



## PRIVILEGE AND PREJUDICE

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### A. INTRODUCTION

1. Issues of privilege, and Without Prejudice communications, occur surprisingly often in practice. Legal privilege is concerned with legal advice privilege (essentially communications between clients and lawyers irrespective of whether there is any or actual contemplated litigation) and litigation privilege (communications not necessarily between client and lawyer, where litigation is contemplated or in existence). Without Prejudice concerns the evidential rule by which, save for certain purposes, and subject to certain exceptions, communications between the parties made for the purposes of resolving their disputes are not admissible in evidence.

### Working definitions

2. Legal advice privilege: *(1) communications, (2) in confidence, (3) between solicitor and client or internal agent, (4) re giving/receiving legal advice, (5) litigation need not be in contemplation.*
3. Litigation privilege: *(1) communications between (client or lawyer) and third party, or documents created by client or lawyer, (2) litigation is contemplated or has commenced, (3) for the dominant purpose of (a) obtaining advice/information in connection with the litigation, or (b) assisting in the litigation itself.*

## **B. LEGAL ADVICE PRIVILEGE**

### **Client**

4. The question of who is the client is straightforward to answer where the client is an individual, or where it is a firm. Difficulties have arisen in the case of corporate clients. This is largely as a result of the decision of the Court of Appeal in **Three Rivers District Council and Others v. Governor and Company of the Bank of England (No.5)** [2003] QB 1556.
5. After the collapse of BCCI, the Government announced an investigation into the banking supervision of BCCI, to be carried out by Bingham L.J. The Bank of England set up an inquiry unit – known as the Bingham Inquiry Unit, or BIU – to deal with the presentation of the Bank’s case to the Inquiry. The case was concerned with a claim by the liquidators of BCCI against the Bank of England for misfeasance in public office. The BCCI liquidators based their misfeasance claim against the Bank to a large extent on material considered in the Bingham Report.
6. There was an application by the liquidators for disclosure of material passed by employees of the Bank to the BIU. The Court of Appeal decided that those employees not part of the BIU were not the client for the purposes of legal advice privilege.
7. It also decided that the documents generated were not for the predominant purpose of taking legal advice, but for the purposes of better presentation by the Bank of its case at the BIU.
8. In the light of that decision, the liquidators made a fresh application for disclosure of communications passing between the BIU and its lawyers. The House of Lords in **Three Rivers District Council and Others v. Governor and Company of the Bank of England (No.6)** [2005] 1 AC 610 held that legal advice privilege applied to such communications.

9. The House of Lords in **Three Rivers (No.6)** did not expressly disapprove of the decision of the Court of Appeal in **Three Rivers (No.5)** as to who was the client for the purposes of the privilege.
10. Where a company is concerned, although the Court of Appeal in **Three Rivers (No.5)** held that the client was an employee authorised to make or receive communications, the safest approach is to treat the question as one of fact in each case. Mere fact of employment is an insufficient precondition. On this approach, consistent with common sense, junior employees of a company would not ordinarily be equated with the client for the purposes of the privilege, whereas senior employees would. But on the other hand, it is not necessary for the relevant employee to be part of the controlling mind or control group within the company. It is safer to treat as anomalous the view of the Court of Appeal that whereas the Assistant to the Governor of the Bank of England, who was a member of the BIU, was the client, the Governor himself was not.
11. A former employee may just as much be a client for the purposes of privilege as a current employee, provided that the relevant test (i.e. one of fact) is satisfied.
12. Generally speaking, legal advice privilege is not concerned with communications between third parties and lawyers (though such communications may well be within the scope of litigation privilege, as to which see below.) However, again, it must be a question of fact whether the communication is truly made by an independent third party. If the communication is made by that third party on behalf of the client, it ought to be protected (and probably will be) just as much as if the client himself had made the communication.

### **Lawyer**

13. The privilege covers only communications intended to be with qualified lawyers and, controversially to some, not with other professionals: **R (Prudential PLC)**

v Special Comr of Income Tax [2011] 2 WLR 50 (NB there is a pending appeal in this case).

14. There is no real surprise about the individuals who come within the definition of lawyer, they include barrister, solicitor, and their agents, such as a solicitor's employees, a barrister's clerk, trainees and pupils.
15. **In-house lawyers:** save for one important EU exception, which has been in the legal headlines, in-house lawyers are also within the scope of the privilege – Alfred Crompton Amusement Machines Limited v. Customs & Excise Commissioners (No.2) [1972] 2 QB 102, 129, Lord Denning M.R.
16. The exception was re-stated by the Court of First Instance ruling in September 2007 in Akzo Nobel Chemicals Ltd v European Commission (joined cases T-125/03 and T-253/03) that for EC law purposes legal professional privilege does not extend to in-house lawyers, and that accordingly, on the facts, certain in-house documents were not exempt from disclosure to the Commission during an EC dawn raid concerned with competition compliance.
17. That decision was upheld by the Court of Justice (Grand Chamber) Case C – 550/07/P [2010] 5 CMLR 19.
18. Although communications with in-house lawyers are in principle protected by privilege, nevertheless that covers only such communications with them in their capacity as lawyers. If the lawyer is acting in some other capacity, the communications will not be privileged. This is often a situation of some difficulty in the in-house context. Sometimes an in-house lawyer will fulfil an administrative role rather than offering advice as to what ought to be done in a relevant legal context. The question of what constitutes “legal advice” is explored below.
19. The privilege will cover communications where a client in good faith instructs an individual believing him to be a lawyer, but it turns out the individual was not

properly qualified at the time: **Dadourian Group International Inc & Ors v Paul Simms & Ors [2008] EWHC 1784 (Ch), [122, 123, 125, 126]**.

20. **Personnel consultants:** personnel consultants are not either in-house or independent professional lawyers, and the privilege does not extend to them. In **New Victoria Hospital v. Ryan [1993] ICR 201, 203-4**, the held that there was no privilege, prior to the contemplation of litigation, in relation to communications between the hospital and personnel consultants. Tucker J. stated *“To extend the privilege to unqualified advisers such as personnel consultants is in our opinion unnecessary and undesirable.”*
21. The distinction between the situation of an employment consultant giving advice prior to the contemplation of litigation, and after litigation has been contemplated, or commenced, is important. In the former case, litigation privilege will not apply, and applications for disclosure of relevant communications ought to succeed.
22. The NIRC held that there will be litigation privilege where the consultant acts in the tribunal – **Grazebrook Limited v. Wallens [1973] ICR 256, 259**. The NIRC held: *“Before Industrial Tribunals it is the rule, rather than the exception, for parties to be represented by persons other than lawyers. Indeed, it is the policy of Parliament to encourage such representation...Accordingly, we rule that, if and insofar as the general law applicable to all courts does not give the privilege [...], then, in the interests of the administration of justice, we hold that the privilege exists in relation to proceedings before an Industrial Tribunal.”*
23. The decision of the EAT in **Scotthorne v Four Season Conservatories (UK) Ltd EAT/0178/10/ZT** is to the same effect. In that case, the employer sought advice from its (non-legally qualified) advisor and insurer. HHJ McMullen QC held that legal advice privilege did not apply, but on the facts of the case litigation privilege did.

24. A similar position has been reached in Australia – **Wood v. Commonwealth Bank of Australia (1996) 67 IR 46**. Mr Wood was a member of the finance sector union. After termination of his employment, he consulted an individual at the Western Australia branch of the union, a Mrs Locke, applying for support for his case. Mrs Locke wrote seeking advice from an officer of the union in Sydney. He replied, giving advice about Mr Wood’s proposed application. Neither Mrs Locke nor the officer in Sydney were legally qualified. The Bank sought disclosure of the documents from Mrs Locke and the Sydney officer, and was successful.
25. In giving this answer, the Court recognised that there were powerful practical factors pointing in the direction of allowing privilege to be conferred, they included: the proper role that unions have in advising members as to their rights, particularly in the context of termination of employment; the role industrial officers may have in representing union members in court applications; the expertise built up by industrial officers in the area of unlawful termination of employment claims such that they are able to provide knowledgeable advice; the effect of the non-application of legal advice privilege being that this might undermine the role which unions arguably can and should properly have in giving their members advice on unlawful termination claims.
26. **Alternative business structures:** Where there are alternative business structures comprising lawyers and non-lawyers, the courts will need to consider the purpose of the communication in order to determine whether it is in relation to giving or receiving legal advice. If it is not, the privilege will not apply.
27. **Litigant in person:** since there can be no lawyer/client communications where a litigant acts in person (even if the litigant is professionally qualified as a lawyer) legal advice privilege will not attach to legal research carried out by the individual prior to contemplation of litigation. It is unlikely the other side will in any event seek disclosure of such documents, since they may only have been prepared where litigation was contemplated (and hence subject to litigation privilege), and

in many cases the other party seeks to reduce the amount of documentation generated. However it is possible to conceive of situations where such documentation might be considered relevant, for example in relation to costs.

### **Communications**

28. *“By the end of the 19<sup>th</sup> century it was, therefore, clear that legal advice privilege did not apply to documents communicated to a client or his solicitor for advice to be taken upon them but only to communications passing between that client and his solicitor (whether or not through any intermediary) and documents evidencing such communications” **Three Rivers (No.5)**, para. 19.* Accordingly, the privilege does not apply to pre-existing documentation, and the communication created must be for the purposes of giving or receiving such advice.
29. An obvious example of a document evidencing such a communication is the note of a consultation with Counsel.
30. Although the purpose of the communication must be in relation to advice, it is not necessary that the communication actually occurs. Thus, a draft letter lawyer/client is covered by the privilege.
31. Whether communications with an agent come within the meaning of client/lawyer communications is a question of fact. Put another way, it depends on the nature of the agency. In a case where surveyors were instructed to produce a report to go directly to lawyers, and not via the client, the surveyors were held to be third parties, and not agents of the client: **Wheeler v. Le Marchant (1881) 17 Ch. D. 676, 684**. In that case the report amounted to a communication from the surveyor to the lawyer, rather than from the client to the lawyer.

## Confidentiality

32. The essence of legal advice privilege is that the communication intended between client and lawyer must be confidential. In the absence of confidentiality, there is no privilege.
33. Certain communications are unlikely to be regarded as confidential. These may include the dates and times that a client consulted his lawyer. Therefore, those parts of a lawyer's fee note may not be confidential even though the narrative of any advice provided, and the amount of the fees will be. However, the conventional view is that fee notes are confidential – **Dickinson v. Rushmer [2002] 1 Costs L.R. 128, para. 12.**
34. What is said or done in open court or tribunal is plainly not confidential. This raises the question as to whether one party is entitled to disclosure of another party's notes of what has been said or done at such a hearing. The traditional approach is that a note made of what occurs in court is not privileged, even when it is made by lawyers: **Ainsworth v. Wilding (1900) 2 Ch. 315, 321-2.** The decision in that case was in turn based on **Re Worswick (1882) 38 Ch. D. 370, 373:** *“A mere verbatim report of the evidence, whether by the solicitor's clerk, the solicitor, or counsel, would not in my opinion be privileged.”*
35. The question of the extent to which one party in tribunal litigation could obtain the notes of the hearing made by the other party's lawyers was considered in the unreported case of **Comfort v. Department of Constitutional Affairs EAT/0137/05,** Burton P. (sitting alone).
36. The EAT was less than enthused by the idea that *“one side who is not bothered, or been in a position, to take notes, to have the advantage of seeing those diligently, or possibly at greater expense, taken by the other side or the other side's advisers”*. The EAT was equally less than enthused at the notion that, if such notes were subject to a continuing obligation of disclosure, for example during a liability hearing, *“before closing*

*speeches at the end of a tribunal hearing, there would need to be trawling through by each side of the other's notes of evidence in order to see whether some precise way in which something was said is differently recorded in the other side's notes from those of one's own side, or, in the case of someone who has not taken their own notes, trawling through the other side's notes."* This notion was rejected on the grounds of relevance. The EAT reached a similar view in relation to the potential for disclosure of the other side's notes for the purposes of an appeal, taking into account the specific mechanism in place for seeking to agree matters rather than calling for the Chairman's notes.

37. However, the position is, or at least may be, different in relation to a successful appeal to the EAT, where there is an Order for remission. In that case there may be the possibility of cross-examination on previous inconsistent statements. The EAT was persuaded that that possibility existed, and ordered the disclosure of notes of evidence in relation to two witnesses.
38. There is also no reason why that principle should be limited to a remission following a successful EAT appeal. It may equally apply where there is a remedies hearing, following a liabilities hearing. Evidence of the witnesses at the liabilities hearing may well be relevant to questions of remedy.

### **Loss of Confidentiality**

39. What is the position where an employee exchanges e-mails with his lawyer, concerned with giving or receiving advice, but using his employer's e-mail system? Is there a loss of confidentiality with the result that there is no privilege?
40. In the US various court decisions have held that where the employer makes clear that the e-mail system is not for private use, and e-mails may be monitored, any privilege is lost. For example, in **Scott v. Beth Israel Medical Center 2007 WL 3053351 (Sup. Ct. N.Y. Co. 17/10/2007)** the Claimant was suing the hospital for wrongful termination and a severance payment, in the sum of \$14 million. It was held that correspondence between a doctor and lawyer sent over

a hospital server was not protected by attorney client privilege or the work product doctrine; the hospital had a policy prohibiting personal use of work email, reserving the right to monitor email, and in fact monitored such email.

41. In **Long v. Marubeni America Corp**, 2006 WL 2998671 (S.D.N.Y 19/10/06), the Claimants wished to bring proceedings against their employer. They sent emails from personal and password protected email accounts on their work computers to their lawyers. Those emails were stored as temporary internet files on the employer's computers. The employee handbook stated '*All communications and information transmitted by, received from, created or stored in...automated systems....are company records*' and further stated that there was no right of personal privacy in any matter sent over the employer's internet systems. The Court held that in the light of the employee handbook the necessary element of confidentiality did not exist, and the employees could not rely on attorney-client privilege.
42. In this jurisdiction, although there are no cases that I am aware of on the point, a Court is likely to consider whether or not the Information Commissioner's Code of Practice relating to monitoring at work has been satisfied. The Court is likely to apply an objective test in doing so. If the Code is satisfied, which may be a high hurdle for an employer to overcome, the material is unlikely to attract privilege, since the necessary element of reasonable expectation of confidentiality will not be present.

### **Legal advice/assistance**

43. The classic test is in **Balabel v. Air India** [1988] 1 Ch. 317, 330-1 "*Legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.*"
44. The House of Lords in **Three Rivers (No.6)** had to decide whether the presentational advice given by lawyers to the BIU regarding the Bingham Inquiry qualified as legal advice.

45. Lord Scott said, para. 38: *“In cases of doubt the Judge called upon to make the decision should ask whether the advice relates to the rights, liabilities, obligations or remedies of the client either under private law or under public law”*.
46. Further, he stated, at paras. 43 and 44 *“The presentational advice falls, in my opinion, squarely within the policy reasons underlying legal advice privilege. [44] I would be of the same opinion in relation to presentational advice sought from lawyers by any individual or company who believed himself, herself or itself to be at risk of criticism by an inquiry, whether a Coroner’s Inquest, a statutory inquiry under the 1921 Act or an ad hoc inquiry such as the Bingham Inquiry. The defence of personal reputation and integrity is at least as important to many individuals and companies as the pursuit or defence of legal rights whether under private law or public law.”*
47. The test is an objective test. Again, Lord Scott, at para. 38: *“Is the occasion on which the communication takes place and is the purpose for which it takes place such as to make it reasonable to expect the privilege to apply? The criterion must, in my opinion, be an objective one.”*
48. Therefore, there may be a wide variety of contexts in which it can be said that a lawyer is providing advice in his capacity as a lawyer. There are inevitably situations in which the advice given will however, cross the line from legal advice to advice in other matters, for example the business wisdom of entering into certain transactions, which would not be covered.

### **C. LITIGATION PRIVILEGE**

#### **Internal discussions**

49. Internal communications once litigation has commenced, or concerning contemplated litigation, if there is the necessary dominant purpose, will be privileged – **Mayor and Corporation of Bristol v. Cox (1884) 26 Ch. D. 678, 682.**

### **Confidentiality?**

50. Confidentiality in the strict sense, namely where the confidant is under a duty not to reveal information provided by the confider, is not a requirement for the existence of litigation privilege. A different test is sometimes applied, namely whether it would be proper for the communication to be admitted into evidence.
51. For example, where a witness to a road traffic accident receives an unsolicited letter from a lawyer for one of those involved, seeking his assistance, that witness is under no duty of confidentiality. Nevertheless, the letter to him is protected by litigation privilege. Equally, any witness statement provided will also be subject to privilege, **Ventouris v. Mountain** [1991] 1 WLR 607, 612.
52. The protection conferred by litigation privilege to client and third party communications is the reason why it was unnecessary for the NIRC in **Grazebrook** to rely on legal advice privilege in order to protect the proofs of evidence in the hands of the employment consultant from disclosure. The protection of litigation privilege is available, in the case of any contemplated or actual litigation.

### **Contemplated litigation**

53. The test for whether litigation is contemplated is whether it is reasonably in prospect: **Three Rivers (No.6)**, Lord Carswell, para. 83. Litigation may reasonably be in prospect even in early days, and even before the would-be claimant has taken legal advice.

### **Litigation**

54. Litigation covers court proceedings, tribunal proceedings, arbitrations and foreign litigation, but not other proceedings. Therefore inquiries such as the Bingham Inquiry are not within this meaning.

### Dominant purpose

55. Although there is a question mark over whether dominant purpose is required for legal advice privilege to apply, it is a clear requisite for the application of litigation privilege. The dominant purpose must be for use in actual or contemplated litigation, or obtaining advice from a professional lawyer about contemplated or actual litigation.
56. Dominant purpose can be a difficult test to apply. The question often arises in the context of reports prepared with a dual purpose. For example, where a body such as the Railways Board prepares a report in respect of an accident, although it also has in mind that there may be litigation, the dominant purpose test may not be satisfied.
57. Where a report is sent by a trade union member to his Union, in order for it to decide whether to grant him legal advice or assistance, litigation privilege does not apply: **Jones v. Great Central Railway Company [1910] AC 4, HL.**
58. The purpose of the communication may be that either of the maker of the communication or of the recipient. So, in **Guinness Peat Properties v. Fitzroy Robinson Partnership [1987] 1 WLR 1027, CA**, litigation privilege applied to a report made by an insured to his insurer, even where the insured made the report as a result of being under an obligation to do so, since the insurer's purpose in receiving a report was to obtain advice on its contents, in relation to litigation that was contemplated at that time.
59. On a practical level, although standard form wording on the face of a report, to the effect that it is subject to litigation privilege, is not determinative, nevertheless it can be helpful when the point arises. Another approach lawyers sometimes take is to ensure that the report itself contains legal advice, and thus that legal advice privilege applies to it.

## D. SOME COMMON ISSUES

### Loss of privilege

60. Legal professional privilege will be lost where there is waiver, which may be express or implied (the latter is sometimes called imputed waiver.) It is an objective question whether privilege has been waived.
61. There may be situations in which it is to a party's advantage to make an intentional waiver of privilege. For example, where there is actual litigation, and the party has changed solicitors, and the other side alleges that the party victimised it, it may be to its advantage expressly to waive privilege in communications with its previous solicitors in order to demonstrate that that was not the case.
62. Another example of express waiver is in the recent case of **Tullett Prebon PLC & Ors v BGC Brokers LP & Ors** [2010] EWHC 484 (QB), Jack J. There were team moves of interbroker dealers from Tullett to BGC. Tullett brought proceedings against BGC and their ex-employees alleging conspiracy. Three employees (the "Tullett Three") were going to move to BGC but changed their minds and stayed with Tullett. A solicitor in independent practice had advised a senior employee at BGC; he then acted for the Tullett Three in their dealings with him and BGC; finally, he ceased acting for these three and again acted for the senior BGC employee. In this litigation the Tullett Three waived privilege over the advice he gave. The lawyer's advice e-mails to them appeared in the trial bundles. In the end the trial judge was not asked to give rulings on privilege, since the parties agreed the matters between themselves; but the facts of this case illustrate the dilemma that can arise over which lawyer ought to give advice.
63. Next, there may be express but unintentional waiver. A question that often arises is whether privilege has been waived if a solicitor in correspondence with the other side in litigation says something to the effect that the lay client has taken counsel's advice, and he is of the view that there are good prospects of success in

resisting the claim, and the claim ought to be dropped. Or whether there has been waiver if the effect of legal advice is mentioned in the course of collective negotiations.

64. The relevant principles have been carefully considered by the EAT in **Brennan & Ors v Sunderland City Council** [2009] ICR 479. In this equal pay and sex discrimination case a council officer exhibited notes of meetings between the council and the unions, and which referred in five places to legal advice the council had received. One of those notes referred to advice received from Counsel as to the permissible period for which pay protection could be granted.
65. The EAT said [66] *“legal advice privilege is an extremely important protection and that waiver is not easily established. In that context something more than the effect of the advice must be disclosed before any question of waiver can arise.”*
66. At [67] *“the authorities in England strongly support the view that a degree of reliance is required before waiver arises, but there may be issues as to the extent of the reliance. Ultimately, there is the single composite question of whether, having regard to these considerations, fairness requires that the full advice be made available”.*
67. The EAT dealt with the Australian case on which the Claimants, seeking disclosure, relied as follows [71]: *We accept that there are observations in the Bennett case 210 ALR 220 which support Mr Engelman’s submissions as to how fairness should apply here.... However, we are satisfied that the case supports wider principles of waiver than would apply here.”*
68. The position in the Australian case of **Bennett v. Chief Executive Officer of the Australian Customs Service** [2004] FCA FC 237 was as follows. The communications on which the successful applicant relied were ‘AGS [Australian Government Solicitor] has now advised Customs that Public Service Regulation 7(13) does not prohibit all comment by an officer on matters of public administration’ and ‘AGS has advised Customs that your client is not correct in asserting that he is not subject to the Act and

*Regulations if he makes public statements about Customs-related matters in his capacity as President of COA [Customs Officers Association].’ The Court held that if ‘a party sets forth part of the contents of a particular identified document or communication or asserts the effect of or his reliance upon a particular identified document or communication, it may be that consideration of fairness might require that he be treated as having waived any legal professional privilege in relation to the whole document or communication.’ This is not the English approach.*

69. Accordingly – mere reference to a privileged document or its effect will not amount to waiver. Deployment of the document, or reliance on its contents, will amount to waiver.
70. An example of mere reference is **Rubin v Expandable Ltd [2008] ICR 1099, CA**. The Court held, in a closely reasoned analysis of the CPR, that the mere mention of a privileged communication in a pleading, where the contents of the communication are not deployed in the litigation, does not amount to a waiver of privilege.
71. Another example is **Tradition v. X and Y [2008] IRLR 934**. This is an illustration of the application of these principles, although it does not review the law in this area. The issue was whether it was just and equitable to allow certain discrimination claims to be presented out of time. The Claimants gave witness statements referring to discussions and e-mails with their lawyers regarding the events which were the subject of the claims, but without divulging any advice received or details of discussions. The purpose of that evidence was to demonstrate that their mental distress excused the delay in bringing the claims. The Respondent contended that there had been waiver of privilege in the attendance notes of the discussions and in the e-mails. The ET disagreed. The EAT upheld that decision although without giving any reasons. The Claimants may be thought fortunate to have succeeded here.

72. The well-known case of **Great Atlantic Insurance Co v. Home Insurance Co [1981] 1 WLR 529** was until recently treated as authority for the proposition that a document containing privileged material, and which was partially disclosed as to the non-privileged material, represented a waiver of the privileged material, unless that material could be said to be distinctly different subject matter. The position has now changed. In **GE Capital Corporate Finance v. Banker's Trust Company [1995] 1 WLR 172** Hoffmann L.J. held that where there is partial disclosure, the non-disclosed privileged material remains non-disclosable, even if it does not deal with an entirely different subject matter from the rest. The EAT in **Brennan [80, 81]** has followed the **GE Capital** approach.
73. However, that is the position in relation to provision of privileged material at the stage of disclosure. The position as to deploying privileged material in Court is different. In that case, **Great Atlantic** still applies, and where a single document is deployed as to part, and the part deployed is privileged, privilege in the balance will have been waived unless that balance constitutes a distinct and separate subject matter.

#### **Collateral waiver**

74. Where a party has waived privilege in communications: *"The opposite party in the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice for its real weight or meaning being misunderstood"* (**Nea Karteria Maritime Co Limited v. Atlantic and Great Lake Steamship Corporation (No.2) [1981] Com. L.R. 138, 139.**)
75. Collateral waiver has the effect that where privilege has been waived in part only of a document, fairness may require the balance of the document to be disclosed if it would be dangerous or misleading to permit privilege to be asserted over the balance of it – **Great Atlantic v. Home Insurance [1981] 1 WLR 529.**

76. Equally, collateral waiver has the effect that where a privileged document has been disclosed, documents for the same transaction must be disclosed if otherwise the impression given would be misleading or inaccurate. This can cause real awkwardness for the party who has waived privilege in a particular document. Suppose that privilege has been waived in a letter of advice from former solicitor to client, for the purposes of proving a particular date. Collateral waiver may require the client to disclose his letters to his former solicitor, which may well be inconsistent with the case advanced in the proceedings.

### **Disclosure applications**

77. There has been comprehensive guidance from Beatson J in **West London Pipeline and Storage Ltd & Ors v Total UK Ltd & Ors [2008] EWHC 1729 (Comm)** on the approach to be taken to determining a claim for litigation privilege. Some of this will be equally applicable to legal advice privilege. He held:

- (1) The burden of proof is on the party claiming privilege to establish it. The court should be particularly careful to consider how the claim for privilege is made out and affidavits or statements should be as specific as possible without making disclosure of the very matters that the claim for privilege is designed to protect.
- (2) An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in an affidavit are not determinative and are evidence of a fact which might require to be independently proved.
- (3) It is, however, difficult to go behind an affidavit of documents at an interlocutory stage in proceedings and the affidavit is conclusive unless it is reasonably certain from (a) the statements of the party making it that he had erroneously represented or misconceived the character of the documents in respect of which privilege is claimed

or (b) the evidence of the person who or entity which directed the creation of the communications or documents over which privilege is claimed indicates that the affidavit is incorrect or (c) there is other evidence before the court that the affidavit is incorrect or incomplete on the material points.

- (4) Where the court is not satisfied on the basis of the affidavit and the other evidence before it that the right to withhold inspection was established, there are four options: (a) it might conclude that the evidence does not establish a legal right to withhold inspection; (b) it might order a further affidavit to deal with matters which the earlier affidavit does not cover; (c) it might inspect the documents (CPR r 31.19(6)) as a solution of last resort; (d) at an interlocutory stage it might order cross-examination of a person who has sworn an affidavit although the weight of authority is that cross-examination might not be ordered in the case of an affidavit of documents. In cases where the issue is whether the documents existed, the existence of the documents is likely to be an issue at the trial and there is a particular risk of a court at an interlocutory stage impinging on that issue. Furthermore whilst there is no longer a jurisdictional bar to cross-examination of the deponent on his affidavit under CPR r 32.7 the exercise of that power should be reserved for extreme cases where there is no alternative relief.
- (5) Where a report is prepared pursuant to a statutory obligation the purposes of the instigator of the report are irrelevant. The report cannot be said to have been prepared for the purpose of litigation and legal advice privilege cannot therefore be claimed. This is not, however, necessarily the case where the obligation is a regulatory one rather than a statutory obligation.

78. As regards paragraph 4(c) above, Tribunals when considering applications for disclosure of privileged material will often consider the privileged material without redaction, and without it being supplied to the party making the application. Therefore, the party resisting the application should have available for the Tribunal copies of the unredacted material.

### **Relevance**

79. A point sometimes overlooked is that even if the claim to privilege is not sustained, in order for a document to be disclosable it must at the least be a relevant document. A recent illustration of this fundamental principle is the EAT decision of **Howes v Hinckley and Bosworth BC** EAT/0213/08/MAA, 4<sup>th</sup> July 2008.

### **Application to restrain use of privileged documents**

80. The principles are contained in **Al Fayed v. Commissioner of Police for the Metropolis** [2002] EWCA Civ. 780. Where a privileged document has inadvertently been disclosed, an Injunction is available to restrain use, although whether it will be granted depends entirely on the facts. However, if the disclosure is an obvious mistake, depending on the stage that the proceedings have reached, an Injunction will usually be granted.

### **E. WITHOUT PREJUDICE COMMUNICATIONS**

81. The Without Prejudice rule is that written or oral communications, made for the purpose of a genuine attempt to compromise a dispute between the parties, may generally not be admitted in evidence. The policy behind the rule is well-known, described in **Cutts v. Head** [1984] Ch. 290, 386: *“Parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of that negotiation (and that includes, of course, as much a failure to reply to an offer as an actual reply) may be used to their prejudice in the course of proceedings. They should...be encouraged fully and frankly to put their cards on*

*the table... The public policy justification, in truth, essentially rests with the desirability of preventing statements or offers made in the course of negotiations for settlement being brought before the Court of trial as admissions on the question of liability.”*

82. Sometimes the basis for the exclusion of Without Prejudice communications is said to be the existence of an agreement between the parties that it should not be used. It is however difficult to see that such an agreement can be implied.
83. The policy basis underlying the exclusionary rule is powerful; an illustration is the HL decision of **Ofolue v Bossert [2009] 1 AC 990**, where the question was whether an offer to buy by a squatter could amount to an acknowledgement of the landlord's title constituting a fresh date for the accrual of the claimants' cause of action for possession. It was held that such an offer, made during the course of without prejudice discussions, could not be referred to.
84. The importance of the rule was reaffirmed by the CA in **Oceanbulk Shipping & Trading SA v TMT Asia Ltd [2010] EWC Civ 79**. In that case, without prejudice discussions could not be used as an aid to interpretation of a contract.

#### **Exceptions to use of WP material**

85. There are various recognised exceptions to the use of without prejudice material. Eight of them are identified in **Unilever plc v. Proctor & Gamble Co [2000] 1 WLR 2436, 2444F**.
86. The well-known case of **BNP Paribas v. Mezzotero [2004] IRLR 508** dealt with whether in the circumstances of that case a dispute had arisen, and whether, if it had, nevertheless an exception to the exclusion of the Without Prejudice material applied.
87. The relevant events took place before the coming into force of the statutory grievance procedures. The Claimant invoked the grievance procedure, and was told to stay at home while it was being processed. The employers initiated a

discussion, stated to be Without Prejudice. They suggested it would be best if the Claimant terminated her employment with the bank. The Claimant brought claims in the ET alleging direct sex discrimination and victimisation by the employers in seeking to terminate her employment after she had raised a grievance.

88. The EAT upheld the ET decision that the contents of the discussions could be admitted, since at the date they took place there was no extant dispute between the parties regarding the termination of the Claimant's employment.
89. The EAT also upheld the ET decision that even if that was incorrect, the material could be admitted as coming within an exception to the usual exclusionary rule. The relevant exception in this case was that "*one party may be allowed to give evidence of what the other said or wrote in Without Prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"*" **Unilever plc v. Proctor & Gamble Co** [2000] 1 WLR 2436, 2444F.
90. Cox J took a similar approach in **Hudson v Oxford University** **EAT/0488/05/DM** in holding that a letter marked without prejudice and which stated that, in the context of the claimant's PIDA claims, he would not be able to work for the university again, was evidence of unambiguous impropriety.
91. **Mezzotero** caused quite a stir in employment circles. In the first place, if a grievance procedure is being followed, and there has been up to date no suggestion by the employer of termination, and the employer mentions the possibility of a termination package in Without Prejudice communications occurring in parallel with the grievance procedure, it can fall foul of the finding in **Mezzotero** that there is no extant dispute which would permit the discussions to be excluded. Equally, **Mezzotero** demonstrates that reference to termination in Without Prejudice discussions may be taken to be evidence of unambiguous

impropriety, removing the cloak of protection, and allowing the material to be used as the basis for a claim.

92. However, the apparent rigour of **Mezzotero** has been mitigated by the decision in **Woodward v Santander [2010] IRLR 834**, EAT. **Woodward** held that cases of discrimination do not form an exception to the WP rule, in each case in order for the WP rule to be disapplied an exception must apply, such as unambiguous impropriety, and it is only in the clearest cases that there will be such unambiguous impropriety, which will not include cases that require inferences to be drawn.
93. The High Court in **AAG Investment Ltd v BAA Airports Ltd [2010] EWHC 2844 (Comm)** [77,78,79] considered **Mezzotero**, and held that there was no unambiguous impropriety, and no disapplication of the WP rule, where one party said something damaging in WP discussions that it did not then repeat openly.

#### **Contemplated litigation**

94. In **Barnetson v. Framington Group Limited and Another [2007] ICR 1439** the Judge at first instance refused an application by the Defendants to strike out from the Claimant's Witness Statement references to compromise terms which had been offered during negotiations in November 2005, in circumstances where the Claimant wrote in December threatening legal proceedings if the dispute was not speedily resolved, was dismissed at the end of that month and issued proceedings in April of the following year. The Judge held that the exchanges which had taken place were before the commencement of litigation at a time when there was no basis for potential litigation and therefore no dispute. The Court of Appeal, overturning his decision, stated that the crucial question was whether in the course of negotiations the parties contemplated or might reasonably have contemplated litigation if they should not agree.

95. This represents some reversal from the position in **Mezzotero**. It indicates that even in a grievance case, where by definition termination has not occurred, nevertheless litigation may be reasonably in contemplation. However, it is plain that there are very serious risks for a Respondent in relation to liability where the Tribunal declines to uphold that analysis, and the Respondent has made a termination offer. Serious compensation consequences can follow in terms of statutory uplifts (i.e. the employer may be found to have made a decision to dismiss without first going through the necessary procedures.)

### **Waiver**

96. One of the exceptions to the exclusionary effect of the Without Prejudice rule is where both parties waive the privilege. (It cannot be the waiver of one party only – **Cowen v Rentokil Services (UK) Ltd EAT/0473/07/DA, 6<sup>th</sup> March 2008.**)
97. This was considered in **Brunel University v. Vaseghi and Webster [2007] IRLR 592**. Both Claimants had brought complaints of race discrimination against the university in 2003. In each case there were Without Prejudice settlement discussions before the hearing began. Both failed at first instance, but went on appeal. Whilst they were on appeal the Vice-Chancellor of the University wrote articles in the University newsletter which the Claimants took as accusing them of having made unwarranted demands for money. They considered that this amounted to victimisation on account of their earlier race claims. They presented further complaints. Their grievances were that they had not made unwarranted demands for money, they had presented bona fide claims, and the University's Counsel had initiated Without Prejudice settlement discussions concerning money. The University appointed a panel to hear and determine the grievances. The Claimants in their victimisation claims referred to the Without Prejudice pre-Tribunal discussions. The University in its Defence denied victimisation and referred to the discussions, and to the findings of the Panel.

98. In essence the Court of Appeal found that privilege had been waived since the University had chosen to refer what would otherwise have been privileged matters from within a privileged University circle to what it described as an independent panel, which conducted what was a mini-trial, and made findings of fact.
99. This case has no bearing on **Mezzotero**, since it was concerned with waiver, and the Court of Appeal expressly declined to express any views as to the correctness of **Mezzotero**.

### **Constructive dismissal cases**

100. In **Brodie v. Nicola Ward (t/a First Steps Nursery) EAT/0526/07/LA** the EAT upheld the ET in determining that a Claimant was not entitled to rely on a Without Prejudice letter from her employer, seeking a compromise involving the termination of her employment, as the last straw for the purposes of a constructive dismissal claim. The EAT held that such a letter from her employer did not come within either of two exceptions to the non-disclosure rule, namely the exceptions of dishonesty or of unambiguous impropriety.
101. It follows that the EAT takes a different approach to allegations of repudiatory breach by an employer than to allegations of discrimination or victimisation. The former will not of itself amount to unambiguous impropriety, the latter, according to **Mezzotero**, will.

### **Where next?**

102. **Mezzotero** will probably be confined to its facts, and the courts and tribunals will look what was said in purportedly WP discussions or correspondence to analyse whether it comes within the meaning of unambiguous impropriety. They will be unlikely to conclude that discrimination cases per se come within it.

103. Pre-**Mezzotero** (non-employment) examples of unambiguous impropriety have included statements made in such discussions by a party that he was blackmailing the other party, he would perjure himself in the proceedings unless the claim was withdrawn, and would bribe other witnesses to perjure themselves. Those are obvious cases.
104. In practice employers either do not have such discussions, or frame their opening discussions in such a way as to encourage the employee to consider termination (e.g. “all options are open to you, it is sensible to discuss them...”)

### **Costs applications**

105. What if there has been an ET claim, where the Claimant has been unsuccessful, and the Respondent writes a letter to the Claimant’s representatives, indicating its intention to apply for costs, but offering to reduce the amount claimed, if the Claimant resigns her employment with the Respondent? That was the situation in **Bird v. Sylvester and Another** [2008] ICR 2008, [2007] EWCA Civ 1052, decided on 4/10/07.
106. Based on a letter sent by the Respondent’s solicitor, and based on a subsequent cost application that was made, the Claimant brought a second set of proceedings for race victimisation. The first proceedings were for race discrimination amongst other things. The Court of Appeal decided the issue on the basis of the House of Lords decision in **Derbyshire and Others v. St. Helen’s**, and considered whether “*a reasonable employee would or might take the view that the employer’s conduct had in all the circumstances been to his or her detriment.*” The Court of Appeal, in a robust judgment, held that the costs letter, and the application, were proper steps in the proceedings, and that no reasonable employee would take the view that such conduct was to her detriment. Accordingly, it upheld the decision to strike out the claim of victimisation.

107. However, although the issue of Without Prejudice communications was not expressly considered, it could have provided the answer to the claim for victimisation based on the costs letter (although not the application itself). Query whether an application of that sort would come within the ambiguous impropriety exception to the Without Prejudice rule.

#### **F. ABSOLUTE IMMUNITY**

108. A very different approach has been explained by the EAT on 18/2/08 in **South London and Maudsley NHS Trust v. Dathi [2008] IRLR 380**. The Claimant was successful in her initial claim for discrimination and victimisation. Following a CMD, and before the liability hearing on that claim, the Respondent's representatives sent a letter (a disclosure letter) refusing to disclose certain documentation, pending completion of the investigation into the Claimant's grievance. After the ET's judgment on liability, the Claimant sent a letter to the Respondent seeking costs. The Respondent's representatives replied to the ET, copied to the Claimant's solicitors, resisting that application (the costs letter). The Claimant brought proceedings for discrimination and victimisation based on the disclosure letter and the costs letter.
109. The Respondent applied to the ET to strike out the claim. The ET dismissed that application. The EAT allowed the appeal, holding that absolute immunity from suit, including from claims for discrimination and victimisation, applies to everything that is done from the inception of proceedings onwards, and extends to all pleadings and other documents brought into existence for the purpose of the proceedings. It held that ET claims are proceedings for the purposes of that rule. It held that based on concessions made at the EAT, both letters came into effect for the purposes of the proceedings. Accordingly, they were covered by absolute immunity, and the claims were struck out.
110. Underlying the case of **Dathi** is the Court of Appeal decision in **Heath v. Commissioner of Police of the Metropolis [2005] ICR 329**, which held that

the rule of absolute immunity applies to all proceedings, including claims for discrimination, and resisted arguments on behalf of the Claimant that to include discrimination claims was to 'extend' the doctrine. (However, a subsequent constitution of the Court of Appeal in **Lake v. British Transport Police [2007] ICR 1293** cautioned against inaccurate claims of immunity being raised, particularly as preliminary issues.)

111. **Dathi** is of great significance so far as claims made by Claimants for discrimination and victimisation arising out of what is said or done by Respondents during the course of ET proceedings are concerned. It appears the EAT in **Dathi** was surprised that the absolute immunity point had not been taken in the **Derbyshire** case (where, if correct, it could have provided a defence).
112. This is unlikely to be the last we hear of this case. It raises in acute form (as the EAT explicitly recognised) the tension between absolute immunity, and the rights of litigants to bring claims under the discrimination legislation. It raises questions whether cases such as **Derbyshire** and **Bird** could have been decided in the Respondents' favour on this basis.
113. Coincidentally, in **Nicholls v Corin Tech Ltd EAT/0290/07** the EAT on 4/3/08 was asked to decide whether alleged abuse of a Claimant ex-employee in a corridor of the Tribunal following a hearing was capable of attracting absolute immunity. It held that it was not. The parties were not professionally represented, and the Judge, Underhill J, expressly indicated that he had not had the benefit of full argument. The case does not refer to **Dathi**, it is only an application of **Heath**, and there is no exposition of the authorities on the topic of immunity.

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