

Privilege update: what happens when legally privileged documents end up in the wrong hands?

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Legal professional privilege seems to be a hot topic at the moment. This privilege is a powerful right once established as it permits a person to withhold information and documents not only from production to the courts but also to investigating authorities. It enables clients and their lawyers to have free and frank recorded exchanges and has been described as one of the cornerstones of the UK's legal system. Loss of its protection is therefore something to be avoided. Three cases have been decided recently that examine different aspects of the same dilemma – what happens when privileged documents end up in the wrong hands?

R (on the application of Stewart Ford) (Claimant) v Financial Services Authority (Defendant) & (1) Peter Johnson (2) Mark Owen (Interested Parties) [2011] EWHC 2583 (Admin)

The key issue in [this case](#) was whether the investigating regulatory body, the FSA, was entitled to use privileged emails passing between the named company client and its lawyers against the former directors of the company. The FSA had had its own nominated administrators appointed to control the company and the company had thereafter waived privilege.

The claimant, the company's former CEO, together with a fellow former director and the former compliance officer (the interested parties), asserted that a number of emails contained legal advice directed to them personally, as well as to their company. The company, by its FSA nominated administrators, had waived privilege in the emails and provided copies of them to the FSA, which has then sought to use the contents in regulatory disciplinary proceedings against both the company and the officers.

On the claimant's application for judicial review, the judge held that, viewed objectively, the evidence showed that although the company's law firm at the time was formally retained to advise only the company in relation to the FSA enforcement investigation of the company, it had extended its role to advising the individual officers of the company on their personal risk of FSA enforcement investigation as individuals and any consequent regulatory action. This advice had been recorded in emails to the individual officers.

The judge ruled that in a situation where there was no formal joint retainer, an individual could claim joint legal professional privilege with others if he could show that the legal advice had been sought by him in his individual capacity, that he had made his capacity clear to the lawyer, that those who shared the joint privilege had appreciated the legal position, and that the communications were confidential.

The claimant CEO therefore did enjoy legal privilege in the emails and the company's waiver of privilege did not and could not impact on the claimant CEO's privilege. The FSA were therefore not entitled to rely on the contents of the emails in regulatory proceedings against the company or the individual officers.

In his judgment, Mr Justice Burnett recommended to the FSA that they 'might usefully review what is done by the Serious Fraud Office and police to deal with potentially legally privileged material'.

There will be a further hearing early in the New Year to decide what should be the outcome of the FSA having sought to rely on legally privileged material that it was not entitled to see.

As well as the immediate implications for FSA and for this particular investigation, this decision also highlights an issue for lawyers generally. Lawyers need to be alert to the fact that someone other than their named client may be able to assert legal professional privilege in their communications. If they act on the instructions of the named client only and release privileged documents, they may risk a claim in negligence from others entitled to assert privilege in those same communications.

Note: Withers LLP represents the claimant in these proceedings.

Bjorn Stiedl v (1) Enyo Law LLP (2) Addleshaw Goddard LLP (3) The Individual Subscribers to the Innovator and Gentech Technology Schemes Litigation [2011] EWHC 2649 (Comm) Bailii

[Here](#) the question concerned the remedy to which the applicant was entitled when his privileged documents ended up in the hands of his opponents' lawyers? The applicant (a defendant in the main action) wanted the lawyers removed from the case altogether.

There was no impropriety involved – the applicant's documents were discovered on an external hard drive provided to the claimants by the

liquidators of the failed company at the heart of the dispute. Just how they got there was unclear, but the applicant claimed that around 3,000 of the 180,000 documents on the drive belonged to him and were “private and privileged” and that the claimants’ knowledge of them prejudiced his right to a fair trial.

By the time an order was made for these documents to be independently reviewed and ring-fenced, the claimants’ solicitors had already conducted a “Tier-1 review” of all documents on the hard drive. The independent review then identified 71 documents as both relevant and prima facie privileged. A further review with a tighter definition of relevance narrowed this to 25, although the applicant maintained the true number of privileged and relevant documents was 49.

The judge appointed to deal with this issue reviewed the documents and concluded that even if the staff employed by the claimants’ solicitors to review the hard drive had read the substance of these documents thoroughly and could recall doing so (neither of which was considered likely), the material contained in them was either already known to the claimants; or was concerned with such general matters that they could hardly be said to be prejudicial; or was entirely consistent with the applicant’s defence. Only one item was identified as being potentially prejudicial to the applicant, and it was highly unlikely that anyone currently working on the claimants’ case could recall reading it. In the circumstances, there was no reason to depart from the usual course of ordering that no use of the documents identified as prima facie privileged be made in the proceedings.

Berezovsky v Hine & ors [2011] EWCA Civ 1089

In this case, the question was what use could a party make of privileged documents that had been voluntarily shared by the owner of the privilege.

The complex background to this and the related dispute is well known, but the point that arises in this decision is one of general application and not unique to the facts of the case.

Early on in the principal claim brought by Mr Berezovsky (‘B’) against Mr Abramovich (‘A’) in the Commercial Court, draft witness statements were prepared for Mr B and Mr Patarkatsishvili (‘P’), two men described by the Master of the Rolls as “staunch allies”. Mr B’s Commercial Court lawyers sent copies of these drafts to a firm acting for both men in connection with their tax and asylum status. The initial communication was marked “privileged and confidential” and was sent to a lawyer acting for Mr B, who then sent it on to a number of other lawyers within the same firm acting for Mr P.

The draft witness statements were privileged documents and the judge at first instance found that the most likely reason for the sharing of these documents was two-fold: to assist Mr P in his ongoing asylum claim, and to ensure consistency in what was said in the Commercial Court and in the asylum claim. The waiver of privilege by Mr B was held to be limited and his privilege was not lost. So far so good: Mr P was legitimately in possession of documents and Mr B could continue to assert privilege as against the rest of the world.

Unfortunately, Mr P died. His family were less willing to support Mr B, and Mr B issued two Chancery actions against them claiming ownership and rights in Mr P’s assets. There were issues in these claims that relied on facts that had already been pleaded in the Commercial Court and an order was made that these common issues be heard together, as preliminary issues in the Chancery actions and as part of the Commercial Court trial. Inevitably, the order contained the usual requirement that documents disclosed in one set of proceedings relevant to the common issues should be disclosed to the parties in the other. Herein lay the problem: Mr P’s family contended that these common documents included the draft witness statements that were now in their possession; Mr B objected, believing that it would be highly prejudicial for these drafts to fall into the hands of Mr A.

With no evidence available of any express terms on which the sharing of privileged documents took place, the court was left to infer what, if any, limitations were placed on Mr P’s use of the draft witness statements.

At first instance, the judge was prepared to allow the use of the statements in the trial of common issues. Although they were plainly privileged documents, and the waiver of privilege involved in sending the drafts to Mr P’s lawyers was limited, the judge was not persuaded that the parties could have intended that Mr P would not be able to deploy the draft statements in any claims brought against him by Mr B.

The Master of the Rolls, giving the lead judgment of the Court of Appeal, disagreed, holding that the nature of the relationship between the two men meant that the possibility of Mr P deploying the draft statements against Mr B was not even in the parties’ minds at the time, and it would have been very clear to Mr P and his lawyers that any use they could make of the statements would not include anything that risked Mr A being able to see them. The statements could not therefore be used by the family in the trial of the common issues.

The lesson from this case is clearly that when sharing privileged documents with another person, it pays to be very clear and open about the terms on which the limited waiver of privilege is taking place. There will always be wholly unpredictable developments but supportive

witnesses changing their stance (or dying) and business partners falling out are not amongst the 'unknown unknowns' to litigation lawyers and should be provided for.