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PERSPECTIVES

PROTECTING SENSITIVE DOCUMENTS: THE USES AND LIMITS OF LEGAL PROFESSIONAL PRIVILEGE

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Legal professional privilege can be a powerful tool to protect sensitive documents from disclosure to an adversary in litigation or to an investigating regulatory authority, even where the documents are highly relevant to the issues in question. Parties need, however, always to be aware that privilege may be lost or indeed never apply to a document despite the involvement of lawyers in its creation.

As well as outlining the fundamentals of legal professional privilege, this article highlights some practicalities and potential pitfalls to avoid when dealing with potentially privileged documents.

In what circumstances will legal professional privilege apply?

There are two primary subcategories of legal professional privilege: legal advice privilege and litigation privilege. Common to both legal advice privilege and litigation privilege is a core requirement of confidentiality, but there are important differences in their scope and applicability. Legal advice privilege covers confidential communications between a client and its lawyer made for the dominant purpose of giving or obtaining legal advice.

Breaking this definition down, a key point to note is that legal advice privilege only applies to client-lawyer communications and does not

extend to communications with third parties. Furthermore, English courts have made clear that, for corporate entities, the term 'client' should be construed narrowly to mean only those employees or representatives who are authorised to seek and receive legal advice from the lawyer.

As a result, communications between a company's lawyers and its 'non-client' employees will generally constitute communications with third parties that are not protected by legal advice privilege. Although the term 'communication' is generally used in English privilege law, and is used in this article for consistency, it can include documents that are not actually communicated, such as a lawyer's working papers or a client's confidential internal documents which record legal advice received.

By contrast, litigation privilege extends more broadly to confidential communications between clients or their lawyers and third parties. The scope of its application is, however, limited to communications that are made for the purpose of obtaining information or advice in connection with litigation, provided three conditions are met. First, the litigation must be in progress or reasonably in contemplation, not merely a possibility. Second, the litigation must be adversarial, not merely investigative. This includes actual or contemplated civil proceedings in English courts as well as arbitrations, criminal proceedings and foreign litigation; but a more complex question can arise in regulatory investigations as to when (or if) the fact-finding phase transitions into an adversarial process. Third, the communication must

have been made for the sole or dominant purpose of conducting that litigation.

Finally, it is worth highlighting a 'secondary' category of privilege, namely common interest privilege, which relies on first establishing that legal advice privilege or litigation privilege applies. If so, common interest privilege may arise when a privileged communication is disclosed to a third party who (at the time of disclosure) has a common interest in the subject matter of the communication or in litigation for which the communication was produced.

For example, a common interest may arise between co-defendants to litigation or companies in the same corporate group. In such cases, it is generally advisable expressly to acknowledge the common interest at the time of sharing the document (and to do so in writing). Where common interest privilege applies, it may be asserted by either the disclosing or receiving party.

Some common issues and potential pitfalls

There can be a number of thorny issues to grapple with when considering whether any given document is, in fact, protected from disclosure by legal professional privilege.

In a non-litigation context, communications with third parties – including other professional advisers and non-client employees of a corporate entity – will not be privileged (unless there is a sound basis for common interest privilege). Great care, therefore, needs to be taken with sensitive third-party communications, which may be disclosable in legal proceedings. This can be a particularly tricky issue when, for example, in the course of conducting internal investigations, it is necessary to interview, or otherwise request information from, 'non-client' employees because such communications will not generally be protected by privilege. In these circumstances, it would be prudent to seek legal advice about how best to conduct and record any such investigation.

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Another common issue concerns the consequences of disclosing a privileged

communication to a third party. Doing so will generally constitute a waiver of privilege, but English law (unlike certain other common law jurisdictions) differentiates between a limited waiver (in favour of a defined recipient) and a general waiver (vis-à-vis the whole world).

As such, it is possible to share privileged communications with third parties without losing privilege as against the rest of the world, provided that the communications remain confidential in the hands of the recipient. How widely a communication can be further shared (e.g., within the recipient's organisation) without loss of privilege is a fact-sensitive question of degree: in general, it must always be remembered that, if a document ceases to be confidential, it will no longer be privileged.

In *Jinxin Inc v Aser Media Pte Limited and others* (2022), the English High Court recently considered the test for confidentiality in privilege law. The case concerned whether former executives in a company were entitled to claim privilege over certain personal and private documents and emails, stored on the company's systems, as against the company.

The judge concluded that confidentiality in such documents was not lost in favour of the company, including because a reasonable person would assume that, whereas the company could access data on its servers if required for monitoring or business purposes, the company would not be entitled to search the data for private information belonging to staff members with a view to using that information for any purpose whatsoever: "Circumstances in which a company permits its employees to use its servers for private purposes but retains a right to monitor them where necessary, do not lead to the conclusion that the company has completely free rein to do as it pleases with any private information that it may find." Therefore, it was a reasonable assumption "that the company's right to monitor and access data on its servers would not extend to locating and exploiting otherwise privileged material for the benefit of a person with an adverse interest to the owner of that privilege, even if that person was a majority shareholder of the company".

In reaching this decision, the judge emphasised that confidentiality is not a binary, either/or quality. Analysis is required in each case to determine the kinds of use that the person with whom information is shared is, or is not, entitled to make of the information.

As well as loss of confidentiality, privilege can also be lost through waiver. This may occur where a party voluntarily produces (and relies on) a document in legal proceedings, notwithstanding that it had a right to object to production on grounds of privilege. Doing so carries with it the risk of collateral waiver, whereby a party becomes obliged to produce a broader set of privileged documents relating to the same subject matter. The underlying principle for this

obligation is one of fairness: collateral waiver exists to prevent one party from 'cherry picking' certain documents to disclose and rely on, thereby giving a partial or misleading picture of the evidence.

The recent case of *Clements v Frisby* (2022) is a cautionary tale. The case concerned a claim to an interest in a fashion business. The claimant referred in his witness statement in the proceedings to delay by his lawyers in progressing his claim due to their doubts about the value of the fashion business target. The defendant argued that, because the claimant had deployed the advice to undermine the defendant's arguments about the claimant's inaction, this amounted to a waiver of privilege over: (i) legal advice about whether the target was valuable and worth pursuing; and (ii) any other privileged material relevant to why the lawyers took time to make progress with the claim.

The judge partly agreed with the defendant, concluding that the waiver extended to advice about whether the target was valuable and worth pursuing. However, fairness in this case did not require the waiver to extend more broadly (as the defendant argued) to all advice that the claimant should not pursue the claim for whatever reason.

Finally, it is worth noting that the question of waiver may be particularly acute in matters with an international element. In English proceedings, courts will apply English rules to determine whether a document is privileged and can be withheld from disclosure. One consequence of this is that documents which are privileged in another jurisdiction, may nonetheless need to be disclosed in English proceedings. For example, some other common law jurisdictions – including the US – do not apply the same narrow definition of 'client' as in English legal advice privilege, meaning privilege may attach to a wider category of documents.

This leads to the question of whether disclosure in one jurisdiction will have the effect of inadvertently waiving privilege in other jurisdictions. This potential for divergence is an issue with which courts have only recently begun to grapple, and may increasingly play out in the context of large-scale investigations and enforcement action, and consequential litigation, in multiple jurisdictions. CD

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