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HFW PRIVILEGE PACK

A Guide for in-house practitioners (First edition)

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PRIVILEGE

INTRODUCTION

Privilege has been recognised as a fundamental principle of English law for several hundred years. The doctrine protects the right of clients to communicate with their lawyers in confidence, without fear that those communications will later be disclosed to third parties, the court or regulatory/enforcement bodies during the course of litigation, investigation and/or enforcement (subject to certain exceptions).

However, a number of English judgments in recent years have restricted the application of the doctrine of privilege. Privilege now extends to fewer categories of documents, and to communications between fewer categories of persons/employees, as a matter of right. Similarly, the application of privilege in the context of criminal investigations and prosecutions has been quite considerably scaled back. Further, the English courts have become willing to order the disclosure of documents clearly protected by US privilege, in a departure from previous practice.

The challenge of ascertaining when privilege attaches to particular communications is only part of the challenge; the other hurdle is to ensure that privileged documents remain so. This is especially challenging in a modern business environment where information exchange is ubiquitous and instantaneous and data storage is often automatic and via servers located remotely. Emails in particular are highly vulnerable to widespread dissemination at the click of a button, which may undermine a document's confidentiality and thus remove its privilege, leaving litigants facing the prospect of disclosing sensitive documents to their adversaries and/or regulators and/or the public.

The increasingly global nature of business and enforcement also poses its own problems. In-house counsel in businesses with offices or interests in more than one jurisdiction are required to be aware of the different approaches to privilege taken in different countries and by supra-national enforcement bodies, in order to present communications and structure data flows to best ensure that confidential documents remain so. Where businesses operate in the regulated sector and/or where they may face investigation by enforcement bodies, in-house counsel also need an understanding of the different conflicts of law rules that apply in the jurisdictions where they operate as well as the statutory powers of the relevant enforcement/regulatory bodies. In the UK for example, authorities such as the Serious Fraud Office (SFO) and Financial Conduct Authority (FCA) are often able to seek and obtain documents from foreign companies with operations or a presence in the UK, and from the foreign offices/registered branches of companies headquartered in the UK, even where such documents would be considered privileged in the relevant foreign jurisdictions (as long as the documents would not be considered privileged under English law).

Against this backdrop, in-house counsel must deal with the added complexity that comes with exercising a multi-faceted role. As both employee and counsel, an in-house practitioner juggles a fiduciary duty to act in the interests of the business, to maintain confidentiality over the company's business, and to meet the standards expected of a lawyer within their jurisdiction. In-house counsel are the clients of external lawyers and the legal and commercial advisors for their internal corporate clients; privilege attaches to their correspondence when acting as the former, but not the latter.

This pack is aimed specifically at in-house counsel and has been designed to help navigate the choppy waters of privilege. It begins with a summary of the fundamental principles of privilege under English Law, looking at both limbs of legal professional privilege: legal advice privilege [p.6] and litigation privilege [p.6],

as well as common interest privilege [p.9] and without prejudice privilege [p.9]. We have developed a privilege flow-chart [p.10] to help practitioners decide whether a document was privileged at the time it was created and have also developed a Without Prejudice Jurisdiction Comparison table [pp.11-13] showing the different approaches taken on the privilege (or lack thereof) attaching to without prejudice communications, in a number of key jurisdictions globally.

The pack then analyses a number of key recent judgments affecting privilege and provides our perspective on the importance of these judgments and their likely impact on the short and long term development of the doctrine: *Three Rivers* [p.15.] which framed the courts' current interpretation of legal advice privilege; the *RBS Rights Issue* cases [pp.15-16] and *ENRC* [pp.16-18], which collectively have served to reduce the protection privilege can provide in circumstances where a company is facing external investigation; *Prudential* [p.18], which confirms the extent to which legal advice privilege extends to legal advice provided by non-lawyers; and *Atlantisrealm* [pp.19-20], which clarifies the circumstances within which privilege can survive accidental disclosure.

We then go on to discuss how privilege in documents can be waived, both wilfully and inadvertently, looking particularly at the importance of taking active steps to prevent the waiving of privilege in communications as an insured with insurers [pp.23-24]. We look also at the recent *Holyoake* case [p.25] which has provided some clarity on what the court will look at when deciding on "collateral waivers" of privilege i.e., when deciding whether a party may waive privilege in certain documents without being required/found to have waived privilege in other privileged documents pertaining to the same or similar issues (so called "cherry-picking"), or, whether disclosure of part of a class of documents requires disclosure of all of the class to prevent the presentation of a distorted picture.

Finally, we provide a succinct summary of the practical steps in-house counsel can take to protect privilege, including specifically in the context of internal investigations [pp.28-29]].

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LEGAL PROFESSIONAL PRIVILEGE

GENERAL PRINCIPLES

Under English law "legal professional privilege" entitles a party to withhold evidence (electronic, written, or oral) and not disclose it to either the other side, the court, or regulatory bodies (subject to certain exceptions).

Legal professional privilege: general principles

English law recognises two main types of legal professional privilege:

1. Legal advice privilege: protects confidential communications between a client and its lawyer, provided that the dominant purpose is the giving or receiving of legal advice i.e., business advice given by the lawyer will not be covered. This means that the protection from disclosure may be lost if the client shares with a non-lawyer third party the confidential legal advice received from its lawyer. In these circumstances, the client is taken to have waived its right to assert privilege where the extent of the document's circulation is such that it no longer fulfils the definition of a confidential communication between a client and its lawyer. That third party may even include employees of the same company who are not part of the "client team" [see *Three Rivers*, discussed at [p.15]].

   For in-house counsel, it is worth remembering that legal advice privilege under English law will only work to protect confidential communications where in-house counsel act as legal adviser and not, for example, where they act as a non-legal commercial adviser to the business.

2. Litigation privilege: protects communications between a client, its solicitor and any third parties and the client and a third party – provided that the dominant purpose is either:

   - the giving or receiving of legal advice in connection with litigation; or
   - the collection of evidence for use in litigation. The litigation need not be active, but must be in "*reasonable contemplation*", i.e., there must be more than simply the possibility or a "*general apprehension of future litigation*". In this context, adversarial proceedings such as arbitration, and tribunal proceedings are also covered by "litigation privilege" but investigatory proceedings may not be, depending on the circumstances [see *ENRC* at [pp.16-18]].

Confidentiality

Privilege can only be claimed if the communication is confidential, once the confidentiality of a document is undermined, privilege is lost and it cannot be regained, and that document then becomes disclosable. If privilege is waived e.g., by the client putting the document before the court, then other related documents may also be disclosable, this is known as a "collateral waiver" [see our discussion of developments in this area at [p.25]].

Lawyer/client communications

Privilege belongs to the client not the lawyer. Not all employees of a corporate entity are regarded as the "client" for privilege purposes, only those specifically tasked with obtaining legal advice from in-house or external lawyers and able to give instructions will be considered to be the "client" [see *Three Rivers* at [p.15]]. It is important therefore that there is a clear understanding of which employees are responsible for instructing the legal team, and that privileged communications are not shared more widely within the organisation. The definition of a "lawyer" includes all members of the legal profession including barristers, solicitors (including professional support lawyers), qualified foreign lawyers, and trainee solicitors.

In-house lawyers

Under English law the definition of "lawyer" extends to in-house lawyers acting in a legal capacity, but it is important to note that not all jurisdictions treat in-house lawyers in the same way. Notably, communications involving in-house lawyers are not treated as privileged by the EU competition authorities and such communications are therefore disclosable in European Commission investigations, irrespective of where the investigation is based (i.e., EU Commission Investigations being conducted in England/involving English domiciled companies, for example, will apply EU Commission rules to decide whether a document is privileged rather than the rules of the English courts).

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OTHER FORMS OF PRIVILEGE

"WITHOUT PREJUDICE" AND COMMON INTEREST PRIVILEGE

Without prejudice privilege: This applies to communications between parties to a dispute whose genuine purpose is to try and reach a settlement. Without prejudice privilege is intended to encourage clients and their legal advisers to negotiate openly. Whilst you should mark all such communications with the heading "without prejudice", it is the substance, rather than the form of the document that will determine whether it is privileged. A note of caution that not all jurisdictions apply the without prejudice protection. Care should be taken when using without prejudice correspondence outside of England and Wales. Similarly, applying the label will not result in an "open" (i.e., non-without prejudice) communication becoming privileged [see the Without Prejudice Jurisdiction Comparison Table below at [pp.11-13]].

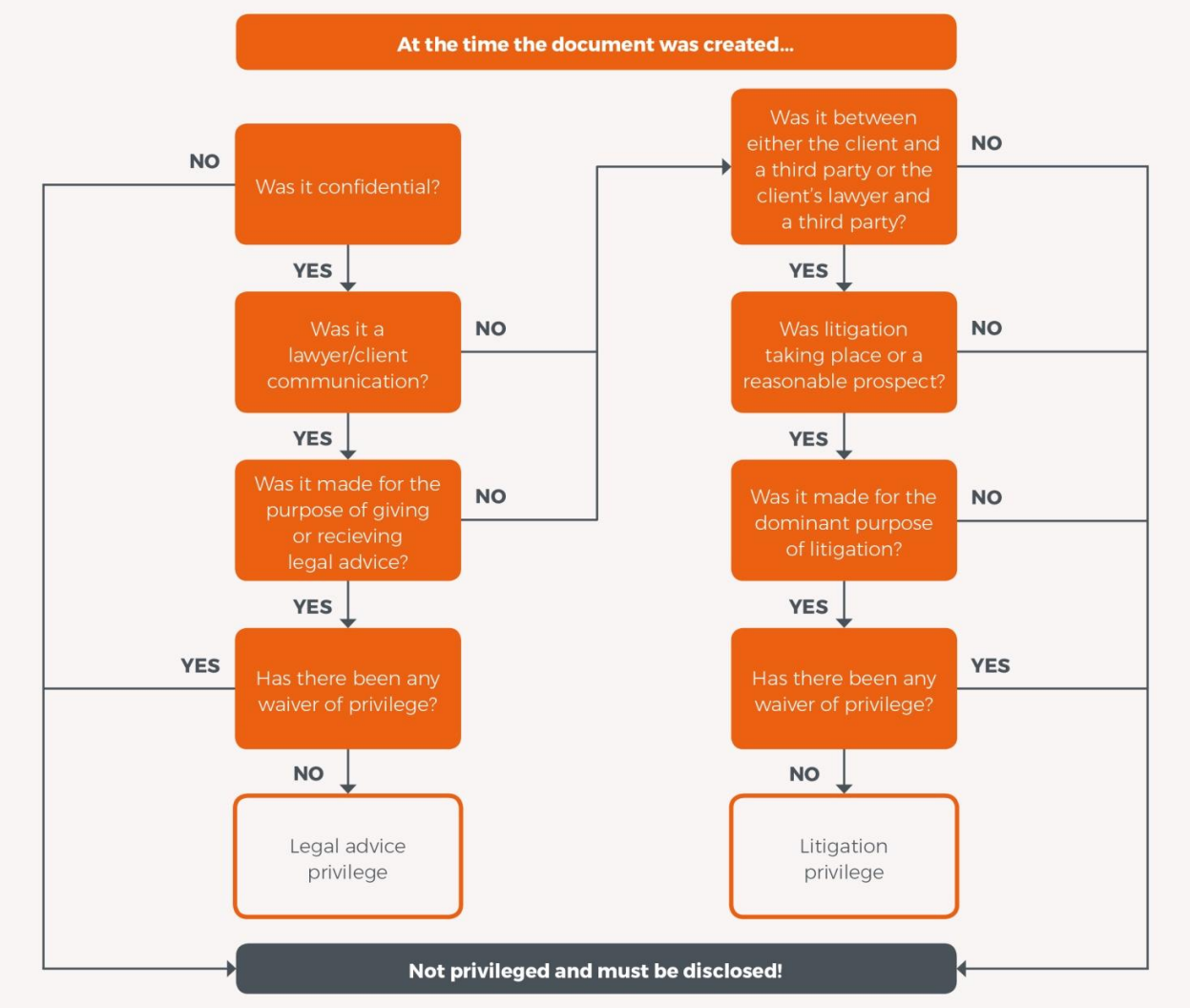
Common interest privilege: This covers the voluntary sharing of a privileged document with a third party who has a shared or common interest in the subject matter of the privileged document, or the litigation to which the document relates e.g. insured and insurers. Care should be taken when sharing documents on this basis, as shared interests might diverge. You should obtain an agreement setting out the scope of the shared, or common interest, which also confirms that privilege is not being waived more widely [see our discussions of Waiving Privilege below at [pp.23-24]].

Exceptions

- Where disclosure is accidental, the document can not generally be used without permission of the court [see our discussion of *Atlantisrealm* below at [pp.19-20]].
- The Regulation of Investigatory Powers Act 2000 will in certain circumstances override legal professional privilege, legal advice should be obtained if this is relevant.
- Foreign jurisdictions do not always recognise legal professional privilege and so before transmitting correspondence to a foreign jurisdiction (or allowing such to pass though servers located in a foreign jurisdiction), local legal advice should be taken.
- Legal professional privilege will not apply where the advice or document will further or assist a criminal act.

PRIVILEGE FLOW-CHART

The flowchart below will help determine whether your communications will be covered by legal professional privilege.



WITHOUT PREJUDICE JURISDICTION COMPARISON TABLE

The table below will help determine whether Without Prejudice privilege is likely to apply in a number of key jurisdictions globally

Country	Will Without Prejudice ("WP") privilege apply to inter-solicitor correspondence?	Comments
Australia	Yes	WP correspondence under Australian law is treated largely in the same way as under English law.
China	No	There is no concept of WP correspondence in China. Litigation is markedly different, with judicial mediation an integral part of procedure; judges often undertake a dual role as both mediator and ultimate adjudicator. Parties should exercise due care when discussing settlement with opponents.
Europe	Yes and no	The treatment of WP correspondence differs in different European jurisdictions – local advice should be sought where settlement is to be discussed with a European counterparty / where there is a European nexus.
Hong Kong	Yes	WP correspondence under Hong Kong law is treated in much the same way as under English law. The main exception is that the Hong Kong courts have carved out an "unambiguous impropriety" exception: privilege will not apply to a provision in a settlement offer/agreement that seeks to prevent a witness giving evidence in subsequent connected proceedings (*Crane World Asia Pte. Ltd v Hontrade Engineering Ltd.* [2016] 3 HKLRD 640).
Singapore	Yes	WP correspondence under Singaporean law is treated in much the same way as under English law, pursuant to Section 23 of the Evidence Act (Cap 97), which provides that "*In civil cases, no admission is relevant if it is made either upon express condition that evidence of it is not to be given, or under circumstances from which the court can infer that the parties agreed together that evidence of it should not be given*".
Switzerland	Yes	WP correspondence under Swiss law is treated in much the same way as under English law. During settlement discussions, parties frequently circulate without prejudice proposals. Parties can maintain privilege in

Country	Will Without Prejudice ("WP") privilege apply to inter-solicitor correspondence?	Comments
		these documents but they need to make the WP status of the documents clear to the court, in any subsequent court proceedings. The courts generally respect the privilege of WP communications, provided the parties intention for such to apply is made sufficiently clear.
UAE	Yes and No	The UAE operates a dual legal system. The UAE is governed by a civil law system which does not recognise WP correspondence. Separately, much commercial activity in the UAE operates out of the Dubai International Financial Centre, which operates a common law system with its own separate laws, regulations, independent judicial authority and courts, where WP correspondence is respected. When seeking to settle a dispute with a party based outside the DIFC there are certain steps a party can take to work around the absence of WP protections and improve confidentiality: In General: Confidential documents cannot be disclosed by a legal professional without the relevant parties' consent (Article 379, UAE Penal Code), therefore parties seeking WP-like protection should reference Article 379 in all communications with UAE legal professionals. Pre-settlement: An express provision can be included in settlement agreements preventing certain parties involved in settlement from providing evidence as a witness in any connected subsequent litigation or arbitration. Parties should also consider: (1) nominating the DIFC courts as the governing jurisdiction in contracts; (2) qualifying every document with a statement that such does not contain an admission of liability; (3) insisting that all parties sign an undertaking that any information disclosed will not be used as evidence; and (4) not documenting any settlement negotiations in writing. Post-settlement: Parties can submit any settlement documents to a Notary Public to be retained. He or she is bound by a duty of confidentiality. This limits the chance of such settlement documents being disclosed in the future.
USA	Yes and No	WP correspondence under US Federal law is treated in much the same way as under English law. The position at state level differs from state to state – local advice should be sought where settlement is to be

Country	Will Without Prejudice ("WP") privilege apply to inter-solicitor correspondence?	Comments
		discussed with a US counterparty / where there is a US nexus.

04

RECENT DEVELOPMENTS

KEY CASES

Three Rivers

Much of the English courts' current interpretation of legal advice privilege can be traced back to the "*client team*" concept which emerged from the litigation in the early 2000s between creditors of the collapsed BCCI and the Bank of England[1] (*Three Rivers No. 5*).

The Court of Appeal decision relating to these cases served to dramatically narrow the application of legal advice privilege under English law. It was held that, in a corporate context, the definition of "*client*" for the purpose of legal advice privilege in relation to a specific matter, was restricted to only the limited group of employees within a company authorised to seek and receive legal advice in relation to that matter; no longer was every employee to be treated automatically as the "*client*".

This decision was controversially received, including by the House of Lords (now Supreme Court) in a subsequent appeal of this case on a different point of law[2]. This led many in the legal community to question in subsequent cases whether the "*client team concept*" was good law, and indeed the decision was not followed in a number of other common law jurisdictions where English law is persuasive authority, including Hong Kong, Australia and Singapore. This question has now been decisively answered by a more recent case: *The RBS Rights Issue Litigation*.[3]

RBS Rights Issue Litigation

This litigation, conducted predominately in 2016 between RBS and a consortium of private individual and company shareholders in RBS, related to the fall-out from the 2008 financial crisis. The shareholders sought to recover investment losses they had suffered following the collapse of the bank's shares, on the ground that the prospectus for a 2008 rights issue of shares had been inaccurate and/or incomplete.

The relevant privilege issue, was whether RBS should be forced to disclose notes and memoranda, which it claimed were privileged, which had been created by in-house counsel and UK and US external counsel (as well as the RBS Group Secretariat, which included non-lawyers) in the context of two internal investigations conducted by the bank into the rights issue. These notes and memoranda related predominately to interviews conducted by lawyers of relevant RBS employees.

RBS asserted privilege on a number of grounds: these notes/memoranda were subject to legal advice privilege; they were (predominately) subject to lawyers' working papers privilege; and/or the court should either apply US federal law to the question of privilege (under which these documents would be

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[1] *Three Rivers District Council and others v The Governor and Company of the Bank of England (Three Rivers No. 5)* [2003] EWCA Civ 474.

[2] *Three Rivers No. 6* [2004] UKHL 48.

[3] *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

privileged[4]) or if English law governed the question of privilege, the English court should nonetheless use its discretion to apply US law, on public policy grounds.

The court rejected these submissions and reinforced the test from *Three Rivers*. It found that communications between the rank-and-file of a company and its lawyers are "*not privileged communications*" – legal advice privilege only protects communications with the small group of employees "*authorised to seek and receive legal advice form the lawyer*." Hildyard J went as far as to say that the "*client*" might include only those employees that could rightly be considered the "*directing mind and will of the corporation*."

The Court rejected the application of working papers privilege and further narrowed the scope of this doctrine, finding that lawyers' memoranda and notes are only privileged where they are "*reflecting or giving a clue to the trend of legal advice being imparted*." This is to be distinguished from reflecting a "*trail of enquiry*" (e.g., a lawyer's decisions in his or her notes to record certain facts arising out of the interview, to aid his or her recollection of the interview), which is not privileged.

The Court similarly rejected the argument that US federal law applied to the question of privilege and elected not to use its discretion to apply US federal law. As a result, the courts took the aggressive step of ordering the relevant notes and memoranda to be handed over to the courts and disclosed to the private shareholder litigants, even where such notes/memoranda had been created by US external counsel, summarising interviews they had conducted of US employees of the bank, that took place in the US, in the context of external counsel's advice on how the bank might best defend an investigation being brought by the US Securities and Exchange Commission.

ENRC

The recent *ENRC* case[5] confirmed the trend towards a narrow understanding of legal professional privilege, (for the first time) in the context of criminal proceedings.

ENRC concerned the efforts of the Serious Fraud Office[6] to have Eurasian Natural Resources Corporation ("ENRC"), a multinational natural resources company headquartered in London, disclose internal documents produced by external counsel and forensic accountants as part of an internal review of its operations in Kazakhstan and Africa, following allegations against it of fraud, bribery and corruption within those jurisdictions.

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[4] Both under the attorney-client and (federal) attorney work-product doctrines, following *Upjohn co. v. United States,* 499 US 383 (1981).

[5] *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd (ENRC)* [2017] EWHC 1017 (QB).

[6] The SFO is a UK body with strong statutory powers to investigate and prosecute cases, with a mandate to tackle a small number of large economic crime cases encompassing the top level of serious or complex fraud, bribery and corruption.

The SFO stopped short of launching a criminal investigation into ENRC[7] but, in light of negative press publicity, wrote to the company strongly encouraging cooperation and later asking it, pursuant to the SFO's statutory powers, to deliver-up documents created by ENRC/its lawyers prior to and during its internal investigations. ENRC claimed the documents were protected by legal advice privilege and or litigation privilege.[8]

The Court came to the same conclusion on legal advice privilege as in the *RBS Rights Issue Litigation*. Interview transcripts (a verbatim record of a conversation with no legal commentary) between the solicitors and employees, ex-employees, officers and third parties did not constitute legal advice. The court upheld legal advice privilege only over presentation slides prepared by the lawyer for the client's Board of Directors.

The Court found that emails between an executive and a "*Legally Qualified Businessman*" within ENRC were not protected, as the Legally Qualified Businessman's professional duties at that time did not include acting as a legal adviser to ENRC. The Court said that "*If the person sending the information to [the Legally Qualified Businessman] had wanted privileged legal advice he should have sent it to General Counsel*".

ENRC provides insights on the application of both variants of litigation privilege, i.e., where the sole/dominant purpose of the communication is (i) the giving or receiving of legal advice in connection with litigation; and/or (ii) the collection of evidence for use in litigation where such is in progress or reasonably in contemplation.

The Court held that privilege does not attach if communications take place when there is no more than a "*general apprehension of future litigation*." Documents produced on a co-operative basis (e.g., pursuant to an agreement with a prosecution or enforcement agency), are not protected by privilege, nor are internal documents created to further an intention to avoid an investigation or contemplated litigation.

In any event, Mrs Justice Andrews stated that an investigation, even if criminal (e.g., when conducted by the SFO) will only in very rare (if any) circumstances be considered adversarial litigation and therefore communications in relation to such will not attract litigation privilege. The Court advised that the moment at which litigation becomes within reasonable contemplation is likely to differ, depending on whether the proceedings are civil or criminal.

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[7] This investigation would have been for failure to comply with the self-reporting requirement introduced under the *SFO Guidance on Corporate self reporting* (2009) under which companies are required to report any circumstances or allegation of fraud, bribery, corruption or wrongdoing to the SFO in anticipation of proceedings.

[8] The SFO later invited ENRC to disclose its internal report and supporting documents under a 'limited waiver of privilege' - meaning the SFO would not use the content for prosecution purposes. ENRC also refused this request.

For criminal proceedings: "*prosecution only becomes a real prospect once it is discovered that there is some truth in the accusations, or at the very least that there is some material to support the allegations.*" A criminal prosecutor must determine whether sufficient evidence exists and whether it is in the public interest to bring the case. As this is a high threshold, it is not enough to "*fear*" a prosecution. As a result, litigation privilege will likely only attach at a late stage during investigations.

For civil proceedings: there is little to stop a claimant bringing an unmeritorious claim (without foundation and lacking evidence in support) and so a civil claim may be within reasonable contemplation far sooner than criminal proceedings.

Practically, there may be procedural steps taken before commencement of a civil claim which evidence its contemplation, e.g., a prospective defendant's receipt of a formal letter before claim.

Prudential

Judgment in this case[9] was handed down by the Supreme Court in 2013, but it remains one of the most important decisions relating to privilege. The case concerned HM Revenue and Custom's efforts to force the disclosure of documents relevant to advice provided by Prudential (an accountancy firm), to its clients, on a tax avoidance scheme. Prudential resisted disclosure on the ground that the advice, were it to have been provided by a firm of lawyers, would have attracted legal advice privilege, which Prudential claimed should attach to its advice, given that it contained much analysis that could properly be classified as legal and given that much of this type of advice is provided interchangeably by accountants and by lawyers.

The Court decided (by a majority of 5:2) that legal advice privilege should apply only to legal advice provided by lawyers and not by other professionals. The Court accepted that logic would dictate that the privilege should extend to advice provided by anyone whose profession ordinarily includes the giving of legal advice, but decided that an extension to the doctrine was ultimately for Parliament to legislate to implement. Further, it decided that an extension might lead to uncertainty and inconsistency.

Unsurprisingly this decision garnered widespread support from the legal community and widespread criticism from other professional groups who routinely provide legal advice. The Supreme Court has effectively deferred the question to Parliament but there is nothing to suggest that steps will be taken to widen the doctrine, given that Parliament has previously conspicuously not taken up opportunities to do so and routinely legislates on the assumption that this privilege applies only to those within the legal community.

[9] *Prudential plc & Anor, R (on the application of) v Special Commissioner of Income Tax & Anor* [2013] UKSC 1.

Atlantisrealm

Atlantisrealm, a case[10] from July 2017 is a rare recent example of an aspect of privilege being extended by the English Courts, specifically, the principles around the privilege pertaining to documents inadvertently disclosed.

The starting point in deciding whether a document inadvertently disclosed is in fact privileged or whether it may be submitted to the court in the context of litigation, is rule 31.20 of the Civil Procedure Rules, which provides that:

"Where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court."

It has been understood since the *Al Fayed*[11] case in 2002, that the court may grant an injunction pursuant to CPR 31.20 preventing the use of privileged material which has been disclosed inadvertently. In deciding whether to grant such an injunction, the court will consider whether the inadvertent disclosure was an "*obvious mistake*". The test to apply is whether the solicitor in receipt of the relevant material appreciated or should reasonably have appreciated that a mistake had been made, before he or she made use of the material. Although this test is at root objective, the testimony of the solicitor in question, to the effect that they gave detailed consideration to the question of whether the material was disclosed inadvertently and concluded that it had not been, can be and often is, persuasive.

Atlantisrealm concerned an application to appeal a first instance decision not to order the deletion of a privileged email disclosed by a party during the disclosure/inspection stage of litigation. It transpired that the document in question had been reviewed by a junior lawyer for relevance to the litigation and then tagged (via an electronic review platform) as requiring disclosure; it was not tagged as "privileged" nor as requiring further review (by a more senior colleague) and so it was duly disclosed to the other side without further process. The broad layout of this review process will be familiar to most practitioners who have been involved in e-disclosure exercises. The privilege attaching to the document was only asserted by a more senior lawyer within the disclosing firm, in response to an email from a lawyer within the receiving firm, which attached the email in question.

The Court clearly decided on the facts that the email had been disclosed in error by the junior lawyer and that neither a senior lawyer within the relevant team nor the client, had ever waived privilege in the document. The Court then had to decide whether the mistake had been obvious, in novel circumstances where the email had initially been received by a junior lawyer and then passed on to a more senior lawyer, both of whom claimed that they had not appreciated the privileged nature of the documents. Upon hearing the evidence, the Court believed the testimony of the more junior lawyer that he had not

[10] *Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd* [2017] EWCA Civ 1029.
[11] *Al-Fayed v Commissioner of Police for the Metropolis* [2002] EWCA Civ 780, [2002] ALL ER (D) 450.

appreciated that the document was privileged. Nonetheless, the Court decided that it was able to look beyond the junior lawyer and consider the knowledge of the more senior lawyer and having done so found that, contrary to his testimony, the more senior lawyer had appreciated the privileged nature of the document and as such the appeal should be allowed and ordered the document not to be disclosed.

Thus, *Atlantisrealm* establishes a new element of the principle of inadvertent disclosure: where the original solicitor in receipt of a document does not appreciate that it is privileged and refers the document to a colleague who does appreciate (or ought reasonably to appreciate) that it is privileged before making use of the document, it is open to the court to grant relevant relief.

The case is also a useful reminder that appropriate quality checks and different levels of review should be built into review/disclosure exercises, particularly where these are substantial and/or where the privilege or lack thereof, attaching to some of the underlying document, is unclear. Further, the case highlights the value in agreeing a document exchange protocol before commencing a disclosure exercise. This is an agreement signed by all the parties involved, which regulates the disclosure exercise; such can contain express terms providing that any privileged documents inadvertently disclosed are inadmissible and provides some added protection against the effects of mistakes.

THOUGHTS ON THE RBS RIGHTS ISSUE LITIGATION AND ENRC

The decisions in the *RBS Rights Issue Litigation* and *ENRC* cases, have been controversial, attracting much judicial attention. Many commentators think that the judges in these cases may have gone too far, including the Law Society[12] – its president, Robert Bourns, described the judgment in *ENRC* as "*deeply alarming*" in an open letter to the Financial Times. It is notable that the Competition Appeal Tribunal ("**CAT**") came to a very different view when it considered the same question, in the context of an Office of Fair Trading (predecessor to the Competition and Markets Authority) investigation into Tesco[13]. ENRC have sought leave to appeal and the barristers who represented ENRC have publicly said that they consider the judgment to have been incorrect, as a matter of law. Notwithstanding this, the ruling in *ENRC* is binding and there can be no certainty that ENRC will be successful on appeal; *Three Rivers* was also controversial, but it has yet to be overturned.

A party served with a notice from an enforcement agency (with similar statutory powers to those conferred upon the SFO by virtue of s. 2 of the Criminal Justice act 1987) requesting it to produce documents which but for the *RBS Rights Issue Litigation/ENRC* decisions it would consider privileged, must deliver up such documents. It may well be that enforcement agencies ramp up their use of production notices in an effort to maximise their, effectively newly enhanced powers, pending a Court of Appeal decision.

Businesses should consider taking active measures to reduce the scope of enforcement agency requests. They can do this by ensuring that all business communications with external counsel are handled solely by a client team, the membership of which is small and recorded in a contemporaneous document or documents, which also codify the client team's authority to bind the company. Further, businesses may wish to consider producing contemporaneous documents detailing their real-time fear of the prospect of litigation, to be exhibited to the court in support of a claim that documents are privileged. Of course this must be handled delicately as there is a difficult balance to be struck when disclosing documents relating to a privilege being claimed, to ensure that such disclosure does not defeat the very privilege being asserted. Solicitors may also want to consider weaving legal analysis into their notes and memoranda when conducting investigations for clients, to the extent to which this is workable in practice.

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[12] http://www.lawsociety.org.uk/communities/the-city/articles/eurasian-natural-resources-corporation-ltd-legal-professional-privilege-corporate-internal-investigations-and-beyond/

[13] *Tesco v OFT* [2012] CAT 6 - The CAT decided that, in general, it was necessary to assess the nature of proceedings in any given case to decide the extent to which such proceedings were adversarial. In this case, they decided proceedings were sufficiently adversarial because: (i) a statement of objections had been issued accusing Tesco of wrongdoing, which it was contesting; (ii) the OFT was determining Tesco's liability for a potential breach of the Competition Act, which carries a potentially large fine; and (iii) the proceedings were regarded as criminal for the purpose of Article 6 of the European Convention on Human Rights. It is unlikely that any of these factors alone or collectively would be enough to present the proceedings as sufficiently adversarial under the revised *ENRC* position.

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WAIVING PRIVILEGE

HOW PRIVILEGE IS WAIVED

Where litigation is ongoing or reasonably in contemplation, litigation privilege applies to communications between: (1) a client and its lawyers; (2) a client and its other third party non-lawyer advisers; and (3) a client's lawyer and non-lawyer advisers, provided that all such communications are connected with the litigation. In such circumstances, in-house counsel may forward the advice it receives from one adviser to another and from its advisers to others within the business (including those outside of the legal function), without worrying about privilege in the advice being waived. So long as the advice remains confidential (i.e., it is not disclosed purposefully or inadvertently to parties outside of the client and its circle of advisers), then it will remain privileged.

In-house counsel have a much more difficult task in ensuring that the privilege attaching to advice protected only by legal advice privilege, is not waived. Where in-house counsel disclose confidential legal advice to a non-lawyer adviser or to employees from the business outside the "client team" [see our discussion of this in the *RBS Rights Issue Litigation* and *ENRC cases* at [pp.15-18]], the client is taken to have waived its right to assert privilege where the extent of the document's circulation is such that it no longer fulfils the definition of a confidential communication between a client and its lawyer. More broadly, privilege is deemed waived where a client acts inconsistently with the maintenance of the confidentiality in the communication; this is subject to an objective test – an implied waiver can be found notwithstanding that it may not reflect the actual subjective intention of the privilege holder.

In-house counsel should be careful when disclosing parts of privileged documents or documents that form part of a privileged or partly-privileged sequence (such as one email in a chain), as such disclosure leaves open the possibility that privilege will have been waived in respect of the wider collection of documents. In the context of litigation, it is open for other parties in receipt of such disclosure to argue that there has been a collateral waiver of privilege in the other documents [this is discussed in more detail at [p.25] in the context of the *Holyoake* case].

Where in-house counsel want to communicate advice received from external counsel to other parts of the business, without losing the legal advice privilege attached to such advice, they should consider the best form of communication to use. It is easier to assert privilege where the wider business has received only a redacted version of the advice, only certain parts of the advice, or better still only a summary or re-working of the advice in the in-house lawyers own words, or, an oral summary.

Disclosure: Insured to Insurer

Parties should exercise due care and caution when disclosing privileged information to any party, including when such disclosure appears to be required pursuant to an underlying contractual or other obligation.

For example, an insured exposed to an insured risk, such as a claim arising out of a third party's default under a contract, is likely to be required under the terms of its cover with its insurer to disclose all

information relevant to its claim against the third party. The wording of such terms would likely cover, for instance, a confidential report prepared by the insured's lawyer, particularising its claim and the chances of such claim succeeding. In such circumstances, the insured should take care before disclosing privileged documents. Whilst there is some commonality of interest between the parties, their interests are also potentially adverse, as the insured is likely to advance a claim at some point against the insurer, under the relevant insurance policy. As such, this type of disclosure would likely be deemed to have waived the insured's privilege over the documents and the insurer would be entitled to rely upon them, if desired, in any future claim brought against it by the insured.

In actuality, it is questionable whether even the most tightly drafted insurance policy would be deemed to require an insured to disclose confidential information to its insurer. If an insured has no objection to documents being disclosed (so long as they retain their privilege) then it is advisable for the insured to enter into a confidentiality agreement with its insurer, setting out the basis upon which the disclosure is made and the limitations upon further use of the information disclosed.

COLLATERAL WAIVERS OF PRIVILEGE

It is possible for a party involved in litigation to waive its privilege over certain correspondence and submit evidence to the court which would otherwise be inadmissible. A party will normally only do this where it believes that such disclosure is to its advantage. Sometimes, a party will consider that it is to its advantage to waive its privilege over a discrete portion of a group of correspondence, retaining privilege in the remainder – so called "cherry-picking".

Whilst this can be advantageous, it is not without its dangers. Once privilege has been waived, the court is at liberty to decide that the "cherry-picking" of documents has provided a misleading picture and disclosure of the remainder of the documents within the relevant group must be provided to give clarity – in such circumstances the disclosing party is deemed to have provided a "collateral waiver" – i.e., to have waived its privilege over the remainder of the documents in the wider group.

Holyoake

In a recent case from February 2017, *Holyoake*[14], the Court adopted a relatively narrow application of the collateral waiver principle, limiting the scope of the further documents that were required to be disclosed following a waiver of privilege over a selection of emails relating to an important issue in the case (here, emails between the defendant and its lawyer concerning alleged threats made by the claimants against the defendants). The Court provided some clarity on the issue, providing that three questions ought to be asked in deciding whether there had been a collateral waiver and the extent of any such waiver:

- What is the transaction/issue in respect of which the disclosed documents have been disclosed;
- What is the purpose of the disclosure; and
- Does fairness require broader disclosure.

The Court's clarification as to the relevant questions to be asked when deciding on the issue of a collateral waiver and its extent, is to be welcomed, as is the judge's expressed desire for there to be more consistency and predictability in judicial decisions in this area. Also to be welcomed is the Court's relatively narrow application of the collateral waiver principle.

Notwithstanding the above, a court's decision on whether there has been a collateral waiver will always, necessarily, be a highly fact dependent one (and judicial decisions on this question have been highly unpredictable historically). Before taking a decision to waive privilege in-house counsel should think very carefully about the wider implications of their decision, including the possibility that a court will come to the view that substantial documents are required to be disclosed as a result of a collateral waiver.

[14] *Holyoake & Anor v Candy & Ors* [2017] EWHC 387 (Ch)

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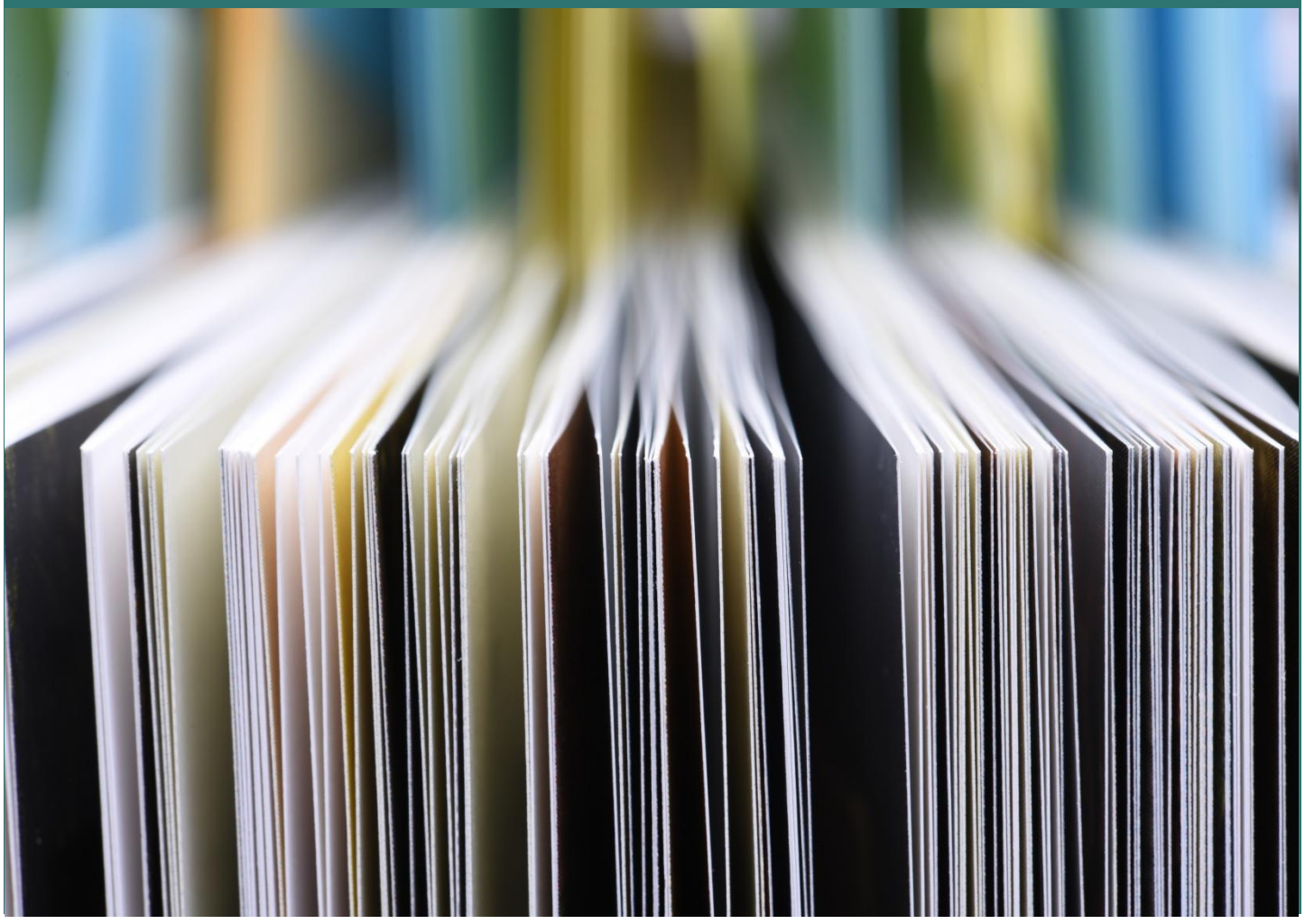
PRACTICAL TIPS FOR PROTECTING PRIVILEGE



PRACTICAL TIPS FOR PROTECTING PRIVILEGE

- Instruct solicitors early: legal advice privilege only applies to communications when a lawyer is receiving instructions or giving advice.
- Assert privilege and confidentiality: mark all communications in relation to obtaining legal advice **"Privileged and confidential – prepared for the purposes of [litigation or arbitration]"** or **"Attorney – client privilege"**. Although labelling is not conclusive, it is a helpful indication of the substance of the document.
- Acknowledge when a dispute has arisen: make a note of the date on which you consider litigation to be a reasonable prospect (i.e., more than a possibility).
- Take care when you share: privilege can be unintentionally waived if documents are disseminated too widely. Put in place internal structures which establish who is responsible for obtaining and acting on the legal advice (i.e., "*the client team*"), and ensure strict confidentiality is maintained.
- Copying/receiving legal advice: copies of privileged advice may have to be disclosed. Care should be taken when copying legal advice; only do so where necessary and make a note of what was done with the copies, to whom they were sent etc.
- Understand what constitutes legal advice: analysis or comments on privileged advice by non-legal staff will not be privileged. If legal advice must be shared, forward a copy of the original advice on strictly confidential terms marked as **"Privileged and confidential – prepared for the purposes of [litigation or arbitration]"**.
- Similarly, circulate summaries of legal advice, or extracts without additional commentary, marked **"Privileged and confidential – prepared for the purposes of [litigation or arbitration]"** alternatively, provide oral summaries.
- Store privileged documents appropriately: ensure as far as possible that privileged documents are easily identifiable and stored separately from non-privileged documents, in appropriately marked non-transparent folders or ideally electronically in folders inaccessible to those outside the "*client team*".
- Do not annotate privileged documents.
- Do not circulate privileged documents outside of your jurisdiction without first checking whether they will remain privileged under local law.
- Maintain a list of those to whom privileged documents are circulated.
- When considering whether to waive privilege in a selection of documents forming part of a larger group, evaluate the benefit to be gained from such disclosure against the potential disadvantage arising out of a potential direction from the court for disclosure of the remaining documents.
- It will be rare for you to have to disclose privileged information (outside the context of a criminal investigation). Where a decision is made to voluntarily disclose privileged information to a party which

has or might have adverse interests to your own (e.g., an insurer), enter into a confidentiality agreement to regulate the extent to which that party may use this information.

- Legal advice privilege can apply to board meeting minutes. To improve the chances that a court will consider minutes to be privileged, those drafting the minutes should consider including notes to assert privilege. For example, minutes might reflect expressly where "the board received confidential legal advice/a confidential report from management regarding potential or actual litigation" or where certain parties "temporarily vacated the meeting" (so that privileged matters could be discussed within a smaller "client" group). Similarly, where material is presented to the board which is subject to third party confidentiality requirements, this should be made clear at the board meeting and recorded in the minutes.

In the context of undertaking an internal investigation, there are additional tips for protecting privilege

- Where possible, instruct outside counsel to undertake investigations and produce reports. Although whether privilege attaches to such reports is decided by the circumstances, use of external counsel affords the strongest arguments in favour of privilege applying. Certain jurisdictions and supra-national enforcement bodies (such as the European Commission), do not consider reports produced by in-house counsel as part of internal investigations to be privileged.
- Create and record the constitution of a dedicated investigation team, responsible for and with adequate power to instruct external counsel – this will help define the "*client*" for the purpose of asserting privilege.
- Assess and marshal documents produced prior to or during the investigation. Consider holding discussions with employees involved in the underlying issues being investigated to avoid having to disclose sensitive internal information.
- If a report is required only for internal purposes, assess whether its contents would be of interest to a regulator with jurisdiction. Consider whether it is worth creating the report if it is possible that it may be disclosable in future enforcement proceedings[15].
- Be aware of the possibility that once documents are disclosed to one regulator/enforcement body (whether voluntarily or not), such documents may be forwarded to other regulators/enforcement

[15] The key regulators in the UK, for commercial activities, are the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA), the Competition and Markets Authority (CMA), the Serious Fraud Office (SFO) and the National Crime Agency (NCA). It is worth noting that the Conservative Government included plans in its most recent general election manifesto to dissolve the SFO and roll its functions into the NCA. This could impact on the nature and efficacy of future investigations, however, following the Conservative Party's failure to achieve an outright majority following the 2017 General Election, it is of interest that such plans did not find their way into the 2017 Queen's Speech, perhaps reflecting that this policy has fallen off the Government's agenda, at least for the time being.

bodies, including in other jurisdictions, even where the documents in question would be considered privileged in those jurisdictions.

- Solicitors conducting interviews may want to consider weaving legal analysis into their notes and memoranda, to the extent to which this is workable in practice, to improve the prospects of such being considered privileged as attorney work-product. However, caution is advised as it is uncertain whether this would serve to make an otherwise open document privileged.

Should you require any further information or assistance with any of the issues dealt with here, please do not hesitate to contact the authors of this pack, or your usual HFW contact.

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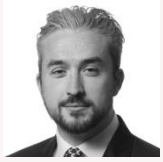

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