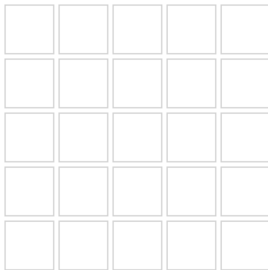


Bell Gully

Litigation

December 2004

Bank of England case highlights need for care in seeking information for legal advisors

"Two recent decisions in England highlight the need for companies to take special care when obtaining internal information for their lawyers when seeking legal advice."

Brian Latimour – Partner

Two recent decisions in England highlight the need for companies to take special care when obtaining internal information for their lawyers when seeking legal advice.

The two decisions, in the English Court of Appeal and House of Lords, arose during litigation in which various creditors sued the Bank of England over the 1991 liquidation of the Bank of Commerce and Credit International (BCCI).

A government inquiry under Lord Justice Bingham had investigated the Bank of England's failure to prevent the collapse. The Bank had instructed lawyers and formed a special internal committee (known as the Bingham Inquiry Unit, or BIU) to deal with the Inquiry.

The creditors sought disclosure of the Bank's documents relating to the Inquiry in two separate applications.

Each application raised issues of legal privilege. Both required the courts to consider solicitor-client privilege (which applies when legal advice is sought), but not litigation privilege (which is broader, and applies where litigation is in existence or in contemplation).

Privilege over the Bank's internal communications for the purpose of legal advice

In the first application – *Three Rivers District Council v Bank of England* [2003] EWCA Civ 474 – the creditors sought disclosure of internal communications, mostly between Bank employees and the BIU, including communications that reported information for the BIU to pass on to the Bank's lawyers. The Bank claimed privilege because these communications were for the purpose of obtaining legal advice.

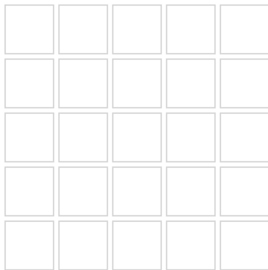
In a surprising decision, the Court of Appeal determined that these communications were not legally privileged, finding that there was no reason to treat them differently from communications between the BIU and third parties. Accordingly, the Bank was ordered to disclose them. Leave to appeal was refused.

Implications of the decision

The decision is probably wrong. In the second case (noted below) the House of Lords was asked to state its view of the Court of Appeal's decision on the first case but, despite making adverse remarks, their Lordships declined to deliver any firm opinions on the point.

Impact in New Zealand

The point will no doubt be raised in New Zealand sooner or later, but hopefully the decision will not be followed here.



"...companies should take steps to maximise the protection for internal communications where they are genuinely in the context of obtaining material to be given to the company's lawyers for advice about a matter."

Bob Hollyman – Senior Associate

In the interim, however, companies should take steps to maximise the protection for internal communications where they are genuinely in the context of obtaining material to be given to the company's lawyers for advice about a matter.

Key steps which should be taken by New Zealand companies

- Make sure that wherever such reports and communications are needed from officers and employees, they are aware that they are to be put before legal advisors in order to obtain legal advice.
- Do not address these communications internally. Instead, address them directly to the firm's lawyers, and copy internal recipients.
- Mark the communications (including emails) "privileged and confidential" and "for the purposes of legal advice".

Privilege over advice as to how evidence and material should be presented

In *Three Rivers District Council v Bank of England* [2004] UKHL 48, the creditors then applied for disclosure of communications between the BIU and the Bank's lawyers relating to the presentation of evidence and material to the Inquiry.

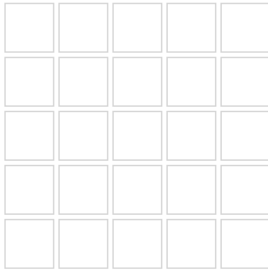
The Court of Appeal held that such "presentational advice" was not legal advice and assistance, and therefore was not privileged.

On this occasion, however, the House of Lords heard and allowed the Bank's appeal.

Rejecting the view that "presentational advice" was not legal advice, their Lordships unanimously endorsed the observation from *Balabel v Air India* [1988] Ch 317 that "[L]egal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."

In the legal context of the Bingham Inquiry, advice about presenting facts and material was therefore legally privileged. Lord Carswell commented:

> *"The work of advising a client on the most suitable approach to adopt, assembling material for presentation of his case, and taking statements which set out the relevant material in an orderly fashion and omit the irrelevant, is to my mind the classic exercise of one of the lawyer's skills."*



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An affirmation of legal privilege

The House of Lords' affirmation of legal privilege in the second application is an important and positive re-assurance for all clients seeking legal advice. It is entirely consistent with New Zealand law, following *B & ors v Auckland District Law Society* [2004] 1 NZLR 326 (PC).

The decision is also another important part of a series of recent cases, at the highest appellate levels in England, New Zealand and Australia, which re-affirm the fundamental nature and importance to clients of legal privilege as part of the administration of justice.

Advice and information

Bell Gully can advise on all aspects of litigation practice, including legal privilege. For further advice and information, please contact your usual Bell Gully adviser or any member of the Litigation Team listed below.

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