**Translations and copies**

This element explains whether translations and copies of documents attract privilege.

**Civil procedure rules**

This element addresses aspects of privilege, the boundaries of which are established by case law rather than the CPR. However, you can find relevant commentary (drawing on the case law) in the White Book in relation to CPR 31.3.

**General rule in relation to copies**

If a party (or its solicitor) has an unprivileged document, and the party/solicitor creates a copy of that document, the copy is not privileged. This is because even if the copy was made for the purposes of the litigation, the copy document is not in substance any different to the original document, and therefore will be unprivileged.

Indeed, because the copy is not in substance any different to the original, 57AD 13.4 (in relation to the BPC) and CPR 31.9 provide that a party only has to disclose one copy of a document **unless** a copy is effectively a separate document because it contains a modification, obliteration or other marking or feature, which (paraphrasing) are material, effectively making it a different document for the purposes of disclosure.

An exception to this general rule (that a copy of an unprivileged document is unprivileged) was established in *Lyell v Kennedy (No.3)* (1884) 27 Ch D 1, explained on the following pages.

**Lyell v Kennedy**

**Facts**: The dispute between the parties concerned who was the proper heir-at-law of a lady who had died many years ago. The defendant’s solicitor had obtained copies of entries in registers and public records and photographs of tombstones and houses and the defendant claimed privilege in these, despite their public nature. The defendant argued that they were obtained by his solicitors solely for the purpose of defending himself in the litigation. The claimant challenged this claim to privilege.

**Held:**

Cotton LJ: *“In my opinion it is contrary to the principle on which the Court acts with regard to protection on the ground of professional privilege that we should make an order for their production [ie inspection]; they were obtained for the purpose of his defence, and it would be to deprive a solicitor of the means afforded for enabling him to fully investigate a case for the purpose of instructing counsel if we required documents, although perhaps publici juris [ie for the public to enjoy] in themselves, to be produced, because the very fact of the solicitor having got copies of certain burial certificates and other records, and having made copies of the inscriptions on certain tombstones, and obtained photographs of certain houses, might shew what his view was as to the case of his client as regards the claim made against him”*

Bowen LJ: *“you cannot have disclosure of them without asking for the key to the labour which the solicitor has bestowed in obtaining them”*

Accordingly, the documents were privileged. This was despite the fact that they were copies of unprivileged documents. A key point is that ordering inspection would show something about what the solicitor’s advice was, because of the nature of the collection of documents. Otherwise, the documents would not have been privileged.

**General rule in relation to translations**

Turning to translations, if a document is translated for the purposes of court proceedings, is that translation privileged? This was one of the questions considered in *Sumitomo Corp v Credit Lyonnais Rouse Limited* [2001] EWCA Civ 1152, and this is explored in the following pages.

**Sumitomo Corporation v Credit Lyonnais Rouse Limited**

**Facts**: This case related to Sumitomo’s trading on the copper market. Credit Lyonnais was Sumitomo’s clearing broker. Sumitomo sued Credit Lyonnais for US$247 million, claiming that Credit Lyonnais dishonestly assisted one of Sumitomo’s employees, Mr Hamanaka, to commit breaches of duty and/or knowingly procured breaches of Mr Hamanaka’s employment contract. These alleged breaches related to unauthorised trading by Mr Hamanaka, which had caused Sumitomo significant harm.

In proceedings in England, Credit Lyonnais wanted to inspect translations made by US and UK lawyers of material relating to Sumitomo’s copper trading. The originals were wholly or partly in Japanese. Sumitomo’s lawyers had translated approximately 30,000 pages into English (out of 6.9 million pages of material obtained).

Two main questions were addressed.

**If a lawyer arranges a translation of a document for the purpose of litigation, and the original document is not privileged, is the translation privileged?**

**Held:** the court concluded that a translation of an unprivileged document is not privileged simply because the translation was prepared for the purposes of litigation. This is because the translation does not contain anything confidential as far as the proceedings are concerned – nothing of substance has been added to the document that would warrant privilege being attached. It is simply the same as the original, but in a different language (notwithstanding the skill and judgment required to make a good translation). This is analogous with the general rule in relation to copies: a copy of an unprivileged document is not privileged even if the copy was made for the purposes of litigation.

**If only some of a client’s documents are translated, will the selection be privileged on the basis that would it say something about the nature of the legal advisers’ advice?**

Sumitomo also tried to argue that because only certain documents were translated, inspection would say something about the nature of the legal advisers’ thought process / advice, and so the translations should be privileged by analogy with *Lyell v Kennedy*.

**Held:** The court rejected this argument. A distinction must be made between a selection made from unprivileged documents which are disclosable by the party claiming privilege ("own client documents") and a selection made from documents which are not so disclosable ("third party documents"). *Lyell v Kennedy* was a ‘third party documents’ case. The court held that the principle in that case **should not** extend to copies or translations which are the result of a selection made from a client’s own documents, and so the translations were not privileged on this (or any other) basis.

**The court’s discretion to refuse inspection**

If a document is privileged then there are only very limited exceptions when the court can override the privilege and require a party to permit inspection of the privileged documents – the court has no general discretion to require a party to permit inspection of privileged documents.

On the other hand, it does not follow that simply because a document is not privileged, the court must order a party to permit inspection of it. Here, the court has a greater discretion. The court has stated:

*“While the court's ultimate concern must always be to ensure the fair disposal of the cause or matter, it need not be unmindful of other legitimate concerns nor is it powerless to control the terms upon which production and inspection may be ordered. I would not wish it thought that because, as I conclude, production and inspection may be ordered therefore they must at once be ordered unconditionally”*

(*Ventouris v Mountain* [1991] 3 AER 472).

For example, a court concerned that the claimant in the Sumitomo case might get translations which Sumitomo paid for free of charge has the option to order that inspection be permitted only if the claimant contributes to the translation costs.

**Summary**

- A party only needs to disclose one copy of a document unless a copy is effectively a separate document because it contains a marking or feature on which the party relies, which supports another party’s case or which adversely affects any party’s case.

- A copy of an unprivileged document is not privileged even if the copy was created for litigation.

- A translation of an unprivileged document is not privileged even if the translation was created for litigation.

- Case law suggests that a selection of documents from a ‘third party’s’ file of unprivileged documents **will be** privileged if ordering inspection would show something about what the solicitor’s advice was.

- Case law suggests that a selection of documents from a client’s own file of unprivileged documents **will not be** privileged even if ordering inspection would show something about what the solicitor’s advice was.

- Lack of privilege does not mean the court must order a party to permit inspection.