

Privilege: An Update



Litigation Privilege: a brief definition

- Confidential
- Made for dominant purpose of civil or criminal litigation
- Relate to litigation which is pending, reasonably contemplated, or existing

Legal Advice Privilege: a brief definition

- Communication
- Between client and legal adviser
- For the dominant purpose of enabling the client to obtain, or the adviser to give legal advice
- Regardless of whether litigation was contemplated

SCHEDULE 2

Regulation 10

Investigation Powers

1.—(1) The competent authority may for any purpose related to inspecting or investigating statutory audit work give notice to any statutory auditor (“A”) requiring A to provide information specified in the notice.

(2) Information may be specified in a notice under sub-paragraph (1) only if it is information relating to the statutory audit of the annual accounts or the consolidated accounts of any audited person.

(3) The competent authority may give notice to any person mentioned in sub-paragraph (4) requiring that person to provide information relating to the statutory audit of the annual accounts or the consolidated accounts of any public interest entity.

(4) The persons to whom notice may be given under sub-paragraph (3) are—

- (a) any person involved in the activities of a statutory auditor (including any person to whom a statutory auditor has outsourced such activities),
- (b) any public interest entity,
- (c) any subsidiary or parent of a public interest entity or any other subsidiary of a company of which a public interest entity is a subsidiary,
- (d) any person otherwise having a connection to a statutory auditor carrying out the statutory audit of the annual accounts or consolidated accounts of a public interest entity.

(5) A notice under sub-paragraph (1) or (3) must be in writing and specify the purposes for which the information is required.

(6) A notice under sub-paragraph (1) or (3) may—

- (a) specify the time within which and the manner in which the person to whom it is given must comply with it,
- (b) require the creation of documents, or documents of a description, specified in the notice, and
- (c) require the provision of those documents to the competent authority.

(7) A requirement to provide information or create a document is a requirement to do so in a legible form.

(8) A notice under sub-paragraph (1) or (3) does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce—

- (a) in proceedings in the High Court on the grounds of legal professional privilege, or
- (b) in proceedings in the Court of Session on the grounds of confidentiality of communications.

(9) In sub-paragraph (8) “communications” means—

(8) A notice under sub-paragraph (1) or (3) does not require a person to provide any information or create any documents which the person would be entitled to refuse to provide or produce—

(a) in proceedings in the High Court on the grounds of legal professional privilege, or

(b) in proceedings in the Court of Session on the grounds of confidentiality of communications.

SFO v ENRC

[2018] EWCA Civ 2006

- Issue 1: Was the judge right to determine that, at no stage before all the documents had been created, criminal legal proceedings against ENRC or its subsidiaries or their employees were reasonably in contemplation?

- Issue 2: Was the judge right to determine that none of the documents were brought into existence for the dominant purpose of resisting contemplated criminal proceedings against ENRC or its subsidiaries or their employees?

- Issue 3: In the circumstances, which if any of the Category 1, 2 or 4 documents are protected by litigation privilege?

- Issues 4, 5 and 6 all concerned legal advice privilege, including the vexed question of whether there was a dominant purpose test.

HSE v Jukes

[2018] EWCA Crim 176

Litigation privilege applies:

- (i) litigation was in progress or reasonably in contemplation;
- (ii) the document was made or created with the or dominant purpose of conducting that litigation;
- and (iii) the litigation was adversarial, not investigatory or inquisitorial.

WH Holdings Ltd v E20 Stadium LLP

[2018] EWCA Civ 2652

- i) Litigation privilege is engaged when litigation is in reasonable contemplation.
- ii) Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.
- iii) Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.
- iv) Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.
- v) There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

CAA v R(Jet2.com Ltd)

[2020] EWCA Civ 35

Legal Advice Privilege: Dominant Purpose

- [95] I am unpersuaded that *Eurasian* [2019] 1 WLR 791 is correct to consider the limbs as fundamentally different with regard to purpose. In my view, there is no compelling rationale for differentiating between limbs of the privilege in this context.
- [96] I consider Morris J was correct to proceed on the basis that, for LAP to apply to a particular communication or document, the proponent of the privilege must show that the dominant purpose of that communication or document was to obtain or give legal advice.

LAP & Multi-Addressee Communications

1. The starting point is to identify the purpose of why an email is being sent: is it to obtain legal advice (including commercial advice through a lawyer's eyes), or is it for some other reason?
2. The concept of "continuum of communications" must be taken fully into account, which may mean that material is covered by LAP.
3. However, if the dominant purpose is to obtain commercial views of non-lawyers, then then it will not be privileged even if a subsidiary purpose is to obtain such views from a lawyer.
4. Documents and attachments should be considered on an item by item basis.

5. The response from the lawyer, if it contains legal advice, will almost certainly be privileged even if copied more widely.
6. Multi-addressee emails should be considered as separate communications between sender and each recipient
7. Helpful acid test: if the communication had been sent only to the lawyer, would it have been privileged?
8. Court dealt with records of meetings where both lawyers and non-lawyers were privileged. Court gave it short shrift: “the mere presence of a lawyer, perhaps only on the off-chance that his or her legal input might be required, is insufficient to render the whole meeting the subject of LAP”

A v B and Another

[2020] EWHC 1491 & [2020] EWHC 1492

Barrowfen Properties v Patel

[2020] EWHC 2536

FRC v Frasers Group Plc

[2020] EWHC 2707

