Keeping your confidences

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Helen McGhee considers the legal rights which allow individuals and companies to resist the disclosure of confidential evidence, and the limitations surrounding legal privilege

Key Points

What is the issue?

Legal professional privilege (in the form of either legal advice privilege or litigation privilege) allows a party to withhold evidence from a third party or the court.

What does it mean for me?

Both legal advice privilege and litigation privilege carry a dominant purpose test. If documents are produced for a mixed purpose, this could undermine the privilege position. The burden of proof is on the person claiming privilege.

What can I take away?

For a document to have been created for the dominant purpose of litigation, the litigation must be existing, pending or reasonably contemplated. Great care must be taken when materials are circulated to a broader audience who may subsequently add a subsidiary purpose and thus compromise legal advice privilege.

In the context of tax disputes, privilege is commonly understood as referring to the fundamental legal right which allows individuals and companies to resist disclosure of confidential evidence. Under English law, there are strict rules on when privilege may apply and this article explores two distinct categories of legal professional privilege: legal advice privilege and litigation privilege.

Another form of commonly encountered privilege is ‘without prejudice’ privilege, which operates to prevent statements made in a genuine attempt to settle an existing dispute from being put before the court as evidence of an admission against the interest of the party making them.

Legal advice privilege

Legal advice privilege only applies to communications between a lawyer and client which have come into existence for the dominant purpose of giving or receiving legal advice. Legal advice privilege is narrower in ambit than litigation privilege but is claimed more commonly. The communications remain privileged at all times unless privilege is waived by the client or inadvertently lost; for example, when confidential information is unintentionally disclosed.

The underlying purpose of legal advice privilege is to ensure that the lawyer’s professional skill and judgment is given freely and is not subject to any constraints. The risk areas in the context of legal advice privilege lie in:

- addressing sensitive material to a wide group of advisers who subsequently comment on the advice; and
- advice given which has a mixed purpose.

Litigation privilege

Litigation privilege applies to confidential communications between a lawyer and the client or a third party created for the dominant purpose of litigation, which is existing, pending or reasonably contemplated.

The burden of proof in establishing privilege is on the party claiming it. Litigation privilege exists in order that a potential litigant is free to seek evidence without being obliged to disclose their research results.

Recent case law

Two recent pertinent cases address how privilege can be maintained and also so easily lost. These are both worth examining.

Frasers Group: protection by litigation privilege?

The first case is FRC v Frasers Group Plc (formerly Sports Direct International Plc) [2020] EWHC 2607 (Ch). The background to this case was the investigation by the Financial Reporting Council (FRC) into Grant Thornton's 2015/16 audit of the financial statements of Sports Direct International Plc (SDI), controlled by UK billionaire Mike Ashley.

In 2014, Sportsdirect.com Retail Ltd (SDR), SDI's subsidiary, received an email from the French tax authorities asking SDR, amongst other things, whether it had paid English or French VAT. The email was interpreted as being in contemplation of a potential enquiry and possible ensuing litigation, and SDR instructed SDI's solicitors and accountants.

As instructed, SDR's professional advisers prepared a series of reports on:

1. the lodging of protective claims with HMRC for repayment of overpaid VAT, in the event that SDR should have been paying VAT in a member state other than the UK;
2. how best to defend SDR's proposed tax structure; and
3. how to improve the arrangements so as to make them more robust.

The issue for the judge to consider was whether these reports in the hands of SDI were protected by litigation privilege and therefore not required to be disclosed to the FRC. The High Court held that the advice was not protected by privilege as it was ostensibly not prepared for the sole or dominant purpose of litigation.

In his judgment, Lord Justice Nugee made it clear that the 'sole or dominant purpose test' for litigation privilege was an extremely high hurdle which could not be overcome in this context simply because, at the time the reports were produced, SDR expected there to be litigation with respect to its VAT arrangements. He said:

> 'A taxpayer who takes advice as to how to structure his affairs does not do so for litigation purposes. He does so because he wants to achieve a particular result for tax purposes… Even if it is contemplated that the particular structure will be likely to be attacked by the relevant tax authorities and that there will be litigation, the advice as to how to implement the new structure … is not primarily advice as to the conduct of the future possible litigation. It is primarily advice as to how to pay less tax.'

Advice about a potential course of action may not be covered by litigation privilege, even if that course of action is expected to lead to litigation. However, where the document or advice in question is legal advice given by lawyers, legal advice privilege (rather than litigation privilege) is likely to apply.

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The Supreme Court in R (Prudential plc) v Special Commissioner of Income Tax [2013] UKSC 1 confirmed that legal advice privilege does not apply to advice from other professionals. Until Parliament decides otherwise, it continues to be the case that legal advice privilege can only protect legal advice given by members of the legal profession to their clients. The same advice emanating from accountants or other non-lawyers is still vulnerable to disclosure.

Civil Aviation Authority: protection by legal advice privilege?

The judgment in the case of Civil Aviation Authority v R (on the application of Jet2.com Ltd) [2020] EWCA Civ 35 is essential reading for companies relying on

the advice of in-house legal teams.

In this case, Jet2 brought judicial review proceedings against the Civil Aviation Authority (CAA) in relation to the CAA's publication of material critical of Jet2's lack of participation in a consumer complaint scheme. Jet2 argued that the CAA made the materials public for an improper purpose and applied for disclosure of all relevant drafts and discussions relating to the disclosure. The CAA asserted that such were protected by legal advice privilege.

The Court of Appeal concluded that drafts of the materials should be disclosed unless specifically drafted by lawyers for the 'dominant purpose' of obtaining legal advice. Documents circulated to or by in-house lawyers, or the mere presence of a lawyer at a meeting, did not automatically satisfy this dominant purpose test.

Where the dominant purpose is to obtain or give advice, even if in a commercial context, then this should satisfy the dominant purpose test. Communications addressed to lots of different recipients need to be considered very carefully so as not to dilute the legal advice and render it merely a subsidiary purpose. Where external lawyers are appointed, legal advice privilege will clearly apply.

Points to take away

In order for litigation privilege to apply, the relevant document must have been created for the dominant purpose of obtaining advice in relation to litigation that is reasonably in contemplation.

This does not include litigation that may possibly arise in future as a result of a particular course of action.

It is always difficult where a communication has a mixed commercial and litigation purpose. A safe way to protect such communication is to ensure that it is also covered by legal advice privilege.

Legal advice privilege is also subject to the dominant purpose test. Where not inextricably intermingled, it may be possible to separate out the component parts of some advice but if there are commercial as well as legal issues being discussed great care is recommended.