

Client Alert: UK Court of Appeal upholds legal professional privilege with regard to the exercise by regulators of investigative powers against third parties

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Introduction

The UK Court of Appeal recently issued an important ruling in favour of legal professional privilege ('privilege') in the context of a regulator exercising its investigative powers against a third party. This article looks at the key points of the ruling.

What's this all about?

The UK's Financial Reporting Council ('FRC') is a body which regulates auditors, accountants and actuaries. In the case at hand it was conducting an investigation into the conduct of Grant Thornton, an accountancy firm, with regard to the latter's audit of the financial statements of Sports Direct International ('Sports Direct'), a sporting goods retailer.

Under the FRC's statutory powers of investigation (under UK audit regulatory legislation), the FRC can require certain other parties to provide it with information relating to an audit. The regulatory legislation in question made it clear however that the power in question did not require such parties to produce documents they would be entitled to withhold in any UK High Court proceedings on the basis of privilege.

Exercising its power to obtain information, the FRC issued a so-called disclosure notice to Sports Direct (as a third party to the investigation into Grant Thornton) to disclose documents to the FRC relating to the audit undertaken by Grant Thornton. In response, Sports Direct provided 2,000 documents to the FRC but 40 documents (emails and attachments to emails sent between Sports Direct and its legal counsel, both internal and external) were withheld on the grounds that Sports Direct claimed they were covered by privilege.

The matter went to the High Court which ruled that Sports Direct could not assert privilege in the circumstances at hand. The judge, relying on the highest level of UK judicial case-law, stated that disclosure to a regulator of privileged material belonging to a client of a party under investigation did not 'infringe' that client's privilege if the only use that the regulator could put the material to was its confidential investigation into the party being investigated. The judge took the view that Sports Direct's material (in the context of the investigation by the FRC into Grant Thornton) fell within this 'exception' to privilege and that Sports Direct could not therefore withhold the material. In the alternative, the judge ruled that that any 'infringement' of privilege would only be a 'technical' one, on the basis of a less stringent test, and would be authorised under the regulatory legislation in question.

The High Court's judgement was seen as an erosion of privilege.

What did the court decide?

The Court of Appeal overruled the lower court ruling that there was no justification:

- for the existence of a 'no infringement exception' to the protection conferred by privilege; or,
- for the application of some lower threshold for implying a statutory override on the grounds that any 'infringement' of Sports Direct's privilege would be 'technical'.

Instead, the court said that its task was to apply the test laid down in the relevant case-law (as referred to by the court in this case) by looking at the relevant part of the legislation in question to see whether Parliament had intended to override privilege – in this case, the court ruled that the relevant parts of the legislation in question precluded this.

The court also determined the issue of privilege and the attachments to the emails in question ruling that an attachment is to be regarded as meeting the terms of a disclosure notice if it is attached to an email that also meets the terms of the notice. Privilege cannot therefore be claimed for non-privileged material if it is simply attached to privileged communications such as emails.

The full judgement can be found here: <https://www.bailii.org/ew/cases/EWCA/Civ/2020/177.html>.

What's the takeaway?

The Court of Appeal's judgement is welcome as it has strengthened the legal status of privilege in the context of a regulatory investigation as regards both an organization targeted by a regulatory investigation and a client of that targeted organization.

What should I be doing to be able to assert privilege?

Privilege is not a given but something that needs to be worked on in order to be able to claim it. General considerations for asserting privilege include the following:

1. Clearly mark communications you consider to be privileged as 'confidential and privileged' – but bear in mind that this does not mean that privilege will necessarily apply;
2. Make sure that those involved understand why privilege is important and why it must be maintained – this will not be obvious to many in a commercial organization so getting the message across is crucial;
3. Set up and agree as soon as possible a framework within which it is clearly understood who privileged communications will take place with and how the circulation of privileged material will be restricted – it is important that those in a commercial organization have a clear structure to operate within;
4. Where possible, limit the volume of privileged communications in order to reduce the risk of inadvertent waiver of privilege and, in the event of accidental waiver, limit any damage caused;
5. Where possible, gather all potentially privileged material and put it in a separate place to all other potentially disclosable material (bearing in mind that privileged documents might also need to be disclosed), in order to reduce the risk of inadvertently producing privileged documents during the heat of a disclosure exercise;
6. Make sure that any strictly commercial advice is not contained within the same communication that sets out legal advice, or, alternatively try to ensure commercial advice has a specific legal context, in order to avoid the risk of privilege not applying to legal advice that has been provided; and,
7. Where you are general/in-house counsel and you are concerned that your communications may not be protected by privilege, appoint external legal counsel in order to be able to obtain the cover of privilege.

We write about a range of compliance issues which can be found here: <https://www.corderycompliance.com/>

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