

Insights

PCP V BARCLAYS : ENGLISH HIGH COURT CLARIFIES WHAT CONSTITUTES A WAIVER OF PRIVILEGE. THE ANSWER - IT ALL DEPENDS ...

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SUMMARY

The Commercial Court has held that a bank waived privilege in **all** contemporaneous communications with its lawyers relating to particular transactions, as the bank had referenced and deployed certain documents containing legal advice in order to support a certain part of its case on the merits. This case is relevant whenever making a reference to legal advice in third party communications is contemplated, including in the context of providing privileged material on a limited waiver basis. The Judge examines the “cherry picking” concept, what constitutes a waiver of legal privilege, and the principles that the Court will consider when deciding whether legal privilege has been waived. *(1) PCP Capital Partners LLP (2) PCP International Finance Ltd v Barclays Bank Plc [2020] EWHC 1393 (Comm)*

INTRODUCTION

This recent Commercial Court disclosure decision *PCP Capital Partners LLP and another v Barclays Bank Plc [2020] EWHC 1393 (Comm)* arose in the context of the ongoing litigation between the claimant (PCP), an investment consortium, and the defendant bank (Barclays), in which it is alleged that Barclays represented to it that PCP would receive the “same deal” (i.e. would receive as much pro rata by way of fees or other payments for investments made) as another private investor. PCP made allegations relating to certain written advisory services agreements (ASA) entered into by Barclays.

Separately, in 2016, Barclays had agreed to provide certain documents under a “limited waiver of privilege” to the Serious Fraud Office (SFO). The SFO subsequently used several of those documents, including referring to them in open court during criminal proceedings. As a result, they lost their privileged status and became “Open Documents”.

PCP applied for further disclosure in the Commercial Court action in relation to contemporaneous documents concerning the ASAs so far as they had previously been withheld from disclosure on the ground of privilege. Barclays resisted, principally, on two grounds (although others including scope and proportionality were also advanced):

1. On a proper application of the relevant legal principles, there had been no waiver at all.
2. All references to were to the "Open Documents", which PCP already had. Deploying these documents in the Commercial Court action could not amount to a waiver, as they had already been deployed in the criminal trial and had become non-privilege documents.

KEY POINTS

Waiver of Privilege

- The Judge noted that there is no absolute definition of when waiver arises. However, in principal, his view was that:
 - The reference to the legal advice must be sufficient and;
 - The waiving party must be relying on that reference to support their case on an issue before the court.

To assist, the Judge gave some examples that would, in his view constitute a waiver or not:

- A purely narrative reference to the giving of legal advice (*no waiver*);
- "My solicitor gave me detailed advice. The following day I entered into the contract" (*no waiver*);
- "I entered into the contract as a result of that legal advice" (*waiver*).
- Next, the Judge turned to the question as to whether, separate to the question of reliance, there is a distinction between referencing the **effect** of the legal advice (no waiver) and referencing the **content** of the legal advice (waiver).
- In applying the content/effect distinction, the Judge emphasised that it is an "*acutely fact-sensitive exercise*" and needs to be applied through the prism of whether there is any reliance on privileged material referred to; the purpose of the reliance; and the context. As such, even where only the conclusion of the legal advice was referred to, as opposed to the contents of the advice, that would not necessarily preclude a waiver. Indeed, in this case, the Judge found that that detailed references in the witness statements to the involvement of lawyers and to '*taking comfort*' from their advice amounted to more than simply referring to the fact of the

advice. Although they were only referring to the effect of the advice, depending on the context, that could still be sufficient for waiver. Here, the witnesses were relying on the advice to improve Barclays' case on the issues surrounding the ASAs. References to '*taking comfort*' in the advice, the Judge noted, could not mean anything other than the lawyers were approving what was being done as lawful.

Once-privileged but now "open" documents in another context are still relevant for determining the question of waiver

- Interestingly, the Judge did not accept the submission that, because all references to legal advice concerned the Open Documents (which were no longer privileged), deploying them in these proceedings did not involve a waiver at all. A once-privileged document, which has lost that status because it has been deployed on a previous occasion, remains relevant for the purpose of privilege considerations.

BCLP PERSPECTIVE - THE IMPLICATIONS OF THIS DECISION

- Generally speaking, referencing legal advice in third party communications or court documents is unusual/rare and the principle against 'cherry picking' which privileged material is disclosed, or creating only a partial picture of the legal advice, is well-known.
- This judgment, however, is more than just a reminder of the existing law and should be carefully considered before making *any* reference to legal advice in communications with third-parties to avoid the risk of waiving legal privilege and having to disclose the content of your legal advice. The corollary being that recipients to a communication, which makes any reference to legal advice, may become more challenging on the grounds of collateral waiver on the back of this judgment.
- Given this judgment, we suspect that in most cases the risk of losing privilege will outweigh the benefit of making any reference to legal advice. Certainly, the safest and sensible conclusion in light of this decision is not to refer to legal advice in any shape or form in communications with third parties, unless you are content to waive privilege over related privileged documents. There may be some rare instances where you just cannot avoid doing so, in which case great care needs to be taken over the precise wording used, and deciding what reliance, if any, is put on the reference to the legal advice.

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Clare Reeve Curatola

London

clare.reevecuratola@bclplaw.com

[+44 \(0\) 20 3400 3326](tel:+442034003326)



Megan Smith

London

megan.smith@bclplaw.com

[+44 \(0\) 20 3400 3106](tel:+442034003106)

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