

# Admissibility of Privileged Documents Lawfully Disclosed by Third Parties in Foreign Proceedings

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## INTRODUCTION

In *Suppipat and others v Siam Commercial Bank Public Company Ltd and another* [2022] EWHC 381 (Comm), HHJ Pelling QC (sitting as a High Court judge) considered an application to prohibit the Claimant from using or deploying certain documents in the proceedings that were confidential and/or covered by legal professional privilege. The documents had been obtained by the Claimant from a third party pursuant to subpoenas in Thailand.

## BACKGROUND

The application arose in the context of a \$2bn Commercial Court claim, listed for trial in October 2022, which concerns allegations of fraud against Thai businessman and Wind Energy Holding Co Ltd (“WEH”) former manager Nop Narongdej, along with several other entities and individuals. The Claimants have alleged fraudulent conspiracy to deprive the Claimants of shares in Thai energy companies (Renewable Energy Corporation Co Ltd (“REC”), which in turn held shares in WEH). Each of the Defendants (save for the Fifth Defendant) is sued under Thai law.

The applicant, Siam Commercial Bank Public Company Limited (“SCB”), is the Tenth Defendant in these proceedings and was WEH’s bank. The Claimants allege that the Tenth Defendant instigated or assisted in the concealment of the transfer of shares to the Fourteenth Defendant by requiring WEH to procure a legal opinion from WEH’s Thai lawyers confirming that the proposed sale was irrevocable, in good faith and at a fair price and that the first claimant would not have legal grounds to return as a direct or indirect shareholder of WEH.

In the course of separate Thai proceedings, the Claimants lawfully obtained a copy of a legal opinion from (undisclosed) Thai lawyers together with 90 pages of emails and an

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invoice related to the legal opinion (the “Documents”). SCB was not a party to the Thai proceedings and was not notified of the disclosure of the Documents by WEH. SCB consequently brought an application requesting an order:

- prohibiting the use of the Documents in the English proceedings on the grounds that the Documents were legally privileged and/or confidential; and
- requiring the Claimants’ legal team in the English proceedings to return their copies of the documents.

## JUDGMENT

### **Documents obtained lawfully in foreign proceedings may still be privileged as a question of English law**

The judge rejected the respondent’s arguments that the Documents are not or have ceased to be privileged because as a matter of Thai law, the recipient of the documents which were obtained lawfully in the Thai court proceedings can use them for whatever purpose they choose. He decided that the “*effect of a loss of privilege in a foreign jurisdiction on the admissibility or disclosability of documents in litigation*” is a question to be resolved using English law. Further, there was no reason to adopt a different approach because the Thai courts have (apparently) decided that the Documents are not privileged.

The judge also rejected the respondent’s arguments that whether a document is confidential is a matter to be determined under Thai law because that is where the confidential nature of the communications arose. He held that it “would be entirely artificial” when applying the English conflicts law concerning the existence and loss of privilege, for the issue of the continued existence of confidence on which the existence of privilege depends to be tested by reference to another system of law.

### **The characteristic of confidentiality is not lost simply by documents being obtained in foreign proceedings**

It was not disputed that the Documents were not generally available to the public. The critical question was whether, in the circumstances of their disclosure, the Documents had lost the characteristic of confidentiality necessary for the assertion of privilege.

The judge considered whether privilege has been lost by reference to *Bourns Inc v Raychem Corp*, which states that “*as a matter of English law whether privilege has been lost is to be tested by asking whether the document and its information remain confidential in the sense that it is not properly available for use*” (emphasis added). He concluded that the

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necessary confidence has not been lost simply by reason of the subpoenas having been applied for and copies of the Documents being obtained in Thailand. Whether confidence has been lost is a contextual and fact specific question.

He emphasised that “...where the issue concerns the loss of privilege which is protected in England as a matter of public policy, a court should be very slow to conclude that the necessary level of confidence has been lost in circumstances such as this namely where an application has been made for disclosure to a foreign court in aid of other proceedings in that court against parties other than the party whose privilege is supposedly thereby lost and without prior notice to that party of the application.”

**The characteristic of confidentiality is not lost simply by documents being shared with multiple defendants in the course of legal proceedings**

The respondents further alleged that the Documents have lost confidentiality because they have been circulated by or on behalf of SCB to various third parties including the Second, Third and Thirteenth Defendants.

The relevant legal test to be applied was whether the recipient of the information knew or ought reasonably to have known that the information was confidential and being supplied confidentially. The judge considered that the relevant parties were aware that the documents were confidential, that assumption of confidentiality was plain from the nature of the legal opinion and that the confidential nature of the material was apparent on the face of certain emails which included headings such as “*Strictly Confidential*”.

**The Documents did not lose their status of privilege by reason of the legal opinion being sought in order to further iniquity.**

The Judge did not accept that the advice received was in furtherance of a scheme to defeat the interests of creditors or that the advice was explicitly or implicitly sought on this basis. Rather, there was a properly conducted major lending exercise by a bank and legal advice was sought regarding a particular concern from senior management.

**COMMENTARY**

The case confirms that just because documents have been obtained lawfully in one jurisdiction, it does not mean that they thereby become available for use in litigation in another.

Litigants should carefully consider the English rules of privilege when considering how to deploy confidential documents obtained in foreign proceedings.

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In determining whether documents disclosed in foreign proceedings are privileged, the English courts will not take into account whether a foreign court considers the document to be privileged or whether the foreign court permits the disclosed documents to be used for other purposes.

The English courts will apply English law in deciding whether a document is privileged, including whether that document has lost its confidentiality. The courts will not detach the question of confidentiality from the question of privilege by reference to foreign law.

In considering the question of confidentiality, it is relevant whether the documents obtained in foreign proceedings were received in confidence, whether the party to whom the privileged materials belong had notice of the application, whether the documents were clearly privileged and the extent and purpose for which the documents were then disseminated.

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Please do not hesitate to contact us with any questions.

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