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Attorney-Client Privilege: The Road Ahead

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Legal professional privilege, otherwise known as "lawyer-client privilege", "attorney-client privilege" or "solicitor-client privilege" is a common law doctrine. By virtue of Section 2 of the Declaratory Act, Chap. 4 of the Statute Law of the Bahamas (the "Act"), which came into operation on the 2nd December 1729, the common law of England was declared to be in full force in the Bahamas which was a colony of Great Britain at the time. The Bahamas became an independent country on 10th July, 1973 but the doctrine of attorney-client privilege continues in full force as it did prior to independence.

The Nature of Attorney-Client Privilege

The privilege is the client's not the attorney's or legal adviser's. It may therefore be waived by the client but not by the attorney. Referring to the privilege, Lord Chancellor Brougham, in *Greenough and others v. Gaskell* *[1824-34] All E.R. Rep. 767 stated at p. 770:-

"The foundation of this rule is not difficult to discover. It is not (as has sometimes been said) on account of any particular importance which the law attributes to the business of legal professors, or any particular disposition to afford them protection; though certainly it may not be very easy to discover why a like privilege has been refused to others, especially to medical advisers. But it is out of regard to the interests of justice which cannot be upholden, and to the administration of justice which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts and in those matters affecting rights and obligations which form the subject of all judicial proceedings.

If the privilege did not exist at all, everyone would be thrown on his own legal resources. Deprived of all professional assistance, a man would not venture to consult any skillful person or would only dare to tell his counsellor half his case."

The Test of Attorney-Client Privilege

The doctrine of attorney-client privilege extends to communications between an attorney and his client and to communications made by the attorney as well as by the client provided the communication is made for the purpose of giving or receiving legal advice and provided further that the communication was not for the purpose of enabling or committing a crime or fraud. The privilege does not extend to any other profession.

Minter v Priest [1930] A.C. 558 was a case about defamation and slander. However, the import of communications between solicitor and client and whether such communications were privileged or not was thoroughly examined by the court. In his speech, Lord Atkin, addressed the test as to whether such communications were afforded the protection of privilege. Lord Atkin, referring to passages from the judgments of Lindley and Kay L.JJ., stated at pp. 50, 581 of his speech:-

"The test for such protection has been defined in different words in a number of cases. I think it best expressed in two phrases used in the Court of Appeal in the leading case of O'Shea v. Wood (1891) 286, 289. Lindley L.J. adopts the language of Cotton L.J. in Gardner v. Irvin (1878) 4 Ex. D. 49, 53: '***professional communications of a confidential character for the purpose of getting legal advice***.' Kay L.J. refers to the language of Kindersley V.C. in Lawrence v. Campbell (1859) Drew 485, 90 and adopted by Lord Selborne L.C. in Minet v. Morgan (1873) L.R. 8 Ch. 361, 368, communications passing as '***professional communications in a professional capacity***.' The Lord Justice prefers the former phrase, and emphasizes the confidential character. As to this it is necessary to avoid misapprehension lest the protection be too limited. It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined. One exception to this protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or fraud the protection will be withheld." [My emphasis]

Policy Regarding Attorney-Client Privilege

Legal advice privilege was one of the topics addressed from a policy standpoint in *Three Rivers District Council and Others v Governor and Company of the Bank of England* [2005] 1 A.C. 610 HL. The House of Lords examined the policy reasons underlying legal advice privilege. In considering the policy reasons which led to legal advice privilege becoming established in English law, Lord Scott of Foscote noted in his speech at pp. 646, 647 that:-

first, legal advice privilege arises out of a relationship of confidence between lawyer and client;

second, if a communication qualifies for attorney-client privilege, the privilege is absolute. The privilege cannot be overridden by a supposedly greater public interest. It can be waived by the person or client entitled to it and it can be overridden by statute but it is otherwise absolute except in the case of Canada, where the Supreme Court of Canada has held that attorney-client privilege though of great importance, is not absolute and can be set aside if there is sufficiently compelling interest for so doing. However, in so far as Lord Scott was aware, no other common law jurisdiction has developed the law of privilege in the way that the law has developed in Canada;

third, legal advice privilege gives the person the right to decline to disclose or allow to be disclosed the confidential communication or document in question;

fourth, legal advice privilege has a relationship with litigation privilege. It is frequently sought or given in connection with current or contemplated litigation but it may be sought or given for purposes that have nothing to do with litigation. A connection with litigation is not a necessary condition for privilege to be attracted to the communication. The case of *Greenough v Gaskell* was cited with approval. It is important to note that Lord Scott emphasized that in England, if a particular communication or document is subject to attorney-client privilege, the privilege cannot be set aside on the ground that some higher public interest requires that to be done.

In the Bahamas, we are not bound by decisions of the House of Lords but such decisions are highly persuasive and the Bahamian courts are not likely to rule differently on the issues of attorney-client privilege that were addressed in *Three Rivers District Council*.

Statutes here in the Bahamas and elsewhere in the Commonwealth of Nations may have made inroads on the doctrine of attorney-client privilege but generally the doctrine remains firmly ensconced in Bahamian law as a matter of public policy.

**Other references, 1 My. & K. 98; 39 E.R. 618*

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