Neutral Citation Number: [2020] EWHC 2437 (Comm)

Case No: CL-2016-000172

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 11/09/2020

Before :

MRS JUSTICE MOULDER

- -

Between :

PJSC Tatneft	**Claimant**
- and -	
(1) Gennady Bogolyubov	**Defendants**
(2) Igor Komoloisky	
(3) Alexander Yaroslavsky	
(4) Pavel Ovcharenko	

- -
- -

David Railton QC, Henry King QC,
David Davies, James Sheehan and **Nicolas Damnjanovic**
(instructed by **Debevoise & Plimpton LLP**) for the **Claimant**

Ewan McQuater QC, Matthew Parker and **Nathaniel Bird**
(instructed by **Enyo Law LLP**) for the **First Defendant**

Mark Howard QC, Ruth den Besten and **Tom Ford**
(instructed by **Fieldfisher LLP**) for the **Second Defendant**

Kenneth MacLean QC and **Owain Draper**
(instructed by **Mischcon de Reya LLP**) for the **Third Defendant**

Marcus Staff (instructed by **Sherrards Solicitors**) for the **Fourth Defendant**

Hearing dates: 27 and 28 July 2020

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

THE HONOURABLE MRS JUSTICE MOULDER

Mrs Justice Moulder :

1. This is the reserved judgment of the court on the issue of whether legal advice privilege is properly claimed by the claimant ("Tatneft") in relation to communications with members of its in-house legal department.

2. The issue is one of a number of issues raised by an application by the second defendant made on 29 May 2020, the other issues having been resolved by consent or determined by the court in the course of the pre-trial review hearing held on 27 and 28 July 2020.

3. The pre-trial review including submissions on this issue was held remotely in light of the current pandemic but the court had the benefit of both written and oral submissions from counsel for the second defendant and the claimant.

Evidence

4. The application was supported by the second witness statement of Mr James Lewis, partner at Fieldfisher LLP, acting for the second defendant, and dated 29 May 2020 and a third witness statement dated 10 July 2020.

5. In response the claimant had submitted a witness statement from Mr Kevin Lloyd, a partner of Debevoise & Plimpton LLP, acting for the claimant, dated 26 May 2020.

6. In addition the parties had obtained evidence as to the position of lawyers in Russia notably the distinction between "Advocates" and other lawyers who are not Advocates. Memoranda from Mr Kirill Trukhanov, Managing Partner and Advocate, of Trubor Law Firm for the second defendant and a memorandum dated 26 June 2020 from Associate Professor Alexandr Yagelnitskiy for the claimant were exhibited to the respective witness statements.

Background

7. I do not propose to set out the factual background or the broader claim in these proceedings as it is in my view unnecessary in order to address the issues which the court now has to determine.

8. The only matter of relevance is that standard disclosure has taken place and the claimant made a disclosure statement dated 11 September 2019 ("Tatneft Disclosure Statement") and asserted the following claim to legal advice privilege:

> "(1) Original and copy correspondence and other communications and documents passing either directly or indirectly between the Claimant and its legal advisers (including but not limited to advice, notes of telephone conversations and meetings, Instructions to Counsel, notes of consultations and conferences with Counsel, Counsel's written advice, drafts of any of the foregoing) all being confidential and consisting of, referring to, requesting or having been prepared for the purpose of requesting or giving legal advice and assistance."

9. In correspondence between the respective solicitors Tatneft has confirmed that legal advice privilege is asserted over communications between employees/officers of Tatneft and members of its internal legal department.

The application

10. In its application the second defendant seeks an order:

> "that the Claimant provides specific disclosure and information relating to Tatneft's compliance with its disclosure obligations in these proceedings"

11. The order is said to be sought pursuant to the requirements of CPR Part 31 and paragraphs 14.2 and 17.1 of CPR Practice Direction 51U. Paragraph 14.2 of CPR Practice Direction 51U provides that:

> "A party who wishes to challenge the exercise of a right or duty to withhold disclosure or production must apply to the court by application notice supported where necessary by a witness statement."

12. The relevant paragraph of the draft order sought (as amended) is paragraph 4 as follows:

> The Claimant shall by 28 August 2020 provide inspection of all documents previously withheld on the basis of legal advice privilege: (a) containing or evidencing communications between, on the one hand, Tatneft employees/officers and, on the other hand, Ms Savelova and/or Mr Glushkov and/or members of the Tatneft in-house "Legal" department; (b) comprising documents prepared by Ms Savelova and/or Mr Glushkov and/or members of the Tatneft in-house "Legal" department.

13. In relation to paragraph 5 of the original draft order, that is no longer pursued.

14. Accordingly the only issue is whether the court should make the order sought by paragraph 4, to order disclosure of communications between Tatneft employees/officers and Ms Savelova and/or Mr Glushkov and/or members of the Tatneft in-house Legal department (and documents prepared by any of them).

The case advanced for the second defendant

15. It was submitted for the second defendant that it is for the claimant to justify its assertion of legal advice privilege: *In re RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch) at [108].

16. It was accepted for the second defendant that it is a question of English law as the *lex fori* whether a document can be withheld on the basis of privilege. In his first witness statement in support of the application, the basis for the second defendant's assertion that legal advice privilege did not apply, was stated as follows (paragraph 69 Lewis 2):

> "Given that advocate's secrecy does not apply to in-house lawyers, it appears that the communications with, and documents generated by, Ms Savelova and/or Mr Glushkov and/or members of the Tatneft in-house "Legal" department are not properly subject to a claim of legal advice privilege, and inspection should be ordered to be provided."

17. In his second witness statement in support of the application the basis was expressed more widely. Mr Lewis stated that (paragraphs 24 to 27 of his third witness statement):

> "24…It in fact appears from the answers given that communications with and work by such individuals are not the subject of a valid claim to legal advice privilege as a matter of English law (nor, if and insofar as relevant, as a matter of Russian law).
>
> 25 As confirmed in the Trukhanov Memo 2, in-house lawyers are not members of the Russian Bar and their activity does not fall under regulation provided under Federal Law governing advocates.
>
> 26… The Trukhanov Memo set out that there is a clear distinction between the status of a self-employed, independent and officially registered advocate, and an employed in-house lawyer. The closest concept to legal professional privilege is "advocate's secrecy" … which applies to the relationship between advocates and their clients. On this basis the Second Defendant set out in the D2 Application that it appears that communications between Tatneft's employees / officers and member of its in-house legal team are not properly subject to a claim of legal advice privilege.
>
> 27. Mr Trukhanov further confirms that the Russian legal system has made a clear distinction that its legal concept of advocates secrecy (an equivalent to the English law of privilege) applies to advocates, but does not apply to non-advocate in-house lawyers. This also applies to the Russian Court's power to order the disclosure of documents…" [emphasis added]

18. Thus the application was made on the basis that, in Russia:

    i) an Advocate is an independent legal advisor who has been admitted to the Russian legal bar and that there is a register of Advocates maintained by the Ministry of Justice of the Russian Federation;

    ii) In-house lawyers are not Advocates;

    iii) there is a legal concept of legal professional privilege termed "advocates secrecy" which does not apply to lawyers who are not Advocates.

Accordingly it was submitted for the second defendant that as a matter of English law, legal advice privilege does not apply to communications with and documents generated by the in-house legal department of Tatneft who are not "appropriately qualified" foreign lawyers.

Tatneft's case

19. The claimant accepts that the relevant individuals are not Advocates under Russian law but submitted that as a matter of English law, legal advice privilege applies: there is an in-house legal department at Tatneft and legal advice privilege attaches to communications between employees of Tatneft and members of its legal department on the basis that as a matter of English law, legal advice privilege applies to advice obtained from foreign lawyers and that includes in-house lawyers. The Russian law of legal professional privilege (advocates' secrecy) is said to be irrelevant.

Submissions

20. It was submitted for the second defendant that under English law legal advice privilege only applies to:

    i) "professional lawyers" i.e. a legal adviser who is professionally qualified and a member of a professional body: *Lawrence v Campbell* (1859) 4 Drew 485; *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax* [2013] UKSC 1;

    ii) in-house lawyers if the in-house lawyer is admitted to practice and regulated: *Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs* (No 2) [1972] 2 QB 102;

    iii) foreign lawyers if they are "appropriately qualified": *Hollander on Documentary Evidence* at 14.09; *Thanki The Law of Privilege* 3rd edition at 1.47.

21. It was submitted for the second defendant that in order for legal advice privilege to exist, the court is concerned with the "status" of the "lawyer" and not just his function: *Dadourian Group International Inc v Simms* [2008] EWHC 1784 (Ch)*; Prudential*.

22. It was submitted for the claimant that:

    i) legal advice privilege applies to all communications made in confidence with professional legal advisers for the dominant purpose of giving or obtaining legal advice including communications with in-house lawyers: *Three Rivers (No 6)* [2005] 1 AC 610; *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] 2 WLR 1215;

    ii) the court does not enquire into the standards of regulation or training applying to the foreign lawyer: *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax* [2013] UKSC 1); and

iii) the courts have recognised that legal advice privilege is not confined to barristers and solicitors provided that the advice is sought from a "variety of lawyer": *Wilden Pump Engineering v Fusfeld* [1985] FSR 159 at 167.

Discussion

23. In my view the starting point for consideration of this issue as to the circumstances in which legal advice privilege can be claimed is the rationale for legal advice privilege which has been said to be that it is in the public interest that clients can obtain legal advice and that these communications should be kept confidential: Lord Scott in *Three Rivers (No 6)* at [34]:

> "None of these judicial dicta tie the justification for legal advice privilege to the conduct of litigation. They recognise that in the complex world in which we live there are a multitude of reasons why individuals, whether humble or powerful, or corporations, whether large or small, may need to seek the advice or assistance of lawyers in connection with their affairs; they recognise that the seeking and giving of this advice so that the clients may achieve an orderly arrangement of their affairs is strongly in the public interest; they recognise that in order for the advice to bring about that desirable result it is essential that the full and complete facts are placed before the lawyers who are to give it; and they recognise that unless the clients can be assured that what they tell their lawyers will not be disclosed by the lawyers without their (the clients') consent, there will be cases in which the requisite candour will be absent. It is obviously true that in very many cases clients would have no inhibitions in providing their lawyers with all the facts and information the lawyers might need whether or not there were the absolute assurance of non-disclosure that the present law of privilege provides. But the dicta to which I have referred all have in common the idea that it is necessary in our society, a society in which the restraining and controlling framework is built upon a belief in the rule of law, that communications between clients and lawyers, whereby the clients are hoping for the assistance of the lawyers' legal skills in the management of their (the clients') affairs, should be secure against the possibility of any scrutiny from others, whether the police, the executive, business competitors, inquisitive busybodies or anyone else (see also paras 15.8 to 15.10 of Zuckerman's Civil Procedure (2003) where the author refers to the rationale underlying legal advice privilege as "the rule of law rationale"). I, for my part, subscribe to this idea. It justifies, in my opinion, the retention of legal advice privilege in our law, notwithstanding that as a result cases may sometimes have to be decided in ignorance of relevant probative material.." [emphasis added]

This dicta shows that firstly the seeking and giving of legal advice is in the public interest and it is "necessary" that communications between clients and lawyers

whereby clients are hoping for the assistance of the lawyers should be secure against the possibility of any scrutiny from others.

24. It is consistent with that rationale that legal advice privilege has been held to extend to foreign lawyers: *Prudential* at [29]:

> "29. There is room for argument whether, by allowing Prudential's appeal, we would be extending the breadth of LAP or would simply be identifying the breadth of LAP. On the former view we would be changing the common law; on the latter view, we would be declaring what the common law always has been. I do not think it necessary to address this issue, as the important point for present purposes is that it is universally believed that LAP only applies to communications in connection with advice given by members of the legal profession, which, in modern English and Welsh terms, includes members of the Bar, the Law Society, and the Chartered Institute of Legal Executives (CILEX) (and, by extension, foreign lawyers). That is plain from a number of sources, which speak with a consistent voice." [emphasis added]

25. It was submitted for the second defendant that the extension to foreign lawyers is only to those who are "appropriately qualified" which counsel described as lawyers who were regulated and "admitted to practice".

26. It is however significant and noteworthy in my view that Lord Neuberger observed in *Prudential* at [45] that the principled justification for the restriction of legal advice privilege to lawyers has been "undermined" by the extension of legal advice privilege to foreign lawyers without regard to their national standards or regulations. Thus he accepted that the courts had not had regard to national standards or regulations as a precondition to the recognition of privilege. He stated that:

> "45. Such principled justification as there is for the restriction of LAP to lawyers seems to me to be further undermined by the extension of LAP which the court has approved to all foreign lawyers, without (it would seem) regard to their particular national standards, regulations or rules with regard to privilege. That extension appears to originate from Lawrence v Campbell (1859) 4 Drew 485 (Sir Richard Kindersley V-C), and was approved and applied in Macfarlan v Rolt (1872) LR 14 Eq 580 (Sir John Wickens V-C), In re Duncan, decd [1968] P 306 (Ormrod J), and Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529, 536 (Templeman LJ)…" [emphasis added]

27. The same approach to the application of legal advice privilege to foreign lawyers was recognised by Lord Sumption in his dissenting judgment in *Prudential* at [126]:

> "…none of the statements of principle in the case law have identified the relationship of lawyers with the court or the arrangements for the admission or discipline of lawyers as a relevant factor. If it had been, then the English courts would not have recognised a privilege for legal advice which was wholly independent of any forensic proceedings, actual or prospective. Nor would they have recognised the privilege attaching to the advice of foreign lawyers. There is no suggestion in any of the cases about foreign legal advice of any interest on the part of the English court in the standards of their training or discipline, and they are certainly not amenable to the supervision of English judges. Nor could Sir John Romilly have recognised the privilege attaching to the advice of a person whom the client believed to be a solicitor and professionally consulted on that basis, but who in fact was not: see Calley v Richards (1854) 19 Beav 401. Third, the legal basis of the privilege was worked out by the courts at a time when most claims for legal advice privilege concerned communications with solicitors and attorneys, whose professional standards were then notoriously low. Many of them were not enrolled and the court's supervision of their professional practices was nominal or non-existent. This was particularly true of attorneys, who practised in the common law courts and whom Sir Vicary Gibbs, Chief Justice of Common Pleas from 1813, once memorably described as "the growling jackals and predatory pilot fish of the law": see The Oxford History of the Laws of England, xi (2010), 1110 (the whole of this chapter repays reading). The high modern standing of solicitors (as all of them were called after 1873) was due very largely to the work of the Law Society, which was founded after 1825 to address this perception, and which together with its provincial affiliates gradually transformed the profession in the course of the nineteenth century." [emphasis added]

28. At [73] of his judgement in *Prudential* Lord Neuberger said that in none of the cases referred to at paragraph 45 (quoted above) does it appear that there was any "significant analysis as to why and to what extent" legal advice privilege was to be accorded where it was a foreign lawyer who had given the advice but he continued:

> "It is none the less understandable why LAP was so extended: the extension was, I suspect, based on fairness, comity and convenience. While that extension does rather undermine much of the principled justification for LAP being confined to cases where the advice is given by professional lawyers, it is consistent with the argument that the court should restrict LAP to its currently understood bounds for reasons of practicality and certainty." [emphasis added]

29. This second reference by Lord Neuberger reinforces the conclusion that he did not regard the extension of legal advice privilege to communications with foreign lawyers

as limited to "professional lawyers" which I infer to mean qualified to a standard which the court would equate with a barrister or solicitor.

30. Despite these observations of Lord Neuberger on the absence of any significant analysis in the cases and his conclusion that the extension was based on fairness, comity and convenience, both counsel took the court to various authorities including *Lawrence v Campbell* and *In re Duncan*.

31. In *Lawrence v Campbell* the court held that legal advice privilege applied to Scottish solicitors.

32. The Vice Chancellor held:

> "…By their answer they state that they have been admitted as solicitors before the Courts of law in Scotland, that they are practising in London as Scotch solicitors and law agents, and that the letters were written and received by them confidentially and in their professional capacity. Here, then, is a very distinct statement, which would, if these gentlemen had been English solicitors, have entitled them to protection from production. These letters consist of two series—those written by these gentlemen to Mr. Campbell, and those written by Mr. Campbell to them; and I think that there can be no question but that they should not be produced. They are professional communications made as between a solicitor—though a Scotch solicitor—and his client, Mr. Campbell. The question is new in specie, but the cases have settled the general principle, and I think that principle must apply to this case. The general principle is founded upon this, that the exigencies of mankind require that in matters of business, which may lead to litigation, men should be enabled to communicate freely with their professional advisers, and their communications should be held confidential and sacred, and that no one should have a right to their production. The reason is that the exigencies of mankind require it; and no mischief arises from it, as it does not in any way break in upon the principle that Courts of Equity may [490] require the production of all documents which will tend to prove the case before them…" [emphasis added]

33. Thus whilst it was clear from the passage quoted above that the fact that their "status" as solicitors was viewed as significant, equally the rationale was stated to be that men should be able to communicate freely with their "professional advisers" and that their communications should be held "confidential and sacred".

34. In *re Duncan* one of the issues was whether privilege applied to advice from foreign lawyers. The issue was expressed (at p309 of the report of the judgment) as follows:

> "an issue as to the extent of the privilege covering communications between the plaintiff and his English solicitors and various foreign lawyers acting on his behalf in the relation of lawyer and client."

35. The judge held:

> "The basis on which this head of privilege rests was stated by Lord Cottenham L.C. in Reid v. Langlois in these words:
>
> "... the object is to protect the party who wishes to take the advice of professional men, and he would be prevented from taking such advice if there was the hazard of having it revealed on entering into a contest with an opponent."
>
> In Anderson v. Bank of British Columbia, Jessel M.R. adopted this statement of principle with the gloss that by "professional men" Lord Cottenham meant members of the legal profession, a phrase which he uses interchangeably with "professional lawyers." There is nothing in these judgments to suggest that either judge intended to limit the rule to legal advisers whose names appear on the roll of Solicitors to the Supreme Court or who are members of the English bar. The basis of the privilege is just as apt to cover foreign legal advisers as English lawyers, provided only that the relationship of lawyer and client subsists between them." [emphasis added]

36. This is a clear statement that it is the "function" of the relationship and not the "status" of the lawyer which is relevant in the case of foreign legal advisers and this is consistent with the stated rationale of protecting a party who wishes to take legal advice. The functional approach was endorsed by Lord Sumption in his dissenting judgment in *Prudential* at [123] as follows:

> "123. It is consistent with the view that I have expressed that the courts have in recent times expanded the categories of lawyer whose advice may attract privilege, in particular to cover salaried legal advisers and foreign lawyers. This development has been the natural consequence of the functional character of the test combined with the law's pragmatic willingness to recognise the changing patterns of professional life. The privilege attaching to the advice of salaried legal advisers was first recognised judicially by the Court of Appeal in *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners* (No 2) [1972] 2 QB 102. Lord Denning MR, at p 129, justified the result primarily on the ground that, although the communications of a corporation with an in-house legal adviser were internal to the corporation, nevertheless the adviser was performing the same function as the lawyer in independent practice. Relevant communications with foreign lawyers have for many years attracted the same privilege for the same reason. In *Lawrence v Campbell* (1859) 4 Drew 485 privilege was claimed in English litigation for communications between a Scottish client and a Scottish solicitor practising in London. Sir Richard Kindersley V-C held (at p 491) that "the same principle that would justify an Englishman consulting his English solicitor would justify a Scotchman consulting a Scotch

> solicitor." Subsequently, communications with foreign lawyers were treated as being entitled as a matter of course to the same privilege as communications with English lawyers in like circumstances: see *Macfarlan v Rolt* (1872) LR 14 Eq 580 ; *In re Duncan, decd* [1968] P 306; *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, 535–536. Sir Sydney Kentridge QC, appearing for the Law Society, described these cases as "anomalous". But he did not suggest that they were wrong. I think that they were clearly right, and I do not regard them as anomalous. They reflect the functional approach which English law has always taken to legal advice privilege." [emphasis added]

37. It was submitted in this case that legal advice privilege should be limited to communications with Advocates on the basis that under Russian law those lawyers who are not Advocates do not benefit from "Advocate's secrecy". A similar submission was made in *In re Duncan* that privilege

> "…does not extend to communications between client and foreign lawyers where such communications are not privileged by the municipal law of the forum of the foreign lawyer. In other words, if the foreign lawyer's own court insists on disclosure of communications between him and his client in litigation in that country, this court will not regard such communications as privileged in litigation in this country."

38. The judge in rejecting this proposition, stated that:

> "[Counsel for the defendant] cited no authority in support of it and, in my judgment, it is inconsistent with the tenor of the judgment of Sir Richard Kindersley V.-C. in Lawrence v. Campbell… The mere fact that the Scots lawyers were practising in England was clearly not a relevant consideration and the vice-chancellor expressly rejected the suggestion that the Scots law of privilege had any bearing on his decision. The essence of the judgment is that privilege attaches to communications between professional legal advisers and their clients…"

39. In *Wilden Pump Engineering* the issue was whether a patent agent could benefit from legal advice privilege. The court held that:

> "it seems to me that the position is that it is impossible to uphold an utterly wide test of privilege extending to any communication by the litigant with any person from whom he has sought, or happens to have received, advice on any point of law relevant to the litigation in question. It is far too wide, and the courts have never adopted such a wide approach. The narrow approach of the common law is to recognise certain types of person as being legal advisers, communications with whom on matters of law are privileged. Besides barristers and

> solicitors, this, it seems from the old authorities, originally also included scriveners and doctors of the civil law practising in Doctors' Commons and Proctors in the Ecclesiastical Courts - whether or not they were solicitors. But those were regarded as varieties of lawyer.
>
> I do not regard the patent agent as a variety of lawyer, and I take the view that the patent agent is not within the common law privilege." [emphasis added]

40. Counsel for the second defendant relied on *Thanki* (ibid) in support of his proposition that legal advice privilege was limited to "professional lawyers or qualified lawyers" and on the case of *Dadourian v Simms.* In that case Patten J stated at [127]:

> "…Given that the general rule is that legal professional privilege does not attach to communications between a lawyer and his client unless the former is qualified to practise, it seems to me that the burden is on the Defendants to show that they continued to believe that Mr Simms held a practising certificate as a solicitor at the time when the Eagle documents came into existence and that in the absence of such evidence the claim to legal professional privilege in the documents cannot be maintained…"

41. It was submitted for the claimant that the case involved an unusual fact situation in that the solicitor had been struck off and the co-defendants who sought advice from the solicitor were aware that he had been struck off. Accordingly it was submitted that in the particular circumstances of that case it was unsurprising that the court held that legal advice privilege did not apply.

42. It seems to me that neither *Wilden Pump* nor *Dadourian v Simms* provide assistance on the issue before this court as neither case was concerned with foreign lawyers which on the authorities (as set out by Lord Neuberger) have been treated as a separate category and justifying a different approach.

43. As to the passages to which the court was referred in *Thanki,* I note that in relation to foreign lawyers the position is stated (at 1.52) to be as follows:

> "Foreign lawyers: Communications with foreign lawyers also attract legal professional privilege, even where the lawyer advises on matters of English law. The rationale for this recognition has never been fully explained in a decided case, but Lord Neuberger has speculated that it is based on fairness, comity, and convenience. If an adviser is a lawyer admitted in a foreign country it is unnecessary to require evidence about legal and ethical practices and controls by foreign courts, though the position may be different if the circumstances otherwise raise questions as to the position of the lawyer, such as whether he is a lawyer at all. " [emphasis added]

44. This passage does not appear to support the contention of the second defendant that the foreign lawyer needs to be "appropriately qualified" (although I accept that *Thanki* appears to take the view that the position is different in relation to English lawyers - *Thanki* at 1.48-1.50).

45. As to the reference in *Hollander* to a foreign lawyer being "appropriately qualified" it is unclear from the passage relied upon on what basis this limitation is included.

46. It seems to me therefore that whilst in *Prudential* the court declined to extend legal advice privilege to communications given by professional people other than lawyers and limited legal advice privilege to "members of the legal profession" the judgments acknowledge and endorse the broader approach which has been taken by the courts to foreign lawyers.

47. It was submitted for the second defendant that a broader approach to foreign lawyers which did not require them to be "appropriately qualified" would be "uncertain" in that it would be "self-defining" and lead to a "two tier" system. In my view the broader approach is consistent with the authorities discussed above and justified by Lord Neuberger on grounds of "fairness, comity and convenience". In my view it would lead to uncertainty (and thus inconvenience) if, even where the relationship of lawyer and client subsists, the court had to go further and examine particular national standards or regulations in order to determine whether in a particular case a party was protected from the disclosure of his communications with his lawyer. It would also raise issues of comity if the court were obliged to express views on the qualifications and regulation of foreign lawyers.

48. In this case the problem is illustrated by the evidence as to the different forms of lawyers in Russia. Of particular relevance in this case is the second defendant's own evidence (paragraph 67.2 of Lewis 2) that Advocates may not be employed by an organisation except for scientific, teaching or other creative activities and an in-house lawyer will not be admitted to the Russian legal bar, or similarly regulated. Further it is estimated by Associate Professor Yagelnitskiy that half of the representatives in civil disputes including those in arbitrazh courts are not advocates (paragraph 32 of his memorandum).

49. The consequences in Russia of the application of the rule in the way in which the second defendant contends, would exclude all in-house lawyers and a large proportion of other lawyers working in Russia. In my view this would be unfair and inconvenient and illustrates why the courts have not been interested in the foreign lawyer's training or discipline (Lord Sumption in *Prudential* at [126] quoted above) and have taken the view that legal advice privilege extends to communications with all foreign lawyers regardless of their "particular national standards, regulations or rules with regard to privilege" (Lord Neuberger in *Prudential* at [45]).

50. The dicta in *Prudential* and the other authorities refer only to foreign lawyers without referring to foreign in-house lawyers. As set out above, the basis on which the second defendant contended that legal advice privilege should not apply was either that advocate's secrecy does not apply and/or that the members of the in-house legal department are not registered or regulated. Neither of these bases is established by the authorities as a matter of English law as a ground for denying the application of the privilege for the reasons set out above. However it was additionally submitted for the

second defendant that foreign in-house lawyers and in particular Tatneft's in-house lawyers, should not be recognised because:

i) English in-house lawyers have to be regulated and (other than in the limited case of government lawyers) have a practising certificate; and/or

ii) In-house lawyers are paid employees and not independent (Transcript Day 2 page 94 line 23).

51. The authorities are clear that legal advice privilege applies to communications not only with the lawyer in independent practice but also with an in-house lawyer: *R (Jet2.com Ltd) v Civil Aviation Authority* [2020] 2 WLR 1215 at [44]

> "Although the older cases (decided at a time when legal advice was generally obtained from or through solicitors in private practice) concern external lawyers, LAP applies to communications, not only with a lawyer in independent practice, but also with an in-house lawyer (see, eg, Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2) [1972] 2 QB 102, and Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc [2007] EWHC 2868 (Ch) at [9])." [emphasis added]

52. The second defendant relied on dicta of Lord Denning in *Alfred Crompton Amusement Machines Ltd* at p129:

> "…Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer. For that reason Forbes J. thought they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges." [emphasis added]

53. Once one accepts that the court will not investigate whether a foreign lawyer is regulated or registered, the inclusion of foreign in-house lawyers seems to me to follow as a matter of both logic and principle, being (as stated by Lord Denning in *Alfred Crompton*) "in the same position as those who practise on their own account", the only difference being that they act for one client.

54. I do not accept that if the result is a "mismatch" i.e. a foreign in-house lawyer does not have to be regulated or qualified in the same way as an English in-house lawyer, then this is a reason to conclude that foreign in-house lawyers are similarly required to be regulated or qualified given the clear statements in the authorities that foreign lawyers are covered by legal advice privilege and that the courts will not look at the regulations governing, and training of, the foreign lawyer.

55. Further as noted above, were this court to hold that legal advice privilege did not extend to in-house lawyers in Russia on the basis that they were not regulated or qualified, it would have the unfairness that since in house lawyers in Russia cannot be Advocates, legal advice privilege could never extend to communications with in-house legal advisers in Russia even though that category of lawyers has been accepted as a matter of English law as being covered by the application of the privilege. Further I have regard to the evidence that it would be likely to exclude from the scope of English legal advice privilege employees of law firms in Russia who according to Associate Professor Yagelnitskiy are also not Advocates:

> "However, it must be taken into account that to the best of my knowledge, the workers of most international law firms operating in Russia are hired under employment contracts and do not hold advocate status."

56. There was a suggestion by counsel for the second defendant in reply that privilege should not apply because in-house lawyers were not independent and were paid employees. That particular objection seems to me to have been firmly rejected by the English courts in relation to English in-house lawyers (see *Alfred Crompton* at p129 quoted above) and is not a reason to deny the application of the privilege to foreign in-house lawyers given the general position in relation to foreign lawyers.

Conclusion on the scope of legal advice privilege

57. Accordingly in my view legal advice privilege extends to communications with foreign lawyers whether or not they are "in-house" and thus employees of a particular company or organisation and the court will not enquire into how or why the foreign lawyer is regulated or what standards apply to the foreign lawyer under the local law. The only requirement in order for legal advice privilege to attach is that they should be acting in the capacity or function of a lawyer or as expressed by Lord Neuberger in *Prudential* at [19], it should relate to:

> "communications passing between a client and its lawyers, acting in their professional capacity, in connection with the provision of legal advice" [emphasis added]

There is no additional requirement in my view that foreign lawyers should be "appropriately qualified" or recognised or regulated as "professional lawyers".

Further relief sought

58. It was submitted by counsel for the second defendant in oral reply submissions that even if the court were to find that legal advice privilege does apply:

> "Tatneft should not now escape …properly explaining how it has applied privilege in the case of such in-house employees."

59. It was submitted for the second defendant that:

> "holding a law degree is not sufficient to constitute someone a professional legal practitioner, otherwise the principles set out in *Dadourian* are wrong."

60. Having rejected the argument that foreign lawyers need to be "appropriately qualified" as discussed above, it seems to me on the authorities (and consistent with the observations of Lord Sumption quoted above) that it is not necessary or relevant to consider the training and experience of an individual foreign lawyer in order for legal advice privilege to apply in the case of a foreign lawyer.

61. Mr Lewis in his third witness statement in response to Mr Lloyd's evidence apparently sought to widen the scope of the application where he referred to various items of correspondence and said:

> "It seems that members of Tatneft's in-house "legal departments" in fact had an extensive role in matters relevant to the issues in dispute, including contemporaneously communicating with S-K and including apparently taking quasi-commercial decisions on behalf of Tatneft." [emphasis added]

62. I accept that the burden of establishing privilege falls on the claimant. However in my view the present application is advanced on the basis that legal advice privilege did not apply for the reasons set out in paragraphs 16-18 above and it is not open to the second defendant to advance this alternative basis for denying legal advice privilege through its reply evidence. Accordingly I do not propose to address this issue.

Conclusion

63. For the reasons set out above the application for an order in the terms of paragraph 4 of the draft order (as amended) and/or for further explanation as to the basis of privilege in respect of communications with certain in-house employees is refused.