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Privilege: The obligation to disclose

OCTOBER 2015

The obligation to disclose, or 'discover', documents during the litigation process is a necessary albeit burdensome part of the litigation process. A party to litigation is under a continuing obligation to the other parties to disclose at the appropriate stage in the proceedings all documents within their control (including video/ audio records and electronically stored information) which: (i) that party relies on; (ii) adversely affects that party's own case; (iii) adversely affects the opponent's case; or (iv) supports the opponent's case. Accordingly, from the outset of the litigation, all documents that could conceivably be relevant to the case will need to be retained.

Pursuant to Rule 6/17(1) of the Royal Court Rules 2004 ("RCR") (Discovery and inspection of documents), the Court may order "any party to any proceedings to furnish any other party with a list of the documents which are or have been in his or her possession, custody or power relating to any matter in question in the cause or matter to verify such list by affidavit".

Rule 6/17(3) of the RCR permits any party to the litigation to withhold documents from discovery and inspection on the grounds that they are privileged. If a document is considered to be privileged, it entitles that party to withhold that evidence from production to a third party or Court.

Once privilege has been established an absolute right to withhold the document in question arises regardless of whether your opponent argues that the document is relevant.

The Jersey concept of privilege follows English Law principles and recognises three main categories of privilege:

1. Legal advice privilege;
2. Litigation privilege; and
3. Common interest privilege.

Set out below is a summary of the categories of privilege that can arise during the discovery process.

Legal Advice Privilege

- Legal advice privilege applies to confidential communications that pass between a client and his lawyer. Such communication must have come into existence for the purpose of giving or receiving legal advice.
- Legal advice privilege can apply whether or not litigation is pending or contemplated.
- The general rule is that if a lawyer commits advice to paper during the course of his retainer and that advice arises only as a result of the professional relationship with his client, then those documents will be privileged.

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- Legal advice privilege does not attach to communications with third parties.

Litigation Privilege

- Litigation privilege arises where a communication is confidential between a lawyer or client or third party and made for the predominant purpose of litigation which is reasonably contemplated or existing.
- The communication may be either between:
  1. A lawyer acting in a professional capacity and his client; or
  2. A lawyer acting in a professional capacity and a third party; or
  3. The client and a third party.
- Common examples of communications that may fall within the scope of litigation privilege are:
  1. draft communications between an expert, the client and lawyer retained for the purpose of assessing the strength of a potential claim; and
  2. communications between a legal insurer, the client and lawyer retained for the purpose of discussing the funding of the litigation.
- For the litigation to be pending, reasonably contemplated or existing, it must be established that there is a real likelihood, as opposed to a mere possibility, of the litigation arising.

Common Interest Litigation

- Common interest privilege arises in relation to confidential communications of material that is privileged in its own right between parties with a common interest in the litigation.
- Once common interest privilege had been asserted, the relevant documents maybe shared between the parties without the risk that they have waived privilege by failing to retain confidentiality in the communication. Commonly parties recognise at an early stage of the litigation that common interest privilege will apply to communications and so email correspondence, letters and attendance notes of conversations will be clearly marked "subject to common interest privilege and confidential" to protect this correspondence from disclosure at a later date.
- Common examples of common interest privilege are:
  1. Communications between co-defendants in a litigious matter where the respective defendants have separate legal advisers
  2. Communications between either a plaintiff or a defendant and their legal insure
- Once common interest privilege has been asserted, if the respective parties subsequently fall out and sue one another neither may claim privilege as against the other, as the original joint interest is not destroyed by subsequent disagreement between the parties

Conclusion

The importance of understanding privilege comes into sharp focus when considering whether a particular document or class of documents fails to be disclosed. There is an ever present risk that a plaintiff and

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defendant will not agree and the danger is that if privileged documents are not adequately protected, this could put at risk an entire class of documents which form part of the same family. Understanding privilege is critical in order to ensure that confidential material, which if disclosed could irreparably damage the case, is preserved.

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