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English High Court Confirms the Application of Privilege to Foreign Lawyers

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A [judgment](#) handed down by the High Court on 11 September 2020¹ has confirmed the well-established principle that Legal Advice Privilege ("LAP") applies to foreign lawyers. However, the Court also confirmed the principle that the only requirement for LAP to attach was that the foreign lawyer should be "acting in the capacity or function of a lawyer", and that it would not investigate whether a foreign lawyer was regulated, registered or "appropriately qualified".

The Facts

The Claimant, a Russian company called Tatneft, had withheld documents during an exercise of standard disclosure on the basis that they comprised correspondence between the Claimant and its legal advisers, being communication between Tatneft employees and members of its internal legal department (the "Tatneft Lawyers"). Whilst it was accepted that English law applied, the question was whether communication by foreign in-house lawyers were properly covered by LAP. The Defendant alleged that the Claimant could not assert privilege over those communication because the in-house lawyers were not members of the Russian Bar and were therefore not covered by the concept of "advocacy secrecy" that existed within the Russian legal system. The Claimants accepted that, as a matter of Russian law, the Tatneft Lawyers were not "Advocates" under Russian Law, but argued that, as a matter of English law, LAP applied.

Brief Overview of the Court's Consideration of the Authorities

Reviewing the authorities, the Court noted that the starting point for considering whether or not LAP applied was to look at the rationale for LAP; in essence, that it is considered to be in the public interest that clients can obtain legal advice in confidence.² Whilst the Courts in England & Wales have declined to extend LAP to professionals other than members of (i) the Bar, (ii) the Law Society, and (iii) the Chartered Institute of Legal Executives,³ in-house lawyers are required to be regulated and to hold a practicing certificate⁴. They can therefore render legal advice to their employer, which is capable of being covered by LAP.

The argument that the requirement for regulation should extend to foreign lawyers was rejected by the Court on the basis that foreign lawyers comprise a separate category. In addition, due to principles of comity,⁵ and also as a result of the functional approach of English law to privilege,⁶ it was noted that the Courts have consistently held that the standards of training, qualification or regulation of foreign lawyers are beyond the supervision of English judges.⁷

Conclusion

The Court reaffirmed the principles that: (i) LAP can apply to communications with professional legal advisers, including in-house lawyers⁸; (ii) communications with foreign lawyers can be protected by

LAP; and (iii) it was not for the Court to enquire into the standards, regulation or training applicable to foreign lawyers.⁹

Accordingly, LAP extends to communications with foreign lawyers whether they are in-house lawyers or not. The Courts of England & Wales will not concern themselves with how foreign lawyers are regulated. The Court noted that the only requirement for LAP to attach to foreign lawyers was as Lord Neuberger had laid down in *Prudential*—that the lawyer should be "acting in the capacity or function of a lawyer" in "connection with the provision of legal advice".¹⁰

This decision will give comfort to companies with contracts and arrangements that are subject to English law that legal advice given by their non-English qualified in-house counsel will attract LAP, even where those advisers are not members of the bar or otherwise subject to professional regulation in the country of their qualification. Instead, the key requirement is merely that the foreign lawyer should be "acting in the capacity or function of a lawyer".



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¹ *PJSC Tatneft v. Gennady Bogolyubov and Others* [2020] EWHC 2437 (Comm).

² *Tatneft* at 23 and *Three Rivers* at 34.

³ *Prudential* at 29.

⁴ *Tatneft* at 50.

⁵ *Tatneft* at 47.

⁶ *Prudential* at 123.

⁷ *Tatneft* at 53.

⁸ *Three Rivers (No 6)* [2005] 1 AC 610; *R (Jet2.com) v. Civil Aviation Authority* [2020] 2 WLR 1215.

⁹ *R (on the application of Prudential plc and another) v. Special Commissioner of Income Tax* [2013] UKSC 1.

¹⁰ *Tatneft*, at 57 and *Prudential* at 19.