

The Litigator's Tale : Whose Privilege?

A recent High Court case has examined an important point concerning litigation privilege. It has shone a light and provided clarity over whether documents are privileged from disclosure.

Litigation Privilege – What is it?

Litigation privilege applies to confidential communications between a client and their solicitors and/or third parties, made where litigation is a reasonable prospect. An important qualification is that the dominant purpose of the confidential communications must be to give or obtain legal advice and/or evidence for use in those contemplated legal proceedings. Every privileged communication must be confidential but not every confidential communication will be privileged.

Legal communications often fall within the solicitor and client relationship, which the Courts have long recognised to be protected by privilege, namely clients seeking and receiving advice from their solicitors, counsel, or experts.

Challenges to the status of a document can arise where they contain price sensitive and confidential information, but on their face, not necessarily legal advice. So, there is a dispute as to whether they are produced by a client or third parties outside the ring of legal advice privilege.

When documents are circulated outside the solicitor/client legal advice ring the party asserting litigation privilege will need to satisfy the Court that the dominant purpose test is satisfied (i.e. the documents were produced for use in or conduct of litigation).

A further difficulty is that privilege can be lost by permitting its circulation, even within the same company or organisation (i.e. between different personnel), without adequate safeguards. The risk of such inadvertent disclosure with adverse consequences is increased where multiple drafts or versions of the same document are being reviewed and amended by various

individuals including lawyers and non-lawyers (a frequent corporate practice). Documents should therefore be marked ‘*Confidential and Protected by Litigation Privilege*’ wherever possible as a safeguard to try to protect or make clear their privileged status.

Krishna Holdco Ltd v Gowrie Holdings Ltd (2025)

The High Court recently addressed the question of dominant purpose in the context of litigation privilege, in a case raising many of the problems outlined above.

In this case, Adam Johnson J rejected as “*too narrow*” the claimant’s argument that the exploration of a sale of a company could not properly be described as for the conduct of litigation.

The Court held that in determining the question of (dominant) purpose, one must look beyond the “*form of the transaction*” proposed and ask, “*why it was intended to happen*” (i.e. why the author was engaged to produce the document?).

The decision supports the premise that in determining the purpose of a document, the Court will look not only at the immediate transaction (which gave rise to it), but also at the broader context of the proceedings (effectively to the author or commissioner’s motive) to ascertain why that work or transaction was taking place.

Key takeaway points

Several important points can be garnered from the decision.

First, in cases where issues of litigation privilege are raised, the identity of the party instructing the creator or author of the documents, or who paid for them will not necessarily be determinative of the issue (e.g. privilege in a document/report paid for by a party may in fact belong to a different party, whose interests the document was intended to protect).

Second, (this will be particularly so) where, as in this case, the commissioning party was a company (or legal entity) under the control of an individual director, who was also a defendant in the same proceedings and a person with significant control over the same. The Court agreed it was that director's interests that were really at stake, based on the facts and evidence at the hearing. This once again emphasises the authorities' view that in every case where litigation privilege is asserted (and contested) the Court will need to take a realistic approach to ascertain the dominant purpose, with reference to the key or "real" interest which the documents are intended to protect.

Third, where the available evidence on the surrounding circumstances is to be assessed, a promise by the party's solicitors (who had reviewed the documents and provided a response in correspondence) to produce an affidavit confirming the same will be satisfactory.

Fourth, a lawyer-led review of documents at disclosure should always be alive to the practical challenges posed by litigation privilege, and seek to identify documents (or categories of communications) which might pose risks of being challenged, on the facts of each case (e.g. due to the number of parties involved, date range, amendments, etc) as early as possible.

Finally, documents created by the parties (and their advisers) in expectation or during legal proceedings should be clearly marked '*Confidential and Protected by Litigation Privilege*'.

JKW Law acted for Laxmi BNS Holdings Limited, the eighth respondent in the above case.

This article does not constitute legal advice and is for general information purposes only.

Specific legal advice should be taken in relation to the issues raised in this article.