

The scope and role of the Legal Professional Privilege and its proper place in the context of corporate internal investigations

Address at breakfast meeting held in support of ‘Youth at Risk’

Lord Neuberger

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1. Good morning and thank you for coming to listen to me. I have been asked to speak about legal professional privilege and its place in corporate internal investigations. And I have been asked to limit my talk to 20 minutes.
2. It is a good discipline for a judge to be told that he only has a limited time to talk. The combination of IT, court practices and the rights culture have resulted in our judgments being rather long. IT has rendered writing and copying much easier and less time-consuming, and it has also resulted in much more extensive documentary evidence and a plethora of electronically reported cases. Trials now involve much more written evidence and written argument, which means substantially *more* evidence and arguments. And the rights culture has made us judges think that we have to deal very fully with all the evidence and arguments which have been raised. A consequence of all these developments is much longer judgments than in the past, which has both good and bad aspects. But it does mean that the sort of discipline which I have accepted today is very good for a judge. It should remind us that if it's not necessary to say something, then it's necessary not to say it.
3. With that introduction, which the unkind among you may feel has lost me at least one of my twenty minutes, I turn to the topic on hand.

4. Legal professional privilege (LPP) was developed by the judges from at least the 16th century¹ to promote the observance of the law and administration of justice². Where a person is entitled to claim LPP in respect of a document, his right to insist on it remaining confidential for all purposes and not “disclosed and used to his prejudice” (unless statute clearly provides otherwise) whether in court or out of court, is a “fundamental human right established in the common law”³.
5. LPP exists for the benefit of the client not the legal adviser⁴, and the privilege is absolute⁵ unless, it involves the seeking of advice to enable the commission of a crime or the like⁶. The lawyer who holds the documents or the information is under an absolute duty to keep it confidential⁷. There are two species of LPP.
6. Litigation Privilege (LitP) applies to any confidential document, not only a document passing between client and lawyer, provided that it has been brought into existence for the sole or dominant⁸ purpose of litigation⁹. For the purpose of LPP, litigation includes contemplated litigation¹⁰, but it is limited to adversarial proceedings, and thus does not include an inquiry or inquest¹¹.

¹ *Berd v Lovelace* (1577) Cary 62; *Dennis v Codrington* (1579) Cary 100 cited in *R(Prudential plc) v Special Commissioners* [2013] 2 AC 185, para 115

² *Upjohn Co v United States* (1981) 449 US 383, 389 cited in *Three Rivers District Council v. Bank of England (No 6)* [2005] I AC 610, para 31 and *Prudential*, para 21

³ *R v Special Commissioner ex p Morgan Grenfell & Co Ltd* [2003] 1 AC 563, para 7

⁴ *Prudential*, para 26

⁵ *Three Rivers (No 6)*, para 25

⁶ *Prudential*, para 120, citing *R v Derby Magistrates' Court, Ex p B* [1996] AC 487

⁷ *Prince Jefri Bolkiah v KPMG* [1999] AC 222, 236

⁸ *Waugh v British Railways Board* [1980] AC 521, 530

⁹ *Three Rivers (No 6)*, para 27

¹⁰ *ibid*

¹¹ *Re L (A Minor)(Police Investigation: Privilege)* [1997] 1 AC 16, and the Court of Appeal in *Three Rivers District Council v. Bank of England (No 5)* [2004] QB 916, para 2

7. The other species is Legal Advice Privilege (LAP), which applies to any confidential communication between client (or client's agent¹²) and lawyer¹³ for the sole or dominant¹⁴ purpose of obtaining or giving legal advice, even where no proceedings are contemplated¹⁵. LAP applies to advice relating to the presentation of the client's case at an inquiry¹⁶ and any other "advice as to what should prudently and sensibly be done in the relevant legal context"¹⁷. It has been authoritatively held that LPP applies to communications with in-house lawyers¹⁸ and foreign lawyers¹⁹.
8. Although the need for LAP where no litigation is contemplated or exists has been judicially doubted²⁰, these principles are well established, and they appear to be workable and clear. And so they largely were in the world in which they were developed, a world so different from ours in many ways. We now live in a world which has global electronic communications, instantaneous international transactions, criminalisation of bribery and cartelism, detailed regulatory systems, increased investigative powers, large and international and complex corporate structures, and, it must be said, highly sophisticated financial and economic fraud. And we live in a world where the law of privilege as developed by judges is modified on a rather ad hoc basis by legislation, and is subject to a number of different sets of published official guidelines.
9. The impact of changes in the world of professional advice on LPP surfaced in the Supreme Court some three years ago. In the past, legal advice was given by lawyers, whereas now it is frequently given by many different professionals. In the *Prudential* case²¹, by a majority of 5 to 2, we refused

¹² Eg in *Anderson v Bank of British Columbia* (1876) 2 Ch D 644, 658, and *Three Rivers (No 5)*, para 19

¹³ But not any other professional person, even when she is giving legal advice - *Prudential*

¹⁴ *The Sagheera* [1997] 1 Lloyd's Rep 160, discussed in *Three Rivers (No 5)* at para 28 and at paras 32ff

¹⁵ *Three Rivers (No 6)* paras 29-35, disagreeing the Court of Appeal; and see *Prudential*, para 120

¹⁶ *Three Rivers (No 6)*, para 37

¹⁷ *Ibid*, para 38 citing Taylor LJ in *Balabel v Air India* [1988] 1 Ch 317, 330

¹⁸ *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No 2)* [1972] 2 QB 102, 129, cited with approval in *Prudential* para 124

¹⁹ *Macfarlan v Rolt* (1872) LR 14 Eq 580, cited with approval in *Prudential* para 124

²⁰ By, for instance, the Court of Appeal in *Three Rivers (No 6)* – see at [2005] 1 AC 610, para 29

²¹ See footnote 1 above

to extend LAP in relation to advice sought from or given by accountants and other non-lawyers even where that advice was of a legal nature.

10. As a serving judge, I have not been at the sharp end of life for over nineteen years and some may wonder whether, even before then, as a practising barrister, I was really at the sharp end. And judges are not always up to date with precisely what is going on in the fast moving corporate and financial worlds. However, despite these handicaps, it is plain even to me that many aspects of modern commercial and legal practices give rise to potential problems in relation to LPP. Particular problems appear to have arisen from the marked increase in the domestic and international fields when it comes to regulatory and criminal sanctions in the corporate environment.

11. I start with a potential problem which arises as a result of increased cross-border co-operation in the criminal and investigatory field. In this jurisdiction, discussions frequently take place between lawyers for co-suspects or for co-defendants under the protection of common interest privilege, which applies “to documents ... passing between persons who have a common interest in advancing ... or in defending proceedings brought or contemplated by another, who seeks disclosure of the documents for use in the proceedings”²². By contrast US criminal defence lawyers adopt a more formal approach, which involves entering into a written joint defence agreement (JDA), signed by all parties and setting out what each party agrees to and the consequences of resiling from the JDA. As the SFO and US Department of Justice have increasingly undertaken joint operations so do English and American criminal defence lawyers often find themselves working together. This has led the US lawyers to ask English lawyers to enter into written JDAs, and many have done so. The effectiveness of a JDA to accord privilege is an open question and has never been tested.

²² *R v Trutch* [2001] EWCA Crim 1750, Para 21, citing *The World Era (No 2)* [1993] 1 Lloyd’s rep 363 and *Buttes Oil Co v Hammer* [1981] 1 QB 223

12. Another rather different issue which arises in the case of a large corporate client, is, given that LAP only applies to communications between a lawyer and the corporate client she is advising, the question arises: which individuals constitute “the client”? The effect of the Court of Appeal’s 2003 decision in *Three Rivers (No 5)*²³ is that LAP does “not apply to documents communicated to a client or his solicitor for advice to be taken on them, but only to communications passing between that client and his solicitor” and associated documents²⁴. So, LAP does not appear to attach to communications between the solicitor and employees or agents of the corporate client, other than the individuals actually being advised by the solicitor – eg the chairman, the CEO, the COO, and the CFO, or the executive committee, or a group specially designated by the board or the CEO or chairman. This approach, which gives a rather narrow meaning to the “client”, has not been followed in a number of other common law jurisdictions²⁵, where the expression effectively appears to include all employees (and maybe agents) of the corporate client.

13. Although the House of Lords refused leave to appeal in *Three Rivers (No 5)*, they said in the subsequent *Three Rivers (No 6)* decision that each of the competing views on the point at issue was “eminently arguable”, but did not say, or even hint, which they thought was right²⁶. So for the moment at least, the sensible course is probably to proceed on the basis that the law as to the “client” for LAP purposes is as laid down in *Three Rivers (No 5)*, although it may in due course be distinguished on its facts, overruled – or affirmed. To adapt a well-known phrase, in my position I can say that, but I can’t possibly comment.

²³ [2004] QB 916

²⁴ *Three Rivers (No 5)*, para 19

²⁵ The Federal Court of Australia in *Pratt Holdings v Commissioner of Taxation* (2004) 136 FCR 357, the Singapore Court of Appeal in *Skandinaviska Enskilda Banken v Asia Pacific Breweries* [2007] 2 SLR 367, the Court of Appeal in the District in Columbia Circuit in *Re Kellogg Brown & Root Inc (unreported) Case No 14-5055* and the Hong Kong Court of Appeal in *CITIC Pacific Ltd v Secretary of State for Justice* [2015] 4 HKLRD 20. And see the *Upjohn* case (footnote 2) in the United States.

²⁶ See at para 47

14. The law as it is thus currently understood can lead to difficulties when a company carries out internal investigations and a regulator, prosecutor or other entity asks for the resulting documents. This can occur in a number of fields, and I shall take three, competition law, bribery law, and the so-called cartel offence.
15. Let me take first competition law. To set the scene, the Competition Appeal Tribunal (“the CAT”) can order disclosure of relevant documents as a matter of discretion, unless they are subject to LPP. When carrying out investigations into whether Tesco had entered into two separate “concerted practices” in relation to the supply of cheeses, following a whistle-blowing report, the OFT sought documents from Tesco²⁷ which were all to do with obtaining the evidence of employees and others in relation to the alleged price-fixing scheme. The CAT held that it would have refused disclosure as a matter of discretion²⁸, but that in any event, it would have to refuse disclosure. This was because the evidence was obtained by solicitors for the dominant purpose of contemplated adversarial proceedings, as the OFT was threatening proceedings against Tesco, which were adversarial, and therefore LitP applied.
16. But if the prospective proceedings had not been the dominant purpose, or had not been classified as adversarial, so that only LAP would have applied, the CAT might well have had to decide that the documents were disclosable (subject to the its discretion to refuse disclosure), at least in so far as the witness statements were taken from employees and others who were not the “client”. (To be clear, the natural inference of the judgment in *Three Rivers (No 5)* is that witness statements taken by solicitors from individuals who are the “client” - and associated communications - are subject to LAP). It is also worth remembering that, if the documents are not privileged, they may not only be sought by the relevant regulator, but also by co-defendants in any proceedings (including a criminal case) and, indeed, by adversaries in other contexts – eg in ordinary commercial litigation,

²⁷ *Tesco Stores Ltd v Office of Fair Trading* [2012] CAT 6

²⁸ *Ibid*, para 33

where the court may well not have the same discretion as the CAT to refuse disclosure of relevant documentation which is not the subject of LPP.

17. Thus, unless one is confident that LitP can be claimed, as in the *Tesco case*²⁹, when a company is carrying out an internal investigation it must, I think, be sensible to decide from the start which group of individuals in the company constitute “the client” for the purpose of seeking and receiving advice from lawyers, whether internal or external. The bigger the group, the more unwieldy and the greater the risk of loss of confidentiality, and I suppose that if the court thought the group was artificially big, it might hold that not all its members were genuinely the “client”. On the other hand, the smaller the group, the fewer the documents that will be potentially subject to LAP. It may well, however, be possible to justify varying the membership of the group with the passage of time, although I expect a court would be unimpressed if it thought that the variation was essentially tactical.

18. I move now to corporate internal investigations into bribery and similar crimes. In 2009, the SFO issued guidance saying that it would “look at” any “investigation ... carried out by the corporate’s professional advisers ... in a proportionate manner”. This was withdrawn in 2012, when a stricter approach was adopted, in new guidance³⁰. According to a contemporaneous SFO document entitled “Corporate self-reporting”³¹, this indicated that prosecution might be avoided if the company concerned “has reported itself”. Such a report has to demonstrate “a genuinely proactive approach ... by the corporate management team ... involving self-reporting and remedial action, including the compensation of victims”, and more relevantly for this morning’s purposes, “in considering whether a self-reporting corporate body has been genuinely proactive, prosecutors will consider whether it has provided sufficient information, including making witnesses available and

²⁹ *ibid*

³⁰ Guidance on Corporate Prosecutions, [joint_guidance_on_corporate_prosecutions.pdf](#) from [sfo.gov.uk](#)

³¹ <https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/corporate-self-reporting/>

disclosing the details of any internal investigation, about the operation of the corporate body in its entirety”.

19. It may sometimes appear to be a difficult decision for companies and their legal advisers whether and when and how to investigate, self-report and co-operate fully with SFO. The Corporate self-reporting document ends by saying that the SFO will not “will not advise companies or their advisers on the format required for self-reports” and will not “give any advice on the likely outcome of a self-report until the completion of that process”. One can well understand why this is said, but it puts any legal adviser of a company framing her advice to the company as to whether to self-report in something of a quandary. LPP is a very valuable right, and it is a big and irrevocable step to waive it. However, given the cost and uncertainty of litigation and the SFO’s self-evident desire to get as much self-reporting and cooperation as possible, there must normally be a strong argument for co-operating – albeit that the investigations and self-reporting must be rigorous and full, the cooperation must be plain, and there must be a preparedness to compensate victims.

20. Self-reporting can be a mixed blessing for the SFO, as is demonstrated by their ill-fated prosecution in late 2013 of Victor Dahdaleh for alleged bribery. Much of the SFO’s case was based on statements which had been obtained by US attorneys who had been assisting the SFO, but who had also carried out an internal investigation into another company, Alba, which was said to be involved in the alleged corruption, and which had provided witness statements obtained through that investigation to the SFO. Mr Dahdaleh, not unreasonably, wished to cross-examine those US lawyers, and, although they had initially attended the trial, they left the UK and refused to come back to give evidence. The case collapsed, in part because the SFO’s case had been so dependent on the evidence gleaned by those attorneys³². Because the US lawyers considered that they were in

³² <http://www.law360.com/articles/494593/uk-drops-bribery-case-against-dahdaleh-blames-akin-gump> and <http://www.telegraph.co.uk/finance/financial-crime/10715623/Judge-accuses-SFO-of-mismanaging-Victor-Dahdaleh-case.html> and see footnote 33

a conflicted position in the light of their duty to Alba, the judge, while characterising their behaviour as “discourteous” said that they could not be said to have been guilty of “serious misconduct”, and therefore he refused to order them to pay any of Mr Dahdaleh’s costs³³.

21. When it comes to failed privilege claims, the SFO can be bitten as well as biting. In its fight against the Tchenguiz brothers, the SFO sought to resist a claim by the brothers of disclosure of reports prepared by liquidators of a company they previously had run. The SFO’s LitP privilege claim failed, as the Court of Appeal approved the trial judge’s statement that “the mere fact that a document is produced for the purpose of obtaining information or advice in connection with pending or contemplated litigation ... is not sufficient to found the claim for litigation privilege. It is only if such purpose is one which can properly be characterised as the ‘dominant purpose’ that such claim for litigation privilege can properly be sustained”³⁴.

22. The SFO has had very recent success, however, on another front. To further its investigation of alleged wrong-doing in connection with Barclays’ emergency rights issue to raise over £5bn in 2008 during the financial crisis, the SFO had been seeking disclosure of internal documents, which the Bank had claimed were privileged. According to newspaper reports³⁵ last month, the Bank has now agree to release the documents, but it is unclear why the privilege argument was being abandoned – whether it is the fraud exception, or the absence of the dominant purpose requirement or fact that the documents were outside privilege because of *Three Rivers (No 5)* is unclear. Similar steps have apparently been taken by the SFO against other companies which may have been guilty of bribery or other crimes and which the SFO considers are not commissioning rigorous investigations and self-reporting of themselves³⁶.

³³ <http://www.ft.com/cms/s/0/2d482512-b0ef-11e3-9f6f-00144feab7de.html#axzz428fCIRk8>

³⁴ *Ranlison And Hunter Trustees SA v Akers* [2014] EWCA Civ 136, para 15

³⁵ <http://www.theguardian.com/business/2016/feb/04/barclays-serious-fraud-office-investigation-internal-documents>, and <http://www.ft.com/fastft/2016/02/04/barclays-handing-over-qatar-documents-to-sfo/>

³⁶ Eg <http://www.ft.com/cms/s/0/13c812f8-5381-11e3-9250-00144feabdc0.html#axzz428fCIRk8>

23. Finally, I turn to the cartel offence, which in a sense straddles both the first category, as cartels are anti-competitive, and the second category, as section 188 of the Enterprise Act 2002 renders forming or operating a cartel (which includes but is not limited to a price-fixing agreement) an offence. The 2013 Enterprise and Regulatory Reform Act varied the cartel offence, by (i) removing the previous express requirement of dishonesty (ii) introducing three new exceptions and (iii) introducing three new defences. The third new defence, in section 188B(3) is that the person concerned “took reasonable steps to ensure that the nature of the arrangements would be disclosed to professional legal advisers for the purposes of obtaining advice about them before their making or ... implementation”³⁷.

24. Nothing is said about LPP in section 188B, but common sense might suggest to many people that, if a person wishes to rely on this defence, he would have to waive his right to claim LAP, and indeed would have to waive privilege in relation to all documents relating to the taking and giving of the relevant advice. Indeed, nothing is spelled out about actually obtaining the legal advice, let alone what it would have to say, although common sense might again appear to suggest that the advice would have to be revealed and would have to be favourable. However, given that LPP has, as I have said, been held to be a fundamental human right, I suppose that there is an argument that it cannot be removed by mere implication in a statute³⁸. The Competition and Markets Authority (the CMA) has issued Prosecution Guidance in connection with the cartel offence³⁹, which makes it clear that the CMA considers that the defence applies to advice from in-house and foreign lawyers, and that the person concerned took “reasonable” steps to “to disclose the arrangements to a professional legal adviser” and that “the purpose” of doing so “was to obtain advice about them”.

³⁷ Section 188B(3) of the 2002 Act added by the 2013 Act

³⁸ See *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 131E-F

³⁹

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/288648/CMA9__Cartel_Offence_Prosecution_Guidance.pdf

25. I believe that this takes me to my 20-minute limit, but, before I stop, I would like to say that this short *tour de piste* of what is only a few aspects of the law of LPP gives rise to two feelings on my part. The first is how difficult the role of a professional adviser can be in an increasingly complex and fast moving world. So often, she is faced with a problem which not only is hard to answer and requires a quick answer, but is one to which there is no safe answer: go wrong one way, and she will be advising her client to break the law; go wrong the other way and she will be unnecessarily disadvantaging her client. Secondly, and concomitantly, judges and legislators have to try harder than ever to ensure that the law is simple, clear and accessible.

26. Thank you very much.

David Neuberger

London, 9 March 2016