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Briefing Note

Demystifying Legal Professional Privilege

A brief overview to assist with seeing through the legal jargon

Today, despite how it may often seem, lawyers endeavour to explain legal advice and options to clients in as simple a way as possible in order that clients do not feel excluded from a legal process that is, ultimately, theirs. However, there are occasions when this is not possible as only the legal terminology will suffice.

One such situation is when it comes to legal professional privilege; whilst most clients do not necessarily need to understand the complexities of legal professional privilege, experience suggests that in order for a client to feel comfortable they should feel included in all aspects of litigation. Implicit in this is a need for lawyers to explain what legal professional privilege is and how it can impact upon litigation.

First, the easy bit: Legal professional privilege enables a party to withhold written or oral evidence that may otherwise be disclosable to a third party or the court. Once privilege has been established, an absolute right to withhold the document arises and if claimed, the court cannot draw adverse inferences from the refusal to disclose.

There are two types of legal professional privilege: **legal advice privilege** and **litigation privilege**.

Legal advice privilege protects those confidential communications between the client and its lawyers which pertain to giving or receiving legal advice. The purpose of this is to enable the client to have unrestricted confidence in its lawyer.

It is worth noting that the courts have held that the definition of 'client' is quite restrictive. For example, if the client is a company, 'the client' will be deemed to consist of only those within the company's structure who are authorised to seek or receive legal advice. Legal advice privilege will only apply to the client as defined in the engagement letter therefore, if an

instruction is given to a lawyer on behalf of a company, it is very important to have this in mind when the terms of the engagement letter/retainer are finalised. Nevertheless, the court has held that where the recipient (the client) of legal advice privilege shares it with its board of directors, privilege is not lost.

The general rule is that where documents are prepared by a lawyer in the course of giving legal advice to their client, they will generally be seen as part of the lawyer's preparatory work for the client and will therefore be covered by privilege.

Litigation privilege protects communications between lawyers or their client and any third party which relate to obtaining evidence/information in connection with existing or reasonably contemplated litigation. It is noteworthy that to attract litigation privilege, the communication must have been made for the dominant purpose of litigation which is pending, is reasonably contemplated or is already on-foot. The courts of England and Wales have also held that the litigation must be adversarial in nature and not merely investigative. It can be presumed that the Royal Court of Guernsey would decide similarly.

There may be instances in litigation where a lawyer advises their client that a pertinent document should be disclosed to a third party whose interests are aligned with the client. In light of the above, the client may be concerned about whether this will result in the document losing privilege. One way to avoid waiving the privilege would be via the assertion of what is known as 'common interest privilege'. This operates to preserve privilege in documents that are disclosed to third parties which have a common interest in the subject matter of the privileged document. An example of where this may arise is between co-defendants or between two or more companies in the same group. Pending and during litigation, clients and lawyers alike must be extremely cautious as to what documents are

being referred to when drafting statements of case, affidavits and witness statements as it can result in privilege being lost. For example, if a document is referred to in a statement of case and quoted, confidentiality in the document in its entirety will likely be lost. However, a short reference to the document or its contents will not necessarily have the same effect. It is therefore better to be overly cautious in this regard to prevent privilege from being inadvertently lost.

One of the references to privilege that clients are most likely to hear is 'without prejudice' privilege. Where emails or other correspondence are headed 'without prejudice' or are referred to as having been sent on a 'WP basis', this often (but not always) prevents the correspondence from being put before the court as evidence of any admissions against the interest of the party that made the statements. This applies to both written and oral communications. Where something is referred to as being 'without prejudice save as to costs', it is not admissible in the substantive dispute but can be considered by the court on the issue of costs. The purpose of this is to prevent hindering genuine attempts to settle an existing dispute and to encourage parties to settle their disputes out of court. It enables parties to speak freely during settlement discussions, secure in the knowledge that what has been disclosed cannot be used against them should settlement discussions fail. A word of caution, though, merely marking a communication as 'without prejudice' will not, of itself, automatically mean that the communication is privileged from disclosure. Rather, it is the substance of the communication (and whether, in fact, it contains an admission made in the interests of procuring a settlement) that will determine whether the communication is privileged. In other words, heading the communication with the words 'without prejudice' is instructive, but is not the end of the matter.

Privilege can be a minefield and especially so for parties who are in the early stages of a dispute and have not yet engaged lawyers to represent them. Babbé LLP has experience of assisting clients through all stages of the dispute resolution process. If you would like any further information in this regard or we can assist with your litigation concerns, please do not hesitate to contact us.

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