

CLAYTON UTZ

Confidentiality, privilege and collaboration

*in the context of acquiring land for
projects*

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Agenda

- Confidentiality
- Without prejudice
- Legal professional privilege
- Considerations for experts
- Collaborative approaches

What's in a name?

Confidentiality

General concept that is an element of legal professional privilege and applies to confidential information if provided in certain circumstances

Without prejudice (WOP)

Relevant in **negotiations** in some circumstances

Applies to communications between parties aimed at settlement, expressed to be on a WOP basis

Legal professional privilege (LPP)

Relevant in **disclosing** documents

Applies to communications between client and their lawyer

Confidentiality

- **Confidential information** is information which is not generally known and which the law will prevent from being used or further disclosed if it was disclosed in certain circumstances.
- It is information that is the subject matter of an obligation of confidence.
- Three tests for a breach of confidence (where no confidentiality agreement):



- Information must have **"the necessary quality of confidence about it"**
- Information must have **been disclosed in circumstances which give rise to an obligation of confidence**
- **Unauthorised use of the information - and generally necessary to show that such use will cause detriment to the "owner" of the information**

Confidentiality agreement

Protection of confidential information

An agreement can specify rights and obligations in relation to the information.

The agreement can:

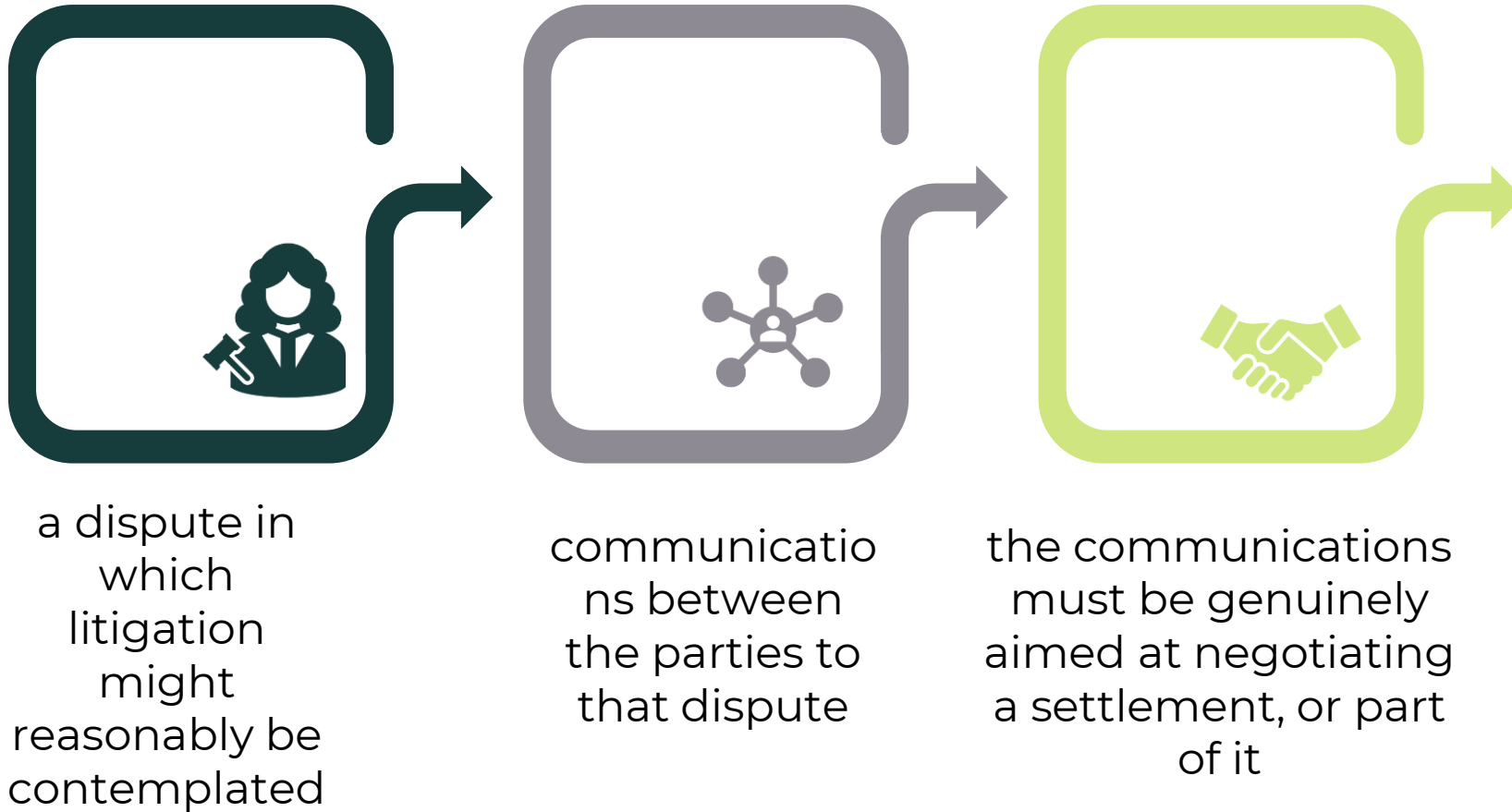
- identify the parties and to whom the information can be shared
- include a definition of the confidential information
- include the purpose for which the information can be used
- include exclusions for the use of the information
- set out the consequences of a breach
- set out the length of the agreement
- set out how to deal with the information at the end of the agreement – return or destruction

Without prejudice

What does 'without prejudice' mean?

If a negotiation or communication is 'without prejudice', any statement made during the discussion cannot be referred to in subsequent legal proceedings

Without prejudice – when does it apply?



What if...?

A party adds the phrase "without prejudice" to correspondence that **is not** part of settlement negotiations.

A party does not include the phrase "without prejudice" in correspondence that **is** part of settlement negotiations.

Legal professional privilege

•Confidentiality

- Confidentiality is the corner stone of privilege
- If a disclosure amounts to the loss of confidentiality, privilege is lost



•Communication

- Confidential communications (typically between a lawyer and client)
- This includes documents which directly reveal, or allow a reader, to infer the content or substance of a confidential communication



•Dominant purpose

- Confidential communications made for the **dominant purpose** ("the ruling, prevailing, or most influential purpose") of a type of privilege

Legal professional privilege and "dominant purpose"

Robertson v Singtel Optus Pty Ltd [2023] FCA 1392; upheld on appeal

Optus data breach.

Deloitte engaged to carry out “a forensic assessment of the cyber-attack and the circumstances surrounding it” and that “the review would ensure [Optus] understood how [the data breach] occurred and how [Optus] can prevent it from happening again”

Report for multiple purposes:

- to assist with prospective litigation and/or regulatory proceedings
- identify the circumstances and root causes of the cyber attack for management purposes and rectification
- to review Optus's policies and processes for managing cyber risk

No LPP - report not for the dominant purpose of litigation or regulatory proceedings

Legal professional privilege - waiver

Privilege is based on confidentiality

Lose confidentiality and you lose (waive) privilege

Privilege will be lost where the client or party has acted in a way that is inconsistent with the privilege

Legal professional privilege and disclosure

- Parties are required to disclose, by way of a list of documents, all documents that are in the possession and under the control of the relevant party that are directly relevant to the matter and to which privilege does not apply.
- Ongoing duty - if new documents are created or located after the initial list of documents has been delivered, those additional documents need to be disclosed by preparing a supplementary list of documents
- Not required to disclose documents subject to legal professional privilege
- Certain expert witness documents are or may be disclosable

What if...?

A party sends a letter to another party which says: "We have received legal advice to the effect that..."

A lawyer takes a file note of a conference with their expert witness. The expert witness discusses their opinions which are recorded in the file note.

Enkelmann v Stewart [2023] QCA 155

Facts:

- Plaintiffs engaged expert.
- Defendants requested copies of file notes taken by the Plaintiff's solicitors in discussion with the expert.
- Did Uniform Civil Procedure Rules(**UCPR**) abrogate privilege protecting file notes of an opinion or summary of facts given by an expert?
- Rule 212(2) of the UCPR contains an “exceptional” statutory provision with respect to privilege claims:

"A document consisting of a statement or report of an expert is not privileged from disclosure."

***Enkelmann v Stewart* [2023] QCA 155**

Held:

- "A solicitor's file note of a conference with an expert, noting or reporting an opinion expressed by the expert at the conference, is not a document consisting of a statement or report of an expert, within the meaning of rule 212(2). Nor are any parts of the note that refer to the expert's opinion."
- But unfortunately, the expert was cross examined about the conference and the Plaintiffs' barrister did not object.
- The Court said that not objecting was inconsistent with maintaining confidentiality and therefore the Plaintiffs waived privilege.
- So the file note had to be disclosed to the other side.

Legal professional privilege – relevance for expert witnesses

Situation	Does LPP apply?
Briefing and instructions to expert	Yes generally, but likely waived upon disclosure of the final report
Communications between expert and lawyer	Yes
Documents provided to an expert	Yes, but likely waived upon disclosure of the final report where those documents "influenced or "underpinned" the expert's opinion
Expert's working notes and field notes	No
Lawyer's file notes (taken in the course of communications and meetings with expert and client)	Yes
Draft report	No
Final report	No

Considerations for expert witnesses

- Assume that any communications or materials provided to you will not be subject to LPP and may need to be produced in litigation.
- Keep in mind that your working papers may have to be disclosed. They may be seen by the other party who may cross examine them at trial.
- Avoid recording unsettled views or uncertain propositions in working notes in terms that might be able to be used to undermine the final report.
- Discuss your preliminary views with the instructing lawyer (by telephone or video call) first before recording them in writing. Aside from the issue of privilege, this will allow the instructing lawyer an opportunity to ensure you have addressed the questions required.
- If you need further instructions, discuss with the instructing lawyer by telephone first.

Collaborative approaches

You're not building something just for the sake of it!

- Sometimes we need to step back and think about the desired outcome.
- Collaboration will give a better product.
- Not just collaboration within the project but between projects.

Collaborative approaches

- Acquisition of the corridor or site - often complex problems that require complex, collaborative solutions
- Acting collaboratively is hard and does not come easily or naturally.
- Danish Crime Prevention Council case study – are you at risk of remaining "embedded in institutional universe of [your own] organisation"?
- Build trust, which plays an essential role in the success of all collaborative endeavours.
- How can you build a collaborative environment?

Collaborative approaches

"Collaboration" has become something of a Holy Grail through which multiple parties seek to resolve wicked problems by combining their resources and expertise.

...it is widely accepted that complex [problems] require experience, knowledge and problem-solving capacities that cannot be provided by any single entity or sector operating on its own.

Butcher et al. (2019) in Attributes of effective collaboration: insights from five case studies in Australia and New Zealand

Questions?

Thank you for listening



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Morning Tea

10.30 am to 10.45 am