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News flash

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Two steps backwards, one step forwards?

The House of Lords' judgment in Three Rivers District Council -v- Bank of England

It had been hoped that the eagerly awaited judgment of the House of Lords in *Three Rivers (No.6)* would provide a fundamental review of advice privilege. Edward Coulson **looks at the at case and assesses the implications for insurers.**

The background and framework

There are two types of legal professional privilege:-

- Litigation privilege – which arises when litigation is in progress or contemplation. It applies to communications for the sole or dominant purpose of conducting that litigation and only to proceedings which are adversarial, not investigative or inquisitorial.
- Advice privilege – which arises even when litigation is not in contemplation but is restricted to communications between the lawyer and client for the purposes of obtaining legal advice.

The House of Lords' recent decision is concerned solely with the second type of privilege – advice privilege – and is, in essence, concerned with the definition and extent of the "legal advice" which attracts privilege.

Advice privilege has always been much more narrow than litigation privilege which extends (for instance) to communications between solicitors and third parties regarding their evidence.

The Bingham Inquiry and the Three Rivers litigation

The starting point is the collapse of the Bank of Credit and Commerce International in 1991 with substantial liabilities to its depositors. The Bingham Inquiry was set up to investigate the activities of BCCI's regulators and, in particular, the Bank of England ("the Bank").

The Bank appointed Freshfields to act for it. It also set up an internal unit, the Bingham Inquiry Unit ("BIU"), to co-ordinate the collection of evidence for the Inquiry and to act as the point of contact with Freshfields.

Subsequently, a number of depositors commenced these proceedings against the Bank. Since the Bank enjoys statutory immunity from claims in respect of its regulatory activities unless it acts "in bad faith", the claimants embarked on an exhaustive search for material evidencing bad faith on disclosure. This led to two cases, *Three Rivers (Number 5)*[1] and *Three Rivers (Number 6)*[2], being considered by the appellate courts.

Three Rivers (Number 5)

Here the claimants sought disclosure of documents prepared by employees and ex-employees of the Bank and which were passed to the BIU to enable it to instruct Freshfields.

The Court of Appeal held that these documents were not privileged. Advice privilege was restricted to documents passing between the Bank (and for these purposes the Court of Appeal limited that to the BIU) and Freshfields for the purposes of obtaining legal advice. The reason was that this was essentially "raw material" for the purposes of obtaining legal advice and not a request for legal advice or the legal advice itself (which would be within legal advice privilege). Leave to appeal from the Court of Appeal to the House of Lords was refused by the House's appeal committee so that this decision remains good law (see below).

It was common ground that the Bingham Inquiry was a non-adversarial, inquisitorial procedure so that litigation privilege was irrelevant.

It had also been common ground that communications between the BIU and Freshfields were privileged. However, during its judgment the Court of Appeal (Longmore LJ) indicated that not all the material passing between the BIU and Freshfields was privileged. This led to the following disclosure application in *Three Rivers (Number 6)*.

Three Rivers (Number 6)

The claimants now sought disclosure of communications between the BIU and Freshfields. The judge at first instance ordered disclosure of all such communicatons save those seeking or obtaining “advice concerning the Bank’s rights and obligations” (which fell within the scope of advice privilege).

The Bank appealed (again) to the Court of Appeal which refused the appeal on the grounds that legal advice privilege was restricted to advice given to the Bank on its rights and liabilities and did not extend to advice given to the Bank on how to present its case to the Bingham Inquiry so as to secure a favourable conclusion from the Inquiry.

The Bank appealed to the House of Lords which also heard submissions from the Attorney General, the Law Society and the Bar Council who also expressed concern about the Court of Appeal’s decision in *Three Rivers (Number 5)* in written submissions to the House. However, the House of Lords declined to make any comment on that decision which was not before it and on which its views would not, therefore, have been binding. Lord Carswell probably went further than his colleagues in indicating that his silence should not be taken as approval of the earlier decision but, as indicated above, it remains good law.

This left the House of Lords with the question whether the Court of Appeal’s decision in *Three Rivers (Number 6)* to allow only a narrow definition of “legal advice” was correct. The unanimous conclusion was that advice privilege is essentially a matter of public policy. Clients should be allowed to “make a clean breast” of their affairs to their legal advisors so as to enable them to obtain full and correct legal advice based upon disclosure of all the facts and not just a selection of them. This is in the interest of the rule of law. Accordingly, the House of Lords allowed the appeal.

The most concise statement of the law on the extent of advice privilege is to be found in Lord Scott’s speech where he said:

“… the judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then… the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must… be an objective one.”

In summary

Two comments can be made about the passage from Lord Scott’s speech quoted above:-

1. The Court of Appeal had restricted legal advice privilege to advice on legal rights and liabilities in private law. The Bank’s success in the House of Lords seems to have turned on the rather narrow ground that the BIU was receiving advice on its public law rights and liabilities and that advice privilege should extend to that. In addition, the privilege also extends to advice on the “presentational” issues. This will, nevertheless, be of assistance to insurers whose insured becomes involved in a similar inquiry.

2. The House seems to have been impressed with the fact that advice privilege allows what would otherwise be relevant probative evidence to escape the requirement of disclosure in subsequent litigation[3]. The sub-text of their decision seems to be that privilege should therefore be kept within strict boundaries. This suggests that, notwithstanding Lord Carswell’s Delphic utterance, the outcome of a review of *Three Rivers (Number 5)* is far from certain – if and when it happens.

A further issue left hanging from *Three Rivers (Number 5)* is the issue whether advice privilege applies only to communications to and from the individuals within the client’s organisation who are responsible for instructing the solicitor. This poses significant problems for any corporate organisation (limited or other company or LLP).

What impact will this have on liability insurers?

Where the insured has notified a **claim** it seems likely that insurers will be able to rely on the much broader scope of litigation privilege to protect communications on the basis that, more or less by definition, once a claim has been made, litigation is “in contemplation”. The need for caution is going to arise where the insured has notified **circumstances** and litigation is not yet anticipated.

Obviously, this will be important in the circumstances of a public or similar inquiry following a large catastrophe or loss but it will also be significant where (for example) an FSA inquiry may be the precursor of or catalyst for civil damages claims (D&O insurers take note!).

There are two areas to watch in the area of circumstances:-

- Advice privilege does not extend to “secondary” material prepared by individuals other than those responsible for instructing solicitors (see *Three Rivers (Number 5)*)
- It is unsafe to assume that documents produced by anyone other than the individual responsible for instructing the solicitors will be subject to advice privilege.

That said, there may be a silver lining in all of this. In claims arising from transactions in which solicitors have been involved, Insurers and their advisors will need to consider whether any of the solicitors’ documents are disclosable. They may provide useful evidence. So, despite the law having gone two steps backwards in the Court of Appeal restricting advice privilege, it has now gone one (somewhat tentative) step forward in the House of Lords.

1 - [2003] QB 1556 (Court of Appeal).

2 - [2004] QB 916 (Court of Appeal) amd [2004] UKHL 48 (House of Lords).

3 - Note that the legal profession is unique in enjoying privileged communications with its clients and, as Lord Carswell observed, it does not apply to priests or doctors (for instance).

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