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**Insights**

# DISPUTES IN FOCUS: QUICK Q&A ON LEGAL PRIVILEGE IN GROUP LITIGATION

CLARE REEVE CURATOLA SPEAKS TO RAVI NAYER AS PART OF HER QUICK Q&A SERIES

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SUMMARY

Legal professional privilege is a key issue in any litigation or investigation and each year the courts determine many disputes over its application. It can become less straightforward to manage and protect in multi-party or group proceedings.

In this blog, Clare Reeve Curatola provides a brief summary of legal privilege and the rules about sharing privileged material under English law. And, she asks fellow Litigation and Investigations partner, Ravi Nayer, about his recent experience of grappling with issues of legal privilege where there are multiple different parties involved in a dispute and in the context of group actions in the High Court.


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Short on time? Jump to our key takeaways.


## QUICK Q&A WITH RAVI NAYER

Ravi's practice focuses on commercial and group litigation, acting on behalf of the UK's largest financial services institutions including asset managers, insurers and pension funds. His experience includes creating joint defence and novel litigation cooperation agreements for peer institutions in some of the UK's largest class actions.

## BRIEF SUMMARY: LEGAL PROFESSIONAL PRIVILEGE UNDER ENGLISH LAW

Legal privilege has been a litigation hot topic throughout the history of the common law. As Bacon VC said in 1881: "*This subject is always a difficult one. On the one hand I have to consider the right of the Plaintiff to discovery, and on the other hand, to consider what are the rights of the*

*Defendants to protect themselves against disclosing anything that has taken place in the course of confidential communications*" (Wheeler v Le Marchant (1881) 17 Ch D 675 at page 677).

Under English law, there are two main forms of legal professional privilege: (i) legal advice privilege and (ii) litigation privilege:

1. **Legal advice privilege** protects confidential communications between a client and their legal adviser made for the sole or dominant purpose of giving or seeking legal advice.

2. **Litigation privilege** covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.

## SHARING CONFIDENTIAL INFORMATION AND PRIVILEGED DOCUMENTS

Often, the risk of losing privilege (and having to disclose it in legal or regulatory proceedings) will outweigh the benefit of making any reference to legal advice in communications with third parties. A different dynamic exists, however, in the context of multi-party claims, where the necessity to carefully manage these large and expensive litigations has become inextricably linked with the cover privilege provides.

There are important scenarios in which privilege can and often does belong to more than one party. And, it is possible under English law to share privileged documents without waiving or losing a party's right to claim privilege as against another party:

1. **Joint privilege** is narrow and applies only where two or more persons have a joint interest or jointly retain a solicitor to act for them.

2. **Common interest privilege** permits different parties with sufficient common interest in the subject matter of a privileged document, or in the litigation, to exchange and share privileged communications. Both parties can continue to assert privilege as against anyone else.

3. **Limited waiver** permits sharing privileged communications with a third-party on a confidential basis for an express or implied limited and specific purpose. This is often recorded as a contractual undertaking or agreement between the sharing parties.

There is an additional form of privilege, **without prejudice privilege**, which is similar in its effects to legal professional privilege. This form of privilege protects statements made between parties in a genuine attempt to settle a dispute, and save for a number of recognised exceptions, it can only be waived with both parties' agreement.

## WHERE DOES PRIVILEGE INTERSECT WITH MODERN MULTI-PARTY LITIGATION OR CLASS ACTIONS?

The short answer is that it is inconceivable to imagine modern "class actions" being effectively managed without complex privilege mechanisms overlaying the litigation. A few recent examples to illustrate the intersection of privilege and the lifecycle of these claims include:

1. **At the pleading stage:** An institution will of course need to take legal advice on the merits of bringing and defending multi-party litigation, whether this is for a single institution defending a mass tort claim against it, or one wishing to join a wider group of similar institutions. The joining forces of institutions (and the clear need for privilege mechanisms to be agreed) has been seen across so many different types of litigation, in particular, shareholder class actions, bondholder litigation, litigation relating to financing of senior debt, and myriad mass torts from data breach litigation to blacklisting of workers.

2. **Ongoing confidentiality clubs/rings:** Even within these groups of co-claimants or defendants, we have repeatedly seen a need to separately agree additional privilege protocols, where individual claimants do not wish to alert lawyers acting for other claimants/defendants (or certain individuals at those other claimants/defendants) to the full detail or provenance of their documents.

3. **Ongoing communications between funders and litigants:** Particularly in the context of so-called elective multi-party litigation, privilege as between the institution and those funding its litigation, or even those funding the law firm it is choosing to use, is incredibly important. This is so that a frank and clear understanding of the litigation can be shared between stakeholders with minimal extra diligence.

4. **Redress schemes:** In my experience, sharing privileged material can become very important where alleged co-tortfeasors come together to institute a redress scheme, and need to both negotiate as between their own respective contribution liabilities for the redress, but also to jointly give instructions and take legal advice as to the methodology they adopt.

5. **Third parties:** Work product prepared in the context of a redress scheme might then also be shared with third parties outside the litigation, as against whom privilege will need not to be waived – obvious third parties in this context include relevant regulators, such as the FCA, CMA or ICO, and insurers (at least one of which is ever present in so many of the multi-party claims in which I have been involved in recent years).

## WHAT HAS BEEN YOUR EXPERIENCE OF HOW THE COURT TREATS THE SHARING OF CONFIDENTIAL AND PRIVILEGED MATERIALS WITH THIRD PARTIES IN GROUP ACTIONS?

The High Court in particular is generally very respectful of claims of privilege, particularly where raised by groups. To some degree this becomes an issue of credibility, so that a party who has otherwise acted responsibly in litigation will be treated generously by the court.

The important thing, I think, is to have documented robust systems in place from the offset to protect privilege that can be clearly demonstrated to the court if necessary, and for confidentiality and privilege considerations to be a key item on all parties' agendas at the beginning of a class action's lifecycle.

## WHAT IS YOUR KEY TAKEAWAY FOR THOSE MANAGING LEGAL PRIVILEGE IN GROUP LITIGATION?

In an effort to provide a short answer (for a change!), the most important thing is to remember that the sine qua non of privilege is **confidentiality**.

Without the documents being confidential, it will be impossible to ever assert privilege over them – and this can be a particular risk in multi-party litigation where the cast of participants and third parties seems to get ever more complex.

In my experience, **the best way to ensure documents are and remain confidential is to enter into written agreements that demonstrate this intention**. When communicating confidential documents to third parties, it is imperative to include express terms that those documents are to remain confidential and to remain only within the possession of a limited, named group, for a specific limited purpose.

In these circumstances, it is possible for privilege to be claimed over those documents against those who are outside of the named third party group, but it should be stressed that such agreements have to be clearly delineated and that confidentiality, and its exceptions, should be seen as a live issue throughout class action proceedings.

Related to this, it is important to **always consider which form of privilege is being applied and the limits to that form of privilege**. For example, if common interest privilege is being claimed, parties need to be conscious of the need for there to be a genuinely common interest in the subject matter being discussed and alive to the possibility that common interest privilege may not be available if there are diverging interests *in a particular aspect* of the dispute.

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