

NORTHERN IRELAND

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1. DEFINITION - PRESENTATION

Legal professional privilege is a right entitling a client to refuse to disclose to third parties certain discussions and written communications with his legal advisers. It is an absolute right - once it has been established, it cannot be overridden. Privilege encourages clients to disclose all relevant facts to their lawyer, thus enabling the provision of informed and comprehensive advice.

Legal professional privilege takes two forms:

- a) *Legal Advice Privilege* attaches to all communications passing between a solicitor and their client within the context of the solicitor/client relationship, and which have been created for the dominant purpose of giving or receiving legal advice, whether or not in the context of litigation. To attract legal advice privilege there must be 'a relationship of confidence between the lawyer and client'.¹

Legal advice privilege applies only to legal advice, although 'legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context'.² There cannot be legal advice without a 'relevant legal context' in which the advice is given. Legal advice can include advice to a client about the presentation of his position.³

It is important to note however that there are certain exceptions to legal advice privilege. A notable exception is that legal advice privilege cannot be claimed in situations where the communications between the lawyer and their client are in furtherance of crime or fraud.

- b) *Litigation Privilege* protects confidential communications between a lawyer and his client and/or a third party or between a client and third party, provided that such communications have been created for the dominant purpose of actual or pending litigation. Communications with witnesses or experts (as well as documents generated by them) are therefore protected by litigation privilege if made for the dominant purpose of actual or pending litigation.

As the law currently stands, three conditions must be made out before litigation privilege will apply:

- (i) the litigation must be in progress or in contemplation;

¹ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48: Lord Scott, at para 24.

² 'Legal Professional Privilege and *Three Rivers* (No 6): Part 3 - Conclusions' by Charles Prest, Fam LJ 36 (958).

³ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48: Lord Scott, at para 37.

(ii) the communications must have been made for the sole or dominant purpose of conducting that litigation; and

(iii) the litigation must be adversarial, not investigative or inquisitorial.⁴

2. SOURCES

Legal professional privilege (both legal advice privilege and litigation privilege) is derived from common law.

It has been argued that recent legislation and case law have eroded the availability of legal professional privilege with the likely effect that clients will be less willing to disclose information to their lawyers, and lawyers will be increasingly prepared to report clients when they suspect that their client is involved in criminal conduct.

2.1 Relevant Statutes

Proceeds of Crime Act 2002 (POCA): This Act imposed an objective test on those within the “regulated sector”, defined in the Money Laundering Regulations 2003, so that members of that sector have to report to the authorities not only where they know or suspect money laundering to be taking place but also where they have reasonable grounds for knowing or suspecting. The “regulated sector” includes legal professionals in private practice. In addition, POCA expanded the scope of “money laundering” offences beyond drug trafficking, funds destined for terrorism and serious crime to cover all criminal conduct with no lower limit.

Section 328 of POCA provides that: “*A person commits an offence if he enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property by or on behalf of another person*”.⁵

By virtue of section 328, solicitors felt under a duty to report possible money laundering to one of several designated bodies, including the National Crime Information Service (NCIS), or face the risk of prosecution and imprisonment. It was thought that if a legal advisor suspected that any transactions involved criminal property, they should give notice to NCIS under section 338 of the Act and could not perform any other act until they received the consent of NCIS.⁶ Section 338(2) of the Act provides that a person does not commit an offence if such notice is given.

Sections 333 and 342 of POCA provide for offences in relation to “tipping off” and to prejudicing an investigation.

⁴ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48: Lord Carswell, at para 102.

⁵ Section 328(1) of Proceeds of Crime Act 2002.

⁶ Or acted under deemed consent as provided for by s.335(4) or (5) of Proceeds of Crime Act 2002.

2.2 Relevant Case Law

P v. P (Ancillary Relief Proceeds of Crime) [2003]:⁷ This case involved solicitors acting in ancillary relief proceedings who became concerned that part of the matrimonial assets might be criminal property and, that if they continued to act for their client, they would commit an offence contrary to section 328 of POCA. They sought guidance from the Court as to the circumstances in which they could continue to act and whether, having given notice to NCIS, they could inform others of the fact that notification had been made.

Dame Butler-Sloss held that section 328 of POCA did not prevent a legal advisor from taking instructions, but once the legal advisor's suspicions arose, they had to notify NCIS and could perform no further work for the client until they had actual or deemed consent. She was of the opinion that an advisor could inform both the client and the other side that an "authorised disclosure" had been made, provided it was not made to further a criminal purpose, since sections 333(3) and 342(4) afforded protection in respect of communications connected with the giving of legal advice or in legal proceedings.

Bowmen v. Fels [2005]:⁸ This case brought about a different interpretation of section 328 of POCA. The case arose out of a dispute about the beneficial ownership of residential property. The Plaintiff was claiming a share in a property that was registered to her former partner, the Defendant. As a result of the disclosure process in those proceedings, the Plaintiff's solicitors became suspicious that the Defendant had fraudulently included the cost of works carried out at the property within his business accounts and VAT returns.

The Plaintiff's solicitors ceased work on the case after they notified NCIS and requested consent to continue acting. Due to the imminent trial date, the Plaintiff's solicitors applied *ex parte* for an adjournment on the basis that consent from NCIS would not be forthcoming before the hearing. The trial judge granted the adjournment. The Defendant's solicitors appealed this decision. The case was transferred to Judge Cowell who did not accept Dame Butler-Sloss's interpretation of section 328. He ordered that the adjournment be discharged and ruled that the Plaintiff's solicitors should have told the Defendant's solicitors why an adjournment was sought. This decision gave rise to an Appeal.

⁷ *P v. P (Ancillary Relief Proceeds of Crime)* [2003] EWHC Fam 2260.

⁸ *Bowmen v. Fels* [2005] EWCA Civ 226.

The Court of Appeal dismissed the Appeal, concluding that the proper interpretation of section 328 is that it is “*not intended to cover or affect the ordinary conduct of litigation by legal professionals*”.⁹

The Court held that, even if mistaken on this point, there was still the question of whether Parliament had, without using clearer language to this effect, intended a) to override the existing rules in regard to legal professional privilege; or b) to require that a lawyer is in breach of his previously well-established duty to the Court in relation to revealing to a third party documents made available through the disclosure process. The Court of Appeal was firmly of the view that section 328 was not to be interpreted in that way.¹⁰

Three Rivers (No. 5) [2003]¹¹ and Three Rivers (No. 6) [2004]¹²
See section 4 below

Re McE [2009]:¹³ This case was an appeal from the Court of Appeal in Northern Ireland-*Re C*¹⁴ and was centred around the question of whether or not the appellants had a right to know whether their consultations with their Solicitors were being recorded. The Police refused to tell them if this was the case and the appellants judicially reviewed the refusal of the Police to do so. The divisional Court held that the RIPA¹⁵ applied to such consultations but that such directed surveillance, in the absence of an enhanced authorising regime such as that prescribed for intrusive surveillance, could not be justified under article 8.2 of the European Convention on Human Rights.

The majority of the House of Lords expressed the view that it would be permissible in certain circumstances to deliberately acquire privileged material as part of a covert investigation.

After the decision in *Re McE* the Regulation of Investigatory Powers (Extension of Authorisation Provisions: Legal Consultations) Order 2010 was introduced on 25 February 2010. This stipulates that any direct surveillance of a legal consultation at a Police Station is to be treated as intrusive surveillance and as such requires the required authorisation before it is permitted. Where covert surveillance is likely to acquire knowledge that is subject to legal privilege the authorising officer must be satisfied that the circumstances are such that there are “exceptional and compelling” reasons that make it necessary. (eg. Matters that are an interest of national security.)

⁹ *Bowmen v. Fels* [2005] EWCA Civ 226: Brooke LJ at para 83.

¹⁰ Greens Civil Practice Bulletin, Issue 62, April 2005.

¹¹ *Three Rivers District Council and Others v. Governor and Company of the Bank of England* (No 5) [2003] EWCA Civ 474.

¹² *Three Rivers District Council & Others v. Governor and Company of the Bank of England* (No 6) [2004] UKHL 48.

¹³ *In re McE (Appellant) (Northern Ireland) In re M (Appellant) (Northern Ireland) In re C (AP) and another (AP) (Appellants) (Northern Ireland)* [2009] UKHL 15

¹⁴ *Re C* [2008] NI 287

¹⁵ *Regulation of Investigatory Powers Act 2000*

The surveillance must be reasonably regarded as being likely to yield intelligence to counter the threat and must be proportionate to the redress that is sought in relation to the threat itself.¹⁶ See *RA's Application for Judicial Review [2010]*¹⁷

3. SCOPE / LIMITS

3.1 General observations

Once established, legal professional privilege (whether legal advice privilege or litigation privilege) creates an absolute right which, provided the litigant still has an interest in continuing to assert the privilege¹⁸, cannot be overridden by some supposedly greater public interest.

The client can however elect to waive the privilege, and his solicitor or counsel in pending proceedings has ostensible authority to do so.¹⁹ Disclosing a privileged document to another party for unrestricted use in the litigation is a waiver of privilege in that litigation, unless the disclosure was procured by fraud or mistake.²⁰ Using the document in open court waives privilege in the whole of it.²¹ Sending the document to another person for a purpose unconnected with the litigation does not waive privilege.²²

A witness should not therefore disclose evidence that is the subject of legal professional privilege unless the consent of the person entitled to the privilege has been given.²³

3.2 Between lawyers

Communications between lawyers (and their clients) expressly or impliedly made “*without prejudice*” are privileged, e.g. communications made to explore or suggest a compromise of matters in dispute in pending or contemplated litigation.

The use or failure to use the words “without prejudice” is not conclusive in any way. An offer of settlement is admissible in Court if it is expressed to be ‘open’. A gratuitous admission in pre-action correspondence not related to any offer of settlement and not marked “without prejudice” is not privileged.

In some cases the Court will, in the interests of justice, revert to some without prejudice material. Examples of exceptions to the “without prejudice” rule include the

¹⁷ *RA's Application for Judicial Review [2010]* NIQB 99

¹⁸ *S County Council v. B* [2000] Fam 76: Charles J at 182, referring to *R v. Derby Magistrates Court ex parte B* [1996] 1 FLR 513.

¹⁹ *Great Atlantic v. Home Insurance* [1981] 1 WLR 529, at 539-40.

²⁰ *A-G (Northern Territory) v. Maurice* [1986] 161 CLR 475 (HC of Aus).

²¹ *Great Atlantic v. Home Insurance* [1981] 1 WLR 529, at 539-40.

²² *Goldstone v. Williams* [1899] 1 Ch 47, at 52-3.

²³ *S County Council v. B* [2000] Fam 76 at 187 -188.

unambiguous impropriety exception which is centred around the desirability of the Courts not to cover up very clear wrongdoing. The recent case of *Oceanbulk Shipping & Trading SA v TMT Asia Limited & others*²⁴ created a new exception to the without prejudice rule. As a consequence of this case Courts will permit statements made in settlement negotiations to be taken into consideration when they assist in the interpretation of the settlement agreement itself or assist in ascertaining whether an agreement has in fact been reached between the parties.

3.3 Third parties

Communications between a lawyer and his client and/or a third party, or between a client and a third party are protected by litigation privilege if they have been created for the dominant purpose of actual or pending litigation (see section 1 (b) above). This includes communications with witnesses or experts, together with documents generated by them.

4. IN-HOUSE LAWYERS

Both in-house lawyers and lawyers in private practice are subject to the provisions of POCA. Lawyers in private practice are covered by the 2003 Money Laundering Regulations. In-house lawyers are not covered by these regulations unless their employer is in the “regulated sector”, e.g. banks, insurance companies, estate agents.

Two decisions which have important implications for legal professional privilege generally, and in-house lawyers in particular, are those of the Court of Appeal in *Three Rivers (No. 5)* [2003]²⁵ and the House of Lords in *Three Rivers (No. 6)* [2004].²⁶ Following the collapse of BCCI in 1991, the Bingham Inquiry (“the Inquiry”) was set up to investigate the supervisory role of the Bank of England (“the Bank”) prior to its collapse. The Bank set up an internal unit comprising three employees (“the BIU”) to obtain and co-ordinate the Bank’s relevant information to enable its external lawyers to advise on the presentation and preparation of its case before the Inquiry. Subsequently, a claim for misfeasance in public office was commenced against the Bank by Three Rivers DC and other investors.

The claimants sought discovery of communications passing between the BIU and other bank employees and its external lawyers in relation to the Inquiry. As the Inquiry did not constitute adversarial proceedings, the Bank did not claim litigation privilege over the documents, but did claim legal advice privilege in respect of all solicitor/client communications.

²⁴ *Oceanbulk Shipping & Trading SA v TMT Asia Limited & others* [2010] UKSC 44

²⁵ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474.

²⁶ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48.

In *Three Rivers (No. 5)*,²⁷ the Court examined the issue of who constituted a lawyer's client. The Court of Appeal adopted a very narrow view in this respect. "Client" was defined as the BIU, as these were the employees within the Bank charged with dealing with the Bank's external lawyers to give instructions and receive legal advice. Therefore, it followed that other employees of the Bank were third parties and documents prepared by those employees could not be protected by legal advice privilege.

Three Rivers (No. 6) dealt with the scope of legal advice. The judge at first instance held that the Bank was entitled to claim legal advice privilege only in respect of communications for the purpose of seeking or obtaining advice as to its legal rights and obligations. Privilege did not extend to communications regarding presentational matters to the Inquiry so as to be least likely to attract criticism. The Court of Appeal in *Three Rivers (No. 6)*²⁸ dismissed the Bank's appeal from this order and affirmed the decision of the lower court. It also held that litigation privilege would only be available when litigation existed or was contemplated. This was not necessarily the case simply because an inquiry was continuing.

The House of Lords overturned the ruling of the Court of Appeal on the scope of legal advice privilege in *Three Rivers (No. 6)*.²⁹ The Lords held unanimously that it was desirable as a matter of public policy that communications between clients and their lawyers for the purpose of obtaining legal advice should be privileged from discovery, notwithstanding that as a result cases might have to be decided in the absence of relevant probative material. The Lords held that "*legal advice*" extended to advice as to what should prudently and sensibly be done in a "*relevant legal context*".³⁰ This included the presentation of a case to an inquiry by someone whose conduct might be criticised by it. Accordingly, communications between the BIU and the Bank's lawyers regarding the presentation of its case to the inquiry were privileged.

However, the Bank only obtained permission to appeal the scope of legal advice, not the issue who constitutes a lawyer's client. We are, therefore, still in the dark as to the House of Lords' thinking on this issue.

²⁷ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474.

²⁸ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] EWCA Civ 218.

²⁹ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48.

³⁰ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48: Lord Scott of Foscote, at para 38.

The Court of Appeal's restrictive definition of "client" in *Three Rivers (No. 5)*³¹ is one which causes extreme difficulty. Communications between a lawyer and an organisation on a project tend to involve many people. Even if an in-house lawyer is the main point of contact, what happens if the managing director, commercial director, or finance director are also in communication with external lawyers from time to time? It depends on whether these directors fall within the definition of "client". Particular problems also arise for in-house lawyers, whereas communications between in-house lawyers and external lawyers will usually be privileged, communications between in-house lawyers and other members of staff may not be.

The recent decision of the European Court of Justice in *Azko v Commission*³² has further highlighted the problems that in-house counsel can encounter in relation to legal professional privilege. The Court held that in-house counsel have no right to legal professional privilege under EU Competition Law. Only external counsel who are not bound by a contract of employment with their client can benefit from legal professional privilege. This judgement makes it more difficult for companies to obtain advice from their in-house lawyer.

5. PERSPECTIVE

Legal professional privilege protects a person's right, in applicable circumstances, to withhold relevant evidence from a court. Privilege, therefore, deprives the courts and other parties of what might otherwise be relevant evidence. Such protection must be justified objectively. Conflicting public interests must be balanced.

Lord Carswell, the former Lord Chief Justice of Northern Ireland, stated in *Three Rivers (No. 6)* that: "*Determining the bounds of privilege involves finding the proper point of balance between two opposing imperatives, making the maximum relevant material available to the court of trial and avoiding unfairness to individuals by revealing confidential communications between their lawyers and themselves.*"³³

The decisions by the Court of Appeal in *Bowman v. Fels*³⁴ and the House of Lords in *Three Rivers (No. 6)*³⁵ have gone some way to restoring legal professional privilege to its previous breadth. However, the refusal of the House of Lords to consider the issue of who constitutes a lawyer's client in *Three Rivers (No. 6)* means that the Court of Appeal's restrictive approach remains the law.

³¹ *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474.

³² *Akzo v Commission C-550/07 P*

³³ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48: Lord Carswell, at para 86.

³⁴ *Bowmen v. Fels* [2005] EWCA Civ 226.

³⁵ *Three Rivers District Council & Others v. Governor and Company of the Bank of England (No 6)* [2004] UKHL 48.

Once privilege is established, there is no question of the court having discretion in the matter as to whether or not to allow its application. Thus, once established, the right of an individual to rely on legal professional privilege is absolute.

Recently however, the Supreme Court has, in what could lead to a landmark change to the principles surrounding legal professional privilege, granted Prudential PLC permission to appeal against a unanimous decision by the Court of Appeal that legal professional privilege does not apply to non-lawyers. In the Court of Appeal case,³⁶ Prudential argued that legal professional privilege should be extended to accountants on the grounds that an increasing number of companies were utilising them rather than lawyers for tax advice. In his judgement in the case Lord Justice Lloyd stated that the rules of privilege were “absolute” and went on to say “if it were to apply to members of other professions who give advice on points of law in the course of their professional activity, serious questions would arise as to its scope and application.” He went on to say that it was the job of Parliament to determine the scope and application of legal professional privilege. Perhaps in the future the scope of legal professional privilege will be reviewed by Parliament however for the time being legal professional privilege can only be claimed by lawyers.

³⁶ *Prudential v HM Inspector of Taxes* [2010] EWCA Civ 1094