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Privilege: What you need to know now

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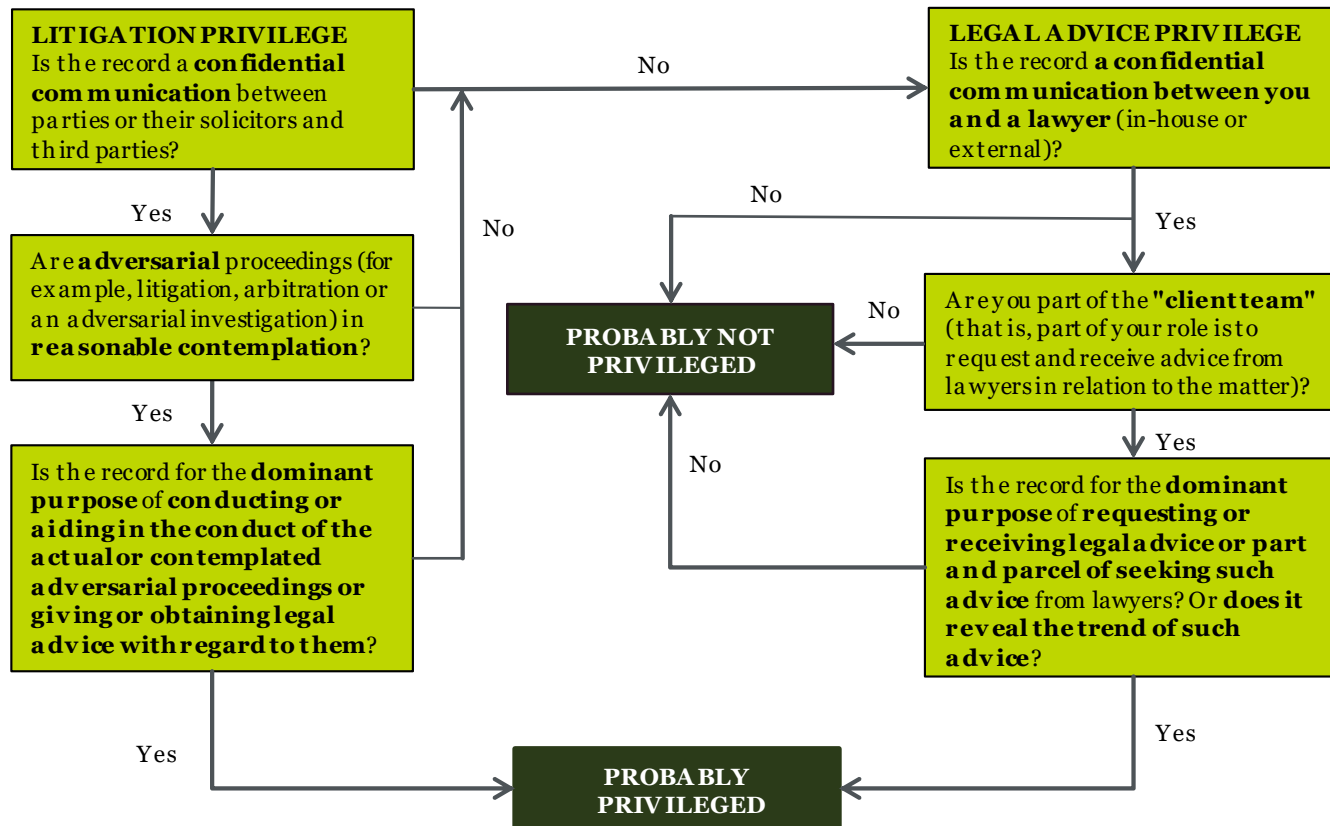
Agenda

- This time last year...
- Legal advice privilege
- Litigation privilege
- General considerations
- Practical tips

Previously, in *The Law of Privilege*...

- Legal advice privilege
 - Questions about the narrow definition of client
- Litigation privilege
 - On the facts, investigations *can* amount to adversarial proceedings
 - Reasonable contemplation doesn't prohibit further investigation
 - Dominant purpose still posing a challenge

The basics



Legal Advice Privilege

Legal advice privilege: the building blocks

- Legal advice privilege protects
 - Confidential communications
 - Between client and lawyer
 - Which have come into existence for the dominant purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context

Confidential communications

Confidential

- Disclosing information contained in a document does not automatically lead to loss of confidentiality in the document itself (*SL Claimants v Tesco plc, 2019 High Court*)
- Disclosing the nature of instructions does not automatically lead to loss of confidentiality in the documents containing those instructions (*Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd, 2020 Court of Appeal*)

Communications

- Documents and communications which would, or might realistically, disclose legal advice

Who is the **client**?

(1) A narrow approach

- Approach from the 2003 Court of Appeal decision in *Three Rivers No 5*
 - Only those persons made responsible by a company for engaging with lawyers
 - Other employees are effectively to be treated as third parties
 - Documents created by these "third party" employees are NOT privileged, even if created for the purpose of obtaining advice from a lawyer

Who is the **client**?

(2) Recent Court of Appeal criticism

- *Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Limited* (2018 Court of Appeal)
 - The "narrow" approach prejudices large corporations
 - English law "out of step with the international common law"
- *Civil Aviation Authority v R (on the application of Jet2.com Ltd)* (2020 Court of Appeal)
 - "like the constitution of the court in *Eurasian*, on the basis of both principle and practical application, I respectfully doubt both the analysis and conclusion of this court in *Three Rivers (No 5)* on this issue; and, had it been in this court's power, I too would be disinclined to follow it."
- This issue is ripe for a decision of the Supreme Court

What is legal advice?

Two limb test (*Jet2*)

- **Legal context** refers to the purpose of the retainer/instructions
 - Lawyers asked "to put on legal spectacles"
 - Legal context alone doesn't avoid an analysis of the document itself
- **Legal advice** extends to the continuum of communications
 - Advice as to what should prudently and sensibly be done in the relevant legal context
 - Documents forming part of a continuum of communications, the object of which is keeping parties informed so that advice may be sought and given as required
 - Documents disclosing or likely to disclose the nature and content of the legal advice sought and obtained

What is the **dominant purpose**?

Breaking news!

- *Jet2* (Court of Appeal 2020)
- Multi-addressee emails and lawyer/non-lawyer communications
 - Review as bilateral communications
 - Analyse the lawyer communication(s) first
 - When considering the non-lawyer communication(s), consider what is the dominant purpose of the email? Failing that, what does the communication reveal about legal advice?
 - Review emails and attachments separately
 - Applies to meetings as well as emails

Litigation Privilege

Litigation privilege: the building blocks

- Lord Carswell in *Three Rivers (No. 6)* (House of Lords 2004)
 - **Confidential communications** between parties or their solicitors and third parties for purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when following conditions are satisfied:
 - litigation must be **adversarial**, not investigative or inquisitorial
 - litigation must be **in progress or in contemplation**
 - communications must have been made for the sole or **dominant purpose** of conducting that litigation

What are **adversarial** proceedings?

- *Tesco v OFT* (CAT 2012) / *Re L (A Minor)* (House of Lords 1997)
- *SFO v ENRC* (Court of Appeal 2018)
 - Not every SFO manifestation of concern would properly be regarded as adversarial litigation
 - **BUT** on the facts, the SFO investigation was sufficiently adversarial

When are proceedings in reasonable contemplation?

- *SFO v ENRC*
 - ENRC was "*aware of circumstances which rendered litigation between itself and the SFO a real likelihood rather than a mere possibility*"
- A very fact-specific analysis
 - When are lawyers instructed?
 - What were those instructions?
 - What did lawyers advise?
 - What did the authorities say?

What is the **dominant** purpose?

- *SFO v ENRC*
 - Settling or avoiding proceedings does not prevent LITP applying
 - Preparing documents with an informal intention to share them does not "automatically deprive" documents of LITP
 - Information gathering and investigation is necessary to defend proceedings

"It is, however, obviously in the public interest that companies should be prepared to investigate allegations from whistle blowers or investigative journalists, prior to going to a prosecutor such as the SFO, without losing the benefit of legal professional privilege for the work product and consequences of their investigation."

[¶116, *SFO v ENRC*, CA, 2018]

What is the **dominant purpose**?

Not so fast! After *SFO v ENRC*:

- Commercial discussions about settlement may not attract litigation privilege
- Some challenging recent decisions
 - *Sotheby's v Mark Weiss Ltd* (High Court, November 2018)
"I do not read the ENRC case as deciding that whenever litigation is the "inevitable" consequence of taking a particular commercial decision, the dominant purpose of documents produced for the making of that decision is necessarily their use in the contemplated litigation."
 - *WH Holding Ltd v E2O Stadium LLP* (High Court, November 2018)
"It has always been recognised that privilege is an inroad into the principle that a court should be able to decide disputes with the aid of all relevant material."
- Practically speaking...
 - Dominant purpose remains a challenge; analyse carefully
 - Interweave legal advice?
 - Commercial discussions orally only?

Some general considerations

Who can assert the right to privilege?

- The beneficiary of the right can assert it (*HML PM Ltd v Canary Riverside Estate Management Ltd*, High Court 2019)
- Where the client ceases to exist
- Company v Shareholder:
 - General rule: a shareholder is entitled to disclosure
 - Exception: where the advice relates to actual or contemplated litigation between a shareholder and the company
 - *Sharp and others v Blank and others* (High Court 2015)

How can privilege be lost?

- Waiver – voluntary; collateral; involuntary
- Must retain confidentiality
 - Legal advice can continue to be privileged if it is disseminated BUT advice must remain confidential
- When privilege can be overridden

Practical tips in respect of investigations

Practical tips and key takeaways

- Think carefully at the outset
 - Identify employees in the "green zone" (clients) and the "danger zone" (outside the client group)
 - Create "rules of the road" for lawyers, clients, and third parties
 - Raise queries when they arise
 - Continue to monitor throughout
- Record when litigation is in contemplation
- If privilege doesn't apply, or if there is any doubt:
 - Try not to create unhelpful documents
 - Draft carefully, and consider the third party reader
 - Avoid opinions, impressions, judgments or speculation
 - Stay neutral and factual
 - Note areas of uncertainty so that you can explain why your position has changed if necessary
- Keep privileged documents separately and mark them clearly
- Limit circulation of privileged documents to preserve confidentiality

Key contacts



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