LITIGATION PRIVILEGE ADVICE
– WHEN IS SUCH ADVICE CONFIDENTIAL?

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In this Article Brian Morgan asks if advices given by HR Consultants to Employers, which can only be covered by "Litigation Privilege", has the benefit of confidentiality, or if it can be subject to scrutiny by an employee / his legal representative at a later Hearing of the employee`s Claim before the Workplace Relations Commission Adjudication Officer / Labour Court? He advises that employers should be careful about when and in what circumstances they take advice from HR Consultants.

The concept of privilege, and the right of an individual to preserve the confidentiality of legal communications, is a fundamental human right long recognized by the Courts in Ireland and the United Kingdom. The rationale is that a client should be able to consult their legal advisor in confidence without fear of having to disclose communications between them at a later date. But will such confidentiality always apply?

Privilege

It is important to differentiate the types of *Privilege* which may apply to advices given by Representatives. The legal concept of *Advice Privilege*, termed generally as *Legal Professional Privilege*, is especially important because it entitles a party to litigation, or other adversarial proceedings, to withhold documents from the other side. It can also be used to deny regulators access to documents. In the main, there are two types of *Privilege*, which exist; namely "*Legal Advice Privilege* (LAP) and "*Litigation Privilege*" (LP).

Legal Advice Privilege

Legal Advice Privilege is designed to protect the confidentiality of the lawyer/client relationship and applies to:

- Confidential communications;
- between lawyer and client;
- that are for the purpose of seeking or giving legal advice

It is clear that, while a Claimant's / Respondent`s Legal Representative is entitled to the benefit of *Legal Advice Privilege*, a Representative, not being a Legal Advisor, is not entitled to such *Privilege*.

This distinction, and the basis for such a distinction to the benefit of the legal profession, is summarized by Fish J. in the Supreme Court of Canada case *Blank -v- Canada*, where Fish J stated at paragraphs 26 and 27 of his Judgment:

> *"26 Much has been said in these cases, and others, regarding the origin and rationale of the solicitor-client privilege. The solicitor-client privilege has been firmly entrenched for centuries. It recognizes that the justice system depends for its vitality on full, free and frank communication between those who need legal advice and those who are best able to provide it. Society has entrusted to lawyers the task of advancing their clients' cases with the skill and expertise available only to those who are trained in the law. They alone can discharge these duties effectively, but only if those who depend on them for counsel may consult with them in confidence. The resulting confidential relationship between the solicitor and client is a necessary and essential condition of the effective administration of justice.*
>
> *27 Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of unrepresented litigant, between the litigant and third party. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purposes, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure".*

Litigation Privilege

Litigation Privilege allows a Litigant to prepare for litigation without fear that any documents produced for that purpose will subsequently have to be disclosed. It is wider in scope than *Legal Advice Privilege* but only arises once litigation or other adversarial proceedings are **reasonably in prospect, or contemplated**. From that moment it covers:

- confidential communications;
- between any of a client, its lawyer and a third party;
- which are for the sole or **dominant purpose** of preparing for or dealing with the litigation.

Whether Litigation is "*reasonably in prospect or contemplated*" and what is the "*Dominant Purpose*" test are detailed later in this Article.

Legal Principles

One needs to look at whether the documentation produced was for the "*dominant purpose*" of preparation for Litigation or at the relevant times was prepared for the primary purpose of genuinely dealing with the dispute. If, for instance, a Respondent employer, in dealing with an employee Grievance, is claiming that documentation was prepared for the dominant purpose of preparation for Litigation, is it not arguable that at no time did the Respondent intend to deal genuinely with the Claimant's Grievances? The Respondent cannot have it both ways. Either it intended to deal genuinely with the Claimant's Grievances at the time or it did not. If the Respondent claims that it was also at the time genuinely trying to deal with the Claimant's Grievances, based on advices received from its HR Consultant, then the "*dominant purpose*" of the production of documents was not for the purpose of preparation for Litigation.

The "Dominant Purpose" Test

Does the "*Dominant Purpose*" Test arise merely by reference to when "*litigation is apprehended or threatened*". The case of "***Tchenquiz and others –v- Director of the Serious Fraud Office and others [2013] EWHC 2297(QB)***, makes it clear that it will be harder than ever for companies to keep certain kinds of documents from being opened up to scrutiny after this High Court decision. The High Court refused a claim for litigation privilege by two liquidators over reports prepared by accountancy firm Grant Thornton and, in so doing, underlined the "relatively high threshold" of the dominant purpose test. As highlighted in that case, the key question, in the consideration of the potential for dual purpose of production of documents, was the "dominant" purpose behind creating the document – was it the litigation, whether actual or reasonably contemplated, or was it to fulfill some other obligation upon the creator? In that case, Eder J. found that documents, over which the defendants claimed *Litigation Privilege* on the basis of the "*Dominant Purpose*" Test, had failed to show that, on a careful analysis, the documents had been prepared for the dominant purpose of actual or contemplated litigation, stating that "*Substance will always triumph over labels*". On the facts of the case, the Judge was prepared to find that no Privilege existed in any of the reports that came under scrutiny, even though two of those reports had been prepared when formal Proceedings were actually on foot.

When is Litigation in reasonable prospect?

A "mere possibility" of litigation will not suffice. In ***United States of America –v- Philip Morris Inc and others [2004] EWCA CIV 330*** the Court of Appeal agreed with the Judge`s view that "*a general apprehension of future litigation*" or "*a distinct possibility that sooner or later someone might make a claim*" were not sufficient to give rise to litigation privilege. On the facts, in circumstances where there was tobacco litigation in the US but no claims had been threatened or made in the UK, litigation was held not to be in reasonable prospect.

In the case of "***University College Cork- National University of Ireland –v- The Electricity Supply Board (2014) IEHC 135"***, Finlay C.J. stated that:

> "*(iv) the document must have been created for the dominant purpose of the apprehended or threatened litigation; it is not sufficient that the document has two equal purposes, one of which is apprehend or threatened litigation. Gallahger –v- Stanley [1998] 21.r. 267 at [age 274 approving the test propounded by the House of Lords in Waugh –v- British Railway Board [1980] AC 521.*

<u>Employment Consultant Case Law</u>

While dealing with the issue of *Legal Advice Privilege* only, the case of ***Water Lilly & Co Ltd –v- Mackay & DMW Developments Ltd [2012] EWHC 649 (TCC)*** raised the issue as to whether documents prepared by HR Consultants were privileged. The Claimant in this case applied for an order against the second defendant (D) to disclose correspondence and relevant documentation, created by D's retained claims consultancy (K). D argued that the documentation requested attained *Legal Professional* / *Legal Advice Privilege* as the parties working for the Claims Consultancy were qualified barristers and solicitors. However the court held that this was not enough.

The first thing the court explored was the relationship between D and K. The court noted that, while the retainer between D and K was for "*contractual and adjudication advice*", there were no rates offered for the service of solicitors or barristers. There were neutral words used to describe some of the available services, and these were "*Advocate*" and "*Legally Qualified Person*". Further they found the words "*solicitors can be retained*" suggested that these services were not included in the retainer.

The court held that the onus was on the Defendant to establish that *Legal Professional Privilege* or *Legal Advice Privilege* applied and in this case was not evidenced. Disclosure was ordered.

A relevant case on the issue of *Litigation Privilege*; is ***Stephen Mooney and Riccardo Cafolla –v- Andras House Limited (Case 185/05FET and 2010/05 FET)"***, in which the UK division of HR Consultancy *Peninsula* was involved as advisors to the Respondent employer. An issue arose following cross examination of one of the Respondent's witnesses, who had conducted a hearing of an appeal against dismissal. Evidence was given that she sought advice and guidance from *Peninsula Business Services Limited* concerning the Appeal and that she had acted upon their recommendations when confirming her decision to affirm dismissal in relation to both claimants. Counsel for the claimants applied for access to all documentation passing between the respondents and their advisers relating to the disciplinary process. He relied upon the EAT decision of *New Victoria Hospital –v- Ryan (1993) IRLR020*. The application was granted by the Fair Employment Tribunal. In its written decision it said: "*the tribunal was satisfied that documentation relating to communications passing between the Respondent and Peninsula during the Disciplinary and Appeals process is not subject to legal professional privilege or litigation privilege because the advisors were not legally qualified. The Tribunal was satisfied that the correct approach was taken by the EAT in the Ryan case in which it was held that "the privilege*

should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their profession and who owe a duty to the court"." The Order was made against the Respondent to produce to the Claimant's Representatives all written communications with *Peninsula* during the Disciplinary process.

The issue as to whether advice given by Human Resources Consultants is confidential is dealt with very succinctly in an Article by James Todd Barrister of the Essex Street Chambers London in an article titled "*Advice given to Employers by Human Resources Consultants: Privileged or not?"*. The author made reference to two Decisions; namely ***M&W Grazebrook –v- Wallens*** and ***New Victoria Hospital –v- Ryan***. As noted at the start of that Article, many employers are accustomed to calling on the services of independent Human Resources Consultants to help them deal with Employment issues and disputes that arise in the workplace. Such Consultants, who are frequently retained through agencies as independent contractors, may enter a long term retainer with the employer and act as substitute HR Department. If a dispute then progresses to a claim, the question may arise as to whether Privilege can be claimed for the advice given by the HR Consultant and for documentation generated by or through him or her. As explained, the case of *New Victoria Hospital –v- Ryan* made it very clear that Legal Privilege could only be claimed where documents came into existence for the dominant purpose of obtaining legal advice in respect of anticipated Proceedings. That case relied on the earlier decision of *M&W Grazebrook –v- Wallen*s in which Sir John Donaldson said (at paragraph 10):

> "*… in the interest of the administration of Justice we hold that … privilege exists in relation to proceedings before an Industrial Tribunal. We would however draw attention to the fact that it is a limited privilege. It exists only in relation to communications with an actual view to the litigation in hand and the mode of conduct of it. It does not exist in relation to the situation at the time when the matters complained of were arising*".

At the conclusion of his Article Mr. Todd raises the example of cases where documentation generated by the HR Consultant would be partly privileged and partly not. He gives the example of a Consultant who was brought in to deal with a Grievance issued by a current employee who is already in litigation with the employer. Where reference is made to the *UK Employment Act 2002* and the necessity to comply with certain procedures as detailed in that legislation, these are, to all intents and purposes, the very same procedures which are expected in the Republic of Ireland; albeit that these procedures are statutory procedures in England. Mr. Todd opines that the Grievance remains an internal procedure not directly related to the Proceedings. He states that, in this situation, careful thought will have to be given to the "*dominant purpose*" test before documentation is deemed disclosable. Documents that come into existence for the purpose of and as part of the Grievance Procedure are not likely to satisfy the Test, whereas a document in which, for example, the HR Consultant discusses how the existing litigation will be affected by the outcome of the Grievance procedure may well do.

The "trilogy" of Court Decisions on *Legal Advice Privilege*

The Decision of the UK House of Lords in ***Three Rivers District Council and Others (Respondents) –v- Governor and Company of the Bank of Ireland (Appellants) (2004) UK HL48***, while dealing more specifically with the issue of *Legal Professional Privilege* / *Legal Advice Privilege* also, it is submitted, very succinctly defines the circumstances in which *Litigation Privilege* applies. In that Decision Lord Carswell (paragraphs 64 of his Decision onwards) summarised the case law on *Litigation Privilege* (paragraphs 96 onwards), in which he referred to a "trilogy" of Court Decisions and ultimately (at paragraph 102) stated that the "*conclusion to be drawn from the trilogy of 19th century cases to which I have referred and the qualifications expressed in 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"

Public Policy

While the UK House of Lords case of ***Three Rivers District Council and Others (Respondents) –v- Governor and Company of the Bank of Ireland (Appellants) (2004) UK HL48*** dealt solely with the issue of Legal Advice Privilege, the comments of Lord Scott of Foscote, in stating the Public Policy for justification of such Privilege, at Para 28 of his Decision is worth noting:

> " *... There is a strong public interest that in criminal cases the innocent should be acquitted and the guilty convicted, that in civil cases the claimant should succeed if he is entitled to do so and should fail if he is not, that every trial should be a fair trial and that to provide the best chance of these desiderata being achieved all relevant material should be available to be taken into account. These are the administration of justice reasons to be placed in the balance. They will usually prevail*."

Also, at Para 38, he stated:

> "*… There is, in my opinion, no way of avoiding difficulty in deciding in marginal cases whether the seeking of advice from or the giving of advice by lawyers does or does not take place in a relevant legal context so as to attract legal advice privilege. 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. If it does not, then, in my opinion, legal advice privilege would not apply. If it does so relate then, in my opinion, the judge should ask himself whether the communication falls within the policy underlying the justification for legal advice privilege in our law. 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."

A Practical Example

John has worked as an employee Salesperson but receives notice from his employer that his employer proposes to make him redundant in circumstances where it has come to John's attention that his employer proposes to recruit a new Salesperson. It is clear to John that this is not a genuine redundancy and he files a Grievance with his employer questioning the circumstances which have given rise to this threatened redundancy.

The employer already had a contract with a HR Consultant for the provision of Contracts of Employment, Staff Handbook and other advices with regard to its employees. The employer decides to consult with the HR Consultant with regard to the employee's Grievance. In seeking advice from the Employment Consultant, it is presumed that the employer was seeking advice at that time on how best to deal with the employee's concerns in circumstances where the employee believed, rightly or wrongly, that his employer was trying to dismiss him.

The employer seeks to justify its intended dismissal of the employee as a Redundancy but before the Tribunal, at a subsequent Unfair Dismissal Hearing, he seeks the protection of the cloak of *Litigation Privilege* in order to hide advices which may have been given by the Employment Consultant to justify a dismissal on the basis of Redundancy in circumstances where, only shortly before these events, the company had recruited a new Salesperson to replace the employee.

Insofar as communication occurred during the Grievance process between the employee and his employers and at the same time occurred between his employers and the Employment Consultant the writer states that *Litigation Privilege* cannot apply to such communications as litigation was not reasonably in prospect at the time of the Grievance process. All the employee was trying to do was seek a resolution by way of Grievance. He hadn`t threatened Court Proceedings. Court Proceedings were not reasonably in prospect, or contemplated. The sole or dominant purpose of the Employer in consulting the HR Consultant was not for the purpose of defending an Unfair Dismissal Claim (thus attracting *Litigation Privilege*), but for the purpose of dealing with the employee`s Grievance.

For the reasons stated above, the writer would submit that all documents created between the employer and the Employment Consultant at that time would not have the benefit of *Litigation Privilege* and could therefore be disclosable by the Employment Consultant to the employee at a later Court Hearing.

A Word of Caution for Employers

The writer is not suggesting that employers should stop instructing HR Consultants. HR Consultants provide a very good service in the provision of Contracts of Employment, Staff Handbooks and related issues. Where however an employer is concerned that issues arising in the workplace could give rise to an Employment Claim before the *Workplace Relations Commission* or before a Court then the employer needs to seriously consider instructing a Solicitor in circumstances where a specific Retainer is agreed between the employer and the Solicitor with regard to advices given by the Solicitor to the employer during the course of the relevant workplace issue so that any required advices given to the employer will attract the benefit of *Legal Advice Privilege*, where confidential communications between the Solicitor and his client will generally have the benefit of confidentiality.

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