Legal Professional Privilege and Professional Secrecy in UK (England & Wales): Overview

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A Practice Note providing an overview of the laws in the UK (England & Wales) relating to the protection available to lawyer-client communications and the best practices for preserving the confidentiality, privilege, and secrecy in those communications in business and commercial situations. In the context of privilege and professional secrecy rules, this Note also considers the definition of lawyers and clients, the impact of a common interest or joint representation on the applicability of privilege, and the application of privilege in an internal investigation or an M&A transaction.

This Note provides an overview of the law related to:

- Parties' disclosure obligations.
- The rules related to legal professional privilege and professional secrecy.
- Who are considered to be lawyers and clients for the purposes of legal professional privilege and professional secrecy.
- How local courts consider privilege and professional secrecy issues when clients share counsel or a common interest with a third party.
- How a party can protect privileged documents during an internal investigation or in an M&A transaction.

For information on the different approaches to legal professional privilege, and professional secrecy in common law and civil law jurisdictions, see *Practice Notes, Legal professional privilege, legal confidentiality and professional secrecy: Cross-border* and *A world tour of the rules of privilege*

General Disclosure Rules

Rules of Disclosure in Civil Litigation

The rules of disclosure in civil litigation in the High Court and County Court of England and Wales are contained in Part 31 and Practice Directions 31A-C of The Civil Procedure Rules 1998 (the CPR). These rules do not apply to claims which have been allocated to the small claims track (*CPR 31.1(2)*).

For proceedings issued in the Business & Property Courts, a new disclosure pilot scheme (DPS) is currently operational until 31 December 2022 This is a new regime for disclosure and it operates under Practice Direction 51U of the CPR (PD51U). Brief references to the DPS will be made in this Practice Note where relevant, for more information on the details of the scheme see *Disclosure Pilot Scheme: toolkit*.

The court will usually make an order for disclosure at the case management conference (the hearing at which the court sets out the timetable for the steps leading up to trial).

The most common order given by the court is "standard disclosure" (*CPR 31.5 (7)(e)*). This is an order to disclose all documents:

- On which a party relies.
- Which adversely affect that party's case.
- Which adversely affect the other party's or parties' case.
- Which support the other party's or parties' case.

(*CPR 31.6.*)

This means that the parties are under a duty to give to the opposing party or parties documents which can have a negative impact on their case.

The definition of a document is very wide: it means anything in which information of any description is recorded. This extends to electronic documents. An electronic document is defined in Practice Direction (PD) 31A as:

> "any document held in electronic form. It includes, for example, email and other electronic communications such as text messages and voicemail, word-processed documents and databases, and documents stored on portable devices such as memory sticks and mobile phones. In addition to documents that are readily accessible from computer systems and other electronic devices and media, it includes documents that are stored on servers and back-up systems and documents that have been deleted. It also includes metadata and other embedded data which is not typically visible on screen or a print out."

The definition of document under CPR 31.4 also includes copies of documents. There are clear rules about whether copies of documents are to be treated as one document or whether each copy is treated as a separate document (*CPR 31.9*).

Under CPR 31.8, a party need only disclose documents which are, or have been, in the party's control. This is where:

- A document is, or was, in their physical possession.
- They have, or have had, a right to possession of it.
- They have, or have had, a right to inspect or take copies of it.

Under CPR 31.7, a party is required to make a reasonable search for these documents when giving standard disclosure. CPR 31.7(2) states that the factors in deciding the reasonableness of a search include:

- The number of documents involved.
- The nature and complexity of the proceedings.

- The ease and expense of retrieval of any particular document.
- The significance of any document which is likely to be located during the search.

Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, this must be put in the disclosure statement (see below) and the category or class of document must be identified in the statement (*CPR 31.7(3)*).

The court has wide powers to give disclosure orders, which, depending on the circumstances, can be more or less onerous than standard disclosure. A non-exhaustive list of possible orders is found at CPR 31.5(7). For example, the court can make an order that a party disclose the documents on which it relies (in support of its case), at the same time requesting specific documents from the other party (*CPR 31.5(7)(b)*).

The duty of disclosure continues until the proceedings are concluded (*CPR 31.11*). In practice this means if a document comes to the notice of a party at any time during the proceedings, and the document falls within the remit of disclosure ordered by the court, that document must be disclosed to every other party to the proceedings.

A party notifies the other side of the documents it is disclosing by way of a list (*CPR 31.10*). The list includes the disclosure statement referred to above. The disclosure statement sets out the extent of the search made, together with a statement that the party understands the duty to disclose documents, and certifies to the best of its knowledge that it has carried out that duty (*CPR 31.10(6)*).

Once it has received a copy of the disclosing party's disclosure list, a party must give the disclosing party written notice of their intention to inspect some or all of those documents, after which the disclosing party must permit inspection (not more than seven days after the notice is received) (*CPR 31.15*). In practice, the party who wishes to inspect the documents will ask the disclosing party for copies of all the documents it would like to see.

A party may claim privilege in disclosed documents in the disclosure list and refuse to allow the other party to inspect them. The documents over which the party claims privilege are set out in that party's list of documents (*CPR 31.10(2)*).

The rules of privilege, or their equivalent, are not set out in the CPR but instead emanate from the common law or statute (such as the equivalent type of privilege set out in section 413 Financial Services and Markets Act 2000 (FSMA) (see *Legal Professional Privilege and Professional Secrecy Rules*)).

The Disclosure Pilot Scheme (DPS)

The DPS is a new scheme of disclosure and is independent of CPR 31 (apart from a few exceptions). It operates under PD51U and only applies to claims issued in the Business & Property Courts.

The aim of the DPS is to reduce the amount of disclosure provided by the parties and, as a result, the costs which are incurred during this aspect of the litigation process. Parties must consider disclosure at an earlier stage of the action than before and co-operate with the other side to agree a list of issues, thereby reducing the amount of disclosure given and the resulting costs. The pilot is designed for use in cases which have huge amounts of electronic data and technology assisted review is encouraged to reduce the amount of documents that require consideration.

Under the DPS the concept of standard disclosure has been removed; instead there is Initial Disclosure and Extended Disclosure using five different models. The parties are expected to agree a model for each issue in dispute. The models range from disclosure limited to a party's known adverse documents to a full train of enquiry type discovery.

The court will approve the models chosen at a case management conference. Parties are no longer expected to file a disclosure report, but instead complete a disclosure review document together.

For more information on the details of the DPS see *Practice Note, The Disclosure Pilot Scheme in the B&PCs: some FAQs*.

As the rules of privilege, or their equivalent, are not set out in the CPR but instead emanate from the common law or statute, the rules of privilege are not affected by the DPS and remain the same.

Rules of Specific Disclosure

A party can be compelled by the court to disclose specific documents, either on the application of one of the other parties to the action or on its own initiative.

Under CPR 31.12 the court may order a party to do one or more of the following things:

- Disclose additional documents or classes of documents.
- Carry out a search for additional specified documents.
- Disclose any documents located as a result of that search.

In making its decision, the court will consider all the circumstances of the case and whether ordering specific disclosure (and making a party go through the disclosure exercise twice) would be proportionate (PD 31A). In assessing proportionality, the court will consider whether making the order satisfies the overriding objective of the CPR. The court's overriding objective (CPR 1) includes ensuring that each case is dealt with in proportion to the amount of money involved, and that consideration is given to:

- The importance of the case.
- The complexity of the issues.
- The financial position of each party.
- Ensuring that the case is dealt with expeditiously and fairly.

The court will want to avoid a "fishing expedition". Applicants are required to be narrow in their request, clearly describing the documents of which they seek specific disclosure.

PD 31A also makes clear that the court will usually grant such an application where a party has given inadequate disclosure; that is, where they have not complied with the court's previous order on disclosure, for example, by failing to carry out a sufficient search for documents or by failing to disclose certain documents resulting from those searches.

An order for specific disclosure can be made before standard disclosure has occurred (*CPR 31.16*). Disclosure can also be sought before proceedings have commenced. This is known as pre-action disclosure. An application to the court for pre-action disclosure must be supported by evidence showing that disclosure before the commencement of proceedings is desirable to dispose fairly of the anticipated proceedings, or to assist the dispute to be resolved without proceedings, or to save costs. The court may make an order under this rule only where:

- The respondent is likely to be a party to subsequent proceedings.
- The applicant is also likely to be a party to those proceedings.
- The documents would have been disclosable under standard disclosure if proceedings had started.

The court can also make an order that a person who is not a party to the proceedings must provide documents (*CPR 31.17*). This is known as third party disclosure. The court will only make the order against the third party if the applicant has provided evidence that the documents sought are likely to support the applicant's case or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary to dispose fairly of the claim or to save costs.

Under the DPS, Paragraph 18 of PD51U, allows the court to make an order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure.

Legal Professional Privilege and Professional Secrecy Rules

In England & Wales legal professional privilege protects certain communications between lawyers, clients and third parties. A party who claims privilege is entitled to withhold inspection of these communications from the other party and from the court.

Legal professional privilege is made up of legal advice privilege (in non-contentious situations) and litigation privilege. Litigation privilege also allows the protection of some third-party communications between a lawyer and a third party, or between the client and the third party. All communications must be confidential before legal professional privilege can apply to them.

The concept of legal professional privilege emanates from the common law and statute and is a substantive right rather than a rule of evidence. To ensure that a confidential communication is protected by legal advice and/or litigation privilege, the communication must fall within either the definition of legal advice privilege or litigation privilege.

The definitions of legal advice privilege and litigation privilege originate from case law and are refined from time to time. Best practice for preserving legal professional privilege must be considered in light of the most recent case law on the topic.

There is also a further but distinct category of privilege known as "without prejudice privilege". This privilege protects confidential communications that contain evidence of genuine settlement discussions between the parties from being seen by the court. These documents cannot be shown to the court, unless they are considered "without prejudice save as to costs", in which case they can be produced at court at the costs stage only.

There are two types of legal professional privilege in English common law: legal advice privilege and litigation privilege. These are introduced below and outlined in more detail in *Purpose*.

Privilege belongs to the client and not the lawyer. Litigation privilege extends to confidential communications between a client and a third party, or a lawyer and a third party (see *Third Parties*). This means that parties to litigation (as opposed to just a lawyer) can refuse to disclose documents in court if those documents fall within the definition covered by litigation privilege. If the document was created before litigation being in the reasonable contemplation of the parties then that document may not be covered by litigation privilege and may have to be

disclosed to the court. This will be a question of fact. The court can order a non-party to disclose documents under CPR 31.17, unless it can be shown that the documents are covered by litigation privilege.

A problem arises where a document may have had a dual purpose when created. In order for the document to fall within litigation privilege it must be shown that the dominant purpose in creating the document was for the purpose of obtaining information or advice in connection with pending or contemplated litigation, or of conducting or helping with such litigation.

If the dominant purpose was not this, then the document is not covered by litigation privilege and will have to be disclosed (*Tchenguiz and another v Serious Fraud Office and others [2013] EWHC 2297 (QB)*). The court can be creative and protect privilege and confidentiality by ordering disclosure subject to the rules of a confidentiality club. This will protect who sees the document and preserves the claim to privilege.

In *Twin Benefits Ltd v Barker and others [2017] EWHC 177 (Ch)* (13 February 2017), Arnold J ordered a solicitor (M) to give non-party disclosure of documents subject to legal professional privilege (LPP), with inspection on confidentiality club terms. The judgment analyses the impact of LPP on an application under CPR 31.17 and, interestingly, suggests (obiter) that one joint beneficiary of LPP might rely upon the improper purpose rule to defeat another joint beneficiary's claim to enforce the privilege.

Arnold J held that, for CPR 31.17(3)(a) to be satisfied, the applicant did not have to show that it could deploy the documents sought. Disclosure could be ordered, even though the respondent might have a right, or duty, to withhold inspection (CPR 31.17(4)(b)(ii)). The position was all the stronger where the respondent had no right or duty to withhold inspection by the applicant itself. After inspection, the applicant might be able to prove the documents' contents in other ways.

Non-Contentious Matters

The relevant protection in non-contentious circumstances is legal advice privilege. This type of privilege only applies to confidential communications between the lawyer and their client which have come into existence for the dominant purpose of giving or receiving legal advice about what should be said or done in a relevant legal context.

Civil Litigation

In contentious circumstances, litigation privilege is relevant in addition to legal advice privilege. Litigation privilege is a wider form of privilege than legal advice privilege, because it can include confidential communications between the lawyer, their client and third parties. The communications must be for the dominant purpose of litigation which must be existing, pending or in reasonable contemplation (see *Purpose* for more detail). It cannot be as commonly claimed as legal advice privilege because litigation must be at least in reasonable contemplation for it to apply.

Criminal Litigation

The same principles of legal advice privilege and litigation privilege apply in criminal litigation.

The Court of Appeal considered the issue of when litigation privilege applies in a criminal context and held that the test for when litigation is in "reasonable contemplation" should be the same in civil and criminal proceedings (*SFO v ENRC [2018] EWCA Civ 2006*).

Regulatory Proceedings

Legal professional privilege applies in the context of proceedings before regulatory authorities in the UK. For example, an inspector from The Competition and Markets Authority (CMA) conducting an investigation using powers under the Competition Act 1988 has no right to see documents protected by legal professional privilege. (This is different to the position under EU rules discussed below.)

The Serious Fraud Office (SFO) is subject to the same restrictions under section 2(9) of the Criminal Justice Act 1987, as is the Financial Conduct Authority (FCA) under section 413 of the Financial Services and Markets Act 2000 (FSMA).

The privilege accorded to "protected items" under section 413 of FSMA is similar to the concept of legal professional privilege but it is not identical. It protects communications between a professional legal adviser and their client or any person representing their client, and also protects communications between a professional legal adviser, their client or any person representing their client and any other person. The protection exists as long as the communications are made in connection with the giving of legal advice to the client or in connection with, or in contemplation of, legal proceedings and for the purposes of those proceedings.

In *Sports Direct International plc v Financial Reporting Council [2020] EWCA Civ 177*, the Court of Appeal held that privileged documents should not be disclosed to the regulator. This was because the regulator's statutory powers did not override the privileged status of the documents.

The SFO's 2020 guidance on deferred prosecution agreements states that corporates cannot be compelled to waive privilege, and will not be penalised for not waiving privilege.

However, the safeguarding of legal professional privilege is not universal. Bodies such as the CMA have the power to conduct directed and covert surveillance under the Regulation of Investigatory Powers Act 2000 (RIPA). In *Re McE [2009] UKHL 15* , the House of Lords held that covert surveillance provisions under RIPA could apply to the type of consultations between lawyers and their clients that are usually protected by legal professional privilege (see further at *Exceptions*).

Regulatory bodies have also sought measures in which legal professional privilege is waived in return for some measure of leniency if a breach is found. The CMA experimented with this approach, but following a consultation in 2012 it decided not to require a waiver of legal professional privilege in either civil or criminal investigations. However, the CMA has indicated that it might still ask a leniency applicant to do this in certain situations (see *Practice note, The English Law of Privilege and its application in competition law investigations*).

The case of *SFO v ENRC* is also illustrative of the dichotomy between protection of documents and co-operation. In *SFO v ENRC*, an application was made by the SFO to view privileged documents created by ENRC. ENRC had instructed solicitors and forensic accountants to carry out its own internal investigation before the commencement of any formal investigation by the SFO. ENRC undertook this internal investigation against a background in which the SFO had encouraged companies to self-report cases of suspected overseas corruption with a view to negotiating a civil settlement. ENRC claimed legal professional privilege in various documents generated during those investigations. In the High Court ENRC's claim to privilege was rejected, with the judge stating that neither legal advice privilege nor litigation privilege could apply in these circumstances. The Court of Appeal overturned this decision in September 2018.

Arbitration Tribunals

There are no set rules on how an international arbitral tribunal should deal with the issue of privilege. This is complicated by the fact that common law and civil jurisdictions deal with the issue of privilege very differently. In England and Wales, the Arbitration Act 1996 states that it is for the tribunal to decide all procedural and evidential matters (*section 34(1)*). In the absence of any prior agreement by the parties, the tribunal can decide to adopt the English rules of legal professional privilege. In addition, the International Bar Association's Rules on the Taking of Evidence in International Arbitration 2020 (in Article 9 - MediaHandler (ibanet.org)) provide some general guidance on how a tribunal should resolve a claim of privilege.

Employment Tribunals

Legal professional privilege applies in the same way to proceedings in employment tribunals.

However, questions have been raised as to whether privilege can apply to non-legal professionals representing or advising parties in employment tribunals. This is because there is sometimes a practice in employment tribunal proceedings of non-legal professionals (for example, HR consultants) working in roles usually occupied by lawyers.

In the case of legal advice privilege, *R (on the application of Prudential Plc and another) v Special Commissioner of Income Tax and another [2013] UKSC 1* has confirmed that legal advice privilege only operates between a lawyer and the client. There is however still ambiguity as to whether this is the case for litigation privilege (*New Victoria Hospital v Ryan [1993] IRLR 202*). Advice should be taken regarding the application of legal professional privilege before generating documents or communications containing sensitive confidential information.

Purpose

Litigation Privilege

Litigation privilege applies to any document which meets all of the following criteria:

- The document is a confidential communication.
- It passes between:
    - the lawyer and the client;
    - the lawyer (acting in a professional capacity) and a third party; or
    - the client and a third party.
- The litigation was reasonably in prospect at the time the document was created.
- The dominant purpose in creating the document was to obtain legal advice, evidence or information for use in the conduct of litigation.

For litigation privilege to apply, the litigation must be "adversarial", not investigative or inquisitorial (*Three Rivers District Council v The Governor and Company of the Bank of England [2004] UKHL 48*). Adversarial proceedings include proceedings in the High Court, the County Court, employment tribunals and, where it is subject to English procedural law, arbitration. However, the position is less clear with regard to other tribunals, public inquiries or statutory investigations. Each must be considered on a case-by-case basis.

For a document to be protected by litigation privilege, the main or dominant purpose for which the document was created must be litigation. If the dominant purpose in its creation was not litigation then the document will not be covered by litigation privilege (although it may fit within the definition of legal advice privilege instead). The court will assess the document's purpose objectively, rather than relying on what the document's author considered the purpose to be. In *Skymist Holdings Ltd v Grandlane Developments Ltd [2019] EWHC 1834 (Comm)*, the court extracted four suggestions from its examination of the case law to help a party analyse a claim of litigation privilege (at paragraph 98 of the judgment):

- The party asserting privilege must show that the communications were "seeking or obtaining evidence or information to be used in or in connection with anticipated or contemplated proceedings" (*Starbev at [4]*).
- Where communications may have taken place for a number of purposes it is incumbent on the party claiming privilege to establish the dominant purpose was litigation.
- The purpose must be assessed from an objective standpoint. It is desirable to refer to contemporaneous material without making disclosure of the very material the claim is designed to protect.
- The court must take a realistic and commercial view.

For litigation privilege to apply, litigation must also be either pending, existing or in reasonable contemplation. This means it should be a real likelihood, rather than a mere possibility, although the chance does not have to be higher than 50% (*USA v Philip Morris & another [2004] EWCA Civ 330*).

Legal Advice

For this type of privilege to apply, the document must:

- Be a confidential communication.
- Pass between a lawyer and a client.
- Be prepared for the dominant purpose of giving or receiving legal advice.

For legal advice privilege to apply, the lawyer must be giving legal advice to their client. In Three Rivers the House of Lords held that the concept of legal advice relates to "the rights, liabilities, obligations or remedies of the client either under private law or under public law" (*[2004] UKHL 48*). It is the work carried out by lawyers in a "relevant legal context" that is privileged (*Balabel v Air India [1988] 1 Ch 317*) and therefore does not extend to all documents prepared by a lawyer (*Property Alliance Group v RBS [2015] EWHC 3187 (Ch)*). For example, this means that documents prepared by a lawyer for the purpose of administration or business, as opposed to the work carried out in a legal context, will not be covered by legal advice privilege.

In *Civil Aviation Authority v R Jet2.com Ltd [2020] EWCA Civ 35* the Court of Appeal held that for a claim of legal advice privilege to succeed the proponent was required to show that the relevant document or communication was created or sent for the dominant purpose of obtaining legal advice.

The court also considered how legal advice privilege would apply to the same document or communication sent to multiple addressees that included both in-house lawyers and non-lawyers. The court suggested the following:

- The focus should be on the document and/or communication, so while the general role of the relevant lawyer may be a helpful starting point, it is not the focus of the decision.

- The purpose(s) of the communication should be identified. In doing so, the wide scope of "legal advice" (including the giving of advice in a commercial context through a lawyer's eyes) and the concept of "continuum of communications" must be taken fully into account. This could mean looking at the context of the communications which preceded it and followed it.
- If the dominant purpose of the communication is, in substance, to settle the instructions to the lawyer then, subject to the principle of 'who is the client' set out in *Three Rivers (No 5)*, that communication will be covered by legal advice privilege. However, if the dominant purpose is to obtain the commercial views of the non-lawyer addressees, then it will not be privileged, even if a subsidiary purpose is simultaneously to obtain legal advice from the lawyer addressee(s).
- The response from the lawyer, if it contains legal advice, will almost certainly be privileged, even if it is copied to more than one addressee. If it does not contain legal advice, then it is unlikely to be privileged.
- The preferred view of the court was that each email/communication should be considered as a separate communication between the sender and each recipient.

The court also considered the point in relation to meetings. It said that legal advice requested and given at a meeting is privileged; but the mere presence of a lawyer is insufficient to render the whole meeting privileged so that none of its contents (including notes, minutes, or records of the meeting) are disclosable. If the legal advice is inextricably intermingled with other discussions taking place then the meeting and its contents will be privileged as the dominant purpose of the meeting will be to give or receive legal advice. If the legal advice sought or given is distinct, then the non-privileged part will be severable (and on disclosure, redactable).

See *Defining the Client* for more detail on the issue of who is the client.

Scope of Legal Privilege and Professional Secrecy Rules

Communications

Under the CPR, a "document" means anything in which information is recorded (*CPR 31.4*). This includes, but is not limited to:

- Paper documents, including letters, faxes, manuscripts notes, among other things.
- Electronic documents, including word documents, emails, presentations, meta data among other things.
- Recordings and transcripts of telephone conversations.

The definition also includes copies of documents (*CPR 31.9*).

The DPS contains a similar definition in paragraph 2, PD51U.

Documents evidencing privileged communications are privileged (in relation to that content only). On the lawyers' side, these documents are sometimes known as the "lawyers' working papers". An example is an email between lawyers within a firm discussing a phone call with the client, or an attendance note setting out the contents of a meeting or a telephone conversation between a lawyer and a client.

Documents that are not privileged do not become so merely because they are sent to lawyers. In *Sports Direct International v Financial Reporting Council*, the Court of Appeal confirmed that an email sent between a lawyer and a client that was subject to legal advice privilege did not confer privilege on an otherwise non-privileged attachment to that email.

However, notes or annotations on unprivileged documents that betray the "trend of legal advice" can be privileged (*Lyell v Kennedy (1884) LR 27 Ch.D 1*). This is where a group of documents indicate the trend of legal advice given when considered together. This rule has also been applied narrowly and does not apply where the documents have been selected from the party's own non-privileged documents.

In *Re RBS Rights Litigation*, the court refused to uphold the claim by RBS to legal advice privilege in respect of lawyers' working papers (*[2016] EWHC 3161 (Ch)*). RBS claimed privilege in the notes taken by its lawyers of interviews conducted with employees during an internal investigation.

The court looked at the point in two stages. It held that the employees did not form part of the "client" for the purposes of legal advice privilege, and therefore the interviews were not covered by legal advice privilege. RBS then claimed privilege in the lawyers' working papers of those interviews. The court held that RBS had not sufficiently demonstrated that the internal notes were likely, by reason of the legal input they reflected, to give an indication of the legal advice given to RBS. In particular, there was no evidence in the notes of any analysis carried out by the RBS legal team, which meant that the documents did not betray the trend of legal advice given. As a result, there was no privilege in the notes.

Draft communications between a lawyer and a client attract privilege even if they are never actually communicated (*Three Rivers District Council and others v Bank of England [2003] EWCA Civ 474*).

It is also clear that the working papers and notes of lawyers are generally privileged. This is discussed in more detail with regard to internal investigations in *Internal Investigation*.

The area of difficulty is in client working papers and notes. The question is one of timing.

Three Rivers confirmed that documents evidencing privileged communications are themselves privileged; therefore, a client's internal summary of a meeting with a lawyer after it takes places will be privileged. However, it should be noted that if the client has included additional information or its own reactions to the advice, these parts of the document will not attract privilege. Care should be taken that privilege is not lost in the whole document.

By contrast, in light of the decisions made in *Three Rivers*, the position remains unclear as to whether documents prepared by clients in advance of obtaining legal advice will be privileged (except in circumstances where litigation privilege may apply). In *Civil Aviation Authority v Jet2.com* the Court of Appeal stated that where the dominant purpose of the communication is to settle instructions to the lawyer then, subject to keeping within the confines of the definition of client set out in Three Rivers (No5), that communication, or those documents, will be covered by legal advice privilege as that communication or document is part of a continuing series of communications with the dominant purpose of instructing the lawyer (*paragraph 100(ii)*).

Companies should ensure that only individuals who fall within the narrow definition of client within corporate bodies produce the document, and clearly label the documents as being intended for the lawyers. Great care should also be taken of the level of sensitive information put into these documents, in case they are not considered privileged.

Third Parties

For legal advice privilege to apply, the communication or document must pass between the lawyer and the client. However, it can apply to communications between the client and lawyer through an agent. This will only be the case if the agent does not themselves add something to the communication (except under the direction of the lawyer) and must only act as a "letterbox".

By contrast, litigation privilege can apply to communications between the lawyer and a third party, or the client and a third party, provided that the other requirements are met.

Confidentiality

For a document to be privileged it must be confidential. Therefore, notes of meetings between the parties to litigation, and transcripts of court proceedings, can never be privileged.

As confidentiality is a prerequisite to privilege, if confidentiality is lost, so is privilege. However, as mentioned above, if a document is disclosed on confidential terms, privilege will not be lost in respect of the wider world.

Loss of confidentiality can also be inadvertent; see *Loss of Privilege* for more detailed discussion.

Adverse Inferences

The court cannot draw adverse inferences from a party claiming privilege. Privilege is recognised as a substantive right in English law which can only be limited by statute and in exceptional circumstances (*R v Derby Magistrates Court, ex p B [1996] AC 487; R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563*).

Exceptions

There are certain circumstances where privilege will be lost or cannot be claimed (aside from waiver, loss of confidentiality and inadvertent disclosure, see *Loss of Privilege*):

- The "fraud or "iniquity" exception: communications and documents which came into existence for a criminal purpose are not protected by privilege.
- Under the Freedom of Information Act 2000 (FOIA), requests can be made by individuals for information held by public authorities, which must then provide those documents. Privileged documents can be protected from this disclosure under section 42 of the FOIA. This is not final, however, and the public body will look at multiple factors and weigh up whether or not the balance of public interest lies in disclosing the documents.
- There are sections of RIPA which defeat privilege; in particular, in relation to records of consultations usually protected by legal professional privilege, such as meetings between lawyers and clients (see *Re Mc E and others [2009] UKHL 15*). However, carrying out the surveillance under RIPA must be proportionate to the interests of protecting national security and preventing serious crime.
- In the context of foreign proceedings: a document considered privileged under English law is not necessarily so in another jurisdiction. Separate local advice should be taken on this point. It should be noted though that an English court will not order the disclosure of documents on the request of a foreign court, nor enforce a foreign order for disclosure of documents if it would contravene English law.

- Communications between a company and its in-house lawyer are not privileged under EU law in the context of an investigation by the European Commission into possible infringements of EU competition law (see *Cross-Border Matters*).

Defining the Client

Issues regarding the definition of client are only relevant in the context of legal advice privilege, as litigation privilege can cover communications between lawyers and third parties. The definition of "who is the client?" can be particularly problematic in a corporate context (see below).

The retainer letter is not in itself determinative in defining the "client", but can be used to aid in defining the client, should questions arise later.

The English courts have interpreted the definition of "client" narrowly in a corporate context. In *Three Rivers District Council and others v Bank of England [2003] EWCA Civ 474* the client was held to be a narrow group of employees expressly charged with seeking and receiving legal advice on the company's behalf, rather than the company itself. Practically, this may mean members of senior management or a group/committee specifically set up to deal with a particular matter.

This is important as it means that documents sent by an employee to the company's lawyer will not automatically be considered privileged.

The Court of Appeal in *SFO v ENRC* considered the narrow definition of "client" in *Three Rivers*. Although it was critical of that decision, it indicated that it was bound by the decision in *Three Rivers* and if this was to be revisited it should be by the Supreme Court. A differently constituted Court of Appeal in *Civil Aviation Authority v Jet2.com* agreed.

Practical Considerations

Communications made internally, or by an employee not included in the narrow definition of client given by Three Rivers, may not fall within legal advice privilege. This could have serious consequences, such as sensitive information being disclosed, and further, could result in the loss of privilege in other documents mentioned in the internal communications.

Companies should consider outlining at the start of a transaction, in the retainer letter, exactly who is authorised to communicate with the lawyers. Companies should note that a wide definition of client could be considered as artificial. A definition that is too narrow can also give rise to practical issues later, as could not defining the scope of client. If an issue did arise, a court is likely to look at what occurred factually during the time in issue.

Document creation policies within a company should also be written with the definition of client in mind.

Defining the Lawyer

Lawyers' Employees (for example, clerks, paralegals, or intern trainees)

Legal professional privilege can apply to paralegals and trainees but only if they are properly supervised by a qualified solicitor (in accordance with Solicitors Regulation Authority and Law Society rules). Their work will then be viewed as that of the department they belong to rather than as their own. Communications these individuals have with the client will only be privileged if they were giving advice, or helping to give advice in the context of the relationship between the client and the qualified solicitor acting on their behalf.

The determining factor here is the supervision by a qualified solicitor rather than a person who is merely a legal professional in training or working in the legal sector. Therefore, communications to a client from other employees of a law firm, such as personal assistants, can also be privileged if they are acting under the supervision of a qualified lawyer.

Foreign Lawyers

Local law restrictions on foreign lawyers to practise law do not have any bearing on legal privilege claims in England and Wales. According to the 13th edition of Hollander on Documentary Evidence:

> "It has been held that so long as the communication satisfies the prerequisites of English law of privilege, the privilege may be claimed for communications between foreign lawyer (whether or not he practises in England) and foreign client, and that this applies even when litigation is not in contemplation and where the foreign lawyer is advising on English law."

This principle has been subject to criticism, and other jurisdictions consider the issue differently. The English Commercial Court held in *PJSC Tatneft v Bogolyubov & Ors [2020] EWHC 2437 (Comm)* that English legal advice privilege extends to communications with foreign lawyers including in-house lawyers, provided that they act in their capacity or function of a lawyer. The court also emphasised that there is no additional requirement that foreign lawyers should be "appropriately qualified" or recognised or regulated as "professional lawyers".

In-House Lawyers

Legal professional privilege applies in the same way to in-house lawyers. However, communications made by in-house lawyers relating to management or administration, or which contain commercial advice, do not attract privilege. There is therefore a risk of privilege being lost in the whole document where it contains non-privileged information.

As long as the elements of privilege are satisfied, legal advice given by an in-house lawyer of a parent company to a subsidiary company in the same group will be privileged. For example, the advice should be given in a "relevant legal context" for legal advice privilege to apply (see *Gotha City v Sotheby's [1998] 1 WLR 114,* and see also *Berezovsky v Hine and others [2011] EWCA Civ 1089*, for examples of where this has occurred). Each subsidiary will be seen as a separate client of the in-house lawyer.

It is sensible to record exactly the companies in respect of which the in-house lawyer is retained, but if the company has not done this any communications will still be privileged if they fall within the definitions of legal professional privilege.

Other Professionals (For example, tax accountants, experts, surveyors, patent agents)

Legal professional privilege does not extend to other professional advisers who may give advice on points of law, for example, accountants providing tax advice (*R (Prudential PLC and another) v Special Commissioner of Income Tax and another [2013] UKSC 1*).

However, it should be noted that documents created by legal executives, patent attorneys, and licensed conveyancers, who are employed to give advice on English law by a licensed body, will be privileged.

Duration of Privilege

There is a general rule that "once privileged, always privileged". This was confirmed by the Court of Appeal in *Addlesee & othrs v Dentons Europe LLP [2019] EWCA Civ 1600* in respect of documents belonging to a dissolved company. The documents would continue to benefit from legal advice privilege unless waived by the company (if it was restored to the company register). (*See Legal update, Legal advice privilege survives dissolution and Crown disclaimer (Court of Appeal)*.)

Documents will generally remain privileged in subsequent proceedings. There are, however, narrow circumstances where the documents must be disclosed; for example, where a client sues their legal adviser, who then needs to refer to the privileged documents to establish a defence.

Also see *Loss of Privilege* and *Exceptions* for discussion of loss of privilege and exceptions to privilege respectively.

Loss and Waiver of Privilege

Scope of Waiver

Privilege belongs to the client. As a result, only the client can waive privilege. If the lawyer considers that a waiver of privilege should be made in respect of a particular document or class of documents, consent must be obtained from the client before the waiver taking place.

Loss of Privilege
Privilege can be lost by:

- Loss of confidentiality (see *Confidentiality*).
- Inadvertent disclosure.
- Waiver of privilege.

Waiver is where a party to litigation voluntarily produces a privileged document to the other party, or to the court. This can however be intentional or unintentional.

Privilege will be waived intentionally where documents are served in the course of litigation. This intentional waiver includes service of witness statements, experts' reports, pleadings, or documents in open correspondence with the other party.

More specifically, under CPR 3.14, making reference to a privileged document in court documents, such as a statement of case or a witness statement, will give the other party the right to inspect the document. Reference to

a privileged document may result in a party waiving its right to withhold inspection of the document. A similar provision is set out in rule 21 of PD51U of the DPS.

Further, referring to a privileged document, or intentionally waiving privilege in a document, could lead to the waiver of privilege in all other associated documents, which must then also be produced (for example, waiving privilege over a letter of advice from a solicitor may lead to the waiver of privilege over all letters from the same solicitor dealing with the same issue).

Parties should be aware that privilege cannot be waived over part of a document. Waiving privilege over part of a document could lead to the whole document losing privilege (see *Partially Privileged Documents*).

Privilege will not be waived if a privileged document is disclosed to a third party, or to a limited class, for an expressly stated purpose (the doctrine of limited waiver). The Court of Appeal has recognized that there must also be some kind of implied limitation on the use of the document if no expressly stated purpose is given (*Berezovsky v Hine [2011] EWCA Civ 1089*). However, it is more sensible to disclose the documents on the express understanding that privilege is only waived for a limited purpose.

Advice should be taken before pursuing any of these courses of action, and more generally on the content of documents communicated with the other party/a third party. Waiver is a complex and fact-sensitive area of law, with errors having potentially far reaching consequences.

Inadvertent Disclosure

CPR 31.20 provides that, where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it only with the court's permission. The DPS contains a similar provision in paragraph 19, PD51U.

The court's approach to CPR 31.20 was laid out by the Court of Appeal in *Al-Fayed v Commissioner of Police of the Metropolis [2002] EWCA Civ 780*:

- If a party has allowed inspection, it is generally too late for them to claim privilege. The receiving solicitor is entitled to assume that privilege has been waived.
- The court can however grant an injunction "where justice requires", including where the documents being made available for inspection was an "obvious mistake".
- A mistake is likely to be obvious where the solicitor appreciates that a mistake has been made before making use of the documents, or where it would have been obvious to a reasonable solicitor in their position that a mistake has been made.

Disclosure of Confidential Document to Third Parties

Care should be taken that confidentiality is not lost by sharing the document with third parties. If, however, a document is disclosed to a small number of individuals on expressly confidential terms, it will only lose its confidentiality with respect to those individuals, not more widely (see *Loss of Privilege* for a discussion of limited waiver of privilege).

Communicating privileged advice at a board meeting orally or in the form of minutes ought not to result in loss of privilege. However, the point is not certain and advice should be taken.

Legal Advice Disclosed to Third Parties for the Sake of Compliance

Legal advice should be taken before deciding how to disseminate information within the organization to ensure that the information falls within the definition of legal advice privilege.

In general, documents falling within the definition of legal advice privilege shared within an organization should include wording stating that they are privileged and confidential and that there is no waiver of privilege intended in sharing them. It should be made clear that the documents are only to be shared with those who are required to have knowledge of their content, and not to be disseminated further. Documents that are shared with employees who do not fall within the definition of the "client" are at risk of losing their claim to privilege.

Generally, a party who has decided to waive privilege in part of a document or in a document that forms part of a series of interconnected documents, for its own benefit, is not allowed to retain privilege in the rest of the document or in the related documents, if those documents may provide the court and the other side with a more complete picture. This is referred to as collateral waiver. That party will be obliged to provide the associated documents in order to give the court and the other parties a full picture.

The court generally frowns upon a party cherry-picking which privileged documents to disclose, as this could lead to the other parties and the court being misled as to the full facts of the case.

In these circumstances, it may be possible to retrieve the material in which privilege has been waived (to avoid disclosing the further associated documents), but only if it has not yet been deployed in court (*R v Secretary of State for Transport ex p Factortame Ltd (1997) 9 Admin. L.R. 591*).

The Court of Appeal considered this obiter in *Civil Aviation Authority v Jet2.com*, and by applying settled principles concluded that if the relevant documents had been privileged (the Court decided that they were not), the Court would have held that the privilege had not been waived in respect of any voluntary disclosure of the specific email which was in dispute between the parties.

(See also *Partially privileged documents*.)

Disclosure to Entities with a Common Interest

Privilege will be maintained in a document on disclosure to a third party with a common interest (*Buttes Gas and Oil Co v Hammer (No.3) [1981] Q.B. 223 at 243; see also Donaldson LJ at 251, Brightman LJ at 267*; *the passage from Brightman LJ was approved by the Court of Appeal in Guinness Peat v Fitzroy Robinson Partnership [1987] 1 W.L.R 1027 at 1038*). The common interest can arise where the third party either has a common interest in the subject matter of the privileged document or in litigation in connection with which the document was brought into existence. For example, common interest can arise between co-defendants in a breach of contract claim, who have a common interest in defeating the claims of the claimant and who wish to disclose confidential communications to each other and their respective lawyers. However, as it can sometimes be unclear as to whether common interest applies, if in doubt, disclosure should be considered on the basis of express contractual undertakings that privilege in the documents is not waived.

Privilege can be waived unilaterally by the sharing party. Only this party (the party which first had privilege in a document, before sharing it with a party with a common interest) has the right to waiver. No consent is required from any other party. This is in contrast with joint privilege, where both parties must agree to waive privilege (see *Disclosure of Confidential Document to Third Parties*).

Common interest may arise by an express agreement between the parties. However, it may also arise from the circumstances of the relationship between the parties or by way of inference based on the parties' mutual conduct (*Singla v Stockler and another [2012] EWHC 1176 (Ch)*). Express agreement to preserve the common interest privilege is preferable.

Disclosure to Entities Represented by the Same Counsel

Joint Retainer

If parties retain the same solicitor to advise them on a matter, they are entitled to see any privileged communications to which they have not been a party, and are not entitled to claim privilege against each other in respect of those communications in any subsequent litigation (*The Sagheera [1997] 1 Lloyd's Rep 160*).

Joint Interest

Where a third party can establish a joint interest in the subject matter of a privileged communication between a lawyer and a client, and that third party is not party to the client lawyer relationship, joint privilege may apply. Examples can include companies and their shareholders, and parent companies and their subsidiaries (*USP Strategies Plc v London general Holdings Ltd [2004] EWHC 373 (Ch)*).

The joint interest must have existed at the time the communication came into existence. If a joint interest has arisen then generally the same principles apply as if a joint retainer exists. Joint privilege is not lost at a later date if the parties are in disagreement and joint interest no longer exists (*Thanki, The Law of Privilege, Third edition, at paragraph 6.08; Commercial Union Assurance Co plc v Mander [1996] 2 Lloyd's Rep 640 (at 648)*).

The parties may not waive joint privilege unilaterally (although please note that the rules vary for executors of a will) (*Birdseye and anr v Roythorne & Co and others [2015] EWHC 1003 (Ch)*).

Partially Privileged Documents

Privileged information contained in a document that is not privileged as a whole can be protected by redaction (which appears as blacked-out or covered sections on the page). A good example of where this may occur is a board minute which may contain a record of legal advice given to the board of directors by its in-house or external lawyer together with regular company business. The legal advice can be redacted.

Privilege in Unique Contexts

Privilege Against Self-Incrimination

Privilege against self-incrimination exempts a person from being compelled to answer a question when called as a witness, produce documents or provide information which might incriminate them in criminal proceedings or expose them to a penalty. It does not apply to civil proceedings.

It can be claimed by a company (*Triplex Safety Glass Co v Lancegage Safety Glass [1939] 2 KB 395*).

The privilege cannot, generally, be claimed for the protection of a third party (*British Steel Co v Granada Television [1981] AC 1096; Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978] AC 547*).

Spousal Privilege

The only privilege that exempts a spouse from being compelled to answer a question when called as a witness, produce documents or provide information exists within the remit of the privilege against self-incrimination. It is based on common law privilege (*Versailles Trade Finance Ltd (in administrative receivership) v Clough [2001] EWCA Civ 1509*) and section 14(1) of the Civil Evidence Act 1968 (CEA).

The privilege may only be claimed personally or on behalf of a spouse or civil partner (*section 14, CEA*).

Overriding Powers of the Court

There are circumstances in which the court can override the privilege against self-incrimination and order disclosure. It is not an absolute right. In *O'Halloran and another v United Kingdom (2008) 46 EHRR 397*, the court held that it is necessary to focus "on the nature and degree of compulsion used to obtain the evidence, the existence of any relevant safeguards in the procedure, and the use to which any material so obtained was put".

There are some statutory exemptions that allow the court to remove the privilege in certain situations, although there may be restrictions on how the evidence can be used as a result. The exemptions include, but are not limited to, the following:

- Proceedings for infringement of intellectual property rights, as set out in section 72 Senior Courts Act 1981.
- Proceedings for the recovery or administration of any property, for the execution of any trust or for an account of any property or dealings with property in relation to offences under the Theft Act 1968 (see *section 31, Theft Act 1968*).
- Proceedings for an offence under section 13(2) of the Fraud Act 2006.
- Information disclosed under certain provisions of the Insolvency Act 1986.

Internal Investigation

For legal advice privilege to apply in case of an internal fact-finding investigation being carried out in relation to an alleged misconduct or fraud in the company, there must be a confidential communication which passes between a lawyer and a client which was prepared for the dominant purpose of giving or receiving legal advice (see *Purpose*). Where interviews with the employees and/or the final report given to the Board were conducted before deciding to obtain legal advice, it is arguable that they are not covered by legal advice privilege; they were not prepared for the dominant purpose of giving or receiving legal advice.

If the interviews with the employees and/or the final report given to the board were conducted after the decision had been taken to obtain legal advice, they could be covered by legal advice privilege as they were prepared for the dominant purpose of giving or receiving legal advice.

However, the answer actually hinges on the definition of who is the client. If the employees form part of the client as defined at the start of the internal fact-finding investigation, legal advice privilege will probably apply to the

interviews, as long as the interviews are conducted by the internal in-house lawyer or external lawyer. In this situation, the final report to the board is also likely to be privileged, as the board is likely to form part of the individuals who give and receive instructions from the internal in-house or external lawyer (*Three Rivers*).

However, in most situations the employees will not form "part of a class of persons authorized to give instructions to the lawyers" because the employees are not part of the client who is authorized to give or receive legal advice (*Astex Therapeutics Ltd v Astrazeneca AB [2016] EWHC 2759 (Ch)*). In this circumstance, legal advice privilege will not extend to these interviews even if the content of the interviews contains information that will help the lawyer to give legal advice to the board (*The RBS Rights Issue Litigation, Re [2016] EWHC 3161 (Ch)*). However, in this situation, the final report to the board, if made by the in-house or external lawyer, may be privileged if the dominant purpose of it is giving legal advice to the board.

There will be a difference if the investigation is carried out after the decision has been taken to pursue litigation. This is because litigation privilege will apply to the interviews as long as the dominant purpose of carrying out the interviews is for the purpose of obtaining legal advice, evidence or information for use in the conduct of the litigation. This principle is illustrated by the decision in *Bilta (UK) Ltd (In Liquidation) v Royal Bank of Scotland [2017] EWHC 3535 (Ch)*.

Litigation privilege is a wider privilege in that it applies to communications with third parties and therefore the definition of who is the client does not have the same importance (see *Defining the Client*).

As explained above, the participation of an in-house lawyer or an external lawyer in leading the investigation or conducting the employee interviews will not always ensure that privilege is maintained (see *In-House Lawyers*). Litigation privilege is likely to apply in this situation if litigation is in reasonable contemplation. However, where this is not the case, whether or not legal advice has been taken, it is unlikely that the interviews will be covered by legal advice privilege unless the employees are being interviewed as part of the group of those who have been authorised to give instructions to lawyers (in other words, they form part of the client).

From a practical point of view, to ensure that privilege associated with documents and information relevant to an internal investigation is preserved and not inadvertently lost, consideration should be given to the definition of the "client. Note however that a wide and possibly artificial definition encompassing too many individuals could be subject to challenge. Likewise, a very narrow definition may be too restrictive and therefore not practical for the particular situation.

Communications regarding the investigation should be directed, where possible, through the in-house lawyer to try and retain privilege. In very sensitive situations it may be prudent to instruct an external lawyer to try to ensure that legal advice privilege is in play if litigation privilege cannot attach to the situation, although this will not necessarily ensure that privilege attaches to the communication.

It should be considered whether communications need to be committed to writing. Oral discussions may protect these communications from production further along the line.

If legal advice or documents subject to privilege need to be disseminated, whether to the internal client or more widely within the company (for example, to a subsidiary), the information should be flagged as private and confidential to ensure that the confidential nature of the communication is not lost. It is also good practice to copy it in full rather than to rewrite it. Following the Court of Appeal's ruling in *Civil Aviation Authority v Jet2.com*, care should be taken when sending emails to multiple addressees that include both lawyers and non-lawyers. If possible, communications which give or seek legal advice should be separated from those which contain purely commercial communications.

If the advice needs to be sent to a third party it should be made clear that the advice or documents are confidential and privileged, and that their provision does not amount to a waiver of privilege. It is good practice to obtain an undertaking from the third party that it will treat the advice as privileged and confidential.

M&A Transactions

A client can engage in a limited sharing of privileged material with another in confidential circumstances in which the other agrees to respect and to maintain the confidentiality (and therefore the privilege) of the shared materials. While there are some circumstances in which the sharing can be conducted without a loss of privilege, the courts usually require that there be some legal or commercial justification for engaging in the sharing. Therefore, in a situation where a potential buyer of a company has requested access to confidential documents related to some of the past litigation in which the company has been involved, but the selling target company does not wish to publish the confidential documents, sharing with a potential buyer on agreed terms would almost certainly be regarded by an English court as not amounting to a loss of privilege.

Sharing in this way has been recognized by the Court of Appeal, for example in *Gotha City v Sotheby's*, where a confidential sharing took place between defendants to litigation (*[1998] 1 WLR 114*).

There are inevitably dangers with sharing, not least the prospect that the sharing will attract a claim to the effect that privilege has been waived. Careful thought should be given before engaging in the sharing of privileged communications with any party, because of the risk of losing control over the further dissemination of the information. If sharing is imperative, it is important to ensure that the terms on which this happens are clearly documented (see below). Conversely, where litigation is material, the buyer and its lawyers are likely to want to see the documents relating to it.

As a practical step, the seller management company can ask the buyer to sign a contractual undertaking such as a non-disclosure or confidentiality agreement to protect the information. A duty of confidentiality is unlikely to be implied in this situation, and so the seller should seek express and binding obligations from the buyer extending to its officers, employees, agents, and contractors (who should only be given access to the information on a need-to-know basis in the terms set out above). The confidentiality obligations should include an obligation to destroy or return the information if negotiations are terminated.

Cross-Border Matters

Investigating authorities, whether in the UK or from another jurisdiction, including the European Commission, recognize the importance of privilege, but the rules as to how communications will be protected differ depending not only on the jurisdiction involved but also on the relevant investigating authority. Courts and regulatory authorities in the UK generally apply local procedural law to determine privilege associated with a document.

The exception to this is investigations of possible infringements of EU competition law by the European Commission. Communications between the company and its in-house lawyer are not privileged under EU law. Case law from the European Court of Justice (ECJ) has set out strict requirements regarding the extent to which companies can prevent disclosure of their documents. These requirements allow confidentiality of written communications between lawyer and client as long as both the following conditions are satisfied:

- The correspondence must have been sent for the purpose of the client's rights of defence in relation to the Commission's investigation.

- The correspondence is with an independent external lawyer who is qualified to practice in a member state within the EEA (*AM&S Europe Ltd v Commission, Case 155/79 [1982] ECR 1575*).

The definition of communications for these purposes extends to documents created by a client seeking or gathering information, but only if the documents were created exclusively for the purpose of seeking legal advice from the external lawyer who is preparing the defence (*Azko Nobel Chemicals Ltd v Commission, Case T-253/3 and C-550/07P*). The judgments from the ECJ are without exceptions and apply even if the in-house lawyer would have privilege at national level. Lawyers who are not qualified in an EEA country are not allowed to claim privilege at all. Therefore, following the end of the transition period, from 1 January 2021 UK lawyers who are not dually qualified in an EU/EEA country are unable to claim privilege in respect investigations of possible infringements of EU competition law by the European Commission.

If a potentially applicable foreign rule on privilege conflicts with local laws, English courts apply the principle of *lex fori*, and so to determine whether a document is covered by privilege in the English courts, the English court will apply English rules of privilege (*Re Duncan [1968] P.306*). Therefore, a document that is not privileged in the country in which it was created or is located may nonetheless be considered privileged in the English courts, and vice versa. However, this can lead to a range of practical complications, especially in jurisdictions where the local definition of privilege may be broader or narrower than English law.

The position was considered by the English High Court in *Re RBS (Rights Issue Litigation) [2016] EWHC 3161 (Ch)*. In the RBS case it was argued by RBS that "the English court should apply the law of the jurisdiction with which the engagement or instructions, pursuant to which the documents came into existence or the communications arose, are most closely connected". This would have been a new choice of law rule. Hildyard J rejected that submission, as it would have resulted in the application of US law to the issue of whether the documents were privileged. Instead, he reaffirmed the *lex fori* rule and stated that the documents were not privileged under English law.

Recent Developments

The latest developments have been included in this Practice Note. By way of summary the following are the most important:

> "The scope of the right to legal professional privilege has continued to exercise the English courts as they maintain a narrow approach to the definition of who constitutes a client for the purposes of legal advice privilege. In *SFO v ENRC [2018] EWCA Civ 2006* extensive arguments were submitted to the Court of Appeal that the judgment in *Three Rivers (No.5)* was wrong. The Court's conclusion with respect to the application of litigation privilege to the documents rendered the issues in relation to legal advice privilege theoretical. Yet, the appeal court acknowledged the general wider interest the decision had garnered, and as a result it would consider the issue although not rule on it as this was a matter for the Supreme Court to determine.

> The Court of Appeal said that if it had been able to rule on the issue it "would have determined that *Three Rivers (No. 5)* decided that communications between an employee of a corporation and the corporation's lawyers could not attract legal advice privilege unless that employee was tasked with seeking and receiving such advice on behalf of the client, as the BIU was in Three Rivers (No. 5)". But the Court of Appeal agreed that there was "much force" in the submissions made

> by ENRC and The Law Society that if this was the correct interpretation of *Three Rivers (No.5)* it was wrongly decided. The Court of Appeal acknowledged that in today's world information upon which legal advice is sought can be in many different hands. The issue for a large corporation is that if it cannot ask its lawyers to obtain information from its employees under the protection of legal advice privilege because those individuals will not all be "the client", it may be at a disadvantage compared to smaller corporations or individuals. The Court of Appeal agreed, having been referred to decisions of the Singapore and Hong Kong Appeal Courts, that English law was not aligned with other common law jurisdictions and this was not desirable. The Court of Appeal concluded that if "it had been open to us to depart from Three Rivers (No.5), we would have been in favour of doing so".

A differently constituted Court of Appeal in *Civil Aviation Authority v Jet2.com [2020] EWCA Civ 35* agreed with this analysis.

The principles underpinning joint retainer privilege were considered and affirmed by the Court of Appeal in *Travelers Insurance Company Ltd v Armstrong and another [2021] EWCA Civ 978*. The court held that although their application gave rise to practical difficulties on the unusual facts of this case (including a possible conflict of interest), there was no principled basis on which to depart from the settled position.

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