English High Court Confirms Advice of Foreign In-House Lawyers Is Privileged

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Introduction. In a seminal judgment that has important implications for foreign lawyers, the Commercial Court (Moulder J) has confirmed in *PJSC Tatneft v Bogolyubov & Ors* [2020] EWHC 2437 (Comm) that legal advice privilege can be claimed over the work of foreign in-house lawyers, so long as those in-house lawyers are performing the functions of a lawyer, without regard to the qualification requirements or regulatory regimes applicable to lawyers in that jurisdiction.

The decision confirms that advice from foreign lawyers, including foreign in-house lawyers, will be privileged as matter of English law, insofar as the lawyer is acting in his/her professional capacity in connection with the provision of legal advice.

Background. *PJSC Tatneft v Bogolyubov & Ors* is a long-running dispute currently being heard in the Commercial Court. Debevoise & Plimpton LLP are solicitors on record for Tatneft, one of Russia's largest oil companies, in its claims against Ukrainian businessmen Gennady Bogolyubov, Igor Kolomoisky, Alexander Yaroslavsky and Pavel Ovcharenko.

The judgment arose as a result of an application by the Second Defendant for specific disclosure of documents and communications between members of Tatneft's in-house legal team and employees/officers of Tatneft. Tatneft had claimed privilege over communications between employees/officers of Tatneft and members of its in-house legal department, all of whom were based in Russia. The Second Defendant argued that such communications were not privileged and sought disclosure on the basis that the closest equivalent to English legal professional privilege recognised in Russian law is the concept of "advocates' secrecy", which does not apply to lawyers who are not Advocates. In Russia, Advocates are admitted to the bar and self-employed. In-house lawyers (and many lawyers in private practice) are not Advocates.

The Second Defendant also argued that for legal advice privilege to apply to the work of a foreign lawyer, that foreign lawyer had to be "appropriately qualified". In short, the Second Defendant's argument was that in order for legal advice privilege to apply, the court should interrogate the "status" of the lawyer, and not just the lawyer's function.

Tatneft, on the other hand, argued that legal advice privilege would apply to all communications made in confidence with a professional legal adviser for the dominant purpose of giving or obtaining legal advice, and this included communications with an in-house lawyer. Tatneft further argued that English law recognised that in the case of legal advice privilege arising in respect of the work of foreign lawyers, the court would not enquire into the standards of regulation or training which apply to the foreign lawyer (see *R (on the application of Prudential plc and another) v Special Commissioner of Income Tax* [2013] USKSC 1).

Tatneft's argument was that the recognised principle that the work of an English in-house lawyer was subject to legal advice privilege applied equally to the work of a foreign in-house lawyer, regardless of the qualification requirements in that lawyer's home jurisdiction.

The parties agreed that the question of whether the work of Tatneft's in-house lawyers was privileged was a question of English law, as the *lex fori,* and both put on expert evidence as to the system of qualification and regulation of Russian lawyers.

Decision. Moulder J agreed with the position put forward by Tatneft.

Moulder J began by examining the rationale for the existence of legal advice privilege and the public interest in clients being able to take confidential legal advice without fear of such advice being scrutinised by others (see *Three Rivers (No 6)* per Lord Scott (obiter).

Moulder J held that the principle applied equally to clients taking advice from private practice lawyers or in-house lawyers, and it was long the understanding of English practitioners and courts alike that regard should not be paid to the national standards or regulations of other jurisdictions as a precondition to recognising privilege over the work of foreign lawyers (see paragraph [26], citing Lord Neuberger in *Prudential* at [45]). Moulder J also rejected the Second Defendant's additional argument that foreign in-house lawyers should not be recognised as being lawyers to whose work legal advice privilege could apply (even if the work of other "appropriately qualified" foreign lawyers would be privileged). The Second Defendant had argued that as Russian in-house lawyers are not regulated, and that because in-house lawyers are paid employees and not independent, their work should not be privileged.

Moulder J held that, once one accepts that the court will not investigate whether a foreign lawyer is regulated or registered in a manner comparable to an English-qualified lawyer, the inclusion of foreign in-house lawyers as a category of lawyer to whose work privilege may apply follows *"as a matter of both logic and principle, [foreign in-house*

lawyers] 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".

Acceptance of the Second Defendant's position regarding in-house lawyers would have given rise to manifest unfairness to in-house Russian lawyers who, because of the Russian system of qualification, cannot be Advocates. Accordingly, legal advice privilege could never have extended to communications with in-house legal advisers in Russia even though that category of lawyers is accepted in English law as being covered by the application of legal privilege. Moulder J also gave weight to the expert evidence put on by Tatneft, noting that it would be impractical if the Defendant's position were accepted because it would exclude the work of most lawyers in private practice in international law firms in Russia, who are employees and not Advocates.

In conclusion, Moulder J noted that the only requirement in order for legal advice privilege to attach to the work of a foreign lawyer (in-house or otherwise) is that they should be acting in the capacity or function of a lawyer (at paragraph [57]). There is no additional requirement that foreign lawyers should be "appropriately qualified" or regulated as "professional lawyers".

Key messages. This case is important as it clarifies that English law recognises 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"* (at paragraph [36]). This approach had previously been adopted by Lord Sumption in his dissenting judgment in *Prudential*, where he noted that in English law the *functional approach* to legal advice privilege has always been taken. Accordingly, in considering whether legal advice privilege would apply to the work of foreign in-house lawyers, we must look at their function within their organisation. This decision should not be taken to be an indication that non-legal functions performed by foreign in-house lawyers would somehow become privileged, if they would not otherwise have been under English law.

Litigants should take comfort from the fact that the court has clearly recognised that it would be "unfair and inconvenient" for the work of foreign lawyers (both in private practice or in-house legal departments) not to be subject to legal advice privilege, having regard to the rationale for the existence of such privilege. On a practical level, Moulder J's ruling clearly confirms the commonly accepted position in the market that the work of private practice and in-house lawyers in jurisdictions with qualification and regulatory regimes different from the regime in England and Wales can be subject to privilege.

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Please do not hesitate to contact us with any questions.

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