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The privilege of cooperation: employee interviews in internal investigations

Last year, Dechert's article, 'Three's a crowd' outlined the tensions between corporates and individuals in circumstances where a corporate is seeking cooperation credit from the authorities. This year, we have seen judgment handed down in favour of a deferred prosecution agreement (DPA) for Rolls-Royce, and more recently a DPA with Tesco Stores Limited. We have also seen one of the most significant recent privilege decisions, concerning the scope of English legal advice privilege, in the *RBS Rights Issue* litigation.[1] Together, these rulings will have a profound impact on how corporates structure their internal investigations.

In this article, we review the learning points in respect of cooperation from Rolls-Royce, and in light of these points focus in-depth on what protection a corporate might exercise over investigative interviews, and the circumstances in which it may wish to disregard or waive such protections. Picking up on the theme of last year's article, we further examine the impact such cooperation may have on individuals caught up in the investigation, and the potential tension between the interests of the corporate and those of its employees.

DPAs

The introduction of DPAs in 2014 has been perhaps the most significant development in respect of corporate prosecutions in England in recent years. On 10 April 2017, Sir Brian Leveson QC approved the UK's fourth DPA, with Tesco Stores Limited, a few months after the Serious Fraud Office (SFO) investigation into Rolls-Royce concluded with its own DPA. In terms of the prominence and size of the potential defendant, and the scale of the financial consequences, these agreements were of a different magnitude to earlier DPAs, and confirm the DPA as a game-changing tool for the SFO in tackling financial crime. As the OECD's March 2017 evaluation of anti-bribery measures in the UK noted, 'incentives to self-report have been bolstered through the introduction of DPAs in England and Wales.'[2]

Overview of DPAs

DPAs are voluntary agreements between prosecutors and corporate bodies under which a prosecutor will not proceed with criminal prosecution against the corporate, on a range of conditions such as the payment of penalties, disgorgement of profits, implementing changes to compliance programmes, providing training to employees, cooperating with investigations related to the alleged offences, and the payment of prosecution costs.

The offences for which DPAs may be entered into are set out in Part 2 of Schedule 17 of the Crime and Courts Act 2013; they include offences of bribery and failure to prevent bribery under the Bribery Act 2010. In *Rolls-Royce*, the approved DPA was not limited to Bribery Act conduct (failure to prevent bribery), but was extended to also include earlier conduct, under the offence of conspiracy to corrupt (section 1 of the Criminal Law Act 1977).

A DPA may be offered to a corporate to defer and (on successful completion of the agreement) ultimately avoid prosecution for wrongdoing. They are not, however, available to individuals, so even if companies have entered into a DPA, their employees can still be prosecuted – and the corporate is likely to be asked to assist in the prosecution. As set out in last year's article, in England as in the US, a corporate will not be given a 'get out of jail free card' for its executives and employees, and strong incentives exist for the corporate to act against the interest of individuals.

In England, whether an investigation may be resolved by way of a DPA is subject to review and approval by the court, initially in a private hearing where the judge must consider whether entering into a DPA is likely to be 'in the interests of justice' and whether the proposed terms of the DPA are 'fair, reasonable and proportionate.' Where the judge agrees, a public hearing follows, where broadly similar tests are applied, and a reasoned ruling is given in public to confirm the terms of the DPA. While no formal admission of guilt is made, a statement of facts must be agreed by the parties and published. There will inevitably be circumstances in which it will be appropriate to either delay public reporting of the facts, or redact certain aspects, to protect the fairness of any subsequent trial of individuals. It must be remembered that a failure to comply with the conditions attached to a DPA, including a requirement for ongoing cooperation with subsequent investigations or prosecutions, will entitle an application by the prosecutor to the court. The judge will then decide whether there has been a breach and can require the parties to remedy the breach or terminate the DPA. In the event of the latter, it may be thought that the substantial effort and sacrifice made in the hope of securing the benefits of a DPA will all have been for nought.

Rolls-Royce

The Rolls-Royce DPA sheds light on some of the factors against which the SFO and judges will consider whether a DPA is justified. Such factors will be judged in the round, and the extent to which the corporate made a genuine self-report of its conduct to the SFO will go a long way in determining whether cooperation has been sufficient. Leveson LJ, who has presided over each and every DPA to date, reiterated previous pronouncements regarding the importance of a timely and full disclosure of suspected wrongdoing and the need for cooperation. In particular, Leveson LJ highlighted the following elements as demonstrating Rolls-Royce's 'extraordinary' cooperation with the SFO:

- While Rolls-Royce started from a position of deficit – the SFO had become aware of allegations of wrongdoing against Rolls-Royce by way of press reports rather than a self-report by the company – Rolls-Royce remedied that failure by providing the SFO with significant amounts of additional detail, which would only have come to light after substantial further investigation.[3]
- Rolls-Royce obtained significant cooperation credit for its approach in conducting interviews, including complying with

a request from the SFO to audio-record interviews. Rolls-Royce also gave a limited waiver of otherwise privileged memoranda of earlier interviews of its employees. On occasion, Rolls-Royce deferred interviews until the SFO had first completed its own interviews.[4]

- Rolls-Royce provided all material requested by the SFO voluntarily, without requiring recourse to compulsory powers.
- By the time of the DPA, implicated personnel had been removed from Rolls-Royce and no current member of the Board was involved in any of the conduct described in the statement of facts. Those now responsible for the strategic direction of the company, including all senior management, are different to those responsible for the company and its culture during the period when the events of concern took place.[5]

Putting *Rolls-Royce* in context, the court's ruling serves as a guide as to some of the factors which may be taken into account, by the SFO and the court, in determining the extent of a corporate's cooperation – most particularly, the 'tipping-point' upon which matters will likely tilt in favour of a DPA. Such an analysis will take place in the round, and the lengths to which a corporate must go will vary depending on whether the corporate is starting from a position of cooperation 'deficit' – such as where, most notably, it is judged not to have made a timely or genuine self-report.

What's next?

The approval of a DPA for Rolls-Royce in circumstances where the investigation was not instigated by a voluntary and spontaneous self-report may widely be seen as a sign of greater flexibility on the part of the SFO and the courts. It is now apparent that a failure to 'get in first' may be remedied by later actions and that the wider circumstances of the corporate and its remediation have a significant role to play.

However, David Green, the director of the SFO, has warned that British businesses should not consider DPAs as the 'new normal' if they are caught misbehaving. Mr Green has said:

> *We are an investigating and prosecuting organisation: that is what we do. But having been given this new power, which comes from a US model, and has been adapted for this jurisdiction, we will use it only in very specific circumstances. Absolutely crucial to those circumstances is that the company has been fully cooperative with us. There is a reason for that. Unlike with the American model, a judge over here has to decide whether or not the DPA is in the interest of justice. That is quite a high bar. If a company is totally uncooperative and sort of leads us a merry dance for four or five years by not cooperating with our investigation, I am sure you would agree that it would be almost impossible for us to represent to the judge that the DPA was in the interests of justice. Companies that don't cooperate will be prosecuted. Indeed, their conduct may be so egregious that they have to be prosecuted anyway and a DPA wouldn't be appropriate.*[6]

So, if overall cooperation over the course of an investigation is capable of remedying failures at the outset, how might that be achieved, and what impact might that have on individuals?

Interviews

A key part of any internal investigation (either before or after a self-report) is to ascertain facts from relevant individuals through interviews. If these interviews are conducted by lawyers, either internal or external, there may be a presumption – on the part of both the corporate and the individuals – that what is communicated during the interview will be confidential and protected by legal privilege.

Privilege

Under English law, there are two types of privilege – legal advice privilege and litigation privilege. Both may, in specific circumstances, apply to investigatory interviews. Broadly speaking, legal advice privilege will apply where interviews are led by a corporate's lawyers and the purpose of the interview is the communication of legal advice from lawyer to client under the framework of an overarching 'relevant legal context' – which essentially means the interview must be for the purpose of the investigation itself, rather than some ancillary or alternative purpose. Litigation privilege is broader than this, in that it extends to third-party communications, led by either the lawyer or the client. However, litigation privilege can only be claimed where litigation is ongoing or 'in reasonable contemplation', and the communications are for the dominant purpose of that litigation. It may prove difficult to ascertain when litigation is 'in reasonable contemplation', but a useful starting point is that a good claim can be made after an accusation of wrongdoing has been made against a corporate. In criminal proceedings, the self-reporting of matters to the SFO will likely give rise to a context under which the corporate client could claim litigation privilege for any future interviews relating to the investigation.

Accordingly, once a corporate has reported its suspected conduct to the SFO, any interviews relating to that subject matter – whether with employees or external individuals – are likely to be privileged. But what of earlier interviews, conducted as part of the fact-finding stage leading up to the self-report? Litigation privilege is unlikely to attach to these interviews (not being for the purpose of contemplated litigation, but rather internal fact-finding), and so they will only be protected from disclosure as privileged interviews if they constitute confidential lawyer–client communications and therefore fall within the ambit of legal advice privilege. In this regard, a clear distinction can be drawn between meetings with third parties and meetings with the corporate client. Legal advice privilege will not apply to meetings with external individuals (as these cannot be 'lawyer–client' communications). However, a natural assumption would be that where a corporate's lawyers discuss matters with one of the corporate's employees, that would constitute a lawyer–client communication – and, providing the communication relates to the relevant legal instruction, they would be privileged. The position is, unfortunately, not that clear. The answer depends crucially on whether the individual falls into one or other of two categories – the first comprising those tasked with instructing the corporate's lawyers, and the second, everyone else. Communications with the former, narrow group will likely be privileged, whereas communications with the wider, latter group will stand on the same footing as communications with external individuals, and therefore not be protected.

RBS Rights Issue litigation

This narrow definition of the corporate 'client' under English law was first set out by the Court of Appeal in 2003, in *Three Rivers (No. 5)*.[7] While much-criticised – and disregarded, distinguished or rejected in a number of commonwealth jurisdictions (Australia, Singapore and Hong Kong) – it was recently applied by the English High Court, in an interim hearing in the *RBS Rights Issue* litigation.[8] In this case, RBS had asserted privilege over, and therefore held back from disclosure, interview notes prepared by its US lawyers. The interviews were conducted as part of two internal investigations (one concerning US Security and Exchange Commission (SEC) subpoenas, and the

other allegations made by a former employee). RBS made its claim to privilege on two grounds – first, that the interviews themselves were privileged; and secondly, that even if the interviews were not privileged, the notes were 'lawyers' working papers' and therefore privileged.

RBS failed on both counts. As will often be the case, RBS and its lawyers had informed the interviewees that the meetings would be conducted as privileged interviews, and would remain confidential. In a concerning development not only for RBS but also the individuals themselves, this turned out not to be the case:

- On RBS's first argument, the judge held that the 'client' for privilege purposes only comprises those tasked with providing instructions to the corporate's lawyers. Although those lawyers undertook the interviews for the purposes of gathering information preparatory to, and for the purpose of, enabling RBS to seek and receive legal advice, the interviewees 'were providers of information as employees and not clients.'[9]
- On RBS's second argument, seeking to protect the interview notes as 'lawyers' working papers', the judge drew an important distinction over how interview notes of non-privileged meetings will be viewed by the court. On the one hand, there is the example of a verbatim transcript of a non-privileged interview, which cannot be privileged if the interview itself is not privileged (it is simply the non-privileged oral communication (the interview) in written form). However, a report by a lawyer to its client of a non-privileged meeting can be privileged, depending on the extent to which it departs from a mere transcript and instead contains a degree of lawyerly input. This does not mean the note must strictly contain legal advice, but rather reflect the 'mental impressions' of the lawyer. The judgment does not provide a great deal of clarity around the requirements in this respect, largely arising out of what the judge described as the inadequacy of RBS's evidence. However, a useful determination of whether a record of a non-privileged interview will be protected by legal advice privilege is looking at the document's form, relevance and purpose; what were the circumstances in which it was created, to what does it relate, and – most particularly – how is it integrated within the relevant legal context?

Analysis

RBS is an extremely significant judgment for those conducting or involved in internal investigations, including relevant individuals. The corporate will need to carefully consider the extent to which it is desirable to create accounts that may not be protected in a future authority-led investigation or in third-party litigation. One solution is to not create any written records at all, although this is far from desirable – both in terms of determining what conduct occurred, and prospectively cooperating with the authorities (who will wish to receive reliable first accounts of interviews). Even if a robust claim to privilege can be made, the corporate may later face a difficult decision as to whether to elect to waive that privilege. While a waiver of privilege may bring significant cooperation credit (as in *Rolls-Royce*), waivers should always be treated with caution, especially where conduct crosses borders, as rules on the consequences of waiver vary considerably between jurisdictions. At the forefront of a multinational corporate's mind, in this respect, will undoubtedly be the US dimension – in the US, limited waiver of privilege is not generally accepted, and through the concept of 'subject matter waiver' a corporate may end up waiving privilege over more than it bargained for, extending to a wider class of documents pertaining to the same subject matter.

What concerns arise for individuals in this context? Individuals interviewed as part of the investigation will face a different set of challenges, largely lying outside their control. Should they cooperate in the investigatory process, if their accounts might not be protected from disclosure? If the corporate is seeking to assert that an interview is privileged, US bar requirements will require any interviews undertaken by US lawyers to begin with an '*Upjohn* warning' – such warnings are increasingly used as standard practice for any investigatory interviews, including in the UK. The warning will explain to the individual that the communication during the interview is confidential and privileged, but that the privilege belongs to the corporate. Only the corporate can waive this privilege – and it may elect to do so, perhaps to the detriment of the individual. So to some degree the individual's control over the dissemination of his or her interview comments is the same whether the interview is privileged or not; but there will naturally be a heightened concern where there is no protection ab initio.

Whether interviews are privileged may, to some extent, in relation to the authorities, be moot where a corporate is seeking cooperation credit. While legal privilege is a fundamental right and a corporate can never be obligated to waive privilege, doing so is likely to be treated as a significant positive factor in advocating for a DPA. This may be desirable where (as in *Rolls-Royce*) a corporate has arguably not provided a genuine self-report of its conduct. In these circumstances, waiver of privilege over interview accounts is likely to add significant, and potentially important, weight in tilting the scales favourably towards cooperation credit.

Subject to the terms of any contractual cooperation obligations, individuals well-apprised of these issues may be inclined to limit the extent of their own cooperation, to protect their position. However, they should seek advice as to what disciplinary action may arise as a result of a failure to cooperate, with employment laws likely to vary considerably between jurisdictions. For those employees who do participate in investigatory interviews, the fair conduct, process and method of carrying the interviews will be of the utmost importance. In a standard criminal case, individuals facing an interview by the police, SFO or other investigating body, enjoy the protections provided by the Police and Criminal Evidence Act 1984 (PACE) and its codes of practice. Internal corporate investigations are not police investigations and investigating lawyers are not police officers. But where the natural consequence of recent developments in the law of privilege and increasing pressure on corporates to cooperate in the provision of witness accounts is that evidence gathered by investigating lawyers may be deployed in criminal courts, it should be no surprise if internal investigations become more formal with a greater focus on process.

Most particularly, the corporate and its lawyers will need to be alive to the potential need for employees to receive independent legal advice on their position – many local bar rules will include in their ethical conduct provisions a requirement that legal advisers cannot take advantage of an unrepresented individual. Employees may also be well advised to make a number of requests in connection with prospective interviews, including the equivalent of 'advance disclosure' of topics or a summary of facts, as well as the underlying documents that will form the basis of the discussion. Questions can also be raised about the nature of the interview, including its privilege status, whether privilege might be waived (noting here the *Upjohn* warning), how the interview will be recorded, and whether (if transcripts or summaries are to be produced) the employee or his lawyer will have the right of access to view and comment on drafts.

If it is the case that records of interviews are likely to be provided to the authorities, either because of a waiver of privilege in pursuit of cooperation credit, or because certain interviews conducted in the context of an internal investigation will simply not be protected by privilege, what consequences are there for the interviewees? Interview notes provided to the authorities can be used in a number of different ways. The notes may inform the investigation in identifying lines of enquiry, and to identify witnesses. They may assist in compiling witness statements. They are also, however, likely to form part of disclosure in any subsequent criminal trial. Where an employee appears as a witness at a subsequent trial, that record may be deployed against them as a previous inconsistent statement. Where an interviewed employee becomes a defendant it might conceivably be used as evidence against them. In this eventuality, if at the time of the interview the employee provided comments or amendments on the interview notes, this will of course facilitate a later reliance on that evidence, including in resisting any challenge to exclude the notes at trial.

Conclusion

The increasing focus on cooperation credit, including waiver of privilege over interview notes, along with the application of the narrow scope of legal advice privilege for corporates, give rise to a number of issues for those caught up in investigations. Most particularly, the process for conducting interviews, and the protection afforded or waived over them, is likely to be under continued and heightened focus. The evolving DPA jurisprudence opens the way for corporates to make up early deficits by giving ground on issues such as privilege, to tilt the scales in favour of a DPA; but giving up such ground will have wider ramifications that might not be desirable, including for the corporate's employees. The question is what lengths the corporate is willing to go to, and what consequences it will accept – both on its own account and for its employees – for the privilege of cooperation.

Notes

1 *Re RBS Rights Issue* litigation [2016] EWHC 2759 (Ch).
2 OECD 'Implementing the OECS Anti-Bribery Convention', p.16, www.oecd.org/corruption/anti-bribery/UK-Phase-4-Report-ENG.pdf.
3 *SFO v Rolls-Royce PLC* U20170036, paragraph 20, www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
4 Ibid.
5 *SFO v Rolls-Royce PLC* U20170036, paragraph 49, www.judiciary.gov.uk/wp-content/uploads/2017/01/sfo-v-rolls-royce.pdf.
6 *The Guardian*, 'Serious Fraud Office boss warns big names to play ball – or else', 2 April 2017, www.theguardian.com/business/2017/apr/01/serious-fraud-office-deferred-prosecution-agreements.
7 *Three Rivers District Council v Bank of England* [2003] EWCA Civ 474.
8 *Re RBS Rights Issue* litigation [2016] EWHC 2759 (Ch).
9 *Re RBS Rights Issue* litigation [2016] EWHC 2759 (Ch).

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