**Disclosure and FCA investigations**

This element considers both whether documents need to be disclosed to the FCA, and also whether documents from a regulatory dispute are privileged in court proceedings.

**Disclosure and FCA Investigations: “Protected Items”**

A firm being investigated may have grounds for objecting to the FCA’s use of its investigation powers. The most common ground is that a particular document may be a ‘protected item’ under section 413 FSMA 2000. This is an important provision:

- section 413 FSMA 2000 could provide a client with a defence to contempt of court proceedings where the FCA alleges that the firm is concealing documents which are otherwise relevant to the FCA’s investigation (section 177 FSMA 2000).

- authorised firms/individuals may also be able to rely on section 413 FSMA 2000 if the FCA suggests that the firm/individual has failed to co-operate with the FCA for the purposes of Principle for Businesses 11 or Individual Conduct Rule 3 or Senior Management Conduct Rule 4.

**Protected items - section 413 FSMA 2000 (1)**

Section 413 FSMA 2000 provides that a person may not be required to produce, disclose or permit the inspection of ‘protected items’, which are defined as:

- Communications between a professional legal adviser and his client (or person representing his client) made i) in connection with the giving of legal advice to the client; or ii) in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings; or

- Communications between any of the above persons and any other person made in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings; or

- Items i) enclosed with or referred to in any of the above communications, and ii) made in connection with the giving of legal advice to the client or in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings, and iii) in the possession of a person entitled to possession of them.

**Protected items - section 413 FSMA 2000 (2)**

Section 413 **broadly mirrors** the doctrine of **legal professional privilege** and allows firms to decline to provide or disclose documents protected under it.

It is ultimately unclear whether section 413 FSMA 2000 **matches precisely** the common law position on legal professional privilege (and this issue is effectively untested before the courts).

The question of whether a particular document will be protected from disclosure and inspection under FSMA 2000 must therefore be considered as against the above provision – section 413 FSMA 2000 – and not against the common law doctrines. It is important that the two are not confused or conflated.

The FCA Enforcement Guide contains some guidance on the FCA’s approach to protected items (see paragraphs 3.11.10- 3.11.15 in particular.

**Litigation privilege in the context of regulatory proceedings (1)**

In some cases, you might be advising your client in respect of both a regulatory investigation and the defence of (connected) court proceedings (for example, if a breach of regulatory rules has also given rise to claims in tort, breach of contract, misrepresentation, negligence, and/or statutory claims –such as under section 138D FSMA 2000). Your client will be

- responding to the regulatory investigation: on this front, any requests for documentation must be considered in the light of section 413 FSMA 2000

- defending the court proceedings: on this front, any requests for documentation must be considered in the light of your client’s disclosure obligations under the CPR and the common law rules on privilege.

The above situation poses potentially complex issues and your clients must take extra care when deciding to create any relevant documentation relating to the circumstances giving rise to the regulatory investigation and/or the connected court proceedings.

In summary, litigation privilege will attach to a confidential communication between a lawyer and its client or between one of them and a third party, where the dominant purpose in creating the document is to obtain legal advice, evidence or information for use in the conduct of litigation which was, at the time, reasonably in prospect.

In situations involving both litigation and regulatory proceedings, the key question is:

- are the documents created for the purposes of the regulatory investigation covered by litigation privilege in the context of the (connected) court proceedings?

- In other words, what constitutes ‘litigation’ for the purposes of that privilege?

Such questions have (to a certain extent) been addressed by the courts and some headline points are set out below. If you wish to look into this issue in more detail, five cases are listed on the next page. Although the cases themselves are non-examinable, you may find the principles which arise from the judgments and their analysis aid your understanding.

*- Re L* [1997] AC 16

*- Three Rivers District Council and others v Governor and Company of the Bank of England* [2004] UKHL 48

*- Tesco Stores Limited & ors v Office of Fair Trading* [2012] CAT 6

*- Property Alliance Group Limited v The Royal Bank of Scotland PLC* [2015] EWHC 1557 (Ch), [2015] EWHC 3187 (Ch) and [2015] EWHC 3341 (Ch)

*- The Director of the Serious Fraud Office (SFO) v Eurasian Natural Resources Corporation Ltd (ENRC)* [2018] EWCA Civ 2006 and [2017] EWHC 1017

Importantly, there is considerable (judicial and practical) doubt as to when and how litigation privilege might apply at any given time to documents created during a particular regulatory investigation. The matter is very fact-dependent and ultimately depends upon (amongst other things):

- whether the current stage of the relevant ‘procedure’ is of an ‘investigative’ nature (i.e., is it seeking to ‘get to the bottom’ of what happened or is it seeking to apportion blame for some other substantive purpose, such as the award of a penalty?)

- some commentators have demonstrated this by comparing and contrasting the investigatory and enforcement aspects of the FCA’s procedure: the FCA’s preliminary investigation is arguably ‘investigative’ in nature, whereas the proceedings before the RDC can often be more ‘adversarial’.

- if there is a degree of ‘confrontation and conflict’ between the participants

- what the outcome of the relevant ‘procedure’ is; is it a report or, instead, some finding of liability/some form of ‘penalty’ or award?

- given (i) the range of possible investigations which might be undertaken and (ii) the different stages as to when such investigations might turn ‘adversarial’, there is no ‘hard or fast’ rule as to when litigation privilege might be triggered.

The key advice is, accordingly, for clients to err on the side of caution. On this basis, it might be preferable for solicitors, in conjunction with their clients, to try to ensure that relevant documents are covered by legal advice privilege (which is not subject to the above issues in the same way) rather than litigation privilege.

**Summary**

- A firm being investigated may have grounds for objecting to the FCA’s use of its investigation powers. The most common ground is that a particular document may be a ‘protected item’ under section 413 FSMA 2000.

- This provision provides similar, but not necessarily identical, protection to legal professional privilege in a civil litigation context.

- A separate question is whether documents produced in the context of a regulatory dispute need to be disclosed in court proceedings – that question is resolved according to the rules of legal professional privilege.

- The situation will be clearer if it can be established clearly that the documents are subject to legal advice privilege (rather than relying on litigation privilege).