Legal professional privilege has recently been the subject of numerous important English court judgments, which have sought to restrict the applicability of legal advice privilege and litigation privilege.

On 30 November 2018, the Court of Appeal handed down its judgment in *WH Holding Ltd v E20 Stadium LLP*[^1]. The court held that, to fall within the scope of litigation privilege, a communication must be prepared for the dominant purpose of obtaining advice or evidence in relation to the conduct of litigation and not for the purpose of conducting litigation more broadly. As a result, the court found that emails between board members which had been prepared for the purpose of discussing a proposal for the settlement of a dispute did not fall within the scope of litigation privilege.

As in-house lawyers are subject to the same standards as external lawyers in relation to determining privilege under English law[^2], it is vital that the legal position in respect of the scope of legal professional privilege is fully understood. This is of increased importance in circumstances where in-house lawyers are seeking to retain privilege in documents whilst they are performing roles of an employee, legal adviser and business adviser.

This update seeks to provide (i) a brief summary of legal professional privilege; (ii) an analysis of recent cases; and (iii) practical steps for in-house lawyers to avoid losing or waiving privilege.

### 1. Brief Summary of Legal Professional Privilege

The law of England and Wales recognises two main types of legal professional privilege: legal advice privilege and litigation privilege.

**Legal advice privilege** exists to protect confidential communications between a client and its lawyers, where the purpose of the communications is giving, seeking or receiving legal advice. It does not extend to communications with advisers who are not lawyers, for example tax advisers or accountants.

**Litigation privilege** protects confidential communications between a client and its lawyers, or either of them and a third party, where the dominant purpose of the communications is giving, seeking or receiving legal advice in connection with adversarial proceedings, or collecting evidence for use in those proceedings, at a stage when they are reasonably contemplated.

### 2. Recent Case Law

*SFO v ENRC*[^3]

In the high profile decision of *SFO v ENRC*, the Court of Appeal overturned a controversial High Court decision, which had caused concern by narrowing the scope of legal professional privilege in internal...
investigations.

The court confirmed that litigation privilege did apply to documents in relation to which ENRC had claimed litigation privilege, including notes of interviews with employees and former employees, and the work product of forensic accountants - thus extending the scope of litigation privilege beyond the purpose of obtaining advice or evidence. It should be noted that the court did make it clear that their decision turned on the facts of the case.

The Serious Fraud Office has confirmed that it will not appeal the Court of Appeal’s landmark ruling and therefore, as it stands, where conduct is investigated that is potentially criminal in nature and circumstances are such that criminal proceedings are reasonably contemplated - which can be the case even where attempts are made to avoid such proceedings by self-reporting - litigation privilege can apply.

The full judgment is available here.

**WH Holding Ltd v E20 Stadium LLP**

On 30 November 2018, the Court of Appeal handed down the judgment in *WH Holding Ltd v E20 Stadium LLP*. The main proceedings in this case were between West Ham Holding Ltd ("West Ham") and its landlord, E20 Stadium LLP ("E20") and related to West Ham's entitlement to a number of seats in the London Olympic Stadium. The appeal was only concerned with West Ham's challenge to E20's claim to privilege over six emails that passed between E20 Board members, and between E20 Board members and stakeholders.

In the appeal, the court held that emails between board members which had been prepared for the purpose of discussing a proposal for the settlement of a dispute were not covered by litigation privilege. The court commented that "We do not consider that there is any justification for extending the scope of litigation privilege in that respect" and therefore confirmed that litigation privilege is restricted to circumstances where the dominant purpose of communications is for obtaining advice or information, and not to the conduct of litigation more broadly.

At paragraph 27 of its judgment, the Court of Appeal usefully summarised its conclusions on the scope of litigation privilege:

1. Litigation privilege is engaged when litigation is in reasonable contemplation.
2. Once litigation privilege is engaged it 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.
3. Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.
4. Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.
5. There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.6

This decision may cause difficulties in the application of litigation privilege in practice. Communications which are for the purpose of conducting litigation (such as settlement agreements) but do not fall within the category of obtaining advice or evidence would not fall within the scope of litigation privilege which may be viewed as a difficult distinction for non-lawyers to draw for themselves. However, the court did accept that litigation privilege would apply if advice or information obtained for the sole of dominant purpose of conduct of litigation cannot be "disentangled" from a document, or it would otherwise reveal the nature of such advice or information. That may go some way to explaining the way these things should be dealt with in the boardroom.

The full judgment is available here.
3. Practical steps to avoid losing or waiving privilege

As can be seen from the aforementioned English law cases, the creation and preservation of legal professional privilege is far from straightforward. Under English law, in-house lawyers are subject to the same standards as external lawyers in relation to determining privilege\(^8\) and the test which the English Court will apply is whether advice was given by the in-house lawyer in the individual's capacity as a lawyer and whether it relates to "rights, liabilities, obligations or remedies of the client either under private law or under public law".\(^9\)

Nevertheless, there are various steps which should be taken as to maximise the prospects of being able to assert legal professional privilege. These are as follows:

3.1 **Define the "client"**: identify the key individuals or core team within the company who will be responsible for managing instructions and receiving advice;

3.2 **Record reasons for contemplating legal proceedings**: clearly document the moment that legal proceedings are first in contemplation and record the reasons why they are considered to be a real likelihood rather than a mere possibility;

3.3 **Label communications**: clearly mark communications and materials produced as "Legally Privileged and Confidential" - although this is not conclusive, it can help create a trail of evidence which supports a claim of privilege;

3.4 **Preserve Confidentiality**:

   3.4.1 restrict the dissemination of privileged documents to circumstances in which it is strictly necessary;

   3.4.2 only share privileged documents with third parties where absolutely necessary, give clear instructions as to maintaining confidentiality and not circulating, and consider the use of protective measures such as confidentiality agreements;

   3.4.3 consider providing privileged documents in hard copy and retrieving the copy after use; and

   3.4.4 if an email contains privileged material, start a new email before replying or forwarding.

3.5 **Document Management**:

   3.5.1 **Limit Written Communications**: produce as few written materials as possible on sensitive issues and carry out initial fact-gathering orally where appropriate and possible;

   3.5.2 **Separation of Advice**: keep legal advice separate in a distinguishable and clearly marked file. Avoid the mixing of business or commercial advice within the same communication setting out the legal advice;

   3.5.3 **Legal Context**: ensure your advice is linked to a relevant legal context in order to avoid arguments that it was free-standing business advice;

   3.5.3.1 **Reports to be Drafted by Lawyers**: investigation reports prepared by non-lawyer internal investigators will not be privileged, and such investigators should provide information to the legal team to enable them to prepare the report.

Finally, if in doubt, seek advice from external lawyers at an early stage.

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\(^{8}\) WH Holding Ltd v E20 Stadium LLP [2018] EWCA Civ 2652.
2 Alfred Crompton Amusement Machines Ltd v Customs & Excise Comrs (No 2) [1972] 2 QB 102.
3 The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd [2018] EWCA Civ 2006.
4 WH Holding Ltd (n 1).
5 Ibid, para 19.
6 Ibid, para 27.
7 Ibid, para 20.
8 Alfred Crompton (n 2), 109.

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