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## 1. DEFINITION - PRESENTATION

Legal professional privilege is the ability to withhold disclosure of documentation or other communications even where such disclosure is sought as part of court or regulatory proceedings. There are two classes of legal professional privilege - litigation privilege and legal advice privilege. Both attach to confidential communications, whether oral or written (including emails, manuscript notes etc).

- **Litigation privilege:** attaches to communications which are made between the client and/or his lawyer and a third party and which are made for the dominant purpose of either obtaining or providing legal advice or collecting evidence for use in litigation in which the client is or may become a party. The litigation must either be proceeding or reasonably in prospect of litigation for privilege to attach – i.e. it must be “reasonably anticipated” or “actively contemplated” rather than just a worst case scenario.
- **Legal advice privilege:** attaches to communications which are made between the client and his lawyer and which are made for the dominant purpose of seeking or obtaining legal advice. Legal advice is not confined to advice just on the law but extends to include advice as to what should prudently and sensibly be done in the relevant legal context – e.g. whether it concerns the client’s private or public law rights, liabilities, obligations, or remedies which includes presentational and general commercial advice within a legal context.

The privilege belongs to the client, not to the solicitor, though the solicitor is under a duty to the client to assert it unless it is waived by the client. Traditionally, legal professional privilege has been seen as a rule of evidence. It is now also regarded a part of the right to privacy under the European Convention of Human Rights, art. 8<sup>1</sup> and part of European community law.<sup>2</sup>

## 1. SOURCES

### 2.1- Relevant statutes

None: the English law concept of privilege is based upon case law, not statute.

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<sup>1</sup> *Campbell v. United Kingdom* (1992) 15 EHRR 137.

<sup>2</sup> *AM and S Europe Ltd v. Commission of the European Communities* (case 155/79) [1983] QB 878 (see paragraph 3 below for details of case).

## 2.2- Relevant Case Law

The law relating to legal professional privilege underwent a thorough review in the now leading case of *Three Rivers District Council and others v. Governor and Company of the Bank of England (No 4)*.<sup>3</sup>

This case arose from the collapse of the bank, BCCI. In 1992, the government commissioned an independent inquiry, headed by Lord Bingham, to consider whether the supervision of the BCCI was adequate and whether action taken by the UK authorities was timely. The Bank of England, focus of the inquiry, set up an in-house team to deal with requests of information from Lord Bingham and his inquiry. This team, known as the Bingham Inquiry Unit (BIU) consisted of three employees of the Bank. The Bank also instructed the solicitors Freshfields Bruckhaus Deringer and counsel to advise on issues of disclosure and the preparation of information to be submitted to the inquiry. The three members of the BIU were allocated responsibility for liaising with Freshfields.

A group of BCCI's creditors issued proceedings against the Bank of England for failing to properly regulate BCCI.

In *Three Rivers (No 5)*, the claimants sought disclosure from the Bank of a large number of documents which were created by employees of the Bank which were communicated to either the BIU or the solicitors direct. The Bank did not claim litigation privilege in relation to the documents because the inquiry was not "adversarial" or litigious in nature. However, they claimed legal advice privilege for those internal Bank documents, arguing they were created for the dominant purpose of obtaining legal advice.

In addition in *Three Rivers (No 6)*, the claimants sought disclosure of advice given by Freshfields to the BIU concerning the presentation of the evidence to the Bingham Inquiry.

The Court of Appeal and House of Lords rulings in these cases has affected the legal position for privilege as will be seen throughout this paper.

## 3. SCOPE/LIMITS

### Client and Lawyer

Prior to *Three Rivers*, the principles of legal advice privilege had been set out in the case *Balabel v. Air India*<sup>4</sup>. Here the court held that legal advice was not to be defined narrowly as simply explaining the law to a client. Rather, it included advice as to what

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<sup>3</sup> Neutral citation [2004] UKHL 48; [2004] 2 WLR 1274.

<sup>4</sup> [1998] Ch 317.

should prudently and sensibly be done in the “relevant legal context”. Where a “relevant legal context” existed, all communications between lawyer and client were privileged so far as they were in a “continuum of communications”. In *Three Rivers (No 6)* Lord Scott of Foscote felt there were two questions to be asked when considering whether advice given was “legal advice”. First, did the advice sought relate to the rights, liabilities, obligations, or remedies of the client under private law or public law? Secondly, if so, did the occasion on which the communication took place and its purpose make it reasonable to expect that the privilege would apply? Lord Rodger of Earlsferry put the question a different way: is the lawyer being asked in his capacity as a lawyer to provide legal advice?

The Court of Appeal decision in *Three Rivers (No 5)* which the House of Lords did not overrule or comment upon, held that communications between the employees of the bank to the BIU were not privileged. Likewise, the communications between the employees and the solicitors were not privileged. Thus there was a departure from *Balabel* in so far as the concept of “client” must be more narrowly construed. The client comprises only those people tasked with liaising directly with the lawyers. It does not automatically include any other person, no matter how senior within the company. It was formerly assumed that employees of a company acted as agent for the client but this assumption now no longer stands. The practical consequence of this ruling is that corporate clients would be well advised to nominate the core “group” who will be the client when retaining a solicitor. This nominated group should be established from the outset – before instructing lawyers or receiving their advice. The group should be defined as flexibly as possible to avoid being too restrictive. This “client group” should prepare all documents for use in seeking advice under the retainer.

Whilst the term “client” remains somewhat ambiguous (the House of Lords explicitly declined to comment on this issue), the term “lawyer” is agreed. It includes both in-house counsel and external lawyers (in contrast to the EU position see below).

### **Legal Advice**

Lord Carswell in his judgment in *Three Rivers (No 5)* provided a concise summary of legal advice privilege<sup>5</sup>:

*“all communications between a solicitor and his client relating to a transaction in which the solicitor has been instructed for the purpose of obtaining legal advice will be privileged, notwithstanding that they do not contain advice on matters of law or construction, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of his client”.*

When considering the question of whether giving presentation advice can be privileged, the House of Lords in *Three Rivers (No 6)* reaffirmed *Balabel*, whilst overturning the Court of Appeal in this case, and held that such advice can be privileged. The Lords asserted that people should be able to consult their lawyers in confidence to achieve an orderly arrangement of their affairs, irrespective of the potential for litigation. It held that

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<sup>5</sup> At paragraph 111.

the threat of criticism by the Bingham Inquiry might have led to a public law action, and that this allowed the advice to fall within a “relevant legal context”.

Legal advice privilege applies therefore only to communications between the client and members of legal professional bodies, such as solicitors and barristers. This includes legally qualified in-house lawyers acting in their capacity as such (and not as executives). For example, it would cover a US corporation in-house legal team making use of direct access to UK barristers (without the involvement of UK solicitors). See section 3.1 below.

It does not, however, extend to say a compliance officer, even if that person regularly gives advice of a legal nature, unless he or she also has formal legal qualifications. Note should be taken of the fact that the ECJ has held in *AM & S Europe v. Commission of The European Communities*<sup>6</sup> that privilege does not protect communications with in-house lawyers where the company in question is being investigated for a suspected breach of Article 81 or Article 82 EC. The privilege exists irrespective of whether litigation is contemplated or pending.

Legal advice privilege embraces all documents generated for the purpose of giving or getting legal advice, not only letters to and from solicitors and instructions to and opinions of counsel, but also working papers and drafts. However, a client should be aware that any internal correspondence (including correspondence with insurers, reports prepared for insurers, board minutes, inter-company memoranda, reports on accidents at work etc) will not be privileged even though they are highly confidential and potentially damaging. Clients should not prepare such documents once litigation is pending without first taking legal advice.

### **Litigation Privilege**

Litigation privilege arises on the satisfaction of three conditions:

- When adversarial litigation is reasonably in prospect
- When documents or communications are prepared for the dominant purpose of:
  - giving or obtaining legal advice with regard to that litigation; or
  - conducting or aiding in the conduct of that litigation.
- When such documents are prepared by the client or his solicitor or by a third party for their use.

In *Southwark and Vauxhall Water Co v. Quick*,<sup>7</sup> the Court of Appeal held that, if litigation is reasonably in prospect, privilege attaches to documents brought into existence for the purpose of enabling lawyers to advise whether a claim should be made or resisted, whether or not a decision to instruct lawyers had been made at the time they were

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<sup>6</sup> (1983) QB 878

<sup>7</sup> (1878) 3 QBD 315.

brought into being, as long as such purpose was the dominant purpose behind creating the documents.

The question of “dominant purpose” has been discussed at length by the courts and was considered by the House of Lords in *Waugh v. British Railways Board*<sup>8</sup>. A widow claimed damages against British Railways following a fatal accident involving her husband. She sought disclosure of an accident report which had been prepared for both legal and safety reasons. The report enables the defendant to establish the cause of the accident and take remedial remedies but also to assess its liability and obtain legal advice in anticipation of the litigation. The test is whether the author was either to use the document to obtain legal advice regarding the litigation (or reasonable prospect of litigation at the time of the documents creation). In *Waugh*, the House of Lords, ranked the two purposes of the document to have equal weight. Therefore, there was no dominant purpose of conducting litigation and the report could be disclosed.

Seven years later in *Guinness Peat Properties v. Fitzroy Robinson Partnership*<sup>9</sup>, the court of appeal considered the question of whose purpose would be relevant in assessing the prevailing reason for creating a document. The court took an objective approach. This case concerned a letter written by a firm of architects to their insurers. The Court of Appeal, looking at it objectively, held that the dominant purpose of the letter was that it should be used by the insurers to obtain legal advice, despite the fact that the architects had merely intended to comply with their insurance policy. The document was held to be privileged.

The other issue referred to the courts is that of “prospective litigation”. The case of *United States of America v. Philip Morris Inc and Others*<sup>10</sup> has clarified and narrowed the circumstances in which litigation will be considered as “reasonably in prospect”. The US government sought to examine a lawyer who had acted for a UK tobacco company. The tobacco company claimed litigation privilege over communications between its lawyers and third parties on the ground that it had been under constant threat from smokers of litigation either against itself in the UK or in the US. In addition, the company had been under the constant threat of application for disclosure of its documents in litigation against its sister company in the US. The Court of Appeal held that a general apprehension of future litigation from a general class of litigants was not enough to attract privilege. In this instance although a greater than 50% chance of litigation is not required to pass this threshold, the test of a “real likelihood” had not been passed. Legal privilege will only apply when litigation against a client by a specific person or group of litigants is a real likelihood.

*Three Rivers* has upheld the position that litigation privilege can only arise when proceedings are adversarial in nature. Litigation privilege applies to proceedings in the high court, county court, industrial tribunal and arbitrations. The Bank of England in *Three Rivers* conceded that the inquiry was not adversarial; if it had been, then most of the Bank’s problems with regard to disclosure would have disappeared.

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<sup>8</sup> [1980] AC 521.

<sup>9</sup> [1987] 1 WLR 1027.

<sup>10</sup> [2004] EWCA Civ 330.

### 3.1- Between lawyers

Legal privilege can subsist between lawyers in the same firm, between lawyers acting for parties which have a common interest, and between in-house lawyers and external lawyers in firms instructed by them.

### 3.2- Third parties

The concept of common interest privilege was first defined by Lord Denning in *Buttes Gas and Oil Co v. Hammer* (No 3)<sup>11</sup> as applying to documents passing between persons who have a common interest in advancing proceedings brought or completed against another, or in defending proceedings brought or contemplated by another. An example would be the owners of adjoining houses complain of a nuisance which affects them both. Both parties take legal advice and documents are exchanged. However (for whatever reason) only one becomes a claimant in the nuisance action. The various documents will be privileged provided the parties had a common interest in advancing or defending the anticipated proceedings.

In order for common interest privilege to exist, two central points must be established:

- The common interest must exist at the time that documents were sent between the interested parties
- The documents which were provided at a time when there was a common interest will remain privileged even if the common interest later ceases to exist.

Over the years, however, the definition of common interest privilege has been extended to include non-contentious matters. Certain types of relationship have been recognised as normally attracting common interest privilege. These include:

- Insurers and the insured (*Guinness Peat v. Fitzroy Robinson*)
- Reinsurers and the insured (*Svenska v. Sun Alliance*)
- Agent and principal
- Parties who do or might use the same solicitor
- Parent companies and their subsidiaries (*Berkeley Administration Inc v. McClelland*)

Common Interest privilege is not often used, however following *Three Rivers* many believe greater reliance will be placed on it, particularly with corporate/commercial clients. Employees of companies can no longer rely on legal advice privilege.

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<sup>11</sup> [1981] QB 223.

However, they do have a common interest with the selected “client” employees sufficient to claim common interest privilege in communications passed on to him. This only helps retain privilege over documents in which privilege can be claimed in the hands of the sender. It does not assist in protecting the raw materials generated for the purpose of requesting legal advice. Following *Three Rivers* these documents are never privileged.

#### **4. IN-HOUSE LAWYERS**

See above. In-house lawyers are treated in all respects the same as any lawyers – their clients/employers enjoy the same rights of privilege in communication with them, subject to the same limits, as with external lawyers. The same is true of the communications of in-house counsel with external lawyers – when acting as lawyers instructing external counsel, they enjoy the same legal privilege as any other client; when acting for their client/employer against other parties the rules are the same as if they were external counsel.

The exception to this rule is in cases involving competition law at European level. Following *AM & S Europe v Commission*, professional privilege extends to advice which is connected to a client’s right of defence and secondly, where that advice emanated from an independent lawyer. However, in 2010, in the case of *Akzo Nobel*<sup>i</sup> the European Court of Justice held that in-house lawyers do not have the independence required to satisfy the requirements for what in England is professional privilege in a European Union context. It was held that due to the personal, functional, structural, and hierarchical integration of in-house lawyers within the companies that employ them, they do not enjoy a level of independence comparable to that of an external lawyer.

Therefore although in-house lawyers enjoy professional privilege under domestic law, they do not have the same rights under the European Union in a competition law context.

#### **5. PROSPECTIVE**

There is no suggestion that there is a need for statutory intervention in the field. Following the House of Lords’ decision in *Three Rivers* in 2004 the law has been sufficiently reviewed and updated such that no significant changes can be expected for some time, though no doubt minor refinements of the position as set out in that decision can be expected in the normal way that common law develops.

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<sup>i</sup> *AKZO NOBEL CHEMICALS LTD AND OTHERS V EUROPEAN COMMISSION* (C-550/07)