

English Court Confirms Legal Advice Privilege Applies to Foreign In-house Lawyers

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European Disputes

In this alert, we review a welcome English High Court decision, which confirms that legal advice privilege extends to communications with foreign lawyers who provide legal advice in their capacity as in-house counsel.

The [decision](#) of Mrs Justice Moulder in *PJSC Tatneft v Bogolyubov and others*¹ is helpful clarification on the status of communications between a client and its in-house counsel in multi-jurisdictional situations and confirms that in any proceedings (whether litigation or arbitration) applying English rules of privilege, legal advice provided by in-house counsel will *prima facie* be privileged and protected from disclosure, irrespective of where the in-house counsel has qualified.

Prior to this judgment, although it has long been recognised in English law that advice given by lawyers in private practice in other jurisdictions were covered by legal advice privilege, there had been no express decision on whether communications with foreign lawyers practising in-house were privileged. This judgment has now dealt with this issue and it is clear that the only relevant test for the purposes of legal advice privilege is whether the foreign lawyer (external or in-house) is acting in their professional capacity, in connection with the provision of legal advice. An English court will not enquire into how or why the foreign lawyer is regulated, or what standards apply to the foreign lawyer under the local law.

Legal Advice Privilege

By way of recap, in broad terms, under English law, legal advice privilege applies to all communications made in confidence between a client and its professional legal adviser, for the dominant purpose of giving or obtaining legal advice.² The rationale for the privilege is that it is in the public interest that clients can obtain legal advice and that these communications should

¹ [2020] EWHC 2437 (Comm)

² The alternative head of litigation privilege is outside the scope of this alert, but in broad terms applies to communications between a client and its lawyer or a client and a third party, made for the dominant purpose of litigation that is existing, pending or reasonably contemplated.

be kept confidential. The Court of Appeal's [judgment](#) in *CAA v Jet2.com* earlier this year provided practical guidance on the application of legal advice privilege, namely:

- Privilege must be considered for each particular document or communication, rather than by reference to the role of the relevant lawyer. Emails and attachments to emails must be considered as separate documents for the purposes of the privilege test.
- When considering group emails, every recipient of such an email should be treated as having received a separate email, and the privilege test should be applied for each separate email. In practical terms, if an email would be privileged if sent only to a lawyer, then one must consider whether that email when sent to the other recipients otherwise meets the dominant purpose test.
- For privilege to apply, the lawyer must be acting in his or her capacity as a lawyer, not as a commercial advisor.
- Legal advice should be considered as a wide concept and can extend to a 'continuum' of communications between a client and its lawyer. That said, if a communication contains both non-privileged and privileged information, unless these two parts are intermingled such that they cannot be distinguished, they may be severed from each other.
- However, purely commercial advice from lawyers, whether external or in-house counsel, is not covered by privilege so parties should endeavour to be clear in their communications when seeking legal advice.
- When privilege does attach to communications, a flexible approach should be taken with that privileged legal advice. Privileged legal advice may be shared internally within the client entity and, in certain circumstances, externally, without a loss of privilege, taking into account "*the realities of modern corporate and commercial arrangements*". However, care must be taken, and confidentiality must be maintained, to avoid waiving privilege.
- A document that discloses the nature and content of privileged legal advice will itself be privileged.

Communications with Foreign Lawyers

The *PJSC Tatneft* judgment focuses on who will be counted as a 'lawyer' for the purposes of legal advice privilege, and whether Tatneft was correct to claim legal advice privilege in relation to communications with members of its in-house legal team. English law recognises that legal advice privilege applies to communications with foreign lawyers in private practice outside of England, without regard to the applicable national rules on privilege and it was widely assumed that it also applies to in-house foreign lawyers, but this had not been the subject of a judgment.

The judgment has now expressly clarified that legal advice privilege extends to communications between a client and foreign in-house lawyers acting in their capacity as lawyers, in connection with the provision of legal advice. Communications passing between a client and their foreign in-house legal counsel in these circumstances are covered by legal advice privilege, and so are protected from disclosure in English proceedings.

Moulder J did not consider there to be any additional requirement that foreign lawyers should be “appropriately qualified” or recognised or regulated as “professional lawyers”. An English court will not distinguish between foreign external lawyers and foreign in-house lawyers, nor will it enquire into how a foreign lawyer is regulated or what standards apply to the foreign lawyer under the local law.

Comment

This case has provided helpful clarification that legal advice privilege applies where foreign in-house counsel are providing legal advice to a client. This should reassure businesses with large in-house legal teams based in different countries, or qualified in different jurisdictions, that such communications will be protected in the context of disputes that are heard before the English courts or an arbitral tribunal applying English rules of privilege, and provide comfort to clients wishing to use English proceedings to resolve disputes.

It is also worth recalling though that the English law approach to the “client” remains narrow, as set by the House of Lords decision in *Three Rivers (No 5)*.³ When the relevant “client” is a company, documents or other materials passing between an employee of that company and co-employees or in-house counsel do not attract privilege unless that employee was tasked with seeking and receiving legal advice on behalf of the client company. Although the Court of Appeal in *Jet2.com* cast doubt on this narrow concept of the “client”, it was bound by the decision of the House of Lords so this test will not be overturned unless and until it is considered by the Supreme Court.

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³ [*Three Rivers District Council v Bank of England \(No. 5\)*](#) [2003] EWHC 2565.