



MAPLES
GROUP

Legal Privilege, Client Communication and Discovery

Cayman Islands Legal Practitioners Association

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Overview

- What is Privilege?
- Types:
 - Legal Advice Privilege
 - Litigation Privilege
 - Recent cases
- Waiver and Loss of Privilege
- Specific situations:
 - Accountants and in-house lawyers
 - Companies and shareholders / partnerships and partners
 - Trusts, beneficiaries and third parties
 - Insolvency proceedings and liquidations
 - Regulatory investigations

What is Privilege?

Privilege is a right which attaches to certain types of confidential communication, disclosure of which is protected by law, by reason (at least in part) of public policy.

“The evolution of the law of Privilege has resulted in a body of law which combines those most dangerous of characteristics for the practitioner: an apparently simple and easily grasped principle which can be confidently enunciated but which has been developed over a long time by the Courts in an incremental fashion until its scope is not always clear and its application is often uncertain”

Christopher Moger QC's forward to *Privilege* (2nd edn) by Colin Passmore

What is Privilege? (cont.)

- Privilege is “*a right to resist the compulsory disclosure*”

B v Auckland District Law Society [2003] 2 A.C 736 per Lord Millett

- The rules in relation to privilege have been developed for the purposes of enabling individuals to obtain legal advice with safety:

*“The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or defend himself from an improper claim... **should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation**”*

Anderson v Bank of British Columbia (1875-1876) L.R. 2 Ch.D. 644 at 649, per Jessel M.R.

What is Privilege? (cont.)

- If a communication or document qualifies for legal professional privilege, the privilege is absolute, cannot be overridden and there is no balancing act to be carried out with the broader interests of justice

Three Rivers (No.6) [2004] 3 WLR 1274 at [24]

Confidentiality and Privilege

- There can be no privilege without confidentiality

Three Rivers (No.6) [2004] 3 WLR 1274 at [24]

- Not all confidential documents are privileged, but all privileged documents are confidential
- No confidentiality; no privilege:
 - Entered the public domain
 - Transcripts of proceedings in open court
 - Attendance notes of meetings where both parties present
 - Telephone attendance notes of conversations between opposing lawyers

Two types of Legal Professional Privilege

- “*Legal Professional Privilege is a single integral privilege, whose sub-heads are legal advice privilege and litigation privilege...*”

Three Rivers (No 6) [2004] 3 WLR 1274 at [105] per Lord Carswell

- Confidentiality is a pre-requisite to each
- But, they arise in different circumstances and raise different practical issues for clients and those advising them

Legal Advice Privilege

- Applies to:
 - Confidential communications
 - Which pass between a client and the client's lawyer
 - Which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context
- Does not require the existence or contemplation of legal proceedings
- Narrower in ambit than litigation privilege but may be claimed more widely

Legal Advice Privilege (cont.)

- Who is the client?
 - *Three Rivers (No 5)* (CA)
 - *The RBS Rights Issue Litigation* [2016] EWHC 3161
 - *SFO v ENRC* [2019] 1 WLR 791 (CA)
- Practical considerations:
 - Consider carefully how to define the “client” in the engagement letter
 - Only the defined “client” should deal with lawyers
 - Only the defined “client” should prepare briefing notes, letters of instruction, meeting agendas or minutes
 - Make it clear to other employees that no documents containing information relevant to the seeking of legal advice should be created without express clearance from the defined “client”
 - Discourage non-“client” employees from reporting to the defined “client” on the relevant matter, or from copying anyone else to those communications

Legal Advice Privilege (cont.)

- What advice is covered?
 - Documents which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context
- Will cover presentational, commercial or strategic advice, provided that it relates to a client's legal rights, liabilities, obligations and remedies
- Will not cover advice of a purely strategic or commercial nature that is not provided in a "*relevant legal context*"
- Specific examples:
 - In-house lawyers – always privileged?
 - Internal documents / reports to the board by employees
 - Accountants / other professions

Litigation Privilege

- Requirements:
 - Must be a communication between either the lawyer (acting in a professional capacity) or the client and a third party, or be a document created by or on behalf of the client or the client's lawyer
 - Must be made for the dominant purpose of litigation
 - Litigation must be pending, reasonably contemplated or existing
- Narrower in scope than legal advice privilege, but allows third party communications
- It depends upon the existence or contemplation of legal proceedings

Litigation Privilege (cont.)

- What is meant by “litigation”?
 - Regulatory investigation: adversarial requirement?
- Dominant purpose test
 - Test is one of dominance and not exclusivity
 - Objective standpoint. Court will look at:
 - Statements within a document that it was prepared to enable the lawyer to advise on litigation
 - Evidence put before the court that the document was prepared for a particular purpose
 - But, high threshold: *Tchenguiz v Serious Fraud Office* [2014] 4 All ER 627
- When is litigation pending or reasonably contemplated?
 - Must be a real likelihood rather than a mere possibility (*USA v Philip Morris Inc and BAT* [2003] EWHC 3028) – chance need not be more than 50%

Specific Situations

- Internal fact finding investigations – regulatory investigations
- Data rooms
- Liquidations
- Trusts
- Companies / Shareholders / Partnerships / Partners
- Experts, expert reports, instructions and communications with experts

Waiver of Privilege

- Privileged may be waived:
 - By express or implied waiver
 - By loss of confidentiality
 - By collateral waiver
 - By placing privileged material before the court
 - By criminal or fraudulent purpose

Express or Implied Waiver

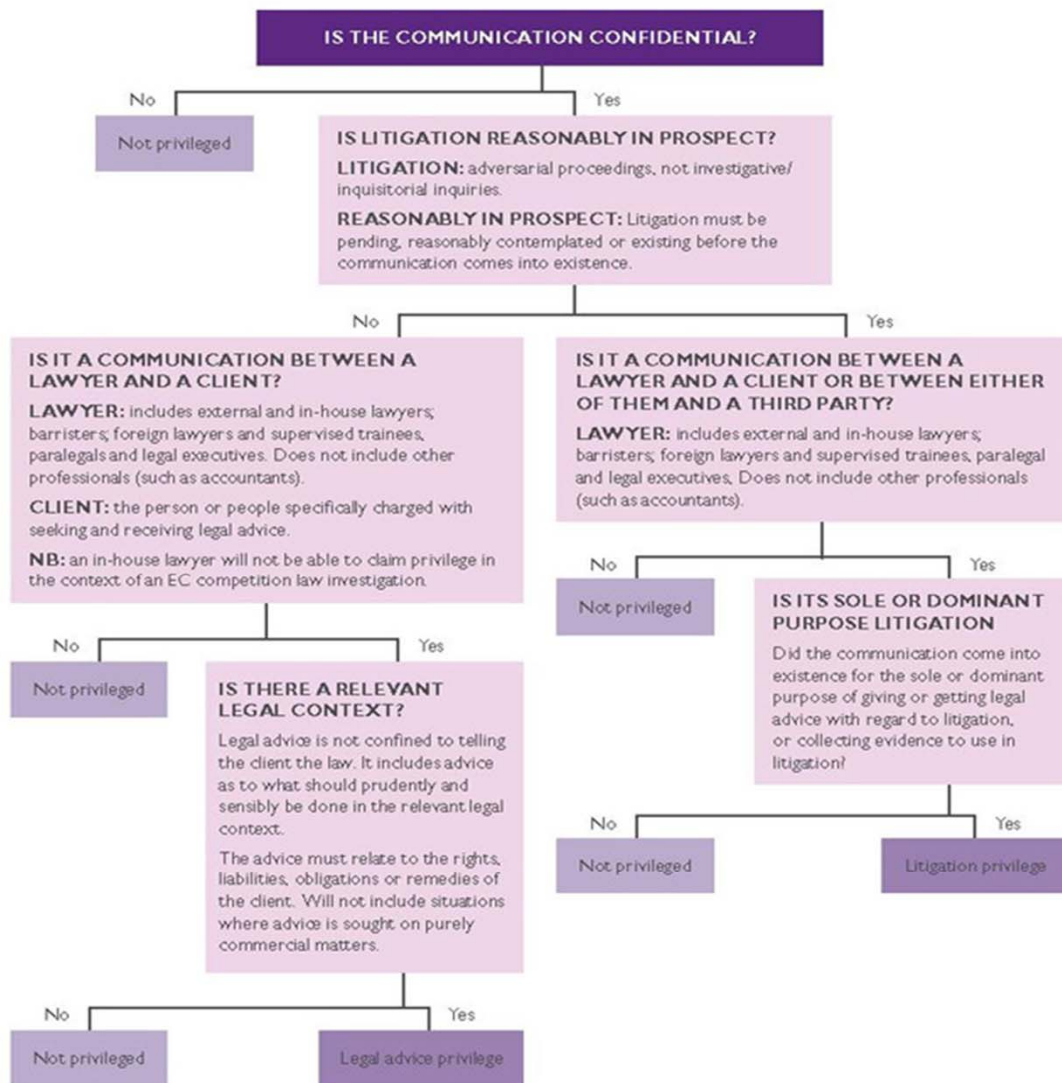
- Only the person entitled to assert privilege or his agents can elect to waive privilege
- Where privileged documents have been disclosed to an individual on express terms that privilege in them is not waived, then privilege will not be lost

B v Auckland District Law Society [2003] 2 AC 736

- If disclosing, include contractual undertaking
- Limited waiver – privileged documents may be disclosed to a third party on the basis that they will only be used for certain limited purposes

Collateral Waiver

- A party who elects to waive privilege will be obliged to disclose other documents so as to prevent the court / opponent from being given only a partial picture.
- Cherry-picking / “Now you see it, now you don’t” approach
 - “the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning not being understood”*
 - Great Atlantic Insurance Co v Home Insurance Co [1981] W.L.R. 529 at 538
- The “tapeworm effect”
 - *Berezovsky v Abramovich* [2011] EWHC 1143





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