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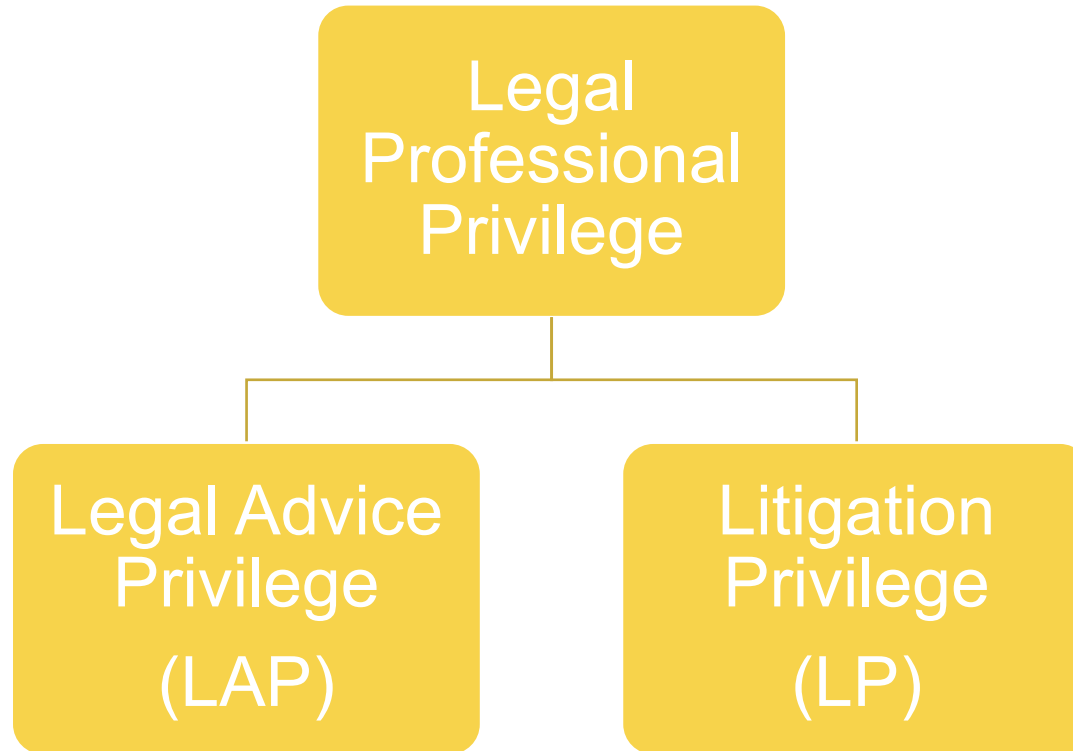


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The dos and don'ts of creating and retaining privilege

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English law: Legal Professional Privilege



Legal Advice Privilege (LAP)



- Protects
 - (i) confidential communications
 - (ii) between a lawyer and client
 - (iii) for the purpose of giving or receiving legal advice
- NARROW – and some tricky issues...
- What is a “lawyer”?
- What constitutes "legal advice"?
- Who is the "client"?

What is a lawyer?

- Foreign qualified lawyers?
- In house lawyers?
- Other consultants?
 - Eg. Accountants providing tax advice?
 - Claims consultants?

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What is legal advice?



- Advice on rights, liabilities, obligations and/or remedies
- Dominant purpose of communication must be obtaining legal advice
- It will not extend to pure business advice, even if given by a lawyer
- There will be many grey areas: "legal spectacles" v. "man of business"
- In-house lawyers: are they performing a business or administrative function?

What is communication for the purpose of giving or receiving legal advice?

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- Documents forming part of a continuum of communications, the object of which is the giving of legal advice, as and when appropriate
- Lawyers in copy:
 - Identify the dominant purpose of the communication
- Lawyers' working papers betraying the trend of legal advice

Who is **the client**?



A Narrow Approach

- Only those persons made responsible by a company for engaging with lawyers
- Other employees are effectively to be treated as third parties
- Documents created by these "third party" employees are NOT privileged, even if created for the purpose of obtaining advice from a lawyer
- CA in ***Three Rivers No 5*** (2003)

"communications between an employee of a corporation and the corporation's lawyers [cannot] attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client."

Criticism of *Three Rivers No. 5*

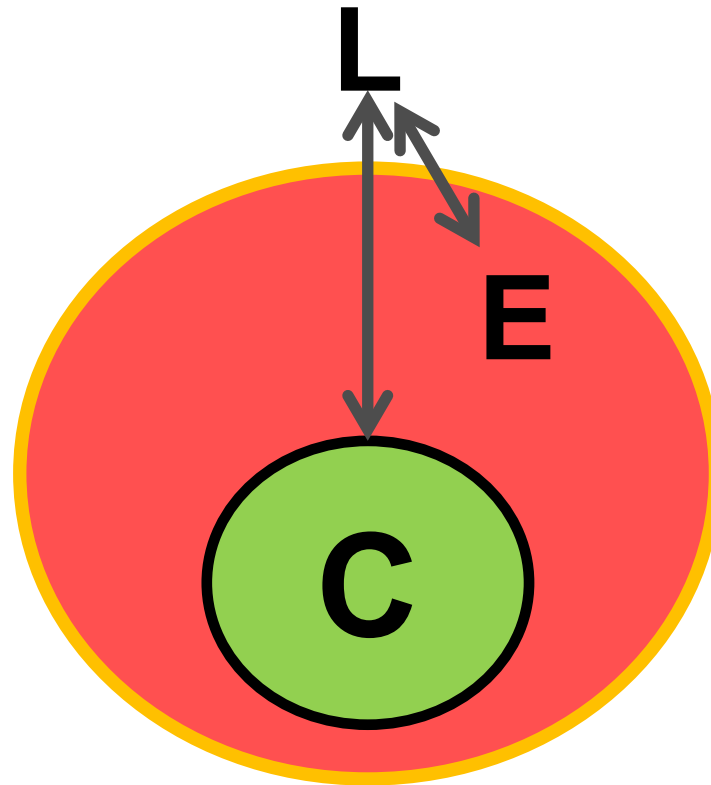


CA in *R(Jet2.com)* (2020)

- *"this court in Eurasian indicated that, if it had been open to it to depart from Three Rivers (No 5) on this issue, it would have done so. In addition to the preference for common law jurisdictions to be in step on such issues as this Three Rivers (No 5) being out of step with overseas common law on this issue the court considered that the foundation of Longmore LJ s judgment (i e an analysis of 19th century authorities) was unsafe, because those cases were decided at a time when the distinction between litigation privilege and LAP was very much in its infancy, and without any of the principled analysis of LAP which has subsequently taken place (see paras 38 and following above). ...I respectfully agree."*

Who is the “client”? The “Danger Zone”

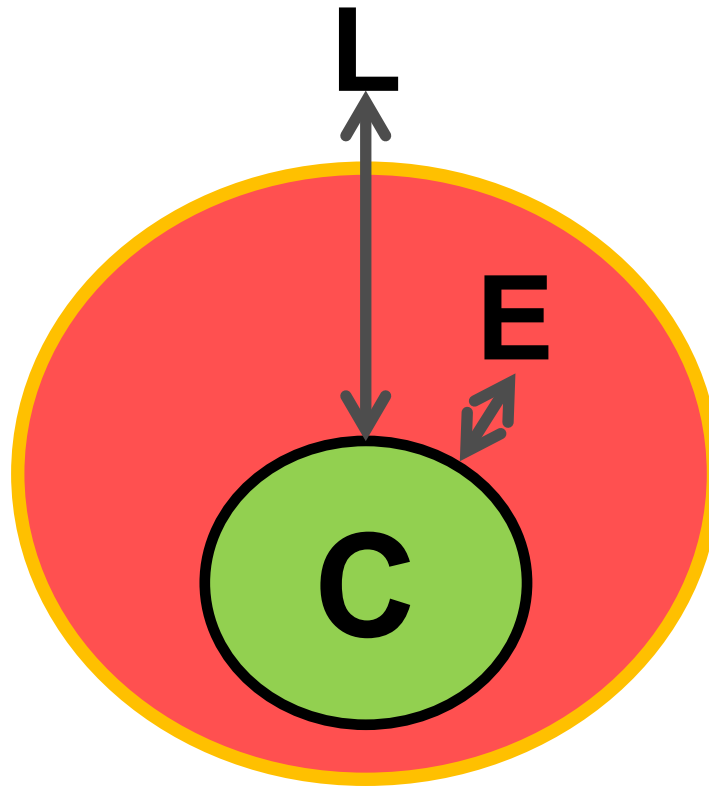
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Who is the “client”? The “Danger Zone”

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Who is **the client**?

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Practical Tips

- A question of fact, established by evidence
- Define at the outset, e.g. engagement letter. Consult lawyers
- Keep under review
- Avoid creating unnecessary records that are not passed on to lawyers

Litigation Privilege (LP)



"The conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in the modern case-law is that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:

- (a) litigation must be in progress or in contemplation;*
- (b) the communications must have been made for the sole or dominant purpose of conducting that litigation;*
- (c) the litigation must be adversarial, not investigative or inquisitorial."*

Lord Carswell in ***Three Rivers (No. 6)*** [2004] UKHL 48 (¶103)

What are **adversarial** proceedings?

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- Litigation
- Arbitration
- Adjudication?
- Expert Determination?
- Regulatory Investigations?

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Regulatory Investigations: ***ENRC*** and ***Jukes***

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- ***Director of the Serious Fraud Office v Eurasian Natural Resources Corp Ltd*** [2018] EWCA Civ 2006
- ***R v Jukes*** [2018] EWCA Crim 176

Regulatory Investigations: **ENRC** and **Jukes**

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- **Eurasian Natural Resources** – First Instance (Andrews J):

“Criminal proceedings cannot be reasonably contemplated unless the prospective defendant knows enough about what the investigation is likely to unearth, or has unearthed, to appreciate that it is realistic to expect a prosecutor to be satisfied that it has enough material to stand a good chance of securing a conviction.”

- **R v Jukes** – Court of Appeal:

“At the time, in February 2011, no decision to prosecute had been taken by the Health and Safety Executive and matters were still at the investigatory stage. An investigation is not adversarial litigation. As Andrews J said in Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2017] EWHC 1017 QB at [154]:

“The reasonable contemplation of a criminal investigation does not necessarily equate to the reasonable contemplation of a prosecution.””

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- ***Eurasian Natural Resources*** - Court of Appeal:

“For the reasons we have given, Andrews J was not right to suggest a general principle that litigation privilege cannot attach until either a defendant knows the full details of what is likely to be unearthed or a decision to prosecute has been taken. The fact that a formal investigation has not commenced will be one part of the factual matrix, but will not necessarily be determinative.”

- Relevant issues: the nature of the investigation/ process, possible penalties, attitude of the relevant agency, knowledge of what has happened.

What are proceedings in reasonable contemplation?



- ***USA v Philip Morris*** (2004), CA - Brooke LJ

a “mere possibility”, “general apprehension” or “distinct possibility” that sooner or later someone might make a claim is not enough

- ***Starbev GP Ltd v Interbrew Central European Holding BV*** [2013] EWHC 4038 (Comm):

“The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation... As Eder J stated in Tchenguiz at [48(iii)]: ‘Where litigation has not been commenced at the time of the communication, it has to be “reasonably in prospect”; this does not require the prospect of litigation to be greater than 50% but it must be more than a mere possibility’.”

What is the **dominant purpose**?



- "Purpose" is broad and can cover many aspects of the proceedings
- The dominant purpose need not be the only purpose
- BUT it is not sufficient to demonstrate a dual/ joint purpose: privilege will not attach if multiple purposes are “of equal importance and relevance” (***Sotheby's v Mark Weiss Ltd*** [2018] EWHC 1379 (Comm))
- Contemporaneous evidence is required – the court will apply close scrutiny

What is the **dominant purpose**?



- **Sotheby's:**

“I do not read the ENRC case as deciding that whenever litigation is the “inevitable” consequence of taking a particular commercial decision, the dominant purpose of documents produced for the making of that decision is necessarily their use in the contemplated litigation.”

Avoiding Privilege Disputes



- If documents are created for the purpose of anticipated proceedings, mark them as such;
- Record (in file notes or emails) the reasons it is understood that proceedings are reasonably in prospect and why;
- Issue a litigation hold letter;
- Once you have privilege, be careful not to lose it!

Sharing privileged material



(1) Share it, but not too far...

- Legal advice continues to be privileged if it is disseminated for the purposes of making commercial decisions
- Summaries or extracts of legal advice may also be privileged
- BUT: advice **must remain confidential**
 - keep sharing to a minimum and remember the danger zone!

"I see no good or valid reason for the suggestion that the confidence which is accepted attached to lawyer-client communication itself, should somehow be lost once the advice is put to the commercial use for which it was sought."

The Good Luck
[1992] 2 Lloyd's Rep 540

Sharing privileged material



(2) Board meetings – where is the line?

- An external lawyer reports, or provides a summary of, legal advice to the Board
YES - privileged
- An in-house lawyer reports, or provides a summary of, legal advice to the Board
YES – privileged
- An external or in-house lawyer prepares a summary of the discussion that took place at the Board meeting regarding the legal advice **YES - privileged**
- A Board minute recording the legal advice given at the Board meeting **YES – privileged** (would be redacted if the rest of the minute is relevant)
- A Board minute which records action to be taken in light of legal advice received **NO – not privileged**

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Thank you.
Questions?

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