

Legal
Privilege

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LEGAL PRIVILEGE

Introduction

The concept of legal privilege provides that certain communications between a client and his solicitor are privileged and immune from subsequent disclosure to a third party. When legal privilege has been established neither the client nor the solicitor can for any reason be compelled to disclose details of this communication.

The rationale behind this principle is that “it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers.... thereby inducing the client to retain the solicitor and seek his advice and encourage(s)... full and frank disclosure of the relevant circumstances to the solicitor.”¹

Privilege over documents covers traditional paper communications such as letters, notes and memos of conversations and documents incorporating or reproducing legal advice. In addition, it also includes items such as e-mails, voicemails, computer databases and tape recordings.

Legal professional privilege will not exist however, in situations where communications exist in furtherance of conduct which is considered by the courts to be criminal, fraudulent or contrary to the interests of justice.

Categories of Legal Privilege

Two categories of privilege exist:

A. Litigation Privilege

This arises only after litigation or other adversarial proceedings have been commenced or are contemplated and it protects all documents produced for the sole or dominant purpose of the litigation in question. The extent of litigation privilege includes all communication between:-

¹ Grant –v- Downs (1976) 135 CLR 674

- (i) a solicitor and his client,
- (ii) a solicitor and his non professional agent, and
- (iii) a solicitor and a third party.

For litigation privilege to exist there must be a reasonable likelihood of litigation and a mere vague possibility that proceedings may arise in the future will not be sufficient. The communications must be made for the dominant purpose of advancing the prosecution or defence of the matter or the seeking or giving of legal advice in connection with it.

B. Legal Advice Privilege

Legal advice privilege protects communications between a solicitor, acting in his professional capacity and his client, provided that the communication is confidential and for the purposes of seeking or giving legal advice.

The key difference between litigation privilege and legal advice privilege is that correspondence with an independent third party is not covered by legal advice privilege.

The area of legal advice privilege has been reaffirmed recently in the English courts² and their findings should be taken into consideration for solicitors advising clients in this jurisdiction.

In a decision of the House of Lords it was held that privilege was not limited to advice about a client's legal rights and obligations but included all confidential communications relating to what should be done in any given legal context. This broad interpretation of legal advice privilege covers all communications between a solicitor and his client prepared in his role as a legal adviser.

Whilst this broad interpretation is obviously welcome for those attempting to assert privilege over documentation, it must be considered in conjunction with the English Court of Appeal's³ view on who constitutes "the client"⁴.

² Three Rivers District Council and Others –v- Governor and Company of the Bank of England [2004] UKHL 48

³ Three Rivers District Council and Others –v- Governor and Company of the Bank of England 2003 EWCA Civ 474

⁴ The issue of "Who is the Client" was not addressed in the decision of the House of Lords

The protection of legal advice privilege only applies to communications between a lawyer and his client. The Court of Appeal ruling provides that with communications between legal advisers and large organisation it cannot be assumed that all employees of the organisation will be considered to be the client for the purposes of legal advice privilege. Where communications pass between a solicitor and an employee who is not considered to be a client, then that documentation may not be subject to privilege. The ruling seems to limit the extent of who constitutes “the client” to certain specified persons who have most contact with their legal advisers and only correspondence with these people will qualify for legal advice privilege.

Summary

As a result of this decision it is now extremely important that organisations take steps to identify, in a situation where legal advice is being given, who within the company is to be the link with their solicitors and consequently will be regarded as the client for the purposes of legal advice privilege. If matters are of a sensitive nature then all communication between these individuals and other parties in the organisation should ideally be kept to a minimum as it is likely to fall outside the ambit of the protection of legal advice privilege.

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