

Update on Legal Professional Privilege and cross-border fraud:
Practical points from two recent areas of development

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I. *RBS Rights Issue / SFO v ENRC*¹: implications for civil and cross-border cases

1. Whenever consideration is being given to an investigatory process (however limited or preliminary), it needs to be planned with questions of privilege in mind:
 - a. Insofar as the investigation risks creating a discloseable treasure trove for future litigants, the exercise might best be avoided or postponed.
 - b. At the least, it needs to be planned so as to minimise the extent of future disclosure potentially required and in full knowledge of what that extent is.
 - c. Legal advice privilege and litigation privilege need to be separately considered, as do the various types of proceedings that could emerge (civil vs criminal vs regulatory).

2. Where the investigation encompasses multiple jurisdictions and/or proceedings may eventuate in multiple jurisdictions, multiple systems of law may be relevant. However, as regards actual or potential proceedings in this jurisdiction:
 - a. The English court will apply English law to the question of whether a party is entitled to withhold inspection on the basis of privilege (even where, for example, a US domiciled party was questioned in the US, by US attorneys, on matters having no direct connection to any jurisdiction other than the US).

¹ In re RBS Rights Issue Litigation [2017] 1 W.L.R. 1991; Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd [2017] EWHC 1017 (QB); see also Astex Therapeutics Ltd v Astrazeneca AB [2016] EWHC 2759 (Ch)

- b. English law is on a limb as regards the lesser scope of the protection afforded by LPP. Therefore even investigations conducted entirely outside this jurisdiction need to take account of English law if proceedings may eventuate here.
 - c. It was suggested in *RBS* that the fact that material was generated in a jurisdiction having more stringent protections may provide a discretionary basis for refusing inspection, but this will rarely if ever provide an escape route.
3. Among the considerations arising with regard to the form of the investigation:
- a. The organisational structure adopted by a company for carrying it out will be key to identifying the 'client' for LAP purposes.
 - b. Lawyers' working papers still provide a potential safe harbour, but bringing interview notes inside it will be difficult.
 - c. Even where it is practicable to avoid written records of interviews or findings, bear in mind the scope for future questioning on what has occurred.
 - d. In corporate groups, carefully structuring access arrangements may provide a degree of protection from disclosure in English proceedings.
4. As regards litigation privilege, civil practitioners need to bear particularly in mind:
- a. The narrower scope of LP in criminal (and possibly regulatory) proceedings as compared with civil ones.
 - b. The potential impact on civil proceedings of the approach to LP adopted in *ENRC* (eg, with regard to steps taken to avoid litigation).
5. It is necessary to consider at each stage how the privileged status of documents will be proved: records should be kept that will support the evidential task in future. However, following the approach taken in *ENRC*, there is the danger that the necessary evidence as regards LP would stray into self-incrimination.

II. *Avonwick v Shlosberg litigation*: privilege and confidentiality where there is a personal insolvency process

1. The *Avonwick* litigation has established that trustees-in-bankruptcy cannot use the bankrupt's privileged documents in a way that amounts to a waiver of the privilege.² The High Court has subsequently rejected arguments that privilege in documents relating to assets that had passed into the bankruptcy estate would itself pass to the trustee and that the bankrupt could be compelled under s 363(2) of the Insolvency Act 1986 to waive his privilege in documents.³ It follows from this position that:
 - a. The trustee is constrained from divulging privileged materials to creditors, including those who may be funding the bankruptcy process.
 - b. The trustee is constrained from divulging privileged materials to potential third party funders.
 - c. In interviewing third parties, it will not be possible to refer the party to the contents of a privileged document.
 - d. In adjudicating on a creditor claim, the trustee will be constrained from explaining the reasons for rejecting the claim by reference to contents of a privileged document.
2. There are two areas of residual doubt:
 - a. The test which emerges from the Court of Appeal's decision in *Avonwick* (namely, whether use "*amounts to a waiver of the privilege*") may enable the trustee to take advantage of the flexibility in the law as to what amounts to a waiver of privilege (that is, the loss of the right to refuse disclosure of the

² The first instance and Court of Appeal decisions in *Shlosberg v Avonwick Holdings Ltd*, both reported at [2017] Ch. 210 and *Re Webinvest Ltd* (In Liquidation) [2017] EWHC 2446 (Ch).

³ *Leeds v Lemos* [2017] EWHC 1825 (Ch)

document concerned). In particular, the law recognises the concept of the limited disclosure of privileged contents of a document that does not amount to waiver.

- b. Second, it remains arguable that the bankrupt's privileged materials could be deployed in proceedings solely against the bankrupt, but it is unlikely that they can be.
3. In any event, it will now be more important to examine the scope for arguments that material is not privileged at all:
 - a. In particular, the crime-fraud exception is likely to play a more prominent role in bankruptcy cases.
 - b. It has been acknowledged for some time that the exception can potentially be invoked in the context of proceedings involving transactions defrauding creditors and pressure will grow to test its application more widely.
4. Appointing the petitioning creditor's solicitors to act for the trustee poses a significant risk wherever the creditor may wish to pursue future actions. This is because, if they review the bankrupt's privileged documents, it will either amount to a de facto sharing of their contents with the creditor, or place them in a position of conflict of interest or duty insofar as the contents are of assistance to their other client. Instructing the petitioning creditor's solicitors will thus require an election by the petitioner that it is content to be disabled from itself pursuing further action (including against a related third party) with the assistance of those solicitors.
5. In principle, the same officeholders can still act as trustees and officeholders of related insolvency estates. However:
 - a. All sharing of compulsorily obtained material must be justified by reference to a purpose of the estate. The practical viability of this in many instances is open to question.
 - b. Where the same officeholders are appointed to related estates, robust arrangements will be needed to ensure no risk of privileged material passing between them.

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