

UK High Court Considers What Amounts to a Waiver of Privilege in Recent Case

by Joseph Lewin

On 1 June 2020, the High Court found that, by using references to their lawyers' legal advice in support of its case that the transactions that formed the subject matter of the application were lawful, a bank had waived privilege in that advice.

The recent decision in this case (*PCP Capital Partners LLP and another v Barclays Bank plc* [2020] EWHC 1393 (Comm)) is an important one for in-house legal teams because it considers when privilege is waived.

Background

Underlying claim

The Claimant, PCP Capital Partners ("**PCP**"), is suing Barclays Bank Plc ("**Barclays**") in respect of losses allegedly arising from PCP's investment in Barclays following the financial crisis.

PCP, an investment consortium, claims that Barclays made false representations as to how the terms of PCP's investment would compare to the terms of an investment in Barclays by the State of Qatar and its related entities and persons (the "**Qatari Investors**"). In particular, PCP alleges that Barclays represented that it would get the "*same deal*" as the Qatari Investors in respect of the pro rata fees and other payments it would receive in return for its investment.

Barclays and the Qatari Investors entered into certain advisory services agreements ("**Advisory Agreements**") in 2008 which PCP alleges were shams, designed to conceal additional benefits that had been agreed with the Qatari Investors in relation to their investment in Barclays.

As a result, PCP alleges that the representation made to it by Barclays about how its investment would compare to PCP's investment was false.

Related People

- Joseph Lewin

Related Capabilities

- Commercial Litigation
- International Arbitration & Litigation
- Europe

Serious Fraud Office (“SFO”) criminal charges

Criminal charges were brought by the SFO in relation to these matters against Barclays, together with its parent company, Barclays Plc, and some senior executives of companies in the Barclays group. These charges were subsequently dismissed and certain of the senior executives acquitted. However, in connection with the SFO’s criminal investigation, Barclays agreed to provide some documents to the SFO pursuant to a “*limited waiver of privilege*”. The SFO used a number of these documents and referred to them in open court in the criminal proceedings (“**Open Documents**”). Privilege in the Open Documents was thereby lost.

Disclosure application

PCP applied to the Commercial Court for disclosure by Barclays of its contemporaneous documents relating to the Advisory Agreements, which documents had previously been withheld from disclosure by Barclays on privilege grounds. The basis for PCP’s application was that some of the witness statements and the opening statement filed by Barclays in the underlying proceedings referred to legal advice that had been received by the bank, and as such, the bank had thereby waived privilege in those documents. The references to legal advice in question related to the drafting and approval of the Advisory Agreements.

Barclays argued that privilege had not been waived on several grounds.

For the purposes of this update, we have focused on two of these grounds:

1. On a proper application of the relevant legal principles, no waiver of privilege had occurred (“**First Argument**”).
2. The references in question were to the Open Documents which PCP had. Barclays argued that since the criminal trial, those documents have been non-privileged documents, therefore deploying them in the current proceedings could not amount to a collateral waiver (“**Second Argument**”).

First Argument

When considering Barclays’ argument that no waiver of privilege had occurred, the judge provided helpful guidance on the law in this area.

The judge, Waksman J, examined the “*cherry picking*” concept in relation to the waiver of privilege. He stated that, in order for privilege to be waived, the reference to legal advice must be “*sufficient*” and the party waiving privilege must be relying on that reference to support its case in some way.

Helpfully, the judge gave examples of scenarios that, in his view, clearly do not amount to waivers of privilege:

1. a purely narrative reference to giving of legal advice, as there is no reliance upon it; and

2. the statement *"My solicitor gave me detailed advice. The following day I entered into the contract"*.

However, he added that the addition of the following sentence to the statement at point two above *"I entered into the contract as a result of that legal advice"* would amount to a waiver of privilege.

The judge also considered what he called the *"vexed"* question of whether waiver arises if the reference is to the *"effect"* of the legal advice, rather than its *"contents"*, acknowledging that there is *"judicial disquiet"* in this area of law. After reviewing the case law in this area, the judge concluded that the distinction between the effect and the content of legal advice cannot be applied mechanically. He said that the following matters should be considered with regards to this distinction:

- whether there is reliance on the privileged material referred to;
- the purpose of that reliance; and
- the context of the relevant matter.

When deciding on PCP's disclosure application, the judge found that a number of statements made by Barclays in its witness statements and opening arguments for trial did constitute a waiver of privilege.

One example of this was a statement from one of Barclays' witnesses which said that he *"took comfort from and adhered to the lawyers' advice in these matters"*. The subject matter of the paragraph in the witness statement which contained this statement was the Advisory Agreements.

The judge found that, whilst this was in a sense a reference to the effect of the advice, it could amount to a waiver because it was a general statement that the lawyers were approving that Barclays' conduct was lawful.

The judge also found that the reliance requirement was satisfied as Barclays was relying on this legal advice to support its case that the Advisory Agreements were lawful.

Second Argument

For the Second Argument, the bank argued that all of the references to legal advice in question concerned the Open Documents, and as those documents were no longer privileged (as they lost privilege when referred to in court in the SFO criminal proceedings), deploying them in these proceedings could not result in a collateral waiver over the other documents involving legal advice relating to the Advisory Agreements which would have been otherwise withheld on the grounds of privilege.

On this point, the judge rejected the underlying premise of Barclays' argument which was that a once-privileged document which has lost that status when it has been deployed on one occasion becomes irrelevant from a privilege point of view going forwards for all purposes, and concluded that a collateral waiver had occurred, despite the fact that the Open Documents lost privilege in the SFO criminal proceedings.

When rejecting Barclays' argument, the judge acknowledged that there may be more privileged documents that were relevant to the question of whether the Advisory Agreements were shams that did not form part of the Open Documents, and that only Barclays would know whether that was the case. In particular, he noted that if the remaining documents were so insignificant, Barclays could have decided to disclose them anyway, but it did not.

Comment

In an electronic world where vast amounts of correspondence is exchanged, in-house practitioners need to be aware of the risk of losing privilege if legal advice is referenced in third party communications. As this case demonstrates, privilege may be lost if legal advice is referred to and relied upon, even where the reference does not include the content of the legal advice.

To avoid inadvertently waiving privilege, in-house practitioners should be alert when making a written reference to legal advice in communications with third parties to avoid waiver of privilege, keeping in mind the case discussed in this article. If possible, it is prudent to avoid referencing legal advice in third party communications to preserve privilege. In instances where reference to legal advice in correspondence with third parties is necessary, the wording used should be considered carefully, and whether any reliance will be placed on the reference to the legal advice.

For more information, please contact [Tim Maloney](#) or [Matthew Blower](#).

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