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Privilege in the context of construction claims: A refresher and warnings

In this month's Insight we review some of the basics in respect of privilege so far as it pertains to construction claims including adjudications. As those who have had to go through the painful process of disclosure will be acutely aware, communications can, of course, be confidential without being privileged. This will mean that once court proceedings or arbitration proceedings are started, "confidential" documents that do not attract privilege may well have to be disclosed. In the era of the email this can, unfortunately, be forgotten far too easily.
We look at some of the traps the unwary can fall into, before setting out some practical tips for attracting, and not waiving, privilege.[1]

The basics: an overview

There are three broad types of privilege which we will examine in this Insight. These are namely:

1. Legal Advice Privilege;
2. Litigation Privilege; and
3. Without Prejudice Privilege.

The first two types fall within the broader category of Legal Professional Privilege. All three types give a right to resist the compulsory disclosure of information in certain circumstances.[2]

Legal Advice Privilege was defined by the House of Lords in the Three Rivers case as:

> *"Communications between lawyers and their clients* **whereby legal advice is sought or given."[3]** **[Emphasis added]**

It is a matter of public policy that a client should be able to communicate openly and confidentially with their legal advisers. Non-lawyers do NOT attract legal advice privilege unless there is a specific statutory provision providing for it (as to which see further below).[4]

As stated in Anderson v Bank of British Columbia:

> *"it is equally necessary, to use a vulgar phrase, that he should be able to* **make a clean breast of it to the gentleman whom he consults** *with a view to the prosecution of his claim..."[5]*
> [Emphasis added]

If a client can freely unburden themselves to their lawyers, warts and all, their lawyers can give honest and candid advice as to the merits of their client's claim without the risk of it later being used as a weapon against them by the other side.[6] This is in the public interest because it should mean hopeless cases settle earlier without reaching the courts.

Litigation Privilege is a wider privilege which can extend to third parties (i.e. those other than the client and their lawyer) but only in defined circumstances. In Three Rivers the House of Lords defined litigation privilege as:

> "Communications between a lawyer or the lawyer's client and a third party or to any document brought into existence for the **dominant purpose of being used in litigation."[7]** [Emphasis added]

The tests a communication (written or oral) must pass in order for a document to be covered by litigation privilege are:

1. It must be between: (i) a client or (ii) his lawyer (who is acting for him in a professional capacity) and a third party;
2. In either case under conditions of confidentiality;
3. For the dominant purpose of use in litigation that is either in reasonable contemplation or under way; and
4. For the purpose of either: (i) enabling legal advice to be sought or given; and/or (ii) seeking or obtaining evidence or information to be used in or in connection with the litigation concerned.[8]

Finally, **Without Prejudice Privilege** was defined in the case of Rush & Tompkins v Greater London Council[9] as applying:

> *"To exclude all negotiations* **genuinely aimed at settlement** *whether oral or in writing from being given in evidence."*
> [Emphasis added]

The key words here are *"genuinely aimed at settlement"*. The underlying purpose of a document expressed to be *"without prejudice"* must always be examined. Blanket application of the label to correspondence is not sufficient to attract this type of privilege.

With these basics in mind, we now examine some of the issues that are particularly pertinent for construction claims, including:

1. How privilege works where there are non-lawyers or non-practising lawyers involved in the claims process;
2. Whether adjudication constitutes "litigation" in the context of litigation privilege; and
3. Without prejudice communications in the context of adjudication.

Privilege for non-lawyers and non-practising lawyers?

It is not unusual for non-lawyers (often quantity surveyors) or non-practising lawyers to be used by contractors and subcontractors to compile their claims early doors. These may later be taken to adjudication and, if that doesn't work, ultimately litigation or arbitration. Quasi-legal advice is often provided as part of this process.

It is important for those non-lawyers and their clients, especially those without the benefit of in-house

counsel or external legal advice, to be aware that communications with them about the claims will not attract legal advice privilege.

The Supreme Court decision of R (Prudential Plc and another) v Special Commissioner of Income Tax [2013][10] confirmed that only members of the legal profession are entitled to rely on legal advice privilege.

In that case, the claimant had obtained advice from tax advisers in relation to questions of tax law on a proposed transaction. Those advisers sought to claim privilege. The Court of Appeal judgment (upheld by the Supreme Court) held:

> *"I would conclude that* **it is not open to the Court to hold that LLP applies outside the legal profession**, *except as a result of relevant statutory provisions. It is the essence of the rule that it should be clear in its application. Since it is not the subject of any ad hoc balancing exercise but is, to all intents and purposes, absolute. As applied to members of the legal professions, acting as such, it is sufficiently clear and certain. If it were to apply to members of other professions who give advice on points of law in the course of their professional activity, serious questions would arise as to its scope and application."*[11] [Emphasis added]

"So what?" you may ask

Well a classic example of the practical implications of privilege not applying can be seen in the infamous case of *Walter Lilly & Co. Ltd v Mackay* [2012].[12]

In this case, the claimants retained construction claims consultants to assist with bringing a claim against the defendant. Some of their advice on programming was disclosed during the lengthy court proceedings but other parts of their advice were not and legal advice privilege was claimed.

Akenhead J held that legal advice privilege did not apply. It was noted that the terms of business used expressly stated that the consultants in question were not providing legal advice, it was unclear whether those advising were actually lawyers and the terms and conditions stated that if legal advice was required the consultant would source it from outside its organisation.

Akenhead J explained:

> *"It does not hold itself out as a firm of solicitors or group of barristers, albeit that it employs some lawyers. It was retained to provide 'contractual and adjudication advice'. It is notable that it was* **not retained to provide legal advice as such."**[13] [Emphasis added]

The practical ramifications of this are clear. If no lawyers are involved and a consultant advises that your claims have no hope of succeeding, or perhaps advises you to maximise the quantum of a claim in order to try and get a good deal, such a communication would not be privileged. If the dispute progressed to court it then becomes disclosable. At that stage it may have a very negative impact on your position, even if the contents of the "advice" were wrong. Clearly you do not want to put yourself in this position.

Is adjudication "litigation" for the purposes of claiming litigation privilege?

Litigation privilege is important because, where the tests set out above are met, it protects communications with third parties such as experts and witnesses.

There does not appear to be any direct English law authority on whether adjudication counts as *"litigation"*. Generally speaking the test for *"litigation"*, in the context of litigation privilege, is based upon there being an adversarial process.[14] As everyone involved in adjudications can attest, they are certainly adversarial.

Helpfully, the Australian case of *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011][15] held that documents created for the purpose of adjudication proceedings were able to benefit from litigation privilege. Macaulay J held:

> "Despite the fact that the adjudication may not ultimately determine the parties' rights if, in a subsequent court proceeding, the parties' entitlements are litigated, the adjudication result is enforceable at law and is binding upon the parties unless and until a subsequent court order changes the outcome. I think that the nature of adjudications is such that preserving the confidentiality of communications, made for the dominant purpose of enabling the provision of legal services to participants in the adjudication, would promote the object of fairness for and between those participants."[16]

It is likely then that adjudication will qualify as "litigation" for the purposes of litigation privilege. That does not, however, provide blanket protection.

Key points to keep in mind include:

1. **You still need practising lawyers for litigation privilege to kick in.** Claiming privilege for third party communications before a solicitor is appointed may well be problematic.[17] Likewise there is some suggestion that non-lawyers providing litigation support in a practical capacity may possibly attract litigation privilege, but this is by no means certain and has not been tested in the context of quantity surveyors so far as we are aware.[18]

2. **Privilege (both advice and litigation privilege) can easily be waived.** Communications which are circulated too widely, including within an organisation, may lose the confidentiality required to allow privilege to apply.[19] In Three Rivers (No. 5) (which related to advice privilege),[20] the Court of Appeal gave a very restrictive definition of client and held it would only cover communications between the lawyer and a small group of the bank's employees actually charged with instructing the bank's lawyers. "Client" would

not cover everyone in the company. This risk may not be as significant with litigation privilege but the moral is still clear: think before you forward.

3. **Think before you involve third parties.** Is litigation really contemplated and what is the dominant purpose behind the communication? Does it pass the dominant purpose test?

Whilst in the vast majority of cases adjudications will resolve a dispute, some disputes do inevitably progress to court or arbitration (as applicable). Protecting yourself by keeping documents produced at an earlier stage of the development of a claim privileged is always going to be sensible in case the worst happens.

Without prejudice communications in adjudication

The final type of privilege we will look at ("without prejudice") is perhaps the most often claimed by laymen. When used properly it means that "without prejudice" cannot be referred to in open correspondence (and hence it will be hidden from a tribunal at a later date). However, in the context of adjudication, without prejudice privilege is too often ignored.

In *Volker Stevin Ltd v Holystone Contracts Ltd* [2010][21] the Judge considered whether an adjudicator's knowledge of a without prejudice offer by Holystone made his decision towards Volker biased. Coulson J, in this case, held that knowledge of the without prejudice offer did not make the adjudicator biased towards Volker and was in no doubt that a fair-minded observer would not reach a conclusion of bias.

This issue arose again in *Ellis Building Contractors Ltd v Vincent Goldstein* [2011],[22] which related to without prejudice documents being submitted to the adjudicator. In this case, Goldstein's solicitors sent a without prejudice letter to Ellis after receiving the notice of adjudication offering a settlement sum. Ellis referred to the letter in their Reply but did redact the sum offered by Goldstein. The Judge enforced the adjudicator's decision and held that there was not a legitimate fear of lack of impartiality.

Akenhead J went on to suggest that such actions could result in the possibility of professional disciplinary action for lawyers who submitted such material. The problem in adjudication is obviously that often lawyers are not involved so no such disciplinary threat sits over those making such disclosures.

Some practical tips

Finally, some practical tips for those involved in construction claims, particularly in their early stages:

1. **Instruct lawyers (external or internal) to maximise your chances of claiming privilege on claims documentation.** In-house lawyers will not attract privilege unless they are providing legal advice or litigation privilege applies, but their involvement may arguably itself signal that litigation is likely.

2. **Keep lawyers copied into communications especially where they are particularly sensitive.** This will also give the lawyers a chance to raise an issue if there is a problem regarding privilege.

3. **Do not inadvertently waive privilege.** Keep communications tightly restricted within a limited and clearly defined team and mark them as privilege and confidential.

4. **Think carefully about the purpose of any sensitive communication before it is sent.** Do you need to send it? Is its purpose to obtain legal advice or to collect information for litigation which is reasonably contemplated (if it hasn't started)? If you have a view on prospects but there are no lawyers involved, perhaps pick up the phone rather than emailing that view for all to see in future years.

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Footnotes

1. It should be noted that this article does not purport to provide a comprehensive overview of privilege which is, by definition, a complex area of law. If in doubt as to the status of any communication (or proposed communication), specific advice should be sought.
2. See Hodge M. Malek QC et al., Phipson on Evidence, 18th edn (Sweet and Maxwell), 2013, chapter 23-01, quoting from Lord Millett in B v Auckland District Law Society [2003] AC 736.
3. Three Rivers District Council and Others v Governor and Company of the Bank of England [2004] UK HL 48, para 10.
4. See Malek et al., Phipson on Evidence, chapter 23-34.
5. Anderson v Bank of British Columbia (1875-1876) LR 2 Ch. D. 644, 649. See also Phipson on Evidence for a more detailed history of the purpose behind Legal Professional Privilege.
6. See Bingham LJ in Ventouris v Mountain [1991] WLR 607.
7. Three Rivers District Council and Others v Bank of England [2004], para 27.
8. See Colin Passmore, Privilege, 3rd edn (Sweet & Maxwell), chapter 3-005.
9. [1986] AC 1280.
10. UKSC 1.
11. R (Prudential plc and another) v Special Commissioners of Income Tax [2010] EWCA civ 1094, para 83.
12. EWHC 649 (TCC).
13. Walter Lilly & Co. Ltd v Hackay & DMW Developments Limited [2012] EWHC 649 (TCC) at para 15.
14. See Passmore, Privilege, chapter 3-087.
15. VSC H77.
16. Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2011] VSC 477, para 49.
17. Re Barings PLC and Others, Secretary of State for Trade and Industry v Baker and Others [1998] 1 All ER 673 arguably means that a litigation in person may not have the benefit of making a privileged communication with a third party (see Passmore, Privilege for a detailed discussion at chapter 3-029 et seq). Equally this case may also render it difficult to claim litigation privilege before a solicitor is instructed.
18. See R (on the application of Prudential PLC and another) v Special Commissioner of Income Tax and another [2013] UKSC 1.
19. See Shepherd v Fox Williams LLP and others [2014] where the claimant sent highly confidential documents to his girlfriend's personal email address. She subsequently forwarded them to her work address. The court, in this instance, held that privilege had been waived because the document was created for a privileged reason and therefore disclosed for a limited purpose, which was not to be disclosed to someone outside the dispute.
20. Three Rivers District Council and others v The Governor and Company of the Bank of England Rev 1[2003] EWCA Civ 474.
21. EWHC 2344 (TCC).
22. EWHC 269 (TCC).
23. With thanks to Laura Bowler and Stacy Sinclair for their assistance.

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