporation.
- Communications between employees and lawyers will not be protected by legal advice privilege even if their purpose is to provide factual information to the lawyers so that they can advise the corporation. It is not enough that the corporation authorises its employees to participate in information gathering or liaise with its lawyers, or that interview notes are marked "confidential" or "subject to attorney/lawyer-client privilege". In the absence of litigation privilege, such communications will not be privileged.
- Additional care needs to be exercised where documents are created and interviews take place before litigation or any regulatory investigation is contemplated because there will be no scope for asserting the wider litigation privilege as an alternative to legal advice privilege.

Given the importance of the decision and the significant criticism that the Three Rivers (No 5) decision has attracted since 2004, RBS was granted a "leapfrog certificate" allowing its appeal to proceed directly to the Supreme Court and by-pass the Court of Appeal. As we go to press, however, it has been reported that RBS has dropped its appeal because the claimants have amended their case. We will, therefore, need to wait for another case to come before the courts before we get clarification on the meaning of "the client" for the purposes of legal advice privilege in a corporate context.

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