Can we claim privilege?

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'BUT I THOUGHT IT WAS PRIVILEGED!' IS A protest that litigation lawyers are used to hearing. Disclosure exercises inevitably raise complex questions about what is and is not privileged: and whenever the more nuanced and difficult questions arise, it is clear that the legal position as to what is, in fact, privileged is rarely as simple as it appeared when the relevant documents were created.

There have recently been a number of developments in the law in this respect. For example, both accountants and lawyers are closely following the case of *R (Prudential) v Income Tax Special Commissioner*, shortly to be heard in the Supreme Court.

The case that is the subject of this article, *R (Ford) v Financial Services Authority* [2011], is another important case. It provides useful clarification of a previously obscure area of the law of privilege; that of joint privilege.

The specific issue covered by *Ford* is whether directors of a company are entitled to claim joint privilege in circumstances where lawyers retained by the company give advice that affects the directors in a personal capacity, as well as the company itself.

This article considers:

- the background to joint privilege;
- the facts of the case and the background to the dispute;
- the debate on the law and the conclusions reached;
- practical implications of the decision; and
- additional points relevant to Financial Services Authority (FSA) investigations and privilege more generally, which were also dealt with in the judgment.

THE LAW OF JOINT PRIVILEGE

Not to be confused with common interest privilege (which relates to the voluntary disclosure of privileged documents to a third party), joint privilege arises in cases where two separate parties can claim a joint interest in communications with a particular lawyer.

The existence of joint privilege, where two or more legal persons jointly retain the same lawyer, is uncontroversial. In this situation, all the parties who can claim joint privilege can use that privilege to prevent disclosure to third parties, but cannot prevent disclosure of communications to each other. Moreover, all parties are entitled to see all privileged communications with the relevant lawyer, even if they were not originally copied in. The joint privilege can only be waived with the consent of all the parties.

However, joint privilege can also occur where one of the parties has no retainer with the lawyer concerned, but the parties have a joint interest in the subject matter of the communication at the time that it comes into existence. It is accepted, for example, that joint privilege without a joint retainer may, in principle, arise between a company and its directors and trustees and beneficiaries. However, due to the shortage of English cases on the subject of when such joint privilege may arise, the scope of the law was rather unclear prior to *Ford*.

The lack of English authority means that much advice on this point had previously to be given on the basis of foreign cases. In that regard, the judgment itself in *Ford* provides an excellent summary of the law in this area insofar as it relates to companies and directors. (The comprehensiveness of the summary was in no small part due to the advocates in the case, Hodge Malek QC and Bankim Thanki QC being, respectively, the editors of the seventeenth edition of *Phipson on Evidence* and the sixth edition of the *Law of Privilege*.)

Essentially, courts in other common law jurisdictions take two contrasting approaches:

- In the US, once a company retains lawyers, officers of that company cannot prevent it waiving privilege on advice concerning its affairs, even if those officers' personal affairs are inextricably intertwined and they are, in fact, receiving advice on those affairs from the same lawyers. This leaves little scope for the concept of joint privilege, as it is understood in this jurisdiction.
- By contrast, the Australian courts have taken a much broader view, and have held that joint privilege applies, including for directors of companies in their personal capacity, where the

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person claiming joint privilege had 'reasonable grounds to believe' that that the lawyers in question were giving them advice in their personal capacity.

Both positions represent opposite extremes of the argument, and it was with these in mind that the Court in *Ford* made its decision. However, before considering the Court's statement of the law, because all such cases are very fact specific, it is worth examining the facts of *Ford* in detail in order to understand better why the court decided the case in the way that it did.

FACTS OF *FORD*

The case concerned three directors of Keydata Investment Services Ltd (Keydata), a financial services company.

There were three key directors, Stewart Ford (the applicant in *Ford*), Peter Johnson and Mark Owen, who were all senior executives at Keydata.

The FSA began considering Keydata's affairs in 2007 and on 18 December 2007 sent Mr Johnson, as compliance officer, a notice of appointment of investigators. Prior to that point, the company had been taking advice from external consultants, but it was thought necessary at that point to instruct external lawyers.

Sarah Wallace of Irwin Mitchell was duly instructed by Keydata in January 2008. Her retainer letter of 7 January 2008 made it clear that she was only acting for Keydata although the letter noted that 'FSA could start investigations against individuals as well as the firm' and that 'it may be that we will also act for individuals employed by the firm'. She noted the possibility of conflicts arising in future between individuals and Keydata.

Between February and June 2008 Ms Wallace sent eight particular e-mails to the three executives at their Keydata e-mail addresses.

The FSA then widened its investigation to cover the three directors personally, and in August 2008 Ms Wallace and the directors formally agreed that Irwin Mitchell would be acting for them personally as well (with their fees to be paid by Keydata under the original retainer arrangements). Ms Wallace confirmed this to the FSA on 29 August 2008. The FSA issued notices of appointment of investigators to the three individuals shortly afterwards.

The evidence of the executives was that they had discussed their personal position with Ms Wallace before August 2008. Also, that it had been made clear to them early on that there was a real threat of an investigation being launched into their affairs personally. Mr Ford stated that he personally spoke to Ms Wallace about potential conflicts between each of the directors and Keydata and, at each point, it appeared that she considered the point and decided there was, in fact, no conflict.

Mr Johnson's evidence was that given Irwin Mitchell's early advice about the possibility of personal liability, he would have certainly sought independent legal advice if there had ever been any doubt as to whether Irwin Mitchell was acting for him and the other directors personally.

It was noted that some of the communications between Irwin Mitchell and the directors concerned instructions to counsel, which resulted in a conference with counsel, at which the directors' potential personal liability was an item on the agenda.

Finally, a great deal of advice was given to the directors about how to protect privilege in the advice being given.

BACKGROUND TO THE DISPUTE ON PRIVILEGE

In June 2009, preliminary investigation reports were served on Keydata and the three executives. Then, on 8 June 2009 Keydata was put into administration on the application of the FSA, and PricewaterhouseCoopers (PwC) were appointed as administrators.

In August 2009, the FSA used its statutory powers to compel provision of Keydata's e-mail records, including those of Mr Ford. On reviewing those e-mails, the FSA investigators realised that some of the e-mails were privileged, and in February 2010 they asked PwC to waive Keydata's privilege in those documents. PwC, having sought legal advice, agreed to a limited waiver for the purpose of the FSA's investigation.

In August 2010, the FSA served supplementary investigation reports on the three executives. Those reports made reference to the eight e-mails referred to above. The FSA, ignoring the protests of Mr Ford's lawyers, proceeded to take a decision on the basis of the supplementary investigation reports and the content of those contentious e-mails. A judicial review application on behalf of Mr Ford was therefore issued on the grounds that the FSA was not entitled to rely on those e-mails because they were privileged. Mr Johnson and Mr Owen were joined as interested parties.

The case was therefore relatively unusual, in that PwC had already purportedly waived privilege in the e-mails, and Mr Ford was effectively seeking retrospectively to have those e-mails removed from the scope of the FSA's investigation.

CONCLUSIONS ON THE LAW

The Court first set out the key principles governing legal professional privilege (which were taken from the House of Lords decision in *Three Rivers District Council v Bank of England No 6* [2006]). In summary, these were:

- Legal professional privilege arises out of a relationship of confidence: a confidential relationship between the lawyer and the person claiming privilege is a pre-requisite to privilege being available.

- Once a document is privileged, the privilege is absolute and cannot be overridden by any public interest concerns.

- The court's overriding concern is to ensure a fair trial, which is best achieved by having all relevant material available. The clear implication is that the court should be cautious in allowing privilege to be claimed.

The Court rejected both the US approach to joint privilege because it was too restrictive, and the Australian approach because it was too subjective.

As a matter of English law, the question was whether, despite the absence of a formal joint retainer:

> '... at the time that the contentious communication was made, [it was] advice being given to an individual as client [rather than] advice which is being given to another, but in which the first individual is interested because it impacts upon his personal position'.

The Court was absolutely clear that 'it is the former that supports a claim for joint privilege, not the latter'.

Having regard to the principles in *Three Rivers (No 6)*, the Court also noted that 'joint privilege should not arise casually or accidentally'. In order to avoid this, the Court laid down a clear test for establishing whether joint privilege could be claimed. The requirements of the test are that the person claiming joint privilege will need to establish that:

- they communicated with the lawyer in question for the purpose of seeking legal advice in their personal capacity;

- they made clear to the lawyer that they were seeking legal advice in that individual capacity (as opposed merely as representative of a corporation);

- those with whom joint privilege was claimed knew or ought to have appreciated the legal position;

- the lawyer knew or ought to have appreciated that they were communicating with the individual in that individual capacity; and

- the communication with the lawyer was confidential.

This is both a clear and relatively restrictive test, taking a middle ground between the US and Australian approaches.

CONCLUSIONS ON THE FACTS OF *FORD*

Applying the test outlined above, the Court held that joint privilege did apply in this case, and the FSA was therefore not entitled to rely on the contentious e-mails.

The Court placed significant weight on:

i) uncontested evidence that although there was no joint retainer between the executives and Keydata, the executives did consider themselves to be receiving legal advice personally;

ii) evidence from Ms Wallace that even before August 2008 she considered she was advising both Keydata and the executives; and

iii) the fact that the scope of the legal advice obviously did relate directly to the personal position of the executives.

IMPLICATIONS

For practitioners, there are a number of important implications from the decision in *Ford*:

- The circumstances in which joint privilege arises have been greatly clarified. Critically, there has to have been (or, in the lawyer's case, should have been) a clear recognition by both the lawyer and the person claiming privilege that legal advice was being sought by that person in their personal capacity.

- The case highlights the need to clarify the scope of retainers, particularly the identity of the client in situations where joint privilege may arise, and review them on an ongoing basis in order to avoid disputes of this kind.

- In the context of FSA investigations, it is important that, if exposed individuals are not in a position to control waivers of privilege, the individuals or organisations in control of the relevant documents are put on notice of the potential existence of joint privilege.

FURTHER OBSERVATIONS

The Court also made the following useful observations, not directly relevant to the issues being determined, but which are worth highlighting nonetheless:

- The Court reiterated the position that non-privileged documents could not be 'clothed' in privilege merely because they had been forwarded under cover of an e-mail of advice. Accountants' advice, even in this context, was not privileged (although the question of whether tax advice given by accountants can attract privilege will be considered by the Supreme Court later this year).

- The FSA's investigative methodology came in for criticism. The judge referred to the practices adopted by the police and the Serious Fraud Office, who take steps to ensure that contentious documents are not seen by investigators and that any disputes about privilege are resolved before those documents are read or relied upon, and suggested that the FSA might usefully consider adopting similar procedures. It remains to be seen whether the FSA will implement this recommendation.

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R (Ford) v Financial Services Authority [2011] EWHC 2583 (Admin)

R (Prudential) v Income Tax Special Commissioner (Supreme Court, ongoing)

Three Rivers District Council v Bank of England No 6 [2006] 1 AC 610