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Legal Professional Privilege

Inside

Introduction

This guide is intended to provide a brief overview of legal professional privilege. It also identifies some practical steps which will help to maintain privilege and concludes with a privilege "flowchart" and table of commonly used terms.

Legal Professional Privilege

Legal professional privilege is a fundamental part of English law. The law of privilege allows parties to maintain confidentiality in their legal communications. In particular, parties may rely on the law of privilege to refuse to produce documents or answer questions from third parties.

Legal professional privilege has two parts: (a) legal advice privilege and (b) litigation privilege. Each is considered briefly in turn below.

Legal Advice Privilege

Legal advice privilege applies to confidential communications between lawyers and their clients for the purpose of giving or receiving legal advice. Legal advice privilege, which is available in contentious and non-contentious situations, therefore concerns:

- confidential
- communications
- between a lawyer and client
- for the purpose of giving/receiving legal advice.

Each aspect of legal advice privilege is considered below.

Confidential

Confidentiality is the touchstone of legal advice and litigation privilege. Documents which are not confidential will not be privileged. Confidentiality may therefore be regarded as a necessary (but not sufficient) condition for privilege to exist.

Communications between lawyers and their clients will ordinarily be confidential, particularly given that a lawyer owes a duty of confidence to his client.

Communication

"Communications" include direct lawyer/client communication such as letters, emails, telephone calls and meetings. But the concept of communication goes further and captures, for example, documents intended to be communicated between a lawyer/client which were never actually sent as well as documents evidencing lawyer/client communications, such as an attendance note of oral advice.

Lawyer

In order for legal advice privilege to apply there must be a relevant communication between a lawyer and a client. "Lawyer" is defined broadly and includes not just members of the Bar and Law Society, but also to properly qualified legal executives, licensed conveyancers and foreign lawyers. Privilege can also extend to non-qualified employees (such as trainees and clerks) acting under the supervision of a qualified lawyer. Privilege will not, however, extend to other professionals (such as accountants) who advise on legal matters.

There is no difference between in-house and private practice lawyers, save that privilege will not apply to in-house lawyers in the context of European competition investigations. Nor will privilege apply if a lawyer (whether in private practice or in-house) is acting, not as the client's legal adviser, but as the client's "man of business" or otherwise acting outside his capacity as a lawyer.

Client

Legal professional privilege belongs to the client.

Where an individual instructs a lawyer they are the client. It is more difficult to identify the "client", however, where a large corporate entity instructs a lawyer. In *Three Rivers No 5* ([2003] EWCA Civ 474), the Court of Appeal held that neither the corporate entity itself nor the employees per se will be the "client" when assessing matters of privilege. Instead, only those within the corporate entity who are authorised to instruct the lawyer and seek/receive legal advice are to be treated as the client. Therefore only communications between a lawyer and that group of authorised individuals will be cloaked in privilege.

The practical impact of the *Three Rivers (No 5)* decision is that communications passing between a lawyer and "non-client" employees of the instructing corporate entity will not benefit from legal advice privilege. Such communications will not be privileged even if the corporate entity specifically authorises a non-client employee to communicate with the lawyer. For example, if litigation privilege does not apply (see below) then internal investigatory interviews between lawyers and "non-client" employees will not attract privilege.

In the recent case of Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited ([2018] EWCA Civ 2006) (SFO v ENRC) the Court of Appeal was pressed with the argument that Three Rivers (No 5) is wrong. The Court of Appeal indicated that it could see "much force" in the argument that Three Rivers (No 5) is wrong and expressed concern that the case made it more difficult for large corporate entities to claim legal advice privilege. The Court of Appeal also expressed unease about the fact that some other commonwealth jurisdictions had not followed the case. Notwithstanding its reservations, however, the Court of Appeal did not overturn Three Rivers (No 5) and the SFO has not appealed the Court of Appeal's decision. Three Rivers (No 5) therefore remains good law until such time as the Supreme Court revisits this issue

It should also be noted that legal advice privilege can apply where a client uses an agent to communicate with a lawyer. However, the definition of an "agent" in this context is narrow and great care should be exercised when a client chooses to communicate with their lawyer via an agent.

Legal Advice

"Legal advice" includes telling the client the law. But it is much wider than that. Privilege attaches to legal advice which relates to the rights, liabilities, obligations or remedies of the client. Privilege is also available for advice about what should prudently and sensibly be done in the relevant legal context. For example, in *Three Rivers (No 6)* ([2004] UKHL 48) it was held that privilege could apply to advice relating to the content and presentation of a statement to be made to a public inquiry.

Privilege also applies to all material forming part of the continuum of lawyer/client communications, even if the communications do not expressly seek or convey legal advice. In *Balabel v Air India* ([1988] Ch 317) it was held that the test is whether the relevant communications *"are part of that necessary exchange of information of which the object is the giving of legal advice as and when appropriate".*

Litigation Privilege

Litigation privilege is based on the idea that parties should be free in adversarial proceedings to prepare their case as fully as possible without the risk that their opponent will be able to recover the material generated by their preparations.

Litigation privilege applies to confidential communications between parties, their lawyers and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation when, at the time of the communication in question, the following conditions are satisfied:

- Litigation is in progress or reasonably in contemplation;
- The communications are made with the sole or dominant purpose of conducting that anticipated litigation; and
- The litigation must be adversarial, not investigative or inquisitorial.

It will be appreciated from the above points that litigation privilege is wider in its scope than legal advice privilege in certain key respects: (a) litigation privilege can apply where communications are between a client (or his lawyer) and a third party and (b) litigation privilege will apply even when legal advice is not sought or received. The above concerns about communications with non-client employees, and the "identity" of corporate clients, therefore do not arise if litigation privilege can be claimed. Communications with non-clients will be privileged provided the above tests are met.

Each part of the test for litigation privilege is explained briefly below.

Confidential

As mentioned above, confidentiality is the touchstone of legal professional privilege.

In the context of legal advice privilege it will often be a relatively straightforward matter to show that communications are confidential (particularly given that a lawyer owes a duty of confidence to his client).

In the context of litigation privilege, which often involves communications with third parties, documents will be confidential if they are not properly available for use. Communications between clients/lawyers and third parties (such as experts and witnesses) which take place in the context of preparations for litigation will invariably have the necessary quality of confidence.

Adversarial

Litigation privilege is only triggered once proceedings are in progress or in contemplation. Given the rationale behind litigation privilege, the relevant proceedings must be adversarial in nature.

Claims before the English courts or arbitration conducted in accordance with English procedural law will be deemed to be adversarial and capable of generating litigation privilege.

Litigation In Progress/Contemplation

Litigation privilege cannot be claimed if proceedings do not exist or are not in contemplation. Therefore a key question is this: when will litigation be "in contemplation"? The answer is that a mere apprehension of proceedings will not be enough to generate litigation privilege. Although there does not need to be a greater than 50% chance of adversarial proceedings, litigation must nevertheless be "reasonably in prospect" in order to claim litigation privilege. The person claiming litigation privilege must show that he was aware of circumstances which rendered litigation between himself and particular persons a real likelihood rather than a mere possibility.

In the recent case *The Director Of The Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* ([2017] EWHC 1017) (*SFO v ENRC*) the court considered when litigation would be reasonably in prospect in the context of a criminal investigation. The case was heard at first instance and on appeal. The High Court and Court of Appeal, however, reached diametrically opposed conclusions.

High Court

In the High Court it was held that a criminal investigation by the SFO does not constitute adversarial proceedings. It was held that such an investigation was merely a preliminary step and that, although such an investigation might create a general apprehension of future litigation, that was insufficient to justify a claim for litigation privilege. The High Court explained its approach to privilege by reference to the way in which criminal proceedings are commenced and stated that:

- Criminal proceedings cannot be started unless and until the prosecutor is satisfied that there is a sufficient evidential basis for prosecution and the "public interest" test is met.
- Litigation privilege therefore cannot be claimed (ie criminal prosecution cannot reasonably be contemplated) until the proposed defendant knows enough to appreciate that a prosecutor is likely to unearth enough evidence to stand a good chance of securing a criminal conviction.

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In other words, the High Court found that litigation in criminal proceedings cannot be claimed by a defendant until such time as the defendant is aware that prosecution (as opposed to mere investigation) is reasonably in prospect.

Court of Appeal

The Court of Appeal disagreed with the High Court and found the distinction between civil and criminal proceedings to be "illusory". The Court of Appeal instead found that when determining whether litigation is reasonably in contemplation, "[e]ach case turns on its own facts and will be judged in light of the facts as a whole". In the context of criminal proceedings, the fact that a formal investigation has not commenced will be part of the factual matrix, but will not be determinative of whether litigation is reasonably in contemplation.

This Court of Appeal decision, which brings the law on litigation privilege in a criminal context back into line with the position on civil claims, has been widely welcomed. Corporations are once again able to carry out internal investigations in the context of criminal proceedings safe in the knowledge that (subject to the ordinary requirements of litigation privilege), documents produced as a result of those investigations will be protected from disclosure.

Dominant Purpose

In order to attract litigation privilege, it must also be shown that the dominant purpose of the relevant communication or document was to obtain advice/information in connection with the litigation or to conduct or assist in the litigation.

If a document has been produced for multiple purposes it is necessary to identify the dominant purpose. If there were two reasons for the creation of a document, and both reasons carried equal weight, then the "dominant purpose" test will not be met.

The court will examine all circumstances to determine the subjective purpose of the person claiming privilege over relevant evidence.

At first instance in SFO v ENRC (referred to above), it was suggested that if a party prepared a document with the ultimate intention of showing that document to the opposing party or seeking a settlement of proceedings (rather than conducting contemplated adversarial proceedings) it would be difficult to claim litigation privilege.

The Court of Appeal in SFO v ENRC, however, doubted the correctness of that approach. Instead, the Court of Appeal found that in both the civil and the criminal context, legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings. The same reasoning applied to documents. The Court of Appeal made it clear that the exercise of determining dominant purpose in each case is a determination of fact, to be undertaken using a realistic, indeed commercial, view of the available evidence.

Loss of Privilege

The general rule is "once privileged, always privileged". This means that once a communication becomes privileged, the party to whom the privilege belongs may continue to claim privilege over that communication in different proceedings or investigations. This right continues indefinitely, unless the privilege is lost.

The main ways in which privilege may be lost are as follows:

- Loss of confidentiality.
- Waiver of privilege.
- Mistaken disclosure.

Loss of confidentiality

If a document loses its confidential nature it will cease to be privileged. However, just because a document has been shared with third parties does not mean that confidentiality or privilege is automatically lost. In *Gotha City v Sotheby's* ([1998] 1 WLR 114) it was said that:

"If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of those friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world".

Given the above decision, parties who wish to share a document while maintaining its confidential/privileged nature can (in principle) do so by sharing it with a limited number of third parties. It is usual in such circumstances for privileged material to be circulated only to a limited number of named individuals, for a specific purpose and on confidential terms which are agreed and documented. In these circumstances privilege will be lost as against the recipients of the document but can nevertheless be maintained against the rest of the world.

Waiver of privilege

Sometimes a party will choose to reveal, during the course of proceedings, a document (or part of a document) which is otherwise privileged. In such circumstances there is a risk that the party might be forced to disclose the whole document or other connected privileged documents.

The key point is that if a person deploys material which would otherwise be privileged, the opposite party and the court must have the 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. Without full disclosure of the relevant privileged material, there is a risk that partial evidence could be "plucked out of context", resulting in a risk of injustice through its real weight or meaning being misunderstood. As a matter of fairness, a party is therefore not entitled to "cherry pick" the privileged material it deploys in court - a party to whom privileged information is provided is entitled to have the full contents of what has been supplied in order to see that cherry picking is not taking place.

In order to engage the above principle (known as collateral waiver) the disclosing party must have done more than simply refer to the fact that privileged material or advice exists. Collateral waiver occurs in circumstances where the disclosing party crosses the line and relies upon or deploys the privileged material in connection with the substantive merits of the claim or defence. In those circumstances it is considered just that the party to whom privileged material is supplied should be able to invoke the principle of collateral waiver and see all relevant material.

Mistaken Disclosure

Sometimes a party will not choose to reveal privileged material, but will do so by mistake. In such cases the starting point is that confidentiality has been lost and the recipient of the material is entitled to assume that privilege has been voluntarily waived. It will generally be too late (following disclosure) to claim privilege or attempt to make a retrospective claim for privilege.

However, the court does have jurisdiction to intervene to prevent the use of privileged documents which have been made available by mistake. The court may grant an injunction to prevent use of the material if it has been made available as a result of an "obvious mistake". A mistake is likely to be held to be obvious where the documents are received by a solicitor and (a) the solicitor appreciates that the document has been disclosed by mistake or (b) it would be obvious to a reasonable solicitor in his position that a mistake has been made.

Although it is not conclusive, if a solicitor receives privileged material and, following detailed consideration, concludes that the documents have been disclosed otherwise than by mistake that will militate against the grant of an injunction. In *Rawlinson and Hunter Trustees S.A., Vincent Tchenguiz and others v Director of the Serious Fraud Office* ([2014] EWCA Civ 1129) it was held that

"…once it is accepted that the person who inspected a document did not realise that it had been disclosed by mistake, despite being a qualified lawyer, it is a strong thing for the judge to hold that the mistake was obvious."

In other words, it will be more difficult to obtain an injunction if the receiving solicitor has actively considered the matter and concluded that privileged material has been disclosed otherwise than by mistake.

Preserving Privilege - Practical Steps

In light of the above matters there are a number of steps that can be taken to preserve and protect privilege. It is impossible to set out every step in this inbrief, and the steps necessary to preserve privilege will depend on each case, but the following are some practical matters which clients and in-house lawyers can take into account when handling privileged material.

Conducting Interviews

Conducting interviews in order to gather evidence, especially in the context of criminal or regulatory proceedings, raises complex issues relating to privilege. If a corporate entity is in the early stages of an investigation, and litigation privilege cannot be claimed, then interviews with third parties or employees who are not designated as "the client" will be unlikely to attract legal advice privilege.

In order to deal with this problem it is usually prudent to create a non-exhaustive or flexible list of the limited number of employees who are deemed to be the "client" for privilege purposes, and to update the list as matters progress. When conducting interviews with non-clients before litigation privilege can be claimed, the following practical options can be considered by way of alternative to creating full interview notes:

- Take no notes of witness interviews.
- Produce a note which only records parts of the interview selected by a lawyer. This might allow the client to claim that the note is privileged because it tends to betray the trend of advice being given by the lawyer.
- Produce a note which records the lawyer's views on the evidence. If the note contains a genuine mixture of selected items of evidence and the lawyer's views on that evidence there could be an increased chance of claiming legal advice privilege.

It is also prudent to ensure confidentiality by informing the interviewee at the beginning that:

- The interview is confidential and privileged.
- Privilege belongs to the company and can only be waived by the company.
- They may not disclose the contents of the interview to any third party.

Finally, a careful watch should be kept on when it can fairly be said that litigation is in reasonable contemplation. Once litigation privilege can be claimed then interviews with ordinary employees and third parties can be privileged. In the case of *Bilta (UK) Ltd v RBS and another* a "watershed" moment occurred and the client instructed external lawyers specifically to obtain advice in respect of a likely dispute. The instruction of external lawyers was cited as evidence that the client's dominant purpose in generating evidence was for the purpose of conducting litigation and that litigation privilege could be claimed from that point onwards.

In House Lawyers

Given the definition of "lawyer" above, it is prudent for in-house lawyers to:

- Maintain a practising certificate.
- Supervise trainees, clerks and others who generate legal advice privilege vicariously through their status.

It is also generally good practice to:

- Mark all communications pertaining to legal advice as "privileged and confidential".
- Segregate privileged and non-privileged documents.
- Ensure that internal clients do not forward or create "new" documents that summarise or comment upon legal advice.
- Where external lawyers are instructed, be clear who is the "client" for the purposes of giving instructions and seeking/receiving legal advice.
- Ensure that communications between external lawyers and "non-client" employees are properly controlled. Outside a litigation context such communications may not be privileged.
- If there is any doubt, assume that litigation privilege is not available and act accordingly.
- Consider the use of external counsel in EU competition matters.

Dissemination

As mentioned above, it is possible in principle to share privileged material with third parties. Provided it is done in the right way, privilege will be lost as against those who receive the documents but can be maintained as against the rest of the world.

In order to manage risk when disseminating privileged material, it is prudent to share the material with a limited number of named individuals and to obtain written agreement to the following points in advance of sharing relevant evidence:

- The evidence is provided on a confidential basis;
- The evidence is privileged;
- Providing the evidence does not constitute a waiver of privilege;
- The evidence is provided for a specific (defined) purpose;
- The evidence shall not be disclosed without consent and will be returned/destroyed upon request.

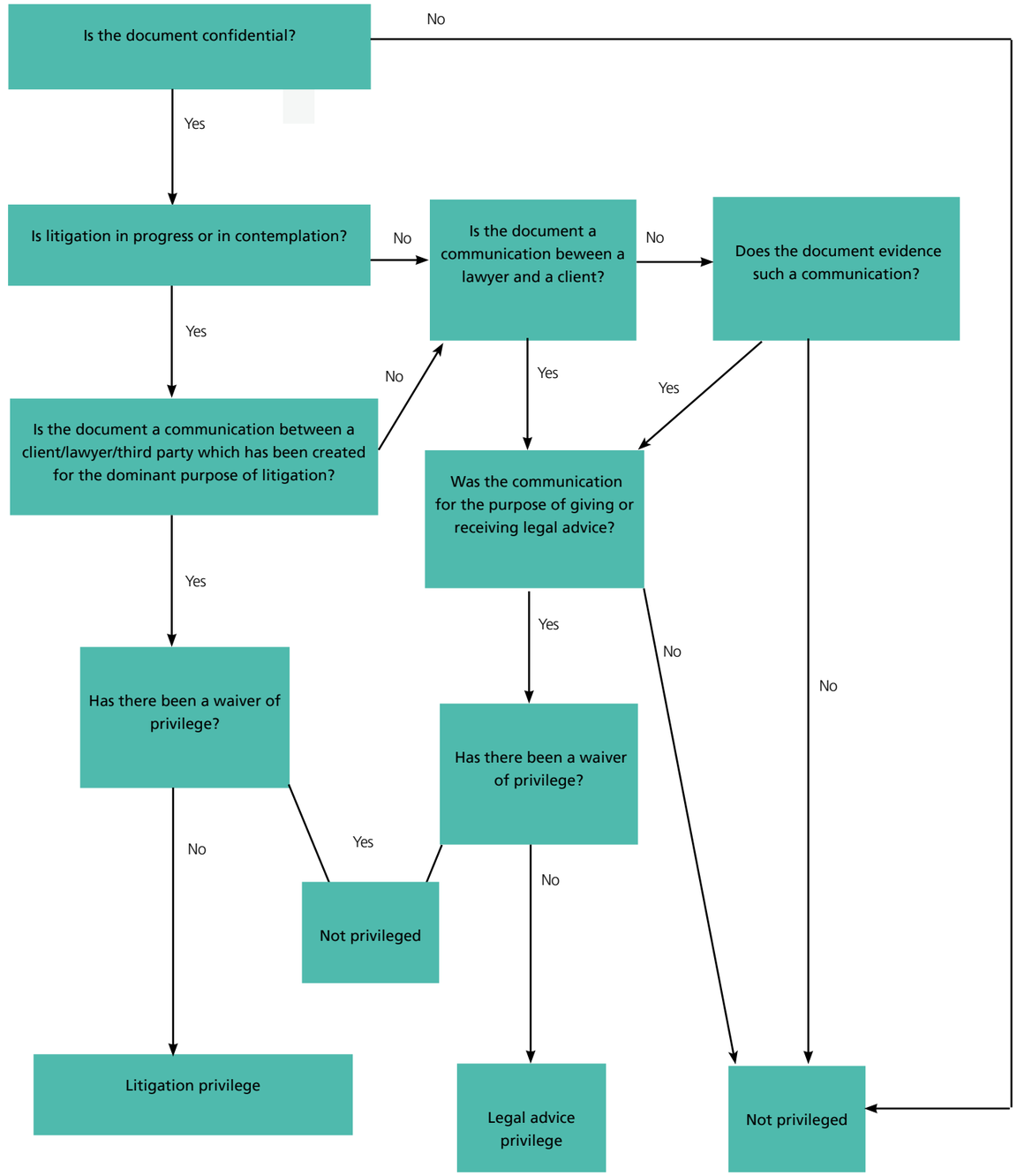
The above steps can be adopted when material is shared with third parties (such as auditors) as well as related entities such as parent/subsidiary companies.

Board Minutes

Communications between an external or in-house lawyer and the Board (ie the client) can be withheld from disclosure in subsequent proceedings provided the tests for litigation/advice privilege are met. However, if it is intended to record legal advice in the context of a board meeting then the following practical points should be borne in mind:

- A board minute which records or evidences the legal advice provided to the board will be privileged.
- Any part of the minute which records board members discussing the advice between themselves, records business decisions resulting from the advice or otherwise goes beyond simply stating the advice that has been received will not benefit from legal advice privilege.
- Legal advice contained in board minutes should not be disseminated widely or else there is a risk that confidentiality (and therefore privilege) will be lost.
- If it becomes necessary to disclose a board minute the privileged part of it can be redacted. It is therefore prudent to record legal advice in an easily redactable paragraph of the minutes. Alternatively, thought should be given to (a) providing the board with oral advice and referring to the fact of such oral advice in the board minutes or (b) setting out the advice in a separate document and cross-referring to that document in the board minutes. In this way any subsequent disclosure of the board minutes themselves will not in itself involve disclosure of the underlying advice.

Privilege Flowchart



This flowchart provides an overview of litigation and legal advice privilege under English law. Other forms of privilege may be available (eg without prejudice privilege). Specific advice should be sought in connection with individual matters.

Glossary of terms

The Language of Legal Privilege

Client – The client is the owner of the privilege. Where an individual instructs a lawyer they are the client. It is more difficult to identify the "client", however, where a corporate entity instructs a lawyer. Only those within the corporate entity who are authorised to instruct the lawyer and seek/receive legal advice are to be treated as the client.

Common Interest Privilege – Common interest privilege is a privilege in aid of anticipated or actual litigation in which several persons have a common interest. Common interest privilege arises when one party discloses privileged material to one or more parties who have a "common interest" in the subject matter of the material. It is a form of privilege which it parasitic on the existence of a primary privilege, in the sense that (a) it must be shown that the primary document being shared is privileged and (b) consideration is then given to whether the recipients of the privileged material share a requisite common interest.

The Dominant Purpose Test – In order to attract litigation privilege, the dominant purpose of the relevant communication or document must have been to obtain advice/information in connection with the litigation or to conduct or assist in the litigation. If a document has been produced for multiple purposes it is necessary to identify the dominant purpose. If there were two reasons for the creation of a document, and both reasons carried equal weight, then the "dominant purpose" test will not be met. The court will examine all circumstances to determine the subjective purpose of the person claiming privilege over relevant evidence.

Legal Advice Privilege – Covers communications passing between a client and his lawyers, provided they are confidential, written to or by the lawyer in his professional capacity, and for the purpose of providing legal advice or assistance to the client. The basic test is whether the communication or other document is made confidentially and for the purposes of legal advice.

Litigation Privilege – Covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation, when at the time of the communication in question, the following conditions are satisfied: (a) litigation is in progress or reasonably in contemplation (b) the communications are made with the sole or dominant purpose of conducting that anticipated litigation and (c) the litigation must be adversarial not investigative or inquisitorial. Litigation privilege is wider than legal advice privilege and covers communications with third parties.

Privilege – The law of privilege allows parties to maintain confidentiality in their legal communications. In particular, parties may rely on the law of privilege to refuse to produce documents or answer questions from third parties. Privilege divides into legal professional privilege (legal advice and litigation privilege), common interest and joint privilege, public interest immunity, privilege against self-incrimination and without prejudice privilege.

Privilege against self-incrimination – The right of an individual who is a party to non-criminal legal proceedings to refuse to answer any question or produce any document or thing if to do so would tend to expose that person or their spouse to proceedings for a criminal offence or recovery of a penalty.

Waiver of Privilege – The general rule is "once privileged, always privileged". This means that once a communication becomes privileged, the party to whom the privilege belongs may continue to claim privilege over that communication in different proceedings or investigations. This right continues indefinitely, unless the privilege is waived. Privilege can be waived by (a) loss of confidentiality (b) choosing to place privileged material before the court or (c) mistaken disclosure of privileged material. Where a party chooses to place a privileged document (or part of a document) before the court there is a risk that the party might be forced to disclose the whole document or other connected privileged documents.

Without Prejudice Privilege – Operates to exclude evidence of statements, whether orally or in writing, made in a genuine attempt to settle an existing dispute from being put before the court.

For further information on this subject please contact:

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