

DOES LITIGATION PRIVILEGE EXISTS IN MALAYSIA?



Discovery of Documents

The discovery of documents was originally an equitable device employed in the English Court of Chancery for obtaining the disclosure and inspection of relevant documents from the other side or third parties.

In Malaysia, the procedure on discovery of documents in court is governed by the Rules of Court 2012. One of the most common grounds of resisting discovery is the protection of legal professional privilege.

There are two types of legal professional privilege. One is Legal Advice Privilege and the other is the Litigation Privilege.

In *Three Rivers District Council and Others v. Governor and Company of the Bank of England (No 5)* [2005] 4 All ER 948, Scott L.J. has stated the law on litigation and legal privilege in language of admirable simplicity and clarity. The learned Judge said:

“The modern case law on legal professional privilege has divided the privilege into two categories, legal advice privilege and litigation privilege. Litigation privilege covers all documents brought into being for the purposes of litigation. Legal advice privilege covers communications between lawyer and their clients whereby legal advice is sought or given.”

What is Litigation Privilege

Litigation Privilege relates to communications at the stage when litigation is pending or contemplated.

A document, such as an investigation report, is accorded privilege from discovery on the ground of Litigation Privilege if the dominant purpose for which it was prepared was for use in litigation. This entrenched principle of Litigation Privilege was laid down by the House of Lords in *Waugh v. British Railways Board* [1979] 2 All ER 1169.

Litigation Privilege extends to documents prepared by a third party so long it is brought into existence for the purposes of litigation. Once a document is considered to be privileged, it does not just operate against the other side in the civil litigation, but as against the world.

Position under the Evidence Act 1950

Section 126 and Section 129 of the Evidence Act 1950 have expressly codified professional communication which is also known as Legal Advice Privilege, to be protected from discovery. The Evidence Act 1950 is however silent on Litigation Privilege. Does this mean that the protection of Litigation Privilege is then excluded by the Evidence Act 1950? Put another way, can Litigation Privilege be invoked as a protection against the discovery of documents in Malaysia?

Litigation Privilege is a well-established principle of law in Common Law. Section 3 of the Civil Law Act 1956 has allowed Common Law to be applied in Malaysia subject to local circumstances and the existence of any written provision on that particular subject. As long as the Common Law is not inconsistent with any existing written law, it can be applied in Malaysia.

The Privy Council speaking through Lord Diplock in *PP v. Yuvaraj* [1969] 2 MLJ 89 has cautioned against any exclusion of well-established principles in Common Law merely because the local statute is silent or fails to be explicit. This is well founded on the presumption that it was not the intention of the legislature to depart from the well-established principles of law.

Our Court of Appeal has recently decided that the application of Litigation Privilege is not excluded by the Evidence Act 1950 in *HSBC Bank Malaysia Berhad v. Wang Han Lin & 3 ors.*

As a matter of law,

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