Global Attorney-Client Privilege Guide - Malaysia

07 - Recent issues

July 4, 2022

| Contents |
| --- |
| To generate table of contents, right-click here and select **Update Field.** |

# What (if any) recent issues have arisen in relation to privilege in the jurisdiction?

**Has common law litigation privilege been displaced by the Evidence Act?**

In the 2017 case of *Wang Han Lin & Ors v. HSBC Bank Malaysia Berhad* [2017] MLJU 1075, the Court of Appeal reversed the position in *Tenaga Nasional Berhad v. Bukit Lenang Development Sdn Bhd* [2016] 5 MLJ 127 where the High Court held that litigation privilege at common law had been displaced by section 126 of the Evidence Act as the existence of a statute codifying the law of evidence had removed the basis on which to rely upon the common law. The court in *Wang Han Lin* held that section 126 of the Evidence Act did not fall within the purview of common law litigation privilege and that there are no inconsistencies between the two. Litigation privilege existed before the passing of the Evidence Act and continues to apply in Malaysia.

**Breach of legal professional privilege**

In the 2018 case of *Tan Chong Kean v. Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669, the Federal Court considered the remedies available to a client against their solicitors in an action for breach of legal professional privilege. The client's solicitors had failed to destroy trust deeds prepared by them on the client's behalf, against the client's express instructions. Instead, the solicitors used the trust deeds to support their application for a third-party notice to be issued against the client. The client had sought to claim damages against the solicitors, but the solicitors contended that the client's only recourse was to lodge a complaint against them to the relevant disciplinary body. The court found in favor of the client and made an order for damages to be assessed by the High Court. The solicitors were also prohibited from disclosure, use or retention of the trust deeds.

**Is a document in the form of a "draft" intended to be disclosed protected by privilege?**

Yes, so long as it has not been disclosed to the counterparty. In the 2020 case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn. Bhd. & Ors* [2020] MLJU 1421 at the Court of Appeal, it was held that as long as the "draft" is a solicitor work product produced on the client's instructions, it shall remain within the protective umbrella of legal professional privilege until the client is satisfied that the "draft" is ready for disclosure and is so disclosed.

**Is privilege lost or waived in the absence of confidentiality?**

No. In the same case of *Malaysia Debt Ventures Berhad v. Platinum Techsolve Sdn. Bhd. & Ors* [2020] MLJU 1421, the Court of Appeal held that privilege is still intact notwithstanding the fact that most or all of the contents of a document have been made known to and/or are in the knowledge of the counterparty, so long as the document itself, in its entirety and as a whole, remains undisclosed to the counterparty. Privilege is waived only upon the conscious or deliberate act on the part of the client in disclosing the document directly to the counterparty or through intermediaries such as their solicitors.

**Can a solicitor's client account attract privilege under the Evidence Act?**

Yes. In the 2021 case of *Ketua Pengarah Hasil Dalam Negeri v. Bar Malaysia* [2022] 2 MLJ 428, the Court of Appeal was of the view that any or all financial information or data exchanged between an advocate and their client, and any such data contained in any document and kept in respect of the client's account for the purpose of the advocate's employment as an advocate, would all come within the ambit of section 126 of the Evidence Act. Such privilege extends to documents rendered or kept in the client's account as well as all information relating thereto.

**Extension of scope under section 126 (1)(b) of the Evidence Act**

Section 126 (1)(b) of the Evidence Act does not protect from disclosure any fact observed by an advocate and solicitor which shows commission of any crime or fraud since the commencement of their employment. It follows in section 126 (2) that it is immaterial whether or not the fact (which shows a crime or fraud has been committed) was brought to the attention of the advocate and solicitor. In the 2020 case of *Celcom (M) Bhd & Anor v. Tan Sri Dato' Tajudin bin Ramli & Ors* *and another suit* [2020] 11 MLJ 44, the High Court, based on section 126 (2), extended the scope of section 126 (1)(b) to apply in the following three circumstances:

Willful blindness – when an advocate and solicitor intentionally closes their eyes to any fact which shows the commission of a crime or fraud after commencement of their employment. In other words, Nelsonian knowledge, willful ignorance and/or contrived ignorance on the part of the advocate and solicitor

Recklessness – when an advocate and solicitor is reckless and fails to make such inquiries as an honest and reasonably competent advocate and solicitor would have made regarding the commission of a crime or fraud after commencement of their employment

Knowledge of circumstances – when an advocate and solicitor has knowledge of circumstances which to an honest and reasonably competent advocate and solicitor would indicate commission of a crime or fraud after commencement of their employment

Copyright © 2025 Baker & McKenzie. All rights reserved. **Ownership**: This documentation and content (Content) is a proprietary resource owned exclusively by Baker McKenzie (meaning Baker & McKenzie International and its member firms). The Content is protected under international copyright conventions. Use of this Content does not of itself create a contractual relationship, nor any attorney/client relationship, between Baker McKenzie and any person. **Non-reliance and exclusion**: All Content is for informational purposes only and may not reflect the most current legal and regulatory developments. All summaries of the laws, regulations and practice are subject to change. The Content is not offered as legal or professional advice for any specific matter. It is not intended to be a substitute for reference to (and compliance with) the detailed provisions of applicable laws, rules, regulations or forms. Legal advice should always be sought before taking any action or refraining from taking any action based on any Content. Baker McKenzie and the editors and the contributing authors do not guarantee the accuracy of the Content and expressly disclaim any and all liability to any person in respect of the consequences of anything done or permitted to be done or omitted to be done wholly or partly in reliance upon the whole or any part of the Content. The Content may contain links to external websites and external websites may link to the Content. Baker McKenzie is not responsible for the content or operation of any such external sites and disclaims all liability, howsoever occurring, in respect of the content or operation of any such external websites.  **Attorney Advertising**: This Content may qualify as “Attorney Advertising” requiring notice in some jurisdictions. To the extent that this Content may qualify as Attorney Advertising, PRIOR RESULTS DO NOT GUARANTEE A SIMILAR OUTCOME. **Reproduction**: Reproduction of reasonable portions of the Content is permitted provided that (i) such reproductions are made available free of charge and for non-commercial purposes, (ii) such reproductions are properly attributed to Baker McKenzie, (iii) the portion of the Content being reproduced is not altered or made available in a manner that modifies the Content or presents the Content being reproduced in a false light and (iv) notice is made to the disclaimers included on the Content. The permission to re-copy does not allow for incorporation of any substantial portion of the Content in any work or publication, whether in hard copy, electronic or any other form or for commercial purposes.

© 2025 Baker McKenzie. All rights reserved.