Blackstone
CHAMBERS

Conducting Investigations

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Introduction to Conducting Investigations

Over the past few years, there has been a noticeable increase in the number, and complexity, of investigations which are being conducted in a broad range of sectors. They can range from confidential fact-finding investigations to high-profile public inquiries. Such investigations often arise in the context of a regulatory regime and almost always have reputational significance.

Members of Blackstone Chambers are instructed to conduct investigations which require an independent barrister. We have extensive and wide-ranging experience in conducting inquiries and confidential investigations in a wide range of sectors and regulatory contexts including financial services, law firms, barristers' chambers, public bodies, national and international sporting bodies, and charities.

We recognise the importance of considering data protection and GDPR issues, safeguarding, regulatory and criminal law issues as well as privilege issues in this context. We are also very aware of the importance of robust and sensitive questioning of interviewees.

Recent examples of high-profile work in this area include:

- leading the internal Manchester City investigation into alleged sexual abuse;
- an inquiry into bullying and harassment of Westminster MPs' Parliamentary staff and others engaged in Parliamentary work on their behalf; and
- chairing the independent safeguarding investigation as part of the Charity Commission's investigation into Oxfam.

Recent examples of confidential investigations include investigations into:

Corporate and financial services

- allegations of misappropriating company funds;
- allegations of fraudulent claiming of expenses;
- bullying allegations against an Executive Chairman;
- discrimination allegations against a senior manager in an insurance company;
- sexual assault allegations against a professional services partner; and
- whistleblowing complaint brought by a CEO of a group of property development companies against the controlling shareholders.

Education

- allegations of safeguarding concerns and discriminatory bullying at a school;
- misconduct allegations against teachers and support staff;
- misconduct allegations against university employees; and
- whistleblowing complaint against a head teacher by the school bursar.

Legal

- allegations against a barristers' chambers;
- allegations of professional misconduct by a law firm partner;
- bullying allegations against a senior in-house lawyer;
- sexual harassment allegations against a barrister; and
- sexual harassment allegations against a law firm partner.

Regulatory

- allegations of discrimination and victimisation against three members of a statutory tribunal;
- allegations relating to money laundering systems and controls;
- internal allegations of potential breaches of FCA regulations and rules; and
- the FCA enforcement response into the collapse of a high profile bank.

Investigations Flow Chart

1 Immediate Priorities

- Seek specialist legal advice
- Is a formal investigation needed?
- Initiate document retention/preservation procedures
- Notify relevant internal and external stakeholders

2 Identify Nature and Scope of the Investigation

- Consider relevant policies
- Prepare outline Terms of Reference
- To whom will the investigator report?
- Will the report be public or private?
- Consider realistic timescale

3 Consider Specific Issues

- Regulatory framework
- Data protection and GDPR issues
- Privilege issues
- Criminal issues
- Safeguarding issues

4 Appoint Investigator

- Internal or external?
- Individual or panel?
- What other resources are needed?
- Internal or public announcement?
- Agree Terms of Reference (and keep them under review)

5 Documents

- Who will provide them?
- Who can they be shared with?
- Where will documents be stored?
- How best to "file" documents in case of any subject access request?

6 Conducting Interviews

- Who will make arrangements?
- Where will they take place? In person or by phone/video?
- Who else will attend?
- Right to be accompanied?

7 Notes of Interviews

- Who will take notes?
- Who will be provided with the notes?
- Will interviewees have opportunity to comment?

8 Investigation Report

- Who is it for?
- Who else can see it?
- Will there be a draft for comments?
- Who can comment on the draft?
- Will it be published?

9 What Next?

- Notification obligations?
- Seek legal advice

Investigations: Determining the Scope

Jane Mulcahy QC

The first step to take at the start of any investigation is to determine the scope.

Investigations come in all shapes and sizes. At one end of the spectrum might be a relatively informal inquiry into a workplace issue which can be easily identified and speedily resolved. At the other, however, might be a wide-ranging inquiry in the public domain into alleged misconduct on a large scale, involving a host of individuals and a complex network of events.

Whatever the reality (and assuming a decision has been taken that an investigation really is necessary: the possibility of an alternative resolution should always be considered) it is important to identify at the outset what an investigation is trying to achieve and how that might best be done.

In relation to scope, the key document in any investigation is the Terms of Reference ("ToR"). This should be drafted at the outset. That is not to say the scope will not change: invariably circumstances will dictate a small (or large) rethink once the process is under way. But recording the "rules" at the start – and promulgating them as widely as is possible, bearing in mind any constraints as to confidentiality – gives an investigator a clear structure as to the way forward.

This is invaluable as a matter of practice for the investigator and provides a philosophical bedrock for the investigation itself. Most usefully, when someone asks why the process is being conducted in a certain way, the ToR are ideally the answer.

Matters to consider when drafting the ToR include the following:

- What is the investigation required to examine? Is the subject matter essentially private or public? How does that feed into the information gathering and any communication of the outcome (for example, by way of a report)?
- Is the investigation to be fact finding only, or should the investigator make recommendations as to how the conduct found to have taken place should be addressed?

- What is the proposed timing? Is this realistic? (Timing is often an area where the ToR will need amendment: investigations can be much more time-consuming than first envisaged.)
- Assuming the investigation is to be independent (time and effort arguably being wasted, if it isn't) how will the process be administered? Should the investigator liaise directly with the commissioning organisation (which close contact might lead to allegations of bias and partiality) or with an external law firm? Or should the investigator function entirely separately, supported by their own secretariat? The latter may sound extravagant, but many large investigations falter because of the failure to devote sufficient resources to administration at the outset.
- When it comes to documents, who will provide them to the investigator? Who can see them once provided? Where will they be stored? Data protection and confidentiality are obviously important issues. So is any claim to legal privilege.
- Interviews with individuals also need careful consideration. How will they be arranged? Where and when will they take place? Should an interviewee have the right to be accompanied? To what extent is it necessary for interviews to be noted/recorded and what input might any interviewee have into such a record?
- Finally, there are a range of considerations concerning the preparation of a final report. Who can comment on any draft and to what extent? Who should have access to the report once finalised? Separately, is there any regulatory context that requires a particular reporting structure?

These are just some of the likely matters that need to be thought through at the beginning of any investigation. In addition, such considerations should be revisited and monitored as the investigation proceeds. Such is the cost of any investigation process, both economically and in terms of time and human emotion, that it makes sense to carefully plan it from the outset.

Learnings from the Dyson Report

Craig Rajgopaul

The shockwaves from Lord Dyson's report on Martin Bashir's interview of Princess Diana for Panorama have been reverberating around the BBC and the halls of Government. The report has significant broadcasting and political ramifications, but there are also many points of interest in the report for those involved with investigations.

Annex 1 to the report contains a Letter of Appointment, Terms of Reference and a "Process Protocol", expressly designed to ensure: (i) Lord Dyson's independence as an investigator; (ii) the thorough examination of evidence; (iii) the fair treatment of affected persons; (iv) that conclusions were reached with all due expedition; and (v) that the investigation was conducted efficiently and economically.

Points of particular interest include:

- Lord Dyson himself set the Terms of Reference, which were then approved by the BBC. They consisted of five clear questions, which were shared with anyone who might be interviewed. That clarity was undoubtedly helpful: the report contains a section on issues raised by individuals during the course of the investigation which were not addressed because they fell outside the Terms of Reference, for example "whether there was a culture at the BBC of hostility towards whistleblowers". My experience as an investigator is that interviewees regularly raise a raft of issues that fall outside the scope of the core issue(s) – clear Terms of Reference not only assist in managing the expectations of interviewees, but also help to prevent 'mission creep'.
- An Investigation Sponsor was appointed to ensure that Lord Dyson had the facilities and assistance needed to conduct the investigation. The Investigation Sponsor was not involved in advising the BBC in relation to its response to the investigation. A separate Investigation Respondent was appointed in respect of the BBC's engagement with and response(s) to Lord Dyson. Such clear points of contact (and clearly delineated responsibilities) are invaluable to an independent investigation.

- External solicitors were appointed to advise Lord Dyson (at the BBC's expense).
- At least five days in advance of any meeting with a witness, Lord Dyson provided a written outline of the topics to be covered and a list of the principal documents that would be referred to. This no doubt assisted with the voluntary cooperation Lord Dyson received in witnesses attending interviews. Whether or not such advance notice is necessary/appropriate will inevitably depend upon the nature of the particular allegations/investigation.
- Witnesses were also entitled to be accompanied by a friend, colleague or legal representative. Permitting individuals to be accompanied by a lawyer is relatively rare in my experience, but can sometimes be appropriate, for example when there are allegations of the most serious professional misconduct, or if an interviewee is disabled and requires legal representation as a reasonable adjustment.
- Unusually, it was specifically agreed that the BBC would not withhold documents on the basis of legal privilege, and that Lord Dyson may refer to such material in his report, provided that there was no wider waiver of privilege (the Investigation Sponsor could decide to redact any references in the report prior to publication).
- If Lord Dyson intended to criticise any individual or group in his report, he followed a "Representations Process", giving the individuals a chance to make written representations that he would consider prior to publication.

Clearly this was a Rolls Royce investigation conducted at considerable expense (estimated at c.£1.4 million).

Few organisations would be prepared (or able) to incur the costs involved in instructing the former Master of the Rolls (supported by external solicitors) to conduct an internal investigation. However, it will always be worth considering what approach should be taken to each of the matters referred to above in any internal investigation, no matter how humble, and there will frequently be process points that can be carried over from the Dyson Investigation into other successful investigations.

Safeguarding: Regulatory and Criminal Issues

Kate Gallafent QC

In recent years, many investigations have been set up with the express purpose of looking into safeguarding and/or regulatory issues (e.g. The FA's investigation into child sexual abuse and the Dame Elizabeth Gloster DBE report into the FCA's regulation of London Capital & Finance plc). Others have been set up with a view to heading off an investigation by a regulator or body with similar oversight (e.g. the Dyson Investigation set up by the BBC against the backdrop of the DCMS Select Committee potentially carrying out its own inquiry into the Diana Panorama interview). But safeguarding, regulatory and even criminal law issues can arise in a large number of other, less high-profile, investigations.

The most typical such case is where an organisation initiates an investigation into alleged misconduct by an employee or worker who works in a regulated environment. The obvious examples of such workers are lawyers, accountants, doctors and workers in financial services, but there are in fact a remarkable 248 regulated professions in the UK. In these types of cases there are two key issues to consider at the outset: whether and when to involve the regulator, and whether to bring in an independent investigator.

In terms of involvement of the regulator, the SRA's approach is likely to be followed by many: it is keen for firms to engage with them at an early stage of the internal investigative process, and to be kept updated on progress and outcomes, although on occasion it may wish to investigate a matter itself. Accordingly, it is sensible to engage with the regulator at the point of agreeing Terms of Reference of any investigation, to ensure that the regulator is content for the internal investigation to go ahead, and its terms.

Other very helpful guidance is provided in the FCA Handbook (EG 3.11), which similarly encourages engagement at an early stage and sets out common themes that the investigator will need to consider:

(i) access to underlying evidence or information;

(ii) status of legally privileged material [NB. whilst the SRA and BSB can require disclosure of legally privileged material, others – including the FCA – cannot];

(iii) the approach to establishing facts and how evidence will be recorded and retained;

(iv) whether the investigation will be limited to establishing facts or will include advice or opinions about breaches of the regulator's rules or requirements; and

(v) how the regulator will be informed of progress.

In terms of the trigger for reporting any matter to the regulator, such that engagement with them is justified, recent cases have emphasised the absence of any bright-line between the private and the public sphere (*Diggins v Bar Standards Board* [2020] EWHC 467 (Admin)), *Ryan Beckwith v Solicitors Regulation Authority* [2020] EWHC 3231 (Admin)) but conduct in the private sphere must be qualitatively and demonstratively relevant to the public.

When considering whether to appoint an independent investigator, whilst neither the SRA nor FCA comment on that issue, at least in cases involving legal professionals a sensible starting point is to ask why wouldn't it be appropriate? The very public process that Baker & McKenzie went through before the Solicitors Disciplinary Tribunal, it having conducted an internal fact-finding process in 2012, is a salutary lesson in that respect.

If an organisation does commission an independent investigator, it needs to consider and agree whether it will see the report in draft and have an opportunity to comment, and whether the investigator will make findings of fact only, or findings as to whether the conduct constituted misconduct / breaches of any regulatory rule, and/or any recommendations more widely (such as improvements to policies and systems).

Even where the person who is the subject of the investigation is not themselves a regulated person, there may nevertheless be relevant regulators involved.

The most commonly overlooked such regulator is the Charity Commission (their remit extends to many educational, religious and sports institutions, not just 'classic' charities), whose guidance on Serious Incident Reporting requires far more reports to be made than has previously been perceived to be the case. The Information Commissioner's Office may also need to be involved if there has been a personal data breach which must be reported to it (Art 33 of the GDPR). Whilst there is no general obligation to report an allegation of criminal behaviour to the police, some sectors (such as schools) are under such a duty, as well as a duty to report to the Local Authority Designated Officer in safeguarding cases.

Finally, one aspect of regulation in the context of investigations that has become increasingly prevalent is the risk that a regulated person such as a barrister or solicitor who conducts an investigation might be reported by a disgruntled subject of the investigation to their own regulators. The regulatory context should never be overlooked.

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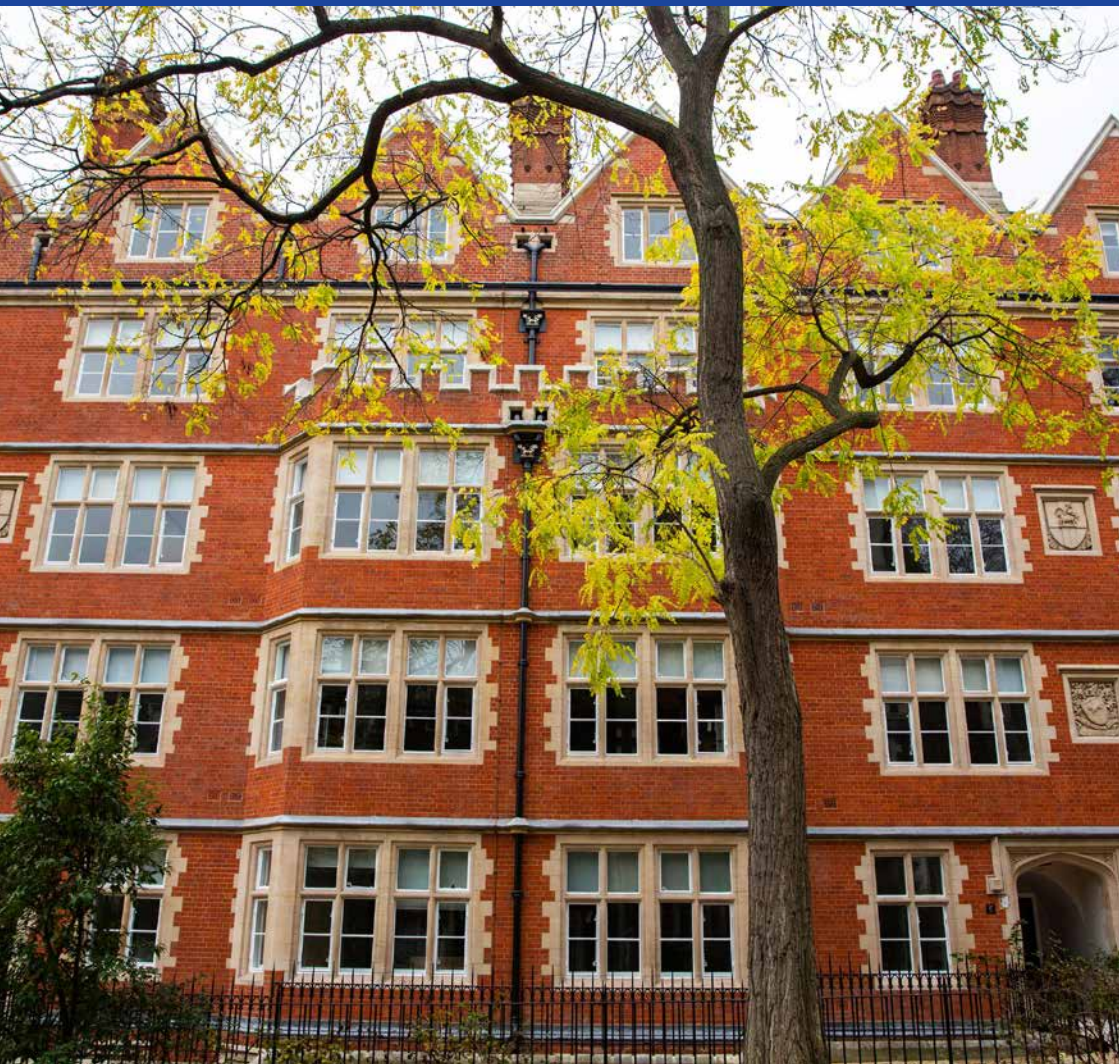


Legal Privilege and Investigations

Kerenza Davis

INTRODUCTION

This article explores some of the issues that arise in relation to legal privilege in the context of investigations. These are considered from the perspective of:
1) lawyers who have been appointed to act as independent investigators; and
2) those who are advising clients who are planning to undertake an investigation.

TYPES OF LEGAL PRIVILEGE

There are two types of legal professional privilege: litigation privilege and legal advice privilege.

Litigation privilege will apply where:

- There is a confidential communication between a lawyer and their client, or between either of them and a third party, or a document created by or on behalf of the client or lawyer; and
- That communication/document was made for the dominant purpose of litigation at a time when that litigation was pending or reasonably contemplated.
- "Reasonably contemplated" means litigation must be a real likelihood rather than a mere possibility, but the chance need not be greater than 50%. [1]
- The litigation in question must be "adversarial", not investigative or inquisitorial. [2]

Legal advice privilege will apply where:

- There is a communication between a lawyer and their client; and
- That communication is made confidentially for the purpose of giving or receiving legal advice.
- "Legal advice" includes advice on what should sensibly be done in the relevant legal context as well as advice on the law itself. [3]

1. *United States v Philip Morris Inc [2003] EWHC 3028 (Comm), paragraph 68 per Brooke LJ, approved by the Court of Appeal [2004] EWCA Civ 330.*
2. *Three Rivers District Council and Ors v Bank of England (No. 6) [2004] UKHL 48; [2005] 1 AC 610.*
3. *Three Rivers (No. 6).*

- Legal advice privilege will also cover documents evidencing the substance of qualifying communications. [4] This will usually include a lawyer's working papers, research notes, factual summaries, notes of attendances on clients and drafts of any documents prepared by the lawyer. However, as explained below, there is an important caveat to this in the context of investigations due to the narrow definition of the term "client".

No distinction is made between solicitors in private practice and those employed as in-house lawyers for the purposes of legal advice privilege, except where the in-house lawyer is acting principally in some other capacity e.g. an administrative or business one. [5] As such, where an in-house lawyer is advising their client on the law or what to do in the relevant legal context, legal advice privilege will apply, but where they are participating in conversations as a general member of the senior leadership team or advising on commercial strategy, it will not.

APPLICABILITY TO INVESTIGATIONS

The principles set out above in relation to each type of legal privilege apply to communications/documents produced as part of an investigation in the same way as to all other communications/documents. However, the particular circumstances in which communications/documents come to be created as part of investigations can cause difficulties in establishing that the relevant criteria are satisfied.

Litigation Privilege

The main difficulty in establishing that litigation privilege should apply to communications/documents produced as part of an investigation tends to be the question of dominant purpose.

This is because the court will often conclude that the real or main purpose for undertaking an investigation was to establish what actually happened; to ensure whatever has happened does not happen again; or to

4. *Passmore on Privilege, Sweet & Maxwell, 4th Edn, §2-003.*
5. *Alfred Crompton Amusement Machines Ltd v Commissioners of Customs and Excise (No.2) [1974] AC 405.*

improve policies and practices in the future etc., rather than to respond to/defend against pending litigation. [6]

However, provided the dominant purpose for carrying out the investigation is held to be reasonably contemplated litigation, all the documents produced as part of that investigation (for that purpose) will attract litigation privilege. This can include notes of interviews with employees, former employees, suppliers and other third parties, as well as materials generated by a review of books and records.

As a result, if litigation privilege does apply, it will be effective in retaining control over the most significant/sensitive documents the investigation has produced.

Legal Advice Privilege

The main difficulty in establishing that legal advice privilege should apply to communications/documents produced as part of an investigation tends to be establishing that they were (or that they evidence) communications between the lawyer and the client.

This difficulty stems from the decision in *Three Rivers (No.5)* [7] , where the Court of Appeal held that communications between an employee of a company and the company's lawyers will not attract legal advice privilege unless that employee was specifically tasked with seeking and receiving such advice on behalf of the client.

This decision has been repeatedly criticised, [8] but unless and until it is overturned by the Supreme Court, it remains binding.

The consequence of this narrow definition of "client" is that where employees are interviewed as part of an investigation, the transcripts/notes from those interviews will not be covered by legal advice privilege unless the employee is one of the (likely small number of) individuals specifically tasked with seeking/receiving legal advice on behalf of the employer, even if the interviews are conducted by lawyers who have been instructed by the employer. [9]

This is a clearly a problematic lacuna since the information/evidence contained in such interviews is likely to be among the most sensitive/significant obtained during an investigation.

Various attempts have been made to circumnavigate this but they have had limited success.

For example, in *Re RBS Rights Issue Litigation 10* RBS argued that the notes their lawyers had taken during interviews should be covered by legal advice privilege because: 1) they constituted the lawyers' working papers and reflected external counsel's "mental impressions"; and 2) because they reflected the work undertaken in preparation for the interviews, thus revealing the lawyers' train of inquiry. [11]

6. *Helpfully the Court of Appeal has also held that it will not be fatal to a claim of litigation privilege if litigation was not the dominant purpose of the investigation at its very inception, provided it swiftly became the dominant purpose after the investigation was underway: Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd [2018] EWCA Civ 2006.*
7. *Three Rivers District Council v Governor and Company of the Bank of England (No.5) [2003] EWCA Civ 474.*
8. *For example in Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd [2018] EWCA Civ 2006.*
9. *The same will apply to interviews with any external third parties such as ex-employees, suppliers, customers and so on.*
10. *[2016] EWHC 3161 (Ch).*
11. *By analogy with the Lyell v Kennedy (No.3) (1984) 27 Ch D 1 line of authorities.*

These arguments were rejected. The Court accepted that, in principle, notes made during an interview (as opposed to a verbatim transcript) might – to some extent – reveal the particular interests and lines of inquiry of the note-taker, as well as indicating their perception of the relative importance of the points covered. However, the Court concluded that in this case RBS had not done enough to demonstrate that the notes in question revealed the lawyers' line of inquiry, noting there was a real difference between revealing that train of thought and merely providing a "clue" to what it was.

Similarly, in *Three Rivers (No 5)* the Court of Appeal indicated that an employer cannot just describe a large number of employees as "the client" to bring their communications with the employer's lawyers within the circle of privilege; the Court will look behind this to determine who was really tasked with seeking and receiving legal advice.

As such, unless and until *Three Rivers (No 5)* is overturned, even if legal advice privilege does apply to some of the communications/documents produced in the course of an investigation, it is unlikely that it will cover much of the crucial evidence/information.

IMPLICATIONS FOR INVESTIGATORS

If you have been appointed to act as an independent investigator (as opposed to being asked to conduct an internal investigation on behalf of clients) it is likely the dominant purpose of this investigation will be to determine what has happened (and perhaps make recommendations about resolving this/preventing reoccurrence) rather than to prepare for anticipated litigation. Consequently it is unlikely litigation privilege will apply.

It is also unlikely (subject to the precise Terms of Reference) that your communications with others will constitute legal advice and, even if they do, at least some documents (including some of your own notes) are unlikely to be covered by legal advice privilege.

As a result, the safest thing for a lawyer acting in this role is to assume that all the communications and documents you produce, including your own notes, drafts and records, will be disclosable.

IMPLICATIONS FOR CLIENTS

If you are asked by clients to conduct or advise on an internal investigation, be sure to discuss with them whether litigation is likely to arise from the matters that form the basis of the investigation. If it is, then make sure to confirm their reason for wanting the investigation to be undertaken.

If litigation is pending and the investigation is directed towards preparing for that, make sure this is recorded in writing [12] as this can be persuasive evidence when asserting a claim for litigation privilege.

Before assuring a client that they will be able to rely on litigation privilege, carefully consider whether the pending/contemplated proceedings are sufficiently "adversarial" to qualify for this protection. If an investigation is being undertaken with potential/actual

12. *I.e. that litigation is anticipated and that the purpose of the investigation is to establish who can properly be said to have legal liability, rather than what happened/what could be done differently etc.*

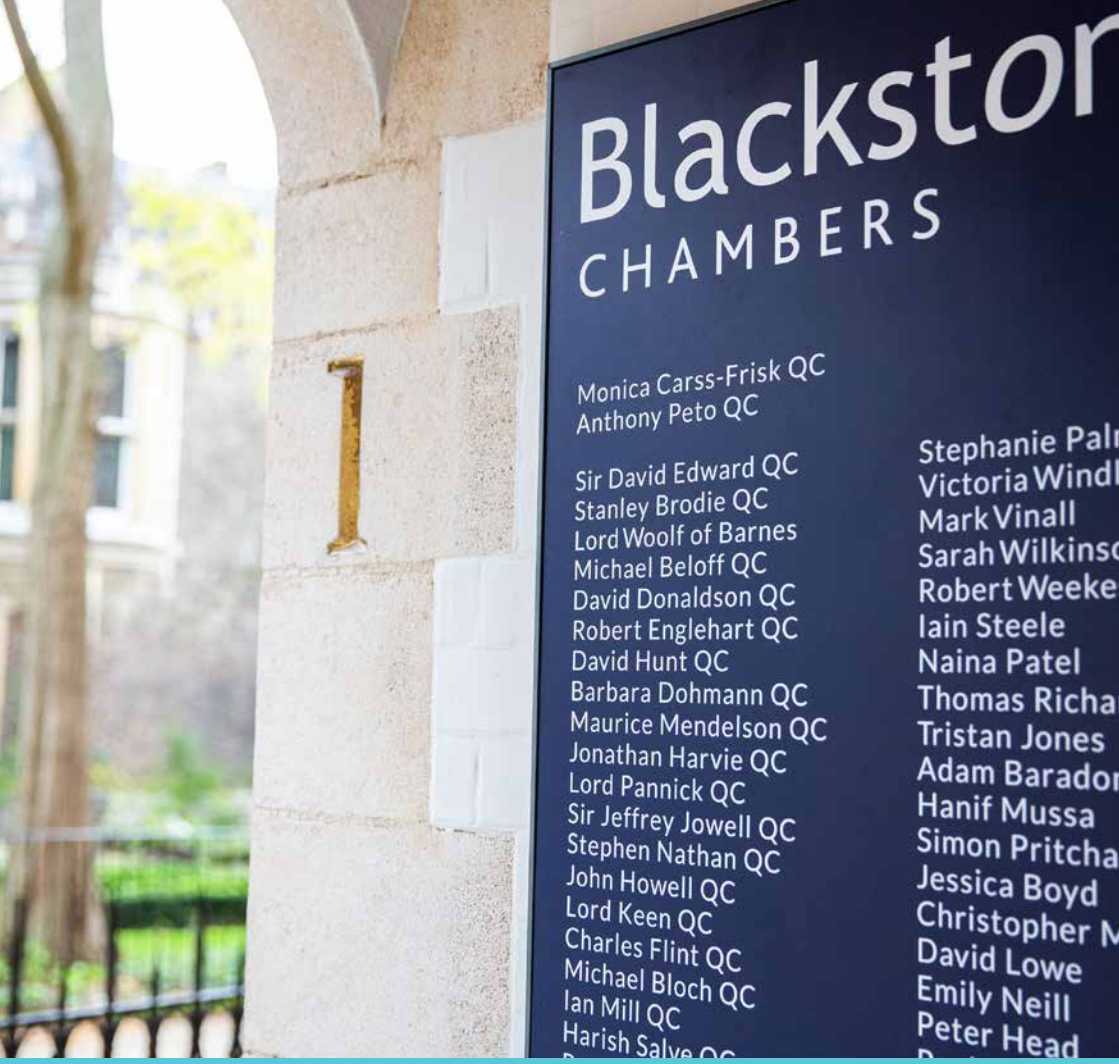
action by a professional regulatory body in mind, there is no clear cut answer on this point. [13] Each situation will need to be considered on a case by case basis, taking account of factors such as the nature of the proposed action; the status of the regulator; the kind of powers the regulator has; and the nature of the sanctions that could ensue. However, where proceedings could be brought before a formal tribunal with sanctions that would affect an individual's livelihood/a company's ability to trade, it seems likely this would be classed as sufficiently adversarial to qualify for litigation privilege.

Whether or not litigation privilege applies, make sure your clients are aware of the limits of legal advice privilege in the conduct of investigations. In particular, it may surprise them that even though you are acting as their lawyer, interviews you conduct with most employees and all third parties will not be covered by legal advice privilege.

It is also helpful to clearly establish who at the client is specifically tasked with seeking/receiving your advice, so that everyone is clear from the outset who you anticipate will fall inside, and outside, the circle of privilege.

Remember (and where necessary warn clients) that privilege can be lost, including on the basis of the "inequity exception", which will disapply privilege if those seeking to apply it have conducted themselves in a criminal or fraudulent manner or indulged in "sharp practice" or "something of an underhand nature where the circumstances required good faith". [14] This may sound extreme/unlikely but there are examples, including from recent case law of these points being successfully argued. [15]

13. *Potential action by the Serious Fraud Office has been held to have this character, but it is significant that this could result in possible criminal sanctions: Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd [2018] EWCA Civ 2006. An investigation into whether companies were acting as a cartel was also held to be sufficiently adversarial: Tesco Stores Limited v Office of Fair Trading [2012] CAT 6. However, Passmore continues to conclude "each case will be very fact dependent with the result one cannot safely assert an overarching principle that determines the result in every case": §3-153.*
14. *BBGP Managing General Partner Ltd v Babcock & Brown Global Partners [2010] EWHC 2176 (Ch).*
15. *In London Fire v Halcrow Gilbert [2004] EWHC 2340 (QB) the Court held that the Claimant would have lost the right to rely on privilege (had this otherwise been available) because it had deceived those who agreed to participate in an investigation, repeatedly assuring them that it was not being conducted for the purposes of anticipated litigation. See also Gerrard v Eurasian Natural Resources Corporation [2020] EWHC 3241 (QB), where an investigation was alleged to involve harassment and breaches of local laws in St Lucia. The Judge concluded that the final determination on the question of privilege could not made at the instant hearing, but the judgment nonetheless contains a detailed ventilation of the relevant principles and the parties' submissions on the same.*



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