

Privilege and In-House Communications: What Aabar v Glencore Means for In-House Legal Teams

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Overview

In a significant development in the law on legal advice privilege, the High Court has ruled that internal company communications and documents created by non-legal employees can in some circumstances be privileged and therefore not required to be disclosed in litigation proceedings.

The Court in *Aabar Holdings SARL v Glencore plc* [2026] EWHC 877 (Comm) has extended the remit of “legal advice privilege” by holding that it protects confidential documents created by, or communications between, members of a “client group” (a term which is discussed below), even where no lawyer is party to the communication, provided the dominant purpose of the document is to seek legal advice.

The decision recognises a broader basis for asserting privilege over internal “client group” documents than was previously thought to apply after the widely debated decision in *Three Rivers (No 5)* [2003] QB 1556.

This clarification of the law is particularly significant for in-house lawyers overseeing internal teams preparing documents or correspondence on issues that may be disclosable in litigation in the future, and helps to remove some of the effects of the *Three Rivers (No 5)* decision, which have been widely seen as overly technical and difficult to apply in practice.

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What Was the Relevant Law in This Area Before This Judgment?

The longstanding principle of legal professional privilege entitles a party to withhold documents from disclosure, even from courts and, in some cases, regulators. There are various categories of legal professional privilege. The case discussed in this article concerns “legal advice privilege”, which protects confidential communications between a lawyer and the lawyer’s client for the dominant purpose of giving or receiving legal advice. Legal advice privilege is distinct from “litigation privilege”, which applies to communications and documents produced when litigation is in reasonable contemplation. Legal advice privilege exists to protect the advisory relationship between client and lawyer and does not require any dispute to exist.

Whilst it is generally easy to identify what documents created by an external lawyer are privileged, a more difficult question is how the relationship between a “client” and a “lawyer” works in the context of legal teams working in-house and advising internal “clients”.

This question has been complicated in English law by the decision in *Three Rivers (No 5)*, which established the principle that where both a lawyer and client are “internal” (for example, an in-house lawyer advising employees), legal advice privilege will arise only in relation to communications between the in-house lawyer and those individuals who are the in-house lawyer’s “client group”: the narrowly defined group of individuals who are authorised to seek and receive legal advice from the lawyer on the subject at hand.

Communications (i) between other employees outside of the client group, (ii) between those other employees and the internal “client group”, or even (iii) internal within the client group would not therefore necessarily be privileged, even if the communications fed directly into the legal advice sought from the in-house lawyers. This meant that internal emails and memos, even if their entire purpose was to feed into the instruction of lawyers, might not be privileged.

Whilst the *Three Rivers (No 5)* decision has been controversial since it was made, it remains law, and lower courts are required to seek to apply it until the Supreme Court overturns it.

What Was at Issue in *Aabar v Glencore*?

The issue in this case was whether legal advice privilege covers “intra-client group documents”, defined as internal communications between or documents created by members of the client group (i.e., not including in-house lawyers).

In the litigation, Glencore withheld documents on the basis that legal advice privilege should protect intra-client group documents. Glencore argued that such documents were analogous to lawyers’ working papers, which are clearly protected.

What Was Decided?

The Court in *Aabar v Glencore* agreed that legal advice privilege “*applies to any intra-client group document which is sent between or created by members of the ‘client group’*”

for the dominant purpose of seeking legal advice”.

The Court’s reasoning was as follows:

1. Mr. Justice Picken distinguished the case from *Three Rivers (No 5)* on the basis that *Three Rivers (No 5)* was only concerned with communications with internal individuals who were outside the client group, whereas this case concerned internal communications within the client group. As such, the High Court was free to determine the position as a matter of legal principle, despite the decision of the House of Lords.
2. There can be no distinction in principle between, for example, (i) a draft engagement letter that identifies the issue on which legal advice is sought, but is only shared internally and not with lawyers, and (ii) a communication created by the client and shared with lawyers which identifies the same issue. The Court considered that, as there is no practical difference between the two documents, it is illogical for privilege to cover one but not the other.
3. Preparatory internal documents may represent evidence or a summary of the substance of privileged advice. For example, a memorandum prepared by a member of the client group before a meeting with lawyers or an email between client group members preparing for that meeting, can form part of the legal advice process even if the document itself is never sent to the lawyer.
4. The Court agreed with Glencore’s analogy to a lawyer’s working papers. If a lawyer’s working papers are privileged because they reveal legal advice given to a client, it is difficult to see why the client’s equivalent working papers would not attract privilege, provided they are created within the client group and for the dominant purpose of seeking legal advice.

What Does This Mean in Practice?

This judgment will be of particular interest to in-house counsel overseeing large corporate organisations.

It highlights several practical points:

1. **Privilege can attach to internal documents, but the “dominant purpose” test is the key:** intra-client group communications and documents may be privileged, even where no lawyers are involved. However, a document will only be privileged if it is created with the dominant purpose of seeking legal advice. Documentation should be marked accordingly.
2. **Define the “client group” at the outset:** the protection recognised in *Aabar* depends on the relevant documents being created by, or exchanged between, members of the properly defined client group. There may be multiple employees with relevant knowledge of a matter, but this does not mean they will all be “the client” for privilege purposes. As was already the case following the *Three Rivers (No 5)* decision, legal teams working within large organisations or groups should identify the group at the start of the dispute and keep a record of who has authority to seek legal advice.
3. **Control communications outside the client group:** the Court’s decision in *Aabar* does not protect all internal communications, such as fact gathering work prior to instructing lawyers. Communications with employees outside the client group remain problematic due to the decision in *Three Rivers (No 5)*. In-house legal teams will still need to manage the process of internal evidence gathering carefully.
4. **Train business personnel:** privilege training should not be limited to lawyers. Senior

management, HR and other business teams should understand who is in the client group, who is not and why copying in a lawyer may still not be enough to attract privilege in some circumstances.

5. **Aabar is only a first instance decision:** the decision is welcome for businesses, but we expect the issue to attract further legal debate. In-house legal teams should stay informed of future cases discussing privilege and intra-client documents.
6. **Litigation privilege:** As noted above, these issues relate only to legal advice privilege. Where litigation is reasonably in contemplation, it may still be possible to rely on litigation privilege, which is more generously applied in an in-house context.

If you would like to discuss how *Aabar* might affect a current or contemplated dispute or internal company policies, please get in touch with our Commercial Litigation and Arbitration team.