

Common interest privilege: common misconceptions

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[Common interest privilege](#) is, in my view, the great red herring of English law. The term is often used in circumstances where it is inapt or unnecessary, and as a result it causes a great deal of confusion. In this blog post I will set out, and hopefully dispel, what I see as some common myths about common interest privilege and consider whether the concept has any remaining significance in practice.

A common interest does not create privilege

Common interest [privilege](#) is not a freestanding form of privilege. As developed in the case law, it allows a party to share material that is **already** privileged with a third party who has the requisite common interest without losing privilege.

So, as common interest privilege has been applied, there must be a communication or document that satisfies the test for either [legal advice privilege](#) (that is, it is a lawyer/client communication to give or obtain legal advice) or [litigation privilege](#) (that is, it was prepared for the dominant purpose of litigation in reasonable prospect). Common interest privilege comes into play if that communication is shared confidentially with a third party in recognition of a common interest in its subject matter. The effect is that the original party will not lose privilege as a result of the sharing (though it probably wouldn't anyway, as to which see below) and the third party will be able to assert common interest privilege in its own right.

The fact that two parties have a common interest does not, in itself, mean that communications between them, as opposed to privileged material that is shared between them, will be privileged (though there may be another basis on which such communications are privileged, such as litigation privilege, if the shared interest relates to the conduct of litigation).

To take an example, let's say A is considering a major extension to his property, which is in a conservation area. He takes legal advice on the potential planning issues. A shares that advice with B, a friend and

close neighbour who is similarly considering an extension. The advice is sent to B under cover of an email marked "private and confidential" in which A sets out details of his plans. What is the position as regards privilege?

- The advice remains privileged in the hands of A, so he will not have to disclose it in any litigation that might arise, such as if another neighbour takes issue with the extension.
- B will be able to assert common interest privilege in the advice, so he will not have to disclose it if he ends up in litigation with any third party.
- The covering email, however, will not be privileged, as it is not a lawyer/client communication and has not been prepared for the dominant purpose of litigation in contemplation (and assuming the covering email itself does not summarise or quote from legal advice received; if so, it will be privileged to that extent).

Lack of a common interest does not lose privilege

So, as I've said, common interest privilege allows a party to share its privileged material with a third party who has a common interest in its subject matter without losing privilege as a result.

But does that mean privilege is lost if material is shared where there is no common interest? The short answer is no. Under English law, a party is entitled to share its privileged material with selected third parties without losing privilege as against the rest of the world, so long as the material remains confidential, and regardless of whether there is a common interest. This is referred to as the principle of [limited waiver](#), or sometimes selective waiver. Given its importance, the principle is surprisingly often overlooked, while parties worry about whether they have a sufficient common interest to be protected by common interest privilege.

The principle has been applied where there was no express duty of confidence on the part of those with whom the privileged communications were shared. The courts have been prepared to imply

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obligations of confidentiality, though obviously it is best practice to ensure that an express confidentiality/non-waiver agreement is in place before any sensitive material is shared.

And in the recent case of *Property Alliance Group Limited v The Royal Bank of Scotland plc*, the High Court confirmed the principle can apply where privileged documents are provided to a regulator, despite the existence of “carve-outs” from the regulator’s obligations of confidentiality which allow it to share the material with other third parties or to make it public in some circumstances.

Given the possibility of a limited waiver of privilege, does common interest privilege add anything? My own view is probably not, subject to two caveats:

- Common interest privilege allows the recipient of privileged material to assert privilege over it in his or her own right, without referring back to the sharing party. Where there is no common interest privilege, but merely a limited waiver, the recipient cannot assert privilege if the sharing party does not choose to do so. However, although there is no clear authority on the point, it would be astonishing if the existence of common interest privilege prevented the sharing party from waiving privilege unilaterally, given the voluntary nature of the sharing (so in my example above, A surely would not have to get B’s permission in order to waive privilege in the legal advice so that he could rely on it in litigation with a third party). If that’s right, then this distinction may have little practical significance, as the receiving party is still at the mercy of the sharing party, at least to some extent, as to whether privilege can be maintained.
- Although a limited waiver is possible under English law, the concept may not be recognised in some jurisdictions. For example, my understanding is that, in the US, disclosure of a privileged document to a third party who does not have a sufficient common interest is likely to result in a broader loss of privilege. That means particular caution is needed in sharing privileged material if there are cross-border aspects to a matter.

A common interest does not give a right to disclosure

What about “common interest privilege as a sword”? That is the notion that a common interest might provide a party with a right to disclosure of privileged material, which it would not otherwise have.

In fact, common interest privilege, on its own, cannot give a right to disclosure. Common interest privilege arises where privileged material is shared, voluntarily, with a third party who has a common interest in it. The existence of a common interest does not allow the third party to demand access to the material. So, returning to my example, neighbour B would not be entitled to demand that A provides him with a copy of his legal advice, just because B is considering a similar extension to his property and so has a common interest in understanding the legal position.

There are cases in which some commonality of interest has been used as a sword, of sorts, though in reality:

- It is not so much akin to sword as to a “shield disabler” (if such a term exists). In other words, the relevant commonality of interest does not give the party with the relevant interest a freestanding right to obtain access to the privileged material. Instead, it prevents the privilege holder asserting privilege in the material against the interested party (as a shield) where the right of access (the sword) arises in another way, most obviously by way of an order for disclosure in litigation.
- Invariably the relationship goes beyond a mere common interest of the sort that would engage common interest privilege if privileged material was disclosed voluntarily. What is needed is some relationship that will preclude privilege arising between the relevant parties even where there is no actual sharing of material, such as a joint retainer.

The upshot of all of this is that common interest privilege is not effective as a sword and, although it can be used as a shield, it is largely a redundant one, save where cross-border considerations might render it necessary.

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