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Quickguides

# Privilege under English law



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This guide provides an overview of the principles governing the ability of a party to keep communications with its lawyer confidential under the English law of privilege. It reviews the main heads of privilege which can be claimed, how privilege can be lost, and how to ensure that communications that are privileged, stay privileged.

In particular, this guide covers:

- Legal professional privilege
  - Legal advice privilege
  - Litigation privilege
- Other heads of privilege
  - Joint privilege
  - Common interest privilege
  - Without prejudice privilege
  - Privilege against self-incrimination
- Duration of privilege
- Loss of privilege
- Preserving privilege

The guide then goes on to look at privilege in practice and at the questions that frequently arise. It concludes with a table providing a brief overview of the categories of legal privilege and an "at a glance" flowchart.

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# Privilege under English law

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The concept of privilege, and the right of an individual to preserve the confidentiality of legal communications, is a fundamental human right long recognised by English common law. The rationale is that a client should be able to consult a lawyer in confidence without fear of having to disclose communications between them at a later date.

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 and enforcement agencies access to documents. Whether a document is privileged will always depend on the facts. This guide summarises the rules relating to privilege under English law. In particular it looks at the main types of privilege, the communications covered, and the ways in which privilege can be lost. It also provides practical advice on how to preserve privilege and deals with issues that arise in practice. The table at the end of the guide gives an overview of the main categories of privilege. The flowchart provides an "at a glance" guide to help ascertain whether privilege applies.

## Legal professional privilege

Legal professional privilege has two manifestations: legal advice privilege and litigation privilege. Although different in scope, the basic principles are the same.

### 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 dominant purpose of seeking or giving legal advice.

The leading judgments on legal advice privilege were delivered by the Court of Appeal and the House of Lords in the *Three Rivers* litigation.<sup>1</sup>

### The requirement of confidentiality

Privilege can only be claimed if the communication in question is confidential. Once it ceases to be confidential, it is no longer privileged. However, while confidentiality is an essential ingredient of a privileged communication, just because a document is confidential does not necessarily mean it is also privileged.

### The scope of "communications"

"Communications" are widely construed to include actual lawyer/client communications (e.g. phone calls, face-to-face discussions, letters, emails, faxes) and evidence of such communications (e.g. file notes of phone calls).

In any lawyer/client relationship there will be a continuum of communication between the lawyer and client. Where information is passed between the two as part of that continuum, aimed at keeping both informed so that advice may be sought and given as required, privilege will attach to those exchanges.<sup>2</sup>

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<sup>1</sup> *Three Rivers District Council -v- Bank of England (No. 5)* [2003] QB 1556 and *Three Rivers District Council -v- The Bank of England (No. 6)* [2005] 1 AC 610. The Court of Appeal has since revisited the test in *The Civil Aviation Authority v Jet2.com Limited* [2020] EWCA Civ 35, and found that the "purpose" referred to had to be the dominant purpose, rather than just "a purpose" [para 96]. For more detail, see [our client briefing](#).

<sup>2</sup> *Balabel and another -v- Air India* [1988] 2 All ER 246.

## Who is a lawyer for the purposes of privilege?

The definition includes all members of the legal profession including barristers, solicitors and trainee solicitors. Communications with non-lawyers advising on legal affairs only enjoy privilege in limited circumstances.<sup>3</sup>

The definition also includes in-house lawyers to the extent that they are providing legal advice. However, where they are providing business advice, or advice relating to administration or management, this will not be privileged. In addition, privilege will not apply to communications with an in-house lawyer in the context of competition investigations by the European Commission.<sup>4</sup> This is on the basis that, as a matter of EU law, in-house lawyers are not regarded as being sufficiently independent from their employer.

## Who is the "client"

In the case of individuals, the client is the individual instructing the lawyer. However, as a result of the Court of Appeal decision in *Three Rivers*, difficulties can arise where the legal advice is being given to a corporate entity. In *Three Rivers* the Court gave a restrictive definition of the client to the extent that only those employees of an organisation responsible for obtaining or receiving legal advice could be classified as "the client" for the purposes of legal advice privilege.

While this judgment was very fact-specific, has been heavily criticised,<sup>5</sup> and gave little guidance as to its more general application, it has been considered in a corporate context, and the narrow interpretation applied. As such, and until the Supreme Court revisits the decision, it should be assumed that the "client" comprises only those individuals authorised to seek and receive legal advice on behalf of a corporate. The cases establish that authorising employees to talk to the corporate's lawyers in order to enable those lawyers to advise the corporate will not, of itself, suffice. Any employee who is not actively involved in instructing the lawyer, or does not form part of a specially designated unit set up by the corporate to work with the lawyers, will fall outside the definition of "client" and will be in the same position as an external third party.<sup>6</sup>

Consequently, unless litigation privilege applies (see below), any documents produced by those employees and sent directly to lawyers will not be privileged, even if they are necessary to provide information to the lawyers to obtain legal advice. Likewise, any verbatim note, transcript, or recording of any discussions or interviews of those employees by lawyers will also not be privileged. Any non-verbatim interview notes produced by lawyers are also unlikely to be privileged. They will only be privileged if it can be shown that they betray the trend of advice being given to the client. The fact that the note is not a verbatim note, is selective/a summary, or includes the lawyers' "mental impressions", will not of itself be sufficient to pass that test.<sup>7</sup>

Careful thought will always need to be given to this issue, particularly in the context of internal investigations.

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<sup>3</sup> There are certain statutory exceptions under which advice given by non-lawyers may be privileged, such as patent and trademark agents.

<sup>4</sup> *AM&S Europe -v- Commission of the European Communities* [1983] QB 878. This point has been the source of much legal debate but the European Court of Justice confirmed that privilege does not extend to in-house lawyers in Commission investigations in *Akzo Nobel Chemicals and Akros Chemicals -v- Commission*, case C-550/07 P.

<sup>5</sup> Critics have pointed to the fact that *Three Rivers* does not recognise the corporate reality that a company can only act through its employees. Other jurisdictions, including Hong Kong (*CITIC Pacific Limited -v- Secretary for Justice and Commissioner of Police* (unreported, 29 June 2015)) and Singapore (*Skandinavisk Enskilda Banken AB (Publ), Singapore Branch -v- Asia Pacific Breweries (Singapore) Pte Ltd and others* [2007] 2 SLR 367), have disapproved it, preferring to look at the purpose behind the communication. They held that if the employee is providing information that enables the lawyer to advise the corporate client, that communication is privileged. However, the Court of Appeal has confirmed that the English courts are bound to apply *Three Rivers* in its most restrictive sense unless and until it is reviewed by the Supreme Court. (*The Director of The Serious Fraud Office -v- Eurasian Natural Resources Corporation Limited* [2018] EWCA Civ 2006).

<sup>6</sup> *Astex Therapeutics Ltd v AstraZeneca* [2016] EWHC 2759 (Ch) and *The RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

<sup>7</sup> In *The Director of The Serious Fraud Office -v- Eurasian Natural Resources Corporation Limited* [2017] EWHC 1017 (QB), a case that concerned a criminal investigation, the Judge gave examples of what may qualify as betraying the trend of legal advice, namely: the lawyers' qualitative assessment of the evidence, thoughts about its importance or relevance to the inquiry, or indications of further areas of investigation that might be fruitful in light of what the witness had said (although the latter on its own would not suffice). That decision was appealed, and the issue of the test to be applied was raised before the Court of Appeal. The Court of Appeal declined to rule on it, preferring to leave the issue to be resolved by the Supreme Court.

## What is "legal advice"?

In *Three Rivers*, the House of Lords confirmed that "legal advice" is not confined to telling the client the law, but includes advice "as to what should prudently and sensibly be done in the relevant legal context".<sup>8</sup> Lord Rodger used a simple but useful test to determine whether the lawyer was providing such advice: whether they had "put on legal spectacles when reading, considering and commenting on the drafts".<sup>9</sup> Consequently, if a lawyer acts as the client's "man of business", the advice may lack the relevant legal context and therefore not be privileged.

## 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 and covers communications between the client or their lawyers and third parties for the purpose of obtaining information or advice in connection with the litigation provided that, at the time the communication was made:

- litigation is in progress or is reasonably contemplated;
- the communication is made for the sole or dominant purpose of the conduct of the litigation<sup>10</sup>; and
- the litigation is adversarial, not investigative or inquisitorial.<sup>11</sup>

The paragraphs under legal advice privilege relating to the requirement of confidentiality, the scope of communications and the definition of lawyer, also apply in relation to litigation privilege.

## What are adversarial proceedings?

Litigation privilege can normally be claimed in proceedings where judicial functions are exercised by the court or tribunal, e.g. proceedings in the High Court, county court, employment tribunal and, where it is subject to English procedural law, arbitration.

However, the test is more difficult to apply in other types of proceedings. The relevant proceedings need to be adversarial rather than investigative or inquisitorial.<sup>12</sup> Therefore, where proceedings which are merely fact-gathering (such as a Banking Act inquiry, public inquiries or statutory investigations) or before administrative tribunals, the generally held view is that litigation privilege cannot be claimed.

The courts have found that litigation privilege can apply in an investigations context. The issue was considered in the context of a Competition Act investigation.<sup>13</sup> Although the case was decided on its facts, the Court considered that once proceedings were confrontational (in that case Tesco had been accused of wrongdoing by the regulator and was contesting that finding), then it could be said that the investigation was "adversarial" and therefore litigation privilege applied. A similar analysis was applied in the context of an HMRC investigation.<sup>14</sup> The same is true for FCA investigations, as argued by the FCA in *Property Alliance Group*.<sup>15</sup> There the FCA argued that the FCA enforcement process was not purely administrative; the matter could be referred to the Upper Tribunal where it would be contested in inter-partes litigation. In the context of a criminal investigation, the test is whether a criminal prosecution is reasonably in prospect.<sup>16</sup>

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<sup>8</sup> Per Lord Justice Taylor at page 330.

<sup>9</sup> Para. 60 of the judgment.

<sup>10</sup> Conducting the litigation includes deciding whether to litigate and whether to settle the dispute giving rise to the litigation. The privilege also extends to documents in which the advice or information obtained cannot be disentangled, or which would otherwise reveal that information or advice (*WH Holding Ltd -v- E20 Stadium LLP* [2018] EWCA Civ 2652).

<sup>11</sup> The test is based on that of Lord Carswell in *Three Rivers (no 6)*.

<sup>12</sup> In *Three Rivers*, one of the criteria for establishing litigation privilege was said to be that the litigation must be "adversarial", not investigative or inquisitorial. This principle derives from the House of Lords decision in *In re L (A minor)* [1997] AC 16. That decision has been criticised and the House of Lords in *Three Rivers*, in particular Lord Scott, considered that the law in this area requires review.

<sup>13</sup> *Tesco Stores Limited -v- Office of Fair Trading* [2012] CAT 6.

<sup>14</sup> *Bilta (UK) Ltd (in liquidation) & ors -v- Royal Bank of Scotland Plc & anr* [2017] EWHC 3535 (Ch).

<sup>15</sup> *Property Alliance Group Ltd -v- Royal Bank of Scotland Plc* [2015] EWHC 1557 (Ch) (see paragraph 82).

<sup>16</sup> *The Director of the Serious Fraud Office -v- Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006.

## When is litigation reasonably in prospect or contemplated?

In order for litigation to be reasonably in prospect or contemplated, there must be a real likelihood rather than a mere possibility of adversarial legal proceedings commencing, although the chance need not be greater than 50 per cent.<sup>17</sup> Mere apprehension of what might happen is not enough. However, it does not matter if the particular litigation (or indeed any litigation) never in fact commences. The point at which the line is crossed between litigation being a mere possibility and contemplated will not always be clear. The court will look to all the circumstances to determine the question.<sup>18</sup>

## Communications with a third party

Unlike legal advice privilege, litigation privilege attaches to communications with third parties and so the concerns outlined above in the discussion of legal advice privilege relating to the identity of the "client" do not arise.

## Dominant purpose test

Communications are often created for more than one purpose. Provided that the sole or dominant purpose for which the communication is created is the conduct of the litigation or contemplated litigation, it will come within the scope of litigation privilege. The court will look at the purpose of the document objectively, taking into account all the circumstances.<sup>19</sup> The cases illustrate the fact-sensitive nature of any decision on privilege.<sup>20</sup>

## Internal communications

Internal communications, for example minutes of board meetings, will only be covered by litigation privilege if they satisfy the test as set out above. As such, caution should be exercised whenever litigating parties internally discuss contemplated or ongoing proceedings. Documents that do not fall within the scope of litigation privilege may have to be disclosed.<sup>21</sup>

## Other heads of privilege

### Joint privilege

Joint privilege arises where more than one party retains the same solicitor to advise them (and so have a joint retainer) or where they have a joint interest in the subject matter of a privileged communication.

It will be a question of fact whether a solicitor is acting under a joint retainer. The test for whether a joint interest exists is whether the parties could have instructed the same solicitor. Relationships where a joint interest can arise include: beneficiaries and trustees; a company and its shareholders; partners; and parent company and subsidiaries.

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<sup>17</sup> *USA -v- Philip Morris Inc. and British American Tobacco (Investments) Ltd* [2003] All ER (D) 191 (Dec), approved by the Court of Appeal, [2004] All ER (D) 448 (Mar).

<sup>18</sup> In *Starbev GP Ltd -v- Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm), the Court considered terms of certain retainers and whether a preservation letter had been sent as part of the circumstances evidencing an anticipation of litigation.

<sup>19</sup> The leading authority on the dominant purpose test is *Waugh -v- British Railway Board* [1980] AC 521. There a report on a railway collision was held to have been prepared for a dual purpose: railway operation and safety purposes (to find out what happened so it can be prevented from happening again) and for the purpose of receiving advice regarding any litigation. The latter was not dominant and the claim to privilege failed. Contrast that with the approach adopted in *Highgrade Traders Ltd*, [1984] BCLC 151 (CA), in which insurers commissioned reports into the cause of a fire which destroyed the insured's business. There the Court of Appeal adopted a "wider purpose" approach, finding that what looked like separate purposes were in fact parts of a single, overarching purpose relating to the contemplated litigation.

<sup>20</sup> A more restrictive approach appears to have been taken in *Starbev GP Limited -v- Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm), and *Rawlinson and another -v- Akers and another* [2014] EWCA Civ 136. That said, the courts adopted a less restrictive approach in *Bilta (UK) Ltd (in liquidation) & ors -v- Royal Bank of Scotland Plc & anr* [2017] EWHC 3535 (Ch) and *The Director of the Serious Fraud Office -v- Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, both of which concerned materials produced during internal investigations. In both, the contemplated enforcement or criminal proceedings were regarded as the primary purpose, with any investigation into the allegations forming a sub-set of that.

<sup>21</sup> In *WH Holding Ltd -v- E20 Stadium LLP* [2018] EWCA Civ 2652, the Court of Appeal found that emails between Board members discussing a commercial settlement of a dispute were not covered by litigation privilege.

### Key characteristics:

- The parties must share the joint interest at the time the communication is created.
- The privilege belongs to all parties who have joined in retaining the solicitor or who share the joint interest. The parties together are entitled to maintain the privilege as against the rest of the world.
- The joint nature of the privilege means that all to whom it belongs must concur in any waiver of it in favour of third parties. This is a key difference between joint and common interest privilege.
- If the parties subsequently fall out and sue one another, neither can claim privilege against the other for documents that attract the joint privilege (i.e. documents which were created at the time the joint interest subsisted).

### Common interest privilege

The law regarding common interest privilege is still developing. Analysis and interpretation of this concept has given rise to much academic debate and some inconsistent case law.

The key point to note is that common interest privilege enables the sharing of privileged documents with others with the same interest. As such, passing a privileged communication to a person with a recognised common interest will not lose privilege in the way it could do if it had been disclosed to a third party. However, unlike joint interest, the right to waive privilege is exclusively that of the party who originally enjoyed the privilege and is not shared by the person to whom the communication is disclosed. As such, only that person can waive privilege in the document; the consent of those sharing a common interest is not required. While there is some debate on the point, it appears likely that the common interest must exist at the time of disclosure of the communication.

### Who has a common interest?

Historically, the test for establishing a common interest has been high. The leading case on common interest privilege is *Buttes Gas and Oil Co -v- Hammer (No. 3)*,<sup>22</sup> which states that the court will treat parties with a common interest "as if they were partners in a single firm"<sup>23</sup>. However, while there is still limited authority on this point, more recent judgments appear to indicate that the boundaries of the concept are widening<sup>24</sup>. For example, parties may establish a common interest despite having differing views or divergent interests. Examples of persons who may have a common interest include companies in the same group, insurer and insured, agent and principal or neighbours with the same complaint. In practice it is prudent for parties to document the extent of the common interest before sharing privileged material.

### Disputes between parties

As with joint interest privilege, if the parties subsequently fall out and sue one another, neither can claim privilege against the other for documents that were disclosed pursuant to the common interest privilege.

### Without prejudice privilege

Often described as a quasi-privilege, the purpose of the without prejudice rule is to encourage parties to a dispute to try and reach a settlement by allowing them and their legal advisers to speak freely and make concessions knowing that the communications cannot be disclosed later in court if the negotiations fail to achieve settlement. The protection is not absolute and there are exceptions. It is covered in more detail in the Ashurst Quickguide: Without Prejudice.

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<sup>22</sup> [1981] QB 223.

<sup>23</sup> See also *The Good Luck* [1992] 2 Lloyd's Rep 540 at 542 which required the identity of interest to be so close that the parties could have used the same solicitor.

<sup>24</sup> See for example *Svenska Handelsbanken -v- Sun Alliance and London Insurance Plc (No. 1)* [1995] 2 Lloyd's Rep 84.

## Privilege against self-incrimination

The rule of privilege against self-incrimination states that no person is bound to answer any question, or release any document, in civil proceedings, if the answer or document would have a tendency to expose him or his spouse/civil partner to any criminal charge or penalty under the law.<sup>25</sup>

### The test

The test is whether the relevant criminal charge or penalty is reasonably likely to be pursued, and whether the answer would have a tendency to incriminate the accused or his spouse/civil partner. There must be a "real and appreciable" danger of incrimination rather than a mere possibility for the privilege to apply.<sup>26</sup>

### Who can claim privilege against self-incrimination?

The person at risk of incrimination can claim the privilege.<sup>27</sup> The privilege can also be claimed by a spouse or civil partner of the person at risk of incrimination so that they cannot be required to answer questions where the answer would tend to incriminate their spouse or partner. It can be claimed by a company/undertaking but it has been left open by the courts whether directors, employees or agents of a company can invoke the privilege where their answers would tend to incriminate the company.<sup>28</sup>

### When does privilege against self-incrimination apply?

The privilege can be claimed when refusing to produce documents or information, whether at or before trial. It is particularly relevant where disclosure orders are sought as part of interim emergency applications, such as search orders and freezing injunctions where the respondent has limited opportunity to take legal advice.<sup>29</sup> The privilege can also be claimed in civil competition investigations by the Competition and Markets Authority or European Commission.<sup>30</sup> The privilege will not, however, apply to independent/incidental material found during the course of the exercise of legal process, as opposed to material required to be produced directly pursuant to it.<sup>31</sup> A prolonged failure to claim the privilege runs the risk of it being lost.<sup>32</sup>

### Duration of privilege

The general rule is "once privileged, always privileged". This means that once a communication becomes privileged, the party to whom the privilege belongs may continue to claim privilege over that communication albeit in different circumstances. This right continues indefinitely, unless the privilege is lost or waived.

### Loss of privilege

Privilege can be lost inadvertently or can be waived by the holder of the privilege. Once privilege has been lost or waived, it cannot be reclaimed. It is therefore important to take care to maintain privilege.

### Loss of confidentiality

As noted above, privilege only attaches to confidential communications. Therefore, if a document is circulated widely, or is made publicly available, privilege may be lost. For example, if an advocate refers to a document in open court, or a document is available for inspection on the court file<sup>33</sup> or

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<sup>25</sup> *Blunt -v- Park Lane Hotel* [1942] 2 KB 253 at 257. Civil Evidence Act 1968, s.14 and Article 6 of the European Convention on Human Rights incorporated into English law by the Human Rights Act 1998.

<sup>26</sup> This risk must be apparent to the court. The fact that the party concerned believes that the information would incriminate him is not relevant though the court will err on the side of caution in its assessment. See *Lamb -v- Munster* (1882) L.R. 10 QBD 110.

<sup>27</sup> *Triplex Safety Glass Co. Ltd -v- Lance Gaye Safety Glass* (1934) Ltd [1939] 2 KB 395, CA.

<sup>28</sup> *Rio Tinto Zinc Incorporation -v- Westinghouse Electric Corporation* [1978] AC 547 HL.

<sup>29</sup> Part 25 of the CPR.

<sup>30</sup> *Rio Tinto Zinc Incorporation -v- Westinghouse Electric Corporation* [1978] AC 547 HL.

<sup>31</sup> *C Plc -v- P and Another* [2007] EWCA Civ 493 concerning the discovery of criminal material on the defendant's personal computer during the execution of a search order.

<sup>32</sup> See *Compagnie Noga -v- Australia and New Zealand Banking Group* [2007] EWHC 85 (Comm) as an example.

<sup>33</sup> *Goldstone -v- Williams, Deacon & Co.* [1899] 1 Ch 47, see Stirling J at p. 52. The rules governing access to documents on the court records are set out in CPR Part 5.



included in the trial bundle by a party, the document enters the public domain and privilege in the document is lost (unless included by obvious mistake – see mistaken disclosure below).

However, if a document is disclosed to a third party then, while a claim to privilege cannot be maintained as against that party, it does not necessarily mean that a claim to privilege is lost as against the rest of the world. The crucial consideration is "whether the document and its information remain confidential in the sense that it is not properly available for use".<sup>34</sup> Therefore, if a privileged communication is disclosed to a third party for a limited purpose and on strict terms as to confidentiality, it may be possible to maintain a claim to privilege in that document as against the rest of the world.<sup>35</sup>

### **Waiving privilege**

A party may choose to waive privilege in a document or part of a document which is helpful to his case. However, this can be risky as, if the party relies on the document in support of its case, it can result in the party having to disclose other privileged documents or the whole document, and so any such waiver should be carefully considered.

The general rule is that where privilege is waived in respect of one document in a sequence of documents (or one part of a document), then the class of documents (or rest of the document) will have to be disclosed unless the document (or part of the document) disclosed deals with an entirely different issue or subject matter.<sup>36</sup> This is to prevent parties unfairly indulging in selective disclosure or "cherry picking" among the privileged material.

### **Disclosure through improper means or mistake**

Where a document is obtained by the other party by improper means or through an obvious mistake, the court may prevent use of the document.

#### **Documents obtained through improper means**

Where privileged documents have been obtained by the other side by improper means, the court will usually grant an injunction preventing use of the documents.

#### **Mistaken disclosure**

Where a party mistakenly allows a privileged document to be inspected, the court will examine whether it was obvious that the disclosure was mistaken in deciding whether to allow the recipient to use the document.<sup>37</sup> If it was either obvious to the recipient, or alternatively would have been obvious to a reasonable solicitor in the same circumstances, the court will prevent use of the document. The courts have sometimes gone further and granted an injunction barring the solicitors who received the privileged documents from acting, on the basis that they would be unable to put the contents of the documents out of their minds.

An inadvertent disclosure of privileged material will not automatically give rise to a wider waiver of privilege unless the disclosing party seeks to rely on the contents of that privileged material.<sup>38</sup>

### **Criminal or fraudulent purpose**

Both legal advice privilege and litigation privilege may be lost if the communication or document in question was created for the purpose of furthering a criminal or fraudulent purpose.<sup>39</sup>

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<sup>34</sup> *Bourns Inc -v- Raychem Corp* [1999] 3 All ER 154, 167-8, CA.

<sup>35</sup> As was the case in *B -v- Auckland District Law Society* [2003] UKPC 38. Note that the limited waiver can be implied if it was obvious in the circumstances (*Berezovsky -v- Hine* [2011] EWCA Civ 1089). However, providing privileged documents under express terms is preferable.

<sup>36</sup> *Great Atlantic Insurance Co. -v- Home Insurance Co.* [1981] 1 WLR 529; *Dunlop Slazenger International Ltd -v- Joe Bloggs Sports Limited* [2003] All ER (D) 137.

<sup>37</sup> The leading case on this is *ISTIL Group Inc -v- Zahoor* [2003] EWHC 165 (Ch). See also *Al Fayed and Others -v- Commissioners of Police for the Metropolis and Others* [2002] EWCA Civ 780.

<sup>38</sup> *Belhaj -v- DPP* [2018] EWHC 513.

<sup>39</sup> See *Kuwait Airways Corporation -v- Iraqi Airways Company* [2005] EWCA Civ 286 for a summary of this principle.

## Preserving privilege

There are a number of practical steps that may be taken to preserve privilege.

### Limit dissemination of legal advice

Circulation of legal advice and other communications with lawyers should be restricted so far as possible and on a need-to-know basis (i.e. it should only be sent to those persons who need to know as part of the instruction/decision-making process). In addition, if advice is circulated, forwarded or repeated by the client internally and any additional comment is added, the additional comment may not be privileged.

### Use of "Privileged" labelling

Privileged communications should be marked "Privileged". While the presence or absence of such a label is not determinative of a communication's privileged status, it makes this clear to the recipient and may also add weight to an argument that the communication is privileged. It will also help protect against inadvertent disclosure.

### In-house lawyers: separate legal advice from other advice

Under English law, in-house lawyers are in the same position as lawyers in private practice for the purposes of claiming privilege. However, their advice will only be privileged to the extent that they are giving legal advice; where they are providing business advice or advice relating to administration or management affairs, their advice will not be privileged. Therefore, it would be prudent for in-house lawyers, so far as possible, to make sure that their communications containing legal advice are kept separate from their other communications to avoid the risk of inadvertent waiver of privilege.

## Privilege in practice: frequently asked questions

### Is privilege in legal advice lost when it is disclosed to the board?

The answer is no. A company can only act through its directors and disclosure to them is not treated separately from disclosure to the company itself. Equally, the involvement of a third party, for example the company secretary, in collating the advice for circulation to the board will not affect the privileged status of the advice. However, any additions made to the advice by that third party may not be privileged and should therefore be avoided. If comments are made, they should always be separate from the advice itself.

### If board minutes record legal advice, are they privileged?

Care should be taken with board minutes. A board minute solely summarising or attaching a copy of legal advice received will be privileged. However, if the board minutes record discussions which go beyond repeating the legal advice then those minutes (or at least that part of those minutes) may not be privileged. So, for example, a discussion of the commercial issues arising from the legal advice received will not be privileged. Caution should always be exercised when recording discussions of the legal advice. In addition, care should be taken not to circulate or copy board minutes which record privileged discussions or attach/summarise legal advice to anyone who does not need to see them for the purpose of acting on the advice.

### What about providing privileged communications to third parties, for example auditors and insurers?

Sharing privileged information is risky as it can give rise to claims that privilege has been waived. However, it is possible to disclose privileged communications to a third party without losing privilege as against the rest of the world if the communication is provided for a limited purpose and on a confidential basis (also known as a "restricted" or "limited" waiver of privilege).<sup>40</sup> In order to reduce the

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<sup>40</sup> *B -v- Auckland District Law Society* [2003] UKPC 38.

risk of loss of privilege, before any privileged communication is sent to a third party, that third party should be asked to acknowledge that it is sent to them on the following basis:

- the communication is privileged;
- provision of the communication does not amount to any waiver of privilege;
- the communication is provided only for a limited purpose (and state what that purpose is); and
- the documents are to be held in complete confidence and are not to be disclosed to any other person without the disclosing party's prior consent (unless required by law or regulation).

In addition, it is helpful to require that the communication be destroyed or returned to the disclosing party once the matter is concluded.

### **Is this the same if the third party is the parent company or another company within the group?**

Yes. In addition, it may also be possible to argue that the companies share a joint or common interest (see above) and that privilege in the document is therefore maintained on that basis. However, the safest course is to provide the advice under terms as to confidentiality in case no joint or common interest is found to exist.

### **Will legal advice provided by in-house counsel employed by the parent to other subsidiaries be privileged?**

Generally speaking, provided the requirements of legal advice privilege are met (see above), legal advice provided by in-house counsel to other companies within the group should be privileged. In those circumstances, each of the subsidiaries or group companies receiving the advice should be regarded as the "client" for the purposes of any legal advice privilege that can be claimed. As a matter of best practice, the in-house lawyer's employment contract should record the fact that the in-house lawyer is employed to advise both the parent and any other companies in the group. However, the absence of such a provision should not be a bar to claiming legal advice privilege.

### **Privilege in internal investigations: how far does it extend?**

Companies should always think carefully regarding their privilege strategy in any internal or regulatory investigation. To what extent will they want to claim privilege over certain documents? If they do want to be able to claim privilege then the following issues will need to be considered:

- Can you claim litigation privilege or are you restricted to legal advice privilege? At the early stages of an investigation, when a company is still trying to establish what has happened, litigation privilege is unlikely to apply.
- If a claim to litigation privilege is available, take steps to support such a claim, including instructing external litigation lawyers (indicating the existence of potential litigation), recording in engagement letters with lawyers and external consultants that their instruction is for the purposes of the proceedings, and notifying employees within the company that they should take steps not to destroy documents in contemplation of future proceedings. The contemporaneous documents and actions taken should reflect an assumption that proceedings are reasonably contemplated.
- If only legal advice privilege is available, only confidential communications between lawyers and the group of individuals authorised to instruct lawyers and receive advice on the company's behalf will be privileged. Careful thought should be given as to how the advice is communicated and disseminated: restrict circulation to those individuals within the company who "need to know".
- How will interviews with employees be conducted and recorded? If litigation privilege does not apply, and the employees are not within the "client" group, then the interview itself will not be privileged. Options include:
  - Take no notes at all and rely on memory.

- Produce a non-privileged note of the interview, but not in verbatim terms, on the basis that a non-verbatim note may not be as damaging if disclosed in subsequent proceedings.
- Produce a record that falls within the privileged category of lawyers' working papers. In order to fall within this category, the notes must be taken by lawyers and indicate the trend of legal advice which the lawyer is giving to the client. At an early stage of an investigation this may not be easy to do, without artificiality.
- In an environment of increasing coordination between regulators in different jurisdictions, understand how privilege laws differ across jurisdictions. The English courts will apply English law to issues of privilege irrespective of where any communications took place. In addition, certain jurisdictions, e.g. the US, do not recognise the concept of limited waiver.

### **Do I have to disclose privileged documents if requested to do so by a foreign court?**

Foreign courts have their own rules on privilege and disclosure. Documents that are privileged under English law will not necessarily be privileged in a foreign court. Therefore, if you are party to foreign proceedings and are ordered to disclose documents, it will be no defence in those proceedings to argue that they are privileged as a matter of English law. However, if a request is made by a foreign court for documents in England (for example where a third party is asked to disclose documents), the recipient of the request will be entitled to claim privilege.<sup>41</sup>

### **What about data rooms and privileged documents?**

Data rooms are often made available to third parties, for example, potential purchasers of a company. As discussed above, it is possible to disclose voluntarily privileged documents on a restricted basis (i.e. for a limited purpose and on strict conditions as to confidentiality), although caution has to be exercised due to the risk that in doing so, privilege will be waived. However, data rooms are likely to hold commercially sensitive information in addition to privileged documents and so it is preferable to permit the other party to inspect the documents only after they have entered into an appropriate confidentiality undertaking. Any notes taken by the other party will not be privileged.

### **What should I do if a regulator requests access to privileged documents?**

Unless statute provides an exception, disclosure to a regulator can be withheld on grounds of privilege.<sup>42</sup> In exceptional circumstances it may be in a party's best interests to disclose voluntarily privileged documents to a regulator. In order to reduce the risk of disclosure leading to a general waiver of privilege, the communication should be provided on an agreed and documented understanding that: (i) the communication is privileged; (ii) the provision of the communication does not amount to a waiver of privilege; (iii) the communication is being provided only for a limited purpose and on strict terms as to confidentiality; and (iv) the communication be destroyed or returned to the disclosing party once the matter is concluded. This should help to ensure that privilege is not waived against anyone apart from the regulator although this cannot be guaranteed. Also note that in certain jurisdictions, this concept of limited waiver may not be recognised.

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<sup>41</sup> In *Re Sarah C. Getty Trust* [1985] Q. B. 956 and section 3, Evidence (Proceedings in Other Jurisdictions) Act 1975.

<sup>42</sup> This was confirmed by the Court of Appeal in *Sports Direct International plc v Financial Reporting Council* [2020] EWCA Civ 177 in allowing Sport Direct's appeal on the point.

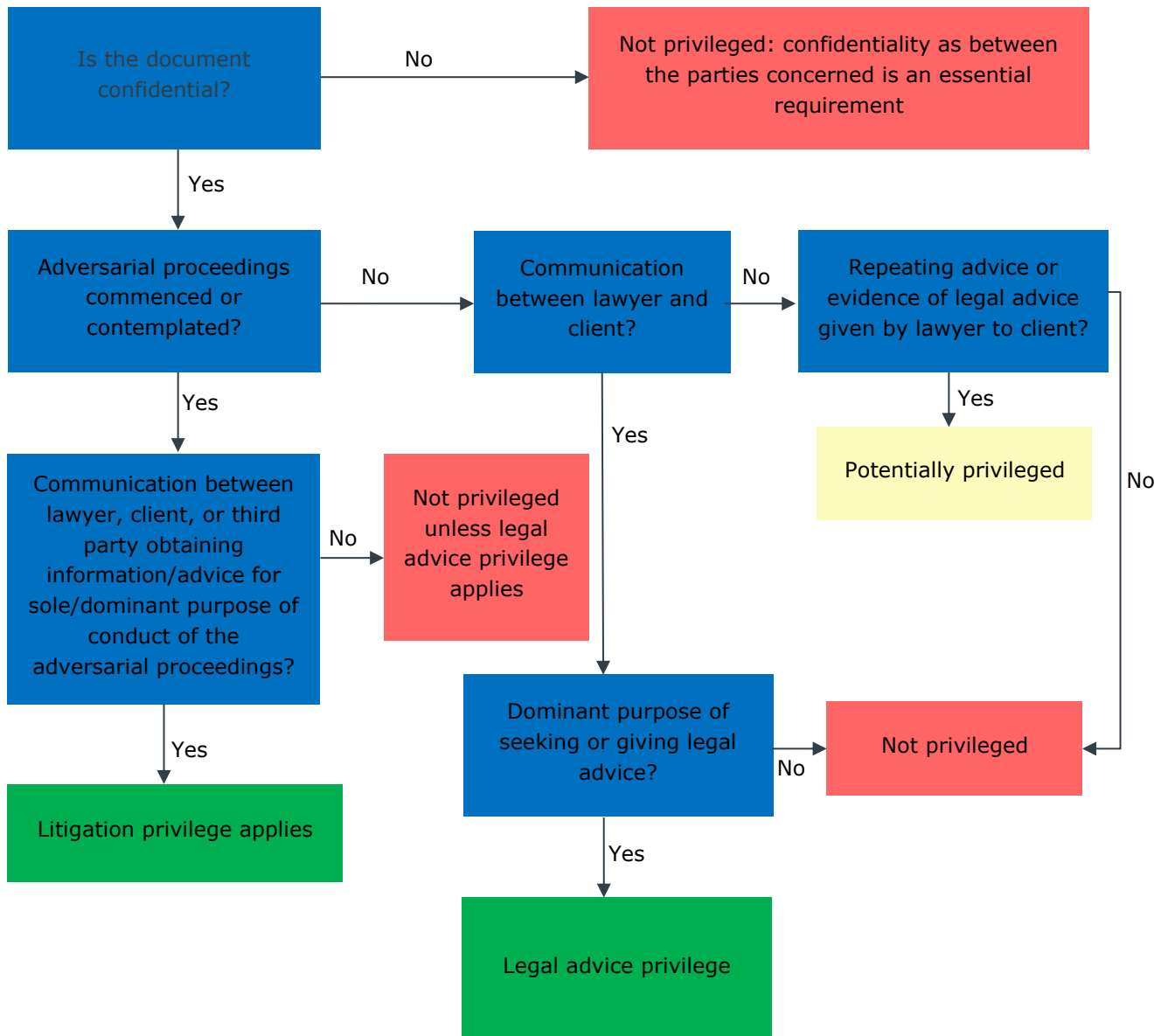
# The categories of legal privilege

HEADS OF PRIVILEGE	APPLICATION	KEY POINTS
Legal advice privilege	<ul style="list-style-type: none"> <li>Confidential communications</li> <li>Between lawyer and client</li> <li>For dominant purpose of seeking or giving legal advice.</li> </ul>	<p>Third party communications excluded.</p> <p>Broad definition of "legal advice" includes advice as to what should prudently and sensibly be done in the relevant legal context.</p> <p>Post <i>Three Rivers (No. 5)</i>, an issue remains as to who is the client.</p>
Litigation privilege	<ul style="list-style-type: none"> <li>Confidential communications</li> <li>Between client, lawyer or third party</li> <li>For the purpose of obtaining information or advice in connection with the litigation</li> <li>Created where litigation is in progress or in contemplation</li> <li>For the sole or dominant purpose of conducting the litigation.</li> </ul>	<p>Wider in scope than legal advice privilege and covers communications with third parties.</p> <p>Covers all adversarial proceedings but does not currently extend to fact finding investigations, e.g. regulatory investigations.</p> <p>Mere apprehension of possible litigation is insufficient; litigation must be "reasonably in prospect".</p>
Joint privilege	<ul style="list-style-type: none"> <li>Where one or more parties retain the same solicitor</li> </ul> <p>or</p> <ul style="list-style-type: none"> <li>Where one or more parties share a joint interest in the subject matter of a privileged communication to the extent that they could have instructed the same solicitor.</li> </ul>	<p>Privilege belongs to all parties.</p> <p>All parties must concur in waiving the privilege.</p>
Common interest privilege	Communications between parties who share a "common interest".	May include group companies, insured and insurer and agent and principal.

		May apply even if they have different views and divergent interests.
Privilege against self-incrimination	Documents or oral statements that would have a tendency to expose a person to a criminal charge or penalty.	<p>Must be a real and appreciable danger of incrimination as opposed to a mere possibility.</p> <p>Can be claimed only in civil proceedings, e.g. civil litigation and civil competition investigations by the Competition and Markets Authority or European Commission.</p>



# Privilege flowchart



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**Simon Bromwich**  
Partner

+44 20 7859 1572  
simon.bromwich@ashurst.com



**Tom Connor**  
Partner

+44 20 7859 1638  
thomas.connor@ashurst.com



**Tom Cummins**  
Partner

+44 20 7859 1051  
tom.cummins@ashurst.com



**Tom Duncan**  
Partner

+44 20 7859 3262  
tom.duncan@ashurst.com



**Lynn Dunne**  
Partner

+44 20 7859 3242  
lynn.dunne@ashurst.com



**Jon Gale**  
Partner

+44 20 7859 1630  
jon.gale@ashurst.com



**Ruby Hamid**  
Partner

+44 20 7859 3922  
ruby.hamid@ashurst.com



**Alison Hardy**  
Partner

+44 20 7859 3258  
alison.hardy@ashurst.com



**Adam Jamieson**  
Partner

+44 20 7859 2101  
adam.jamieson@ashurst.com



**Emma Johnson**  
Partner

+44 20 7859 1356  
emma.johnson@ashurst.com



**James Levy**  
Partner

+44 20 7859 1810  
james.levy@ashurst.com



**Dyfan Owen**  
Partner

+44 20 7859 1176  
dyfan.owen@ashurst.com



**Madeleine Pope**  
Partner

+44 20 7859 3057  
madeleine.pope@ashurst.com



**Matthew Saunders**  
Partner

+44 20 7859 1339  
matthew.saunders@ashurst.com



**Tim West**  
Partner

+44 20 7859 2858  
tim.west@ashurst.com



**Nathan Willmott**  
Partner

+44 20 7859 2036  
nathan.willmott@ashurst.com



**Myfanwy Wood**  
Partner

+44 20 7859 2821  
myfanwy.wood@ashurst.com





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