

# Balancing disclosure and protection

**Georgina Squire** advises litigators on the potential pitfalls involved in protecting privileged documents



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**T**here is always a delicate balance for any litigator between complying with standard disclosure obligations under the Civil Procedure Rules and maintaining privilege over sensitive documents that clients do not want in the public domain.

While the main categories of legal advice and litigation privilege remain at the forefront of a litigator's mind when preparing for disclosure, recent case law has added further factors that all litigators must consider even before proceedings are issued in order to protect privileged documents from the outset of any claim.

## Statements of case

Litigators must ensure they do not waive privilege by including reference to privileged documents in statements of case. Any documents that a party relies upon in its statements of case will almost always lose privilege. This was highlighted in

*Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch) (the *PAG* case).

RBS claimed privilege over documents it provided to regulators as part of the ongoing LIBOR investigations. While the court was inclined to agree the documents were privileged as part of the investigations, the fact that RBS had relied on the documents in its defence meant it had effectively waived privilege over them.

The court said that RBS could not rely on the regulator's findings as a limiting factor in its alleged misconduct while also seeking to maintain privilege over these documents.

## Witness statements

Until recently, litigators and witnesses have continued to refer to privileged documents in witness statements and yet have qualified the disclosure by expressly stating that privilege over the documents has not been waived.

This, however, can no longer be relied upon following the decision in *Commodities Research Unit International (Holdings) Ltd v King and Wood Mallesons LLP* [2016] EWHC 63 (QB). The witness expressly stated they had not waived privilege to a document in a witness statement. The court disagreed and held it was not sufficient for a witness to maintain privilege over a document they relied upon in their witness statement by simply stating that privilege to the document had not been waived.

## One source

Again in *PAG*, RBS claimed its Executive Steering Group (ESG), which was created to oversee the internal and external LIBOR investigations, held privileged documents. RBS claimed privilege on the basis that its lawyers, Clifford Chance, had also attended ESG meetings and provided input into the investigations under the instruction of RBS, and this therefore had attracted litigation advice privilege over all ESG documents by their very nature of reporting back solely to RBS.

The court was sceptical that the ESG had been set up with a sole purpose of overseeing LIBOR investigations and that Clifford Chance's involvement would give legal advice privilege to all documents created by the ESG. It was therefore ordered that these documents should be provided to the court for inspection and that it would make the decision regarding their relevance and whether they had any privileged status.

## New category

A new potential category of privilege emerged from *PAG* in the form of regulatory without prejudice privilege.

RBS sought legal privilege over correspondence between the Financial Conduct Authority (previously the Financial Services Authority) and RBS during the investigations into the LIBOR issue. RBS sought to protect such communications produced in the period prior to the FSA producing

its final notice on RBS's involvement in the LIBOR issue. The court agreed RBS was entitled to enforce regulatory without prejudice privilege over documents referring to settlement negotiations as part of its legal advice privilege.

However, in *PAG* this proved insufficient to protect the documents from production under the disclosure order, as RBS had referred to the documents in statements of case and so waived that privilege.

Litigators may benefit from reminding themselves of the basic privilege principles and remembering the following:

- Plan ahead: litigators should continue to identify and categorise potentially privileged documents before statements of case are drafted to ensure that privilege is not waived early on in proceedings;
- Is reference to a document really necessary in a statement of case or witness statement? While it may provide supportive contemporaneous knowledge of a witness if referred to in their statement, the document will not be protected by an express statement of privilege; and
- Carefully inspect all documents from one source, if you intend to claim privilege – it is dangerous to rely on an assumption that documents from one source may all fall under an umbrella of privilege. **SJ**