

# Waiving privilege by reference or allusion – a case update

This case is important because referring to a document in a statement of the case or witness statement in support of a claim or defence is not usually intended to act as a waiver of privilege.

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A recent High Court case, *Scipharma Sarl v Moorfields Eye Hospital NHS Foundation Trust* [2021] EWHC 2079 (Comm) has considered what it means to 'mention' a document in a witness statement and whether such reference amounts to a waiver of privilege, where the document 'mentioned' would otherwise attract privilege.

## Case

The Claimant and Defendant were parties to a pharmaceutical development agreement. The Claimant alleged that the Defendant breached the Agreement when the Defendant lost its 'good manufacturing practice' status which prevented the product in question from being manufactured, resulting in losses to the Claimant.

In one of the Claimant's witness statements, the witness referred to a conversation between the Claimant's solicitor and one of the Defendant's employees (Ms B). Some three years prior to the date of this case, it transpires that the Claimant had obtained a previous witness statement from Ms B. The Defendant contended that this three-year old statement was not consistent with the content of the further statement from the Claimant in terms of what the Claimant says Ms B had told the Claimant's solicitors.

The Defendant sought the disclosure of the Claimant's solicitor's attendance notes or similar documents pursuant to Rule 31.14 of the Civil Procedure Rules, which allows a party to inspect or request a copy of a document which is mentioned in a statement of case or witness statement.

## Issues

The Judge considered that he needed to determine the following:

1. Had the document in relation to which inspection was now sought been sufficiently 'mentioned' to reach the threshold to give rise to a right to inspect it;
2. If so, should he exercise his discretion in ordering inspection; and
3. Given that the documents in questions were privileged documents (attendance notes taken by the Claimant's solicitors), had there been an express or implied waiver of privilege which was sufficient to permit inspection to take place.

On point 1, had there been a sufficiently direct allusion to the document in the witness statement? The Claimant's solicitor had spoken with Ms B three years previously. The Claimant argued that the witness statement did not refer to an attendance note specifically. The Defendant argued the inference that the only way in which the Claimant's solicitor could recall the conversation with Ms B from three years previously would be if there was an attendance note of the conversation. The Judge agreed that in the absence of an explanation as to how the information came to be included in the (present) witness statement, an inference must be drawn that this was by reference to an attendance note containing the relevant information.

On point 2, the Judge's discretion – should the Judge order the disclosure of a document quite clearly protected by litigation privilege? In determining point 2, the Judge considered that he needed to answer point 3 – had there been a waiver of the privilege which attached to the attendance note?

The Judge considered an important passage made in the case of *Magnesium Elektron v Neo Chemicals and Oxides (Europe) Limited* [2017] EWHC 2957:

“The general rule is that... Where a person is deploying in court material which would otherwise be privileged, the opposite party and the court must have the opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood.”

The Judge identified the key word as “deploying”. Simply referring to a privileged document would not, of itself, amount to a waiver of privilege. However where it is the contents of the document which are being relied upon, there may be a waiver of privilege.

#### Decision

The Judge considered that the Claimant’s witness statement plainly sought to rely upon the contents of the attendance note rather than referring to the attendance note in passing. The attendance note had thus been ‘mentioned’ and the Claimant had sought to rely upon its contents. The Judge then considered what he described as the ‘residual question’ – would it be unfair to allow the Claimant not to reveal the whole of the relevant information because it would risk the court and the Defendant only having a partial and potentially misleading understanding of the material?

In circumstances where further material was available and there was a discrepancy in relation to Ms B’s evidence, the Judge decided that it would be unfair for the Claimant not to reveal the full picture. The Judge therefore ordered the Claimant to disclose the attendance note.

#### Commentary

This case is important because referring to a document in a statement of case or witness statement in support of a claim or defence is not usually intended to act as a waiver of privilege. In this case it was not even necessary to name or define the privileged document; a simple allusion to it, combined with reliance upon it, was sufficient to waive privilege, and there was no other reason why the Judge should not order disclosure and inspection by the exercise of his discretion.

This case acts as a useful reminder that parties need to take renewed care in preparing statements of case and witness statements, to ensure they are not inadvertently waiving privilege and potentially opening themselves up to an order to disclose documents which they would not wish for the other party to see.

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