



**TC03102**

**Appeal number: TC/2013/05924**

*LEGAL PROFESSIONAL PRIVILEGE – information notice – communications between parties in attempt to compromise settle claims between employee and employer - whether privileged from production to Respondents in separate proceedings - litigation privilege - common interest privilege - appeal dismissed*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MARK LEWIS**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE & CUSTOMS**

**Respondents**

**TRIBUNAL: JUDGE GREG SINFIELD**

**Decided on the papers on 22 November 2013**

## DECISION

### Introduction

1. This appeal concerns an information notice under paragraph 1 of Schedule 36 to the Finance Act 2008 dated 22 May 2013 issued to the Appellant (“Mr Lewis”) by the Respondents (“HMRC”). The information notice required Mr Lewis to provide certain information and documents. The background to the information notice is a dispute between Mr Lewis and HMRC over the nature of a payment made to Mr Lewis on the termination of his employment with Simons Group Limited (“Simons”).

2. Paragraph 23 of Schedule 36 provides that a person is not required to provide any part of a document that is privileged. Mr Lewis claimed that certain documents that were included in the information notice were legally privileged. Regulations made under paragraph 23 of Schedule 36 (the Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009) set out the procedure for resolving disputes where a claim that a document is privileged is not accepted by HMRC. That procedure has been followed. Mr Lewis provided HMRC with a list specifying each document in respect of which he claimed privilege. HMRC notified Mr Lewis of those documents on the list that they consider are not privileged (“the Disputed Documents”), which were as follows (using the original numbering):

Ref No	Date	Between (From To)	Nature of Document
30	10/11/2008	Simons to R Bradshaw	Letter and attachment
31	11/11/2008	Simons to R Bradshaw	Email and attachment
33	17/11/2008	Simons to R Bradshaw	Email and attachments
35	26/11/2008	R Bradshaw to Simons	Email
36	26/11/2008	Simons to R Bradshaw	Email
37	02/12/2008	R Bradshaw to Simons	Email

3. All the Disputed Documents are communications between Robin Bradshaw of Bradshaw and Hollingsworth, who was Mr Lewis’s solicitor, and the Group HR Director of Simons. HMRC considered that Mr Lewis could not maintain a claim to legal privilege in relation to the Disputed Documents because they had been passed to the other side during the course of legal argument.

4. Mr Lewis made an application to the Tribunal by Notice of Appeal dated 16 August 2013, served on the Tribunal by email on 20 August, and provided copies of a large number of documents by email on 9 October. The documents were not numbered but I believe that I have identified the Disputed Documents from the other details provided in the list. The Disputed Documents all concern the negotiation of a compromise agreement between Mr Lewis and Simons to settle any claims by Mr Lewis in relation to the termination of his employment by Simons.

5. Mr Lewis contends that he is not claiming legal advice privilege, which covers communications between lawyers and their clients whereby legal advice is sought or given. Mr Lewis maintains that he is claiming litigation privilege which, he says, attaches to communications between his lawyers and third parties in reasonable prospect of litigation and where litigation was the dominant purpose. Mr Lewis contends that the Disputed Documents fall into this category. Mr Lewis also claims common interest privilege on the ground that privilege attaches to documents where the parties share a common interest in the subject matter.

### Discussion

6. The only issue for the Tribunal to determine is whether the Disputed Documents are privileged.

7. In *Three Rivers District Council & Ors v. Bank of England (No 6)* [2004] UKHL 48, the House of Lords considered the subject of legal advice privilege but, in doing so, also discussed the meaning of litigation privilege. Lord Carswell summarised the general principles of litigation privilege at [102] as follows:

"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."

8. In *Three Rivers*, Lord Rodger of Earlsferry said at [51] and [52]:

"51. It is common ground between the parties that legal advice privilege has to be distinguished from litigation privilege. As Lord Edmund-Davies noted in *Waugh v British Railways Board* [1980] AC 521, 541-542, in the past the need to make that distinction was sometimes overlooked:

'It is for the party refusing disclosure to establish his right to refuse. It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it) 'for the purpose of obtaining information to be submitted to the client's professional legal advisers for the purpose of obtaining advice upon pending or contemplated litigation'.'

52. Litigation privilege relates to communications at the stage when litigation is pending or in contemplation. It is based on the idea that legal proceedings take the form of a contest in which each of the opposing parties assembles his own body of evidence and uses it to try

to defeat the other, with the judge or jury determining the winner. In such a system each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations. In the words of Justice Jackson in *Hickman v Taylor* (1947) 329 US 495, 516, ‘Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.’”

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9. In *JSC BTA Bank v Shalabayev* [2011] EWHC 2915 (Ch) Having referred to Lord Carswell’s summary at [102] in *Three Rivers No 6*, Henderson J observed at [24] and [25] that

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“It follows from these principles that a document which did not originally come into existence for the purposes of litigation will not be privileged, even if it is subsequently supplied to a party’s lawyer for the purposes of litigation: see generally *Ventouris v Mountain* [1991] 1 WLR 607 (CA).

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It is also relevant to note that, in order to decide whether a communication is subject to litigation privilege, the court needs to make an objective assessment of the purpose of the person or body that created it: see *Guinness Peat Limited v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 at 1037B-C per Slade LJ, with whom Woolf LJ and Sir George Waller agreed. Accordingly, as Aikens J said in *Winterthur Swiss Insurance Company v A G (Manchester) Limited* [2006] EWHC 839 (Comm) at [83], in considering whether material might be subject to litigation privilege, three questions arise:

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‘First, at the time that the relevant communications were created, was litigation contemplated? Secondly, were the communications created for the dominant purpose of obtaining legal advice for that litigation or in aid of that litigation? Thirdly, under the direction of which person or entity, objectively, were those communications created?’”

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10. Lord Rodger in *Three Rivers No 6* at [52] makes clear that litigation privilege covers all documents brought into being for use by a party in litigation that is in progress or in contemplation. It covers documents, whether or not prepared by lawyers, produced in preparing for the case. The policy reason for litigation privilege is that it would not be fair or just to require one party to provide materials obtained or prepared in support of its case to the opposing party. Litigation privilege does not protect documents created for the purpose of settling litigation and provided to the other party. To be clear, where such communications are expressed to be ‘without prejudice’ (as most of the Disputed Documents were) and are made as part of negotiations in an attempt to compromise the proceedings, they will usually be subject to privilege from disclosure by either party to the court adjudicating those proceedings. Such documents are not privileged from disclosure in other, unrelated proceedings. As the passage from the *Winterthur Swiss* case makes clear, litigation privilege applies only to documents and communications created for ‘that litigation’.

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11. Mr Lewis does not claim that the communications between Mr Bradshaw and Simons were brought into being for use in or in contemplation of litigation with

HMRC. Accordingly, I hold that litigation privilege does not apply to the Disputed Documents and they are not protected from disclosure to HMRC in relation to tax matters. That conclusion is supported by a case from Australia, which applies the same concepts of legal privilege as the UK. In *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* [2009] FCAFC 32, the Federal Court of Australia held that witness statements prepared for the purposes of an action were not the subject of litigation privilege once disclosed to the other party (even though not used in those proceedings) and had to be disclosed to a third party for the purposes of different proceedings.

10 12. Mr Lewis also claims common interest privilege on the ground that privilege attaches to documents where the parties share a common interest in the subject matter. I can deal with this claim briefly. The common interest privilege applies where two or more persons have a common interest in litigation and one of them can claim legal privilege (ie legal advice privilege or litigation privilege) over a document – see

15 *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 per Lord Denning MR at 243. In such circumstances, the privilege of one extends to all members of the common interest group and none of them can be required to produce the document. If the document is not privileged in the hands of one of the common interest group then the mere existence of a common interest does not confer privilege on that document.

20 In this case, I have already held that the Disputed Documents are not privileged and so a common interest between Mr Lewis and Simons (and I make no finding on that) cannot make those documents subject to privilege.

### **Decision**

13. For the reasons given above, I have decided that the Disputed Documents are not privileged and Mr Lewis’s appeal against the Information Notice dated 22 May 25 2013 is dismissed.

### **Rights of appeal**

14. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal 30 against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**GREG SINFIELD**

**TRIBUNAL JUDGE**

**RELEASE DATE: 29 November 2013**