



Think Ahead



Legal Privilege in Ireland

Legal professional privilege is a right conferred by law and a rule of evidence which entitles a client and solicitor to withhold certain confidential communications and documents on the basis that those communications can be classified as attracting legal privilege. It is a protection that parties can expect when consulting or communicating with their lawyers and advisors and is seen as an aide to the administration of justice to ensure that communications between a client and their lawyer which are intended to be confidential are treated that way. This protection extends to cover traditional paper communications such as letters, notes and memoranda incorporating or reproducing legal advice and entitles a party to legal proceedings to withhold disclosure of certain documents for use in evidence or from inspection in discovery. It also includes e-mails, voicemails, information on computer databases and taped recordings.

However, not every exchange between a client and their advisors automatically attracts this protection. Careful consideration must be given to the circumstances in which the interaction occurred. The rules of evidence which are applied in Ireland have largely developed through case law and precedent. That is to say, while the Courts have published detailed practice directions, particularly in the context of providing discovery in litigation, there is no overarching statutory instrument or legislation governing these rules.

When assessing whether a document or communication is privileged it must be capable of being categorised as either attracting ‘litigation privilege’ or ‘legal advice privilege’.

LITIGATION PRIVILEGE

‘Litigation privilege’ arises where a document is created (a) at a time when litigation has either commenced or is anticipated and (b) for the purpose of that litigation. The most obvious example comprises instructions provided between a client and their lawyer during the course of court proceedings but it also applies to communications at a time when those

proceedings were reasonable apprehended. Distinguishing between the point of time before and after the real contemplation of litigation has naturally been the source of contention and case law in itself.

A recent High Court case provides a useful example of the criteria which must be satisfied in order to succeed in claiming litigation privilege. The case of *Artisan Glass Studio Ltd v The Liffey Trust & Others* (2018) IEHC 278 concerned a dispute as to liability following a fire which spread from one commercial premises owned by the defendant to a neighbouring premises. The party who owned the affected neighbouring premises sought copies of a record of inspection and an engineer's report which had been prepared by engineers on behalf of the defendant. The engineers had been engaged two days after the fire. They produced a record of inspection and subsequent report shortly after.

At the time the report was finalised and circulated to the client the plaintiff had already issued a 'letter before action' to the defendant. The Court held that litigation was clearly contemplated at that point in time. The Court then considered whether litigation was the dominant purpose of the documents. As regards the engineer's report the Court found that the document was created to assist the defendant defend a claim arising from the fire. The dominant purpose of the report was the anticipated litigation with the neighbouring premises and accordingly the report was protected from disclosure by litigation privilege. However, the Court held that the inspection record should be treated differently. This was a document produced on behalf of the defendant, at a time when proceedings were imminent, but the Court found that there was nothing to indicate that the dominant purpose of the record in of itself was court proceedings. The Court confirmed that the onus is on the party claiming privilege to explain why that is the case and provide material to support this assertion if requested by the Court to do so. In this case the Court held that the explanations provided were inadequate and there was nothing to sufficiently indicate that the dominant purpose of the inspection record was to assist or aid the defence of a court case.

LEGAL ADVICE PRIVILEGE

'Legal Advice Privilege' protects communications between a solicitor, acting in a professional capacity and client, provided that the communication is confidential and for the purposes of seeking or giving legal advice. In practice, it can be more difficult to readily identify communications attracting 'legal advice privilege'. When claiming 'litigation privilege', the reference point is the proceedings themselves, whereas 'legal advice privilege'

requires a more nuanced assessment of the communication or exchange and the circumstances in which it arose.

In *Smurfit Paribas Bank Ltd v AAB Export Finance Ltd* (1990) the Supreme Court drew a clear distinction between communications with a lawyer for the purposes of obtaining legal advice (which are privileged) and communications with a lawyer for the purpose of merely obtaining legal assistance (which are not).

In the case of *Three Rivers District Council & Ors v Government and Company of the Bank of England* [2004] UKHL 48 the English Court of Appeal held that legal advice is not confined to simply telling the client what the law is. It must include advice as to what should prudently and sensibly be done in the relevant legal context. When determining whether advice is ‘legal advice’ for the purpose of establishing privilege the courts will look at whether or not a solicitor is providing advice in their capacity as a lawyer.

Although the *Three Rivers* case was a decision by an English Court it is often referred to by the Irish Courts, particularly in the context of establishing who exactly the client is in the context of privileged communications. In *Three Rivers* the Court held that the ‘client’ was the Bingham Inquiry Unit (BIU) which comprised only three bank officials responsible for providing instructions to the bank’s lawyers. The Court rejected the argument that communications between all and any employees of the bank and the lawyers were privileged. The Court held that “*the client for the purpose of privilege consists of only those employees authorised to seek and receive legal advice from the lawyer.*” Only communications between the limited group of individuals within the organisation who had been assigned the task of seeking and receiving legal advice on behalf of the organisation were protected by legal advice privilege.

LEGAL PRIVILEGE AND OTHER PROFESSIONALS

In the UK, the Supreme Court has confirmed that legal advice privilege only extends to the legal profession. The issue has not been conclusively determined in Ireland although the courts have noted that the issue of whether such privilege ought to extend to a business advisory firm or practice who are not solicitors or barristers is important and in need of clarification.

In *Prudential Plc & Anor v Special Commissioner of Income Tax & Anor* [2013] UKSC 1, the Court acknowledged that when accountants give advice on tax law that is clearly legal

advice. However, the Court held that extending legal advice privilege to legal advice given by professionals other than lawyers would lead to an unacceptable level of uncertainty as regards who would be regarded as a sufficiently qualified “professional advisor”. The Court also emphasised that whereas lawyers generally only give legal advice, when members of other professions give legal advice, it will often not represent the totality of the advice so the same clear and coherent basis for the privilege may not exist. As a matter of policy the Court was not willing to extend this protection to advice provided by other professionals in the absence of input from Parliament.

It is worth noting that the *Prudential* case arose in the context of an application by the UK Revenue authority to obtain information relating to an alleged tax avoidance scheme. So, in the circumstances of that case there was also a balancing exercise to be conducted between the competing interests of protecting the communications between the individuals involved and their advisors on the one hand and the public interest in obtaining full disclosure.

From an accountant’s perspective, or that of another professional advisor, it is important to bear in mind that the protection offered by legal privilege may be lost through inadvertence or waiver. For example, if a document comes in to the public domain it will no longer be privileged. If privileged written legal advice is disclosed to a third party advisor it may also lose that status depending on the circumstances. For example, the extent to which a document is circulated will be relevant in a subsequent assessment by a court of whether it is still sufficiently confidential. Privilege is not necessarily waived when documents are shared on a confidential basis or where they are shared with an advisor who has a sufficient common interest. However, all clients and advisors need to ensure that the manner in which documents are treated by the author and recipients is objectively consistent with maintaining confidentiality.

LEGAL NOTICE

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