**Common interest privilege and limited waiver**

This element explains common interest privilege and limited waiver.

**Civil procedure rules**

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

**Introduction**

Common interest privilege can operate to preserve privilege in documents that are disclosed to third parties during actual/contemplated litigation. It was first recognised in case law in 1981.

**Not a ‘free-standing’ privilege**

Common interest privilege is not a form of privilege in its own right in the way that litigation and legal advice privilege are. Rather, it is a doctrine which allows Party A to share material which is already privileged (eg on the basis of legal advice or litigation privilege) with Party B, without being deemed to waive privilege in the material by doing so.

**Key definition: Common interest privilege**

Common interest privilege is a doctrine which allows Party A to share material which is already privileged with Party B without being deemed to waive privilege in the material in relation to anyone else.

**Examples of common interest**

There is no exhaustive list of situations where there is a common interest, but the following parties may have a common interest:

- Co-claimants / co-defendants in litigation;

- A company involved in litigation communicating with its holding company;

- A company involved in litigation communicating with its insurer, or a reinsurer communicating with the reinsured; and

- Similar situations between agent and principal.

A common interest agreement setting out the basis on which privileged material is shared may be entered into.

**Example of common interest privilege**

A subsidiary company is involved in litigation. It creates a report relating to the litigation. That document attracts litigation privilege. It shares the report with its parent company. The doctrine of common interest privilege means that privilege is not lost in the report, despite the report being shared with a third party (the parent), because the parent company has a common interest with the subsidiary in relation to the litigation (they both want the subsidiary company to prevail in relation to that litigation).

**Limited waiver**

Another doctrine which can have a similar effect to common interest privilege is the doctrine of limited waiver which has been recognised in case law since the late 1990s.

Under this doctrine, privileged documents can be shared with third parties on confidential terms without losing privilege against the rest of the world (and to some extent also the receiving party). Confidentiality can be inferred but it is advisable to put in place an express confidentiality/non waiver agreement. It will not generally be possible to assert privilege against the recipient in the case of dispute unless that dispute is outside the ambit of the limited purpose for which the material was shared. Again, it is advisable to put in place an express agreement as to the basis on which the privileged material is shared.

The court will generally uphold such a limited waiver of privilege. This can have the same effect as common interest privilege just described.

In fact, the doctrine of limited waiver is in one important regard wider than that of common interest privilege – no common interest is required.

If a third party comments on the privileged material shared with it, whether those comments will be privileged will depend on whether litigation privilege or legal advice privilege apply.

An example of limited waiver would be a financial services firm voluntarily disclosing a privileged document to a financial services regulator on a limited waiver basis. Privilege against the rest of the world could still be maintained.

This demonstrates why the doctrine of limited waiver is broader than that of common interest – the party and the regulator do not have a common interest in the subject matter.

Note, however, that there may be potential risks if the regulator is liaising with overseas regulators or working on other linked investigations in which withholding of that document could fetter the regulator’s powers.

**Summary**

- Common interest privilege is not a free-standing privilege.

- It allows an already privileged document to remain privileged after disclosure to another party with a common interest.

- Parent and subsidiary may have a common interest, as may insurer and insured.

- The doctrine of limited waiver has a similar effect. No common interest is needed, but the limited waiver must be in circumstances of confidentiality.

- If a third party comments on the privileged material shared with it, whether those comments will be privileged will depend on whether litigation privilege or legal advice privilege apply.