

# The extent of legal privilege in regulatory investigations

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In June 2015 the English High Court handed down its judgment in Property Alliance Group Limited (PAG) v Royal Bank of Scotland PLC (RBS) [2015] EWHC 1557 (Ch). This case provides useful guidance on the extent of legal privilege in connection with regulatory investigations. The Jersey concept of privilege follows English principles and the decision is therefore relevant to Jersey regulated businesses.

## Background

PAG's claims related to alleged LIBOR manipulation and mis-selling of interest-rate swaps. Its case depending upon establishing that RBS did manipulate LIBOR. Therefore, it sought disclosure of: (i) a number of internal reports; (ii) without prejudice correspondence with the FCA leading up to the FCA's Final Notice; (iii) privileged communications that had been shared with the FCA (PAG asserted that privilege had been waived as a result). Each will be taken in turn.

## Without Prejudice Privilege

### (WPP)

The Court held that there were important public interest arguments for affording parties the benefit of WPP in settlement communications with their regulators.

However, the Court found that if, in the context of litigation with a third party, an entity advanced a positive case regarding the basis for a Final Notice (for example, that there had been no regulatory finding of misconduct) the benefit of WPP may be lost and the documents liable to be disclosed.

## Legal Advice Privilege

RBS asserted legal advice privilege over documents prepared by lawyers for the Executive Steering Group (the internal group dealing with the investigation (ESG)). Whilst accepting that ESG was

essentially the “client” for the purposes of the regulatory investigation (so that communications could in principle attract legal advice privilege), the Court questioned whether certain documents, such as memoranda and factual summaries, were in fact legal advice. The Court therefore ordered that the ESG documents should be reviewed by it, in the first instance, to ascertain whether claims to legal advice privilege were correct.

### **Limited waiver of privilege**

Provided documents remained confidential, RBS was entitled to maintain its right to assert privilege against third parties such as PAG even though they had been supplied (confidentially) to a regulator. However, as with WPP communications, the Court would not allow privilege to stand in circumstances where an entity was relying on the lack of a regulator’s finding of misconduct to assert a positive defence against a thirdparty claim.

### **Comment**

The Court’s decision helpfully clarifies the application of key principles on legal professional privilege. Regulated persons should exercise caution:

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On balance, the judgment is a positive one. As ever, privilege is a complex area and advice should be taken if you are in doubt.

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