

UNDER LOCK AND KEY: PRIVILEGE IS MAINTAINED OVER DOCUMENTS SHARED WITH A LITIGATION FUNDER



The right of legal professional privilege is a fundamental one for all litigants. Where privilege applies, a party is permitted to withhold potentially sensitive and confidential material from its opponent and the court. However, the law reports are filled with examples of hapless disputants deemed to have inadvertently waived their rights of privilege.

When a claimant is seeking funding for its claim, a funder will always conduct careful diligence on the case in order to determine whether to invest and on what terms. As part of that process, the claimant is asked to share certain important case documents, such as counsel's advice or draft evidence. Lawyers, as guardians of their client's information, often raise concerns as to whether sharing documents in this way jeopardises their important privileged status. However, claimants and their lawyers can be assured that privilege is preserved on a number of grounds under English law.

In particular, if documents are shared on an expressly confidential basis, this either preserves privilege entirely or (at most) would be construed as a strictly limited waiver for the specific purpose of securing funding. Alternatively, a claimant can rely on the common interest it shares with the funder in question.

The confidential basis on which disclosure is given to a professional funder maintains privilege

There are robust authorities confirming that where a party discloses a privileged document to a limited number of third parties in circumstances preserving the overall confidentiality of the document, that party does not lose privilege in the document and it can be withheld from inspection (Gotha City v Sotheby's [1998] 1 WLR 114; Nederlandse Reassurantie Groep Holding NV v Bacon & Woodrow and others [1995] 1 All ER 976; and USP Strategies plc v London General Holdings [2004] EWHC 373).

In *Gotha City* for example Staughton LJ clearly had no difficulty with the concept of preserving privilege in legal advice notwithstanding that it was communicated by the client to the third party. He cited, with approval, a passage from *Style and Hollander on Documentary Evidence*:

“If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of the friends sues him because the document is not confidential as between him and the friend. But the fact that six other people have seen it does not prevent him claiming privilege as against the world”.

In particular, it was held that the receipt of the advice by the third party was attended by a degree of implied confidentiality which meant that there was no waiver vis-a-vis the outside world.

When lawyers share their client’s documents with professional funder it is done so on an expressly confidential basis under a Non-Disclosure Agreement prior to funding, as well as pursuant to confidentiality provisions in the funding agreement once finance has been provided, thereby preserving the client’s privilege.

Any deemed waiver of privilege is strictly limited

An alternative analysis which finds support in the English law authorities is that the provision of documents in this context would at most amount to a limited waiver of the client’s privilege for a specific purpose - that purpose being to share relevant information with the funder to enable us to determine whether to fund (and continue to fund) the claim. On this analysis, the client’s privilege is otherwise maintained and there is no waiver of privilege as against the world.

For example, in Winterthur Swiss Insurance Company v AG (Manchester) Limited [2006] EWHC 839 (Comm) Mr Justice Aikens (as he then was) held:

“...a client can also agree to produce privileged communications for a limited purpose only. If that happens, the privileged nature of those communications is not lost completely. The client can assert the right not to produce the same communications for any purpose outside the limited purpose for which he agreed to produce the communications.”

(See also British Coal Corporation v Dennis Rye Ltd [1988] 1 WLR 1113; B and another v Auckland District Law Society [2003] UKPC 381 and Eurasian Natural Resources Corp v Dechert [2016] 1 WLR 5027).

Common interest privilege is also likely to apply

Common interest privilege arises where a person confidentially discloses a privileged document to a third party in recognition of an interest they share in its subject matter, or in litigation in connection with which the document was brought into existence.

Whilst there are currently no reported cases in England and Wales which confirm the existence of a common interest between a claimant and its funder, it is strongly arguable that the necessary common interest exists given (i) a common financial interest and (ii) the contractual rights of the funder under the funding agreement to see privileged material of the client.

Protected information sharing is consistent with public policy of supporting litigation finance

More generally, the tide of public policy is firmly behind litigation funding as an industry on the basis that it promotes access to justice. In the words of Tomlinson LJ in Excalibur Ventures LLC v Texas Keystone Inc & Others [2016] EWCA Civ 1144, it is a “an accepted and judicially sanctioned activity perceived to be in the public interest”. It is equally clear from the Excalibur case that the judiciary expects professional funders to conduct thorough due diligence before funding a claim, and to remain involved by performing periodic reviews of the litigation strategy. It would therefore be a surprising contradiction if the sharing of sensitive information by claimants that is essential to allow professional funders to conduct responsible diligence and ongoing review, could be said to render that information open to inspection.

For all these reasons, lawyers and their clients can feel comfortable that any commercially sensitive and privileged information shared with a professional funder remains protected, and that the option of funding can be explored in a fully confidential context.



If you would like to learn how third party funding could assist you/your client, or you would like to discuss any of the content of the article in more detail, please contact joanna.baillie@augustaventures.com