



February 2014

## Legal Privilege

The concept of legal privilege provides that certain communications between a client and his solicitor are privileged and immune from subsequent disclosure to a third party. When legal privilege has been established neither the client nor the solicitor can for any reason be compelled to disclose details of this communication.

The rationale behind this principle is that:

*“it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers.... thereby inducing the client to retain the solicitor and seek his advice and encourage(s)... full and frank disclosure of the relevant circumstances to the solicitor.”*

Privilege over documents covers traditional paper communications such as letters, notes and memos of conversations and documents incorporating or reproducing legal advice. It also includes items such as e-mails, voicemails, computer databases and tape recordings.

Legal professional privilege will not exist in situations where communications exist in furtherance of conduct which is considered by the courts to be criminal, fraudulent or contrary to the interests of justice.

### Categories of Legal Professional Privilege

#### Litigation Privilege

This arises only after litigation or other adversarial proceedings have been commenced or are contemplated and it protects all documents produced for the sole or dominant purpose of the litigation in question.

Litigation privilege includes all communications between:-

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- (i) a solicitor and his client,
- (ii) a solicitor and his non professional agent, and
- (iii) a solicitor and a third party.

For litigation privilege to exist there must be a reasonable likelihood of litigation and a mere vague possibility that proceedings may arise in the future will not be sufficient. The communications must be made for the dominant purpose of advancing the prosecution or defence of the case or the seeking or giving of legal advice in connection with it.

A recent decision of the English High Court demonstrates a strict approach in analysing the purpose for which a report was prepared in order to determine if a claim for litigation privilege was available.

The court held that privilege will only apply if it can be shown that the litigation in question could be characterised as the “dominant purpose” for its creation. If the document was created for one of a number of reasons of equal importance then a claim for litigation privilege will fail.

In this case the report was prepared by a liquidator both for the collection of assets and the settlement of liabilities and also for use in legal proceedings.

The court noted that difficulties may arise where documents are produced for a dual purpose but in this particular case the court held that none of the reports in question were subject to litigation privilege.

## Legal Advice Privilege

Legal advice privilege protects communications between a solicitor, acting in his professional capacity and his client, provided that the communication is confidential and for the purposes of seeking or giving legal advice.

The key difference between litigation privilege and legal advice privilege is that correspondence with an independent third party is not covered by legal advice privilege.

The area of legal advice privilege was discussed and affirmed recently in the English courts and their findings are important for all solicitors advising their clients in this jurisdiction.

In a decision of the House of Lords it was held that privilege was not limited to advice about a client’s legal rights and obligations but included all confidential communications relating to what should be done in any given legal context. This broad interpretation of legal advice privilege covers all communications between a solicitor and his client prepared in his role as a legal adviser.

Whilst this broad interpretation is obviously welcome for those attempting to assert privilege over documentation, it must be considered in conjunction with the English Court of Appeal’s view on who constitutes “the client” .

The protection of legal advice privilege only applies to communications between a lawyer and his client. The Court of Appeal ruling provides that with communications between legal advisers and large organisation it cannot be assumed that all employees of the organisation will be considered to be the client for the purposes of legal advice privilege. Where communications pass between a

solicitor and an employee who is not considered to be a client, then that documentation may not be subject to privilege. The ruling seems to limit the extent of who constitutes “the client” to certain specified persons who have most contact with their legal advisers and only correspondence with these people will qualify for legal advice privilege.

As a result of this decision it is now extremely important that organisations take steps to identify, in a situation where legal advice is being given, who within the company is to be the link with their solicitors and consequently will be regarded as the client for the purposes of legal advice privilege. If matters are of a sensitive nature then all communication between these individuals and other parties in the organisation should ideally be kept to a minimum as it is likely to fall outside the ambit of the protection of legal advice privilege.

## In-House Lawyers

A further recent decision of the European Court of Justice (“ECJ”) in the Akzo Nobel case has confirmed that communications between in-house lawyers and other employees of the company are not privileged in relation to European Commission competition law cases. The basis for this decision was that an in-house lawyer does not enjoy the same level of independence from his client as an external one. As a result, the ECJ held that only written communications exchanged between internal counsel and an independent external lawyer can avail of professional legal advice privilege.

While the decision of the ECJ applies only to EU Commission competition investigations it clearly shows the attitude of the ECJ to the role and protection afforded to communications exchanged by internal counsel. Clearly, this limitation must be borne in mind by organisations in circumstances where documents are prepared which they may ultimately need or seek to claim privilege over.

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