

LEGAL PROFESSIONAL PRIVILEGE AND WITHOUT PREJUDICE COMMUNICATIONS:

A PRACTICAL OVERVIEW FOR LOSS ADJUSTERS

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Introduction

1. The application of Legal Professional Privilege to documents produced by third parties who are neither ‘the client’ nor ‘the solicitor’ can be a source of misunderstanding and uncertainty. Documents produced or procured by loss adjusters fall within this category. If an insurer instructs a loss adjuster to produce a report in relation to a claim made by an insured, does that report have to be disclosed in any subsequent litigation? What if a loss adjuster takes statements from the insured, or procures a report from an expert, do those documents have to be disclosed? This paper seeks to provide an overview of the rules governing disclosure and to examine the application of Legal Professional Privilege in the particular context of documents procured or produced by loss adjusters. The paper also seeks to provide a brief overview of the rules on Without Prejudice communications as a related topic which can also be source of uncertainty.

Disclosure

2. In cases allocated to the fast-track or the multi-track¹, the court will usually make an order for ‘standard disclosure’. Standard disclosure requires a party to disclose²:
 - 2.1 The documents on which he relies; and
 - 2.2 Documents which:
 - 2.2.1 Adversely affect his own case;
 - 2.2.2 Adversely affect another party’s case; or
 - 2.2.3 Support another party’s case; and

¹ CPR Part 31 does not apply to small claims proceedings – CPR r.27(1)(b). Instead the court will usually give a direction that each party shall, at least 14 days before the date fixed for the final hearing, file and serve on every other party copies of all documents (including any expert’s report) on which he intends to rely at the hearing (r. 27(3)(a)(i)).

² CPR r.31.6

- 2.3 Documents which he is required to disclose by a relevant practice direction.
3. A party discloses a document by stating that the document exists³. This is usually done by listing the documents in a disclosure list and providing a copy of the list to the other party. Once documents have been disclosed in this way, the other party has a right to inspect each of the documents that have been listed, unless an exception to this general rule can be relied upon.
4. Standard disclosure, on its face, covers a wide range of documents, including:
- 4.1 Inter-party correspondence regarding the dispute, both prior to and after proceedings have begun;
 - 4.2 Correspondence with third parties concerning the dispute, for example, correspondence with a loss adjuster;
 - 4.3 In-house correspondence of each party, for example correspondence between employees / directors, regarding the dispute;
 - 4.4 Correspondence between a party and its *own* lawyers, for example legal advice and strategy discussions;
 - 4.5 Correspondence between a party or its lawyers and an expert retained in relation to the dispute.
5. A right to inspect all such documents would obviously cause significant prejudice to the party disclosing them. A party needs to be able to obtain legal advice and to prepare its case without being concerned that such correspondence and documents can be inspected by the other side. Thus, whilst all such documents have to be disclosed (i.e. their existence must be listed), the CPR provides that the other party is not entitled to inspect a document where “*the party disclosing the document has a right or a duty to withhold inspection of it*”⁴.
6. Where a party is seeking to withhold inspection of a document, the existence of the document must still be disclosed on the disclosure list, but the party asserting the right to withhold will state

³ CPR r.31.2

⁴ CPR r.31.3(1)(b)

on that list the ground on which the right to withhold is being asserted⁵. It follows that all relevant documents produced / obtained by a loss adjuster in connection with a dispute (including any reports, letters, emails, statements etc) must be disclosed and can be inspected by the other party unless they fall within one of the exceptions to the general rule allowing inspection. The key right (arising at common law) to withhold inspection of a document where the document has been procured or produced by a loss adjuster is Legal Professional Privilege.

Legal Professional Privilege

7. There are two classes of Legal Professional Privilege:
 - 7.1 Legal Advice Privilege; and
 - 7.2 Litigation Privilege.

Legal Advice Privilege

8. In order to attract Legal Advice Privilege the relevant document must satisfy the following criteria:
 - 8.1 It must be a communication between the lawyer and the client;
 - 8.2 The communication must be a confidential communication;
 - 8.3 The lawyer must be acting in his professional capacity; and
 - 8.4 The purpose of the communication must be the seeking or giving of legal advice or assistance.

For Legal Advice Privilege it is irrelevant whether litigation is pending or contemplated or not.

9. In order to assess whether the criteria are met in relation to a particular document, it is essential to understand what is meant by “lawyer” and “client” in this context:
 - 9.1 “Client”: In Three Rivers⁶ the Court of Appeal held that the “client” is the person who retains the solicitor. Where the party is a company or corporation, the Court interpreted

⁵ CPR r.31.19(3)

⁶ Three Rivers District Council v Governor and Company of the Bank of England (No. 5) [2003] QB 1556

this narrowly, holding that the privilege only covers communications between the lawyer and those personnel who have been authorised by the company or corporation to retain the services of the solicitor. In the context of an insurance company, this may mean that only certain employees of the insurer tasked with handling the matter will be ‘the client’.

- 9.2 “Lawyer”: It is well established that the term “lawyer” in this context is restricted to counsel, solicitor and attorney. It does not extend to loss adjusters. As stated in *Privilege* (Passmore 2nd Ed.):

*“A professional who is not a lawyer but who dispenses advice on the law, such as ... loss adjusters ... cannot communicate with their client under the cloak of privilege, unless they can get within the scope of litigation privilege. The ability of certain professionals to instruct counsel directly has not changed this.”*⁷

- 9.3 Acting as agent? Loss adjusters may, however, be able to bring their documents within ‘the cloak’ of Legal Advice Privilege if they can be said to be acting as agent for either the lawyer or the client. Communications that are genuinely made *through* a loss adjuster rather than by a loss adjuster may attract the privilege⁸ provided the communication would have been covered had it come directly from the client or the lawyer (depending on which it is said the loss adjuster is acting as agent for). However, this is likely to only to cover a fairly narrow category of documents produced by loss adjusters.

10. It follows that documents produced by loss adjusters will only attract Legal Advice Privilege in limited circumstances. Where it cannot be said that litigation is pending or anticipated so as to raise Litigation Privilege (see below), loss adjusters should be aware of the very real risk that documents they produce or obtain may not be privileged if the matter were ever to be litigated.

Litigation Privilege

11. Where litigation is “pending or anticipated” Litigation Privilege can be invoked to withhold confidential communications between the client, the lawyers *and* third parties, where the dominant purpose in creating the document is to use it or its contents in order to obtain legal

⁷ At [1.145]

⁸ Jones v Great Central Railway Co [1910] A.C. 4 Lord Loreburn L.C. at p.6

advice or to help in the conduct of litigation. Litigation which is “pending or anticipated” is also said to be “reasonably in prospect”.

12. Given its application to communications with third parties who cannot be said to be either the lawyer or the client, Litigation Privilege is the form of privilege that is most likely to apply to documents produced or obtained by loss adjusters.

- *Pending or anticipated proceedings?*

13. It is therefore key for loss adjusters to consider whether litigation is “pending or anticipated” in the particular case. This will be a question of fact in each case - the party relying on the privilege must show that, at the time when the document was created, they reasonably anticipated that litigation would commence. The following cases provide some guidance:

13.1 In United States of America v Philip Morris Inc and Others [2004] EWCA Civ 330 a solicitor’s firm had advised a tobacco company generally in relation to claims arising from smoking related illnesses between 1985 and 1994. The advice had been sought due to the increasing volume of tobacco litigation in the US coupled with the fact that claims were being made against its parent company. The Court of Appeal upheld the trial judge’s statement that:

“The requirement that litigation be ‘reasonably in prospect’ is not ... satisfied unless the party seeking to claim privilege can claim that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility.”

13.2 In Farady Capital Limited v SBG Roofing Limited & Ors [2006] EWHC 252 insurers had instructed loss adjusters to appoint a forensic scientist to investigate the cause of a fire at a school, having in mind the possibility of a breach of one of the insured’s warranties under the policy. The evidence was that where a potentially substantial loss has occurred in circumstances such as a fire at a school, the insurer inevitably investigated the circumstances in order to ascertain whether there has been compliance with policy terms and conditions and warranties. Cooke J. was satisfied that all of this was done in contemplation of prospective litigation because, if there had not been compliance, such litigation would have been likely to follow. The litigation that was envisaged was

litigation between the insured and the insurer, not litigation by the insured and a third party.

13.3 Re Highgrade Traders Ltd [1984] BCLC 151 concerned the disclosure of 3 reports produced by loss adjusters for an insurer following a fire in a warehouse. At the time when the reports were commissioned, the insurer was undecided as to whether it would indemnify the insured as it was investigating the possibility of arson. The Court of Appeal rejected the argument that it must be shown that the insurers had, at the time of commissioning the reports, actually taken a decision to instruct their solicitors to resist the claim. It was not necessary for a final decision to have been taken, provided that the documents were brought into being for the dominant purpose of obtaining advice with regard to contemplated litigation.

13.4 Southwark and Vauxhall Water Co v Quick (1878) 3 QBD 315: Where documents have been produced in advance of instructing a solicitor (which may well be the case where initial investigations are carried out by a loss adjuster), such documents may still attract litigation privilege, even if they are never in fact passed on to the solicitor.

- *Litigation?*

14. A further question that arises is the extent to which alternative dispute resolution constitutes ‘litigation’ for these purposes. What is the position if an arbitration or adjudication is pending or anticipated? It is settled that arbitration proceedings are to be regarded as litigation for the purposes of Litigation Privilege. There seems to be no authority as yet as to how adjudication is to be regarded for these purposes.

- *Dominant purpose of the communication?*

15. In addition to the need for litigation to be pending or anticipated, the party relying on the privilege must also show that the “dominant purpose” in creating the document was for use or advice in the pending / anticipated litigation:

15.1 In Waugh v British Railways Board [1980] AC 521 an internal inquiry report was prepared two days after the train crash. The evidence showed that the report had been prepared for two purposes, (i) to establish the cause of the accident so that safety measures could be introduced, and (ii) for legal advice in the event of any claim. The court considered that it was clear from the evidence that the Railways Board regarded

both purposes as of equal importance. The House of Lords held that the report would only have been covered by litigation privilege if the legal advice aspect had been the dominant purpose i.e. one with ‘clear paramountcy’;

- 15.2 In Re Highgrade Traders Ltd the trial judge held that the reports provided by the loss adjusters had a duality of purpose because the insurer wanted not only to obtain advice from their solicitors but also wanted to ascertain the cause of the fire. The Court of Appeal held that these two purposes were ‘quite inseparable’:

“The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow. The claim had been made and there was no indication that it was not going to be pressed... Whether they paid or not depended on the legal advice which they received, and the reports were prepared in order to enable that advice to be given.”⁹

The Court went on to hold that the only real purpose for bringing the reports into being was to obtain legal advice which would lead to the decision whether or not to litigate.

- 15.3 In Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 W.L.R 1027 the Court of Appeal emphasised that the dominant purpose of the document did not necessarily fall to be ascertained by reference only to the intention of the actual composer of the document. Instead it is to be determined by an objective view of the whole evidence, and in particular by reference to the intention of the insurers who procured the document.

- *Confidential Communication?*

⁹ at 25E

16. In order to be privileged the communication must also be a confidential communication. In Farady the insured sought disclosure of the witness statements taken by the forensic scientist during the course of his investigations into the cause of the fire. The witness statements were those of two employees of the insured. The court held that the witness statements were not privileged as they were not confidential. They had been provided by employees of the insured, in circumstances where the insured could have requested copies of the statements from the employees at the time they were created. There was no confidential relationship between the employees and the insurer to the exclusion of the insured.
17. Because communications between the parties are not confidential, Litigation Privilege does not attach to such communications. On a practical level, there should be no need for a party to request inspection of such communications anyway as both parties should already have copies of them (the communication will either have been produced by them or sent to them by the other party). Inter-party correspondence may however fall within the Without Prejudice rule if they are aimed at settlement (see below).

Instructing experts

18. CPR r. 35.10(3) requires an expert who has been instructed to give or prepare evidence for the purpose of court proceedings to state the substance of all material instructions (whether oral or written) on the basis of which his report has been prepared. CPR r. 35.10(4) provides that the expert's material instructions are *not* privileged. This raises the possibility of a party seeking disclosure of the actual instructions themselves and possibly also related documents that have been provided to the expert, which may otherwise have been privileged (for example an early draft of a factual witness statement). The rule does, however, provide that the court will not order disclosure of any specific document unless it is satisfied that there are reasonable grounds to consider that the expert's statement of his instructions is inaccurate or incomplete. Whilst disclosure will only be ordered in limited circumstances, loss adjusters who instruct experts should be alive to the possibility of privilege in some documents being lost in this way.
19. Loss adjusters should also be aware that a party may be required to disclose an expert report even if that party does not intend to rely on that report. The court may require disclosure of the report as a condition of granting permission to obtain and rely on a further report.

Loss of privilege

20. Legal Professional Privilege belongs to and may be waived by the person who has the right to the privilege in it. This is the client rather than the lawyer. Privilege may be waived either expressly or implicitly by allowing the other side to inspect the document. A witness statement prepared for pending or anticipated litigation, for example, is a privileged document, but privilege is waived when the statement is served on the other side¹⁰.
21. If a party waives privilege to part of a document, privilege is usually waived for the whole document, unless the other parts deal with an entirely different subject matter¹¹.
22. Privilege may also be lost by inadvertent disclosure. However, CPR r.31.20 provides that, where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may only use it or its content with the permission of the court¹².

Without Prejudice Communications

23. A further category of documents often referred to as giving rise to a form of privilege is without prejudice communications. Without prejudice communications are inter-party correspondence (whether oral or in writing) genuinely aimed at settlement of the dispute. It is therefore not right to describe them as giving rise to a right to withhold inspection. The very nature of a without prejudice communication is that it is an *inter-party* correspondence. It follows that both parties will have a copy of it. Without prejudice communications are not therefore communications that can be withheld from inspection by the other side – rather they are communications that can be withheld from the court. The reason for this is that it could obviously damage a party's case (and consequently inhibit the settlement process) if the court were entitled to see offers and concessions that may have been made by a party in an attempt to reach settlement.
24. The communication does not need to contain the words 'without prejudice' to attract the protection, it is the substance of the document rather than its label which is relevant. Conversely, a document headed 'without prejudice' does not necessary make it a without prejudice communication. The test is whether its purpose is a genuine attempt at settlement.

¹⁰ Re Rex Williams Leisure plc [1994] Ch 350, CA

¹¹ Great Atlantic Insurance Co. v Home Insurance Co [1981] 1 WLR 529

¹² The relevant principles applied by the court in deciding whether to grant permission are set out in Al-Fayed v Commissioner of Police of the Metropolis [2002] EWCA Civ 780 at [16].

25. Once a document is protected in this way, it cannot be shown to the court, even on the question of costs, unless the protection is waived by the parties jointly¹³. Where, however, without prejudice negotiations have resulted in a settlement, the communications *are* admissible to prove the terms of the settlement¹⁴.
26. Given the restriction on using without prejudice communications in court in relation even to costs, it is common for without prejudice communications to be marked “Without Prejudice Save As To Costs”. This allows the document to be produced in court when costs come to be determined.

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¹³ Rush and Tompkins Ltd v Greater London Council [1989] AC 1280, HL

¹⁴ Walker v Wilsher (1889) 23 QBD 335