

Think before you write

A new court decision on client confidentiality means that lawyers must be careful what they say to clients in writing.

The satellite litigation generated by the ongoing BCCI dispute (where creditors are seeking compensation from the Bank of England for its alleged failure to regulate BCCI adequately) has dealt a significant blow to client confidentiality.

On 1 March 2004, the Court of Appeal gave judgment on the question of the professional privilege of communications between the Bank and its solicitors relating to the Bingham inquiry (see *Three Rivers District Council v Governor & Co of the Bank of England* [2004] EWCA Civ 218). This inquiry was established following the collapse of BCCI, with Lord Bingham being asked to report on bank supervision and regulation.

The parties' arguments

Three Rivers District Council sought disclosure of certain documents produced by Freshfields, the Bank's solicitors, in the preparation for the inquiry. The Bank claimed the documents were protected by legal professional privilege. Three Rivers disagreed, saying that the documents:

- (1) were not of a class that came within the doctrine of legal advice privilege, and
- (2) were not prepared for the dominant purpose of obtaining "legal advice".

Three Rivers further argued that the inquiry should not be classed as a "legal transaction" for the purpose of taking legal advice. The inquiry was private and lacked the benefit of statutory powers. The district council argued that any advice or assistance afforded the Bank by its solicitors was therefore not protected by legal professional privilege.

Court of Appeal's decision

The Court of Appeal considered that the privilege should be kept "within justifiable bounds". But while work done within the ordinary business of a solicitor did not mean that it would automatically be protected by professional privilege, the court did accept that the representation of witnesses at inquiries fell within the scope of a solicitor's ordinary business.

An initial consideration was whether it was necessary to distinguish between legal assistance given to witnesses about the presentation of evidence (which could possibly protect a witness's reputation) and legal advice given to witnesses about the legal consequences that would flow from giving evidence to the inquiry. In the event, no individual witness claimed privilege, so it was unnecessary to rule definitively on this point. The Court of Appeal did, however, distinguish between legal advice provided by a solicitor in preparation for litigation and assistance given to a typical inquiry (which, the court said, "is not necessarily – or even primarily – concerned with legal rights and liabilities"). But it did not feel that the particular facts of the case justified extending the law of privilege still further to cover legal advice on things other than legal rights and liabilities. Consequently, correspondence between solicitors and their clients dealing with issues not directly relating to advice on legal rights and liabilities should, in future, be drafted with particular care because it may be disclosed in litigation.

At the time of writing, the Bank is considering an appeal to the House of Lords.

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