IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Before Mrs Justice Moulder

11 September 2020

PJSC Tatneft -v- Gennady Bogolyubov and Others
[2020] EWHC 2437 (Comm)

CASE SUMMARY

Moulder J confirmed that legal advice privilege applies to communications with and documents created by foreign in-house lawyers, regardless of particular national standards, regulations or rules on privilege.

Background

This judgment concerns an application by the Second Defendant, Mr Igor Kolomoisky ("**Mr Kolomoisky**"), challenging an assertion of privilege by the Claimant, PJSC Tatneft ("**Tatneft**"), over (i) communications between its employees/officers and its in-house legal department and (ii) documents created by its in-house legal department.

The issue on this application arose out of the Russian law distinction between "Advocates" and other lawyers who are not Advocates, including members of Tatneft's legal department.

Application of principles of legal advice privilege to foreign lawyers

Each party advocated a different general approach to the application of the rules on privilege to foreign lawyers. Tatneft favoured an approach looking at the function performed by the relevant individual, regardless of the applicable standards of regulation or training in the foreign jurisdiction. Mr Kolomoisky focussed instead on the status of the foreign lawyers, suggesting that privilege would only apply if they are "*appropriately qualified*".

In support of his position, Mr Kolomoisky submitted that privilege should only be extended to those Russian lawyers recognised as Advocates (and not to other Russian lawyers), on the basis that (i) only Advocates are admitted to practice at the Russian bar and registered with Ministry of Justice of the Russian Federation and (ii) the Russian equivalent of legal advice privilege ("Advocate's secrecy") applies only to Advocates.

Ultimately, Moulder J held that "*neither of these bases is established by the authorities as a matter of English law as a ground for denying the application of the privilege"* (at [50]).

In reaching that conclusion, Moulder J referred to the observations of Lord Neuberger and Lord Sumption in *R (on the application of Prudential plc and another) v Special*

Commissioner of Income Tax [2013] UKSC 1, confirming (at [45] and [126] respectively) that the court has approved the extension of legal advice privilege to foreign lawyers without regard to national standards or regulations. Similarly, the judgment in *In re Duncan*, *decd* [1968] P 306 supports the functional approach, looking at whether the "*relationship of lawyer and client subsists*". The functional approach was also endorsed by Lord Sumption in his dissenting judgment in *Prudential* (at [123]).

Mr Kolomoisky relied on authorities (e.g. *Dadourian Group International Inc v Simms* [2008] EWHC 1784 (Ch)) suggesting that the lawyer should be qualified to practice in order for privilege to apply. However, Moulder J did not consider these authorities to be of assistance, as they were not concerned with foreign lawyers specifically. The authorities clearly recognise foreign lawyers as a separate category justifying a different, broader approach, which is said to be based on "*fairness, comity and convenience*" (per Lord Neuberger in *Prudential*, at [73]).

Moulder J therefore held that English law is only concerned with whether the individual is acting in the capacity or function of a lawyer; there is no additional requirement that they are *"appropriately qualified"* or recognised or regulated as a *"professional lawyer*" (at [57]).

As regards the relevance of Russian law principles of "Advocate's secrecy", Moulder J noted that a similar submission as to the relevance of foreign laws of privilege was made and rejected in *In re Duncan.*

Application of principles of legal advice privilege to foreign in-house lawyers specifically

Having accepted that, in principle, privilege is not limited to documents created by or communications with Advocates as recognised in Russian law, Moulder J turned to consider the specific position as regards foreign in-house lawyers.

Mr Kolomoisky further submitted that privilege should not be recognised in relation to Tatneft's in-house lawyers because (i) English in-house lawyers have to be regulated and have a practising certificate and (ii) in-house lawyers are paid employees and not independent.

The first of those submissions failed for the same reasons as set out above: the court will not investigate whether a foreign lawyer is regulated or registered (at [53]).

Moulder J observed that the second submission would apply equally to English in-house lawyers, who are paid employees and also effectively act only for one client, and has been firmly rejected in that context (*Alfred Crompton Amusement Machines Ltd v Customs and Excise Comrs (No 2)* [1972] 2 QB 102). This ground is not, therefore, a reason for denying the application of legal advice privilege to foreign in-house lawyers (at [56]).

In support of the conclusions above, Moulder J examined the possible consequences of accepting the position contended for by Mr Kolomoisky. Tatneft's Russian law expert evidence estimated that half of representatives in civil disputes in Russia are not Advocates. Mr Kolomoisky's position would therefore exclude a large proportion of Russian lawyers

from the scope of legal advice privilege, and would mean that privilege could never extend to Russian in-house lawyers despite English law accepting that category of lawyers as being covered by the application of privilege. Such a result would have been unfair and inconvenient (at [49]).
