BLP Corporate Crime & Investigations column: January 2017

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Berwin Leighton Paisner LLP's Corporate Crime & Investigations team is led by Aaron Stephens. The team regularly share their views on topical corporate crime and investigations issues with our subscribers.

With great privilege comes great responsibility

Hildyard J's significant judgment in *Re the RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)*, handed down on 8 December 2016, has been widely analysed and commented on already (for example, see *Legal update, Scope of legal advice privilege: RBS Rights Issue litigation decision (High Court)*). It is clear that the judge was perfectly willing to rule that documents produced in connection with employee interviews (in the context of a corporate internal investigation) were protected by legal professional privilege (LPP), at least as lawyers' working papers. However, on the evidence before him, the interview notes in question did not exhibit the necessary attributes to enable him to reach that conclusion.

Further clarification on the thorny and controversial topic of legal advice privilege (in a corporate context) will hopefully be provided by the Supreme Court on appeal.

Until that happens, our key takeaways for lawyers carrying out internal investigations are (in no particular order):

- Consider from the outset whether litigation privilege could arguably apply to your particular investigation and, if so, record the basis for any claim to litigation privilege and structure the matter to maximise the client's ability to claim litigation privilege.
- Always consider and record who the corporate "client group" is (the individuals who are among the class of persons authorised by the corporate to seek legal advice on its behalf by way of instructions). Create and implement a clear protocol for how documents and information are to be shared with this group, along with meaningful and effective limitations on further dissemination outside the group.
- Avoid, where possible, creating verbatim records (audio or written) of employee or third party interviews. Any written notes of such interviews should be constructed not as a record of the interview, but rather as a communication from lawyer to the corporate "client group" about the interview. Such a communication will obviously include information obtained from the witness, but may also include such things as:
    - preliminary evidential and/or legal analysis;
    - evidential or legal issues raised or clarified by the information obtained from the witness;
    - consistencies or inconsistences with other witness accounts;
    - assessments of credibility; and
    - areas requiring further work.

It is also a good practice to structure such communications thematically.

- Think across borders. Even if a document would clearly benefit from privilege in another jurisdiction (like the US), the doctrine of *lex fori* means that in an English court it is English law (with a discretionary override) that will be applied to any dispute about privilege. Where litigation in different jurisdictions is a real possibility, take local rules and practices into account before creating records of employee interviews.

For more information on LPP, see *Practice note, Legal professional privilege: overview*.

OFSI consults on monetary penalties for breaches of sanctions

On 1 December 2016, the Office of Financial Sanctions Implementation (OFSI) announced a consultation on its approach to imposing monetary penalties for breaches of financial sanctions. For more information, see *Legal update, Office of Financial Sanctions Implementation launches consultation on proposed monetary sanctions*.

OFSI was established in 2016 as the body within HM Treasury responsible for ensuring that financial sanctions are properly understood, implemented and enforced in the UK. Under the current legal framework, OFSI's powers to enforce financial sanctions are limited to recommending a criminal prosecution, a decision which ultimately lies with the CPS and the Attorney General. However, OFSI is due to receive a significant expansion to its enforcement powers from April 2017, when the Policing and Crime Bill is expected to come into force, empowering OFSI to issue monetary penalties under civil law.

The consultation seeks views on the draft guidance published by OFSI in connection with the Bill and asks for feedback on the proposed processes that OFSI will use to decide:

- Where a civil monetary penalty is suitable.
- The level of any penalty.
- The process for imposing the penalty, including the timescales for the process and the rights of the penalised person or entity.
- The circumstances in which OFSI will publish details of the monetary penalties it imposes.

In deciding when to issue a monetary penalty, OFSI will first apply the statutory test, namely whether it is satisfied on the balance of probabilities that there has been a breach of UK financial sanctions law and the person committing the breach knew or had reasonable cause to suspect they were doing so. If the test is met, OFSI will then consider whether there are any aggravating or mitigating factors which might affect its decision of whether to impose a monetary penalty.

The proposed aggravating factors include where funds or economic resources have been provided directly to an individual or entity subject to financial sanctions, or where the breach consists of a deliberate circumvention of the sanctions regime. In these circumstances, OFSI will normally impose a monetary penalty or refer the matter for criminal investigation, regardless of the presence of any mitigating factors. In other cases, however, mitigating factors can lead OFSI not to take enforcement action or else reduce the penalty imposed. Notable mitigating factors include where the breach is voluntarily disclosed, or where a company with high standards and a strong compliance culture acts swiftly to remedy the cause of the breach.

The maximum penalty under the new regime will be the greater of £1 million and 50% of the estimated value of the breach. Within this statutory maximum, OFSI will then determine a level of penalty that is reasonable and proportionate. This will involve an assessment of the monetary value of the breach and how seriously it undermined the UK sanctions regime.

The penalty determination process places great weight on the voluntary disclosure of financial sanctions breaches (for cases where a self-report has not led OFSI to decline to take enforcement action). OFSI proposes up to a 50% reduction in the final penalty amount for a person who makes a prompt and complete voluntary disclosure. The 50% maximum reduction will apply to "serious" cases, however, for the "most serious" cases, a reduction of only up to 30% will be available.

Once equipped with these new powers, OFSI can be expected to take a more active role in enforcing financial sanctions. The new UK regime represents a move in the direction of the US enforcement model, where the US Office of Foreign Assets Control is known for its aggressive approach towards sanctions enforcement and for reaching a number of eye-watering settlements in recent years. Companies will be well advised to ensure their sanctions compliance policies and procedures are fit for purpose in view of the potentially very significant fines permissible under the new UK regime.

The consultation will close at 11:45pm on 26 January 2017.

For more information on OFSI and sanctions, see *Practice note, Sanctions: overview of the UK sanctions regime and criminal penalties*.

Panama Papers Taskforce: an update

Following the creation of the cross-agency Panama Papers Taskforce in April 2016 (drawing together investigators, compliance specialists and analysts from HMRC, the National Crime Agency (NCA), the Serious Fraud Office (SFO) and the Financial Conduct Authority (FCA)), an update was published in November 2016 announcing the launch of civil and criminal investigations. For more information, see *Legal update, Update on Panama Papers Taskforce*. More than 30 individuals and companies are under active investigation and hundreds more are under detailed review.

In the written ministerial update to the House of Commons, the Chancellor of the Exchequer and the Home Secretary reported that the Taskforce has:

- Opened civil and criminal investigations into 22 individuals for suspected tax evasion.
- Led the international acquisition of high-quality, significant and credible data on offshore activity in Panama, ensuring the important work of the Taskforce was not delayed by the International Consortium of Investigative Journalists' (ICIJ's) refusal to release all of the information that it holds to any tax authority or law enforcement agency.
- Identified a number of leads relevant to a major insider-trading operation led by the FCA and supported by the NCA.
- Identified nine potential professional enablers of economic crime, all of whom have links with known criminals.
- Placed 43 high net-worth individuals under special review while their links to Panama are further investigated.
- Identified two new UK properties and a number of companies relevant to an NCA financial sanctions enquiry.

- Established links to eight active SFO investigations.
- Identified 26 offshore companies whose beneficial ownership of UK property was previously concealed, and whose financial activity has been identified to the NCA as potentially suspicious.
- Contacted 64 firms to determine their links with Mossack Fonseca to establish potential further avenues for investigation by the Taskforce.
- Seen individuals coming forward to settle their affairs in advance of Taskforce partners taking action.

The Taskforce has also established a Joint Financial Analysis Centre (JFAC). Using the data and intelligence gathered from across the Taskforce, the JFAC has developed cutting-edge software tools and techniques, to ensure that the Taskforce has access to the very best information from which to work.

The Chancellor reported that the proactive acquisition of data, alongside the establishment of JFAC, has enabled the Taskforce to identify a number of areas for further investigation across the full range of tax and economic crime, as well as links to organised crime. Taskforce members are present in Panama, and are working with Panamanian authorities, diplomatic colleagues and international partners (as part of the Joint International Tax Shelter Information Centre) in their efforts to identify wrongdoings and bring them before the courts. It was reported that the Taskforce has already added greatly to the UK's understanding of the increasingly complex structures being developed to mask offshore tax evasion and economic crime.

New FCA financial crime guide for consumer credit firms

In November 2016, the FCA published a financial crime guide for consumer credit firms. For more information, see *Legal update, FCA financial crime guide for consumer credit firms*. The guide is directed in particular at firms new to being regulated by the FCA. It aims to enhance firms' understanding of the FCA's expectations and help them to assess the adequacy of their financial crime systems and controls.

The guide makes clear that the FCA requires all consumer credit firms to put in place systems and controls to mitigate the risk that they may be used to further financial crime. It provides a high-level overview of the requirements, with further references to more detailed sources of guidance. It also gives a number of examples of good and poor practice under the Money Laundering Regulations 2007 (MLRs) relevant to consumer credit businesses.

The guide covers the following aspects of firms' financial crime systems and controls:

- Risk assessment.
- Policies and procedures.
- Governance.
- Staff awareness.
- Data security.
- Anti-money laundering.
- Customer due diligence.
- Enhanced due diligence.
- Ongoing monitoring and suspicious activity reporting.

- Record-keeping.

The guide notes that the FCA is responsible for supervising how some consumer credit firms comply with the MLRs, which will generally only apply if a firm is entering into regulated credit agreements as a lender. There are additional anti-money laundering rules in the FCA Handbook for these firms, set out in SYSC 6.3.6 to 6.3.10, including the requirements for most firms, other than sole practitioners and limited permission firms, to appoint a money laundering reporting officer.

However, the guide also notes that if firms are only offering fixed sum credit with deferred payments of less than 12 months, the MLRs will not apply to that part of their business. In addition, if a firm is offering cheque cashing, currency exchange or money transmission, then it will be supervised by HMRC, not the FCA, for its compliance with the MLRs.

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