

Dispute Resolution Hotline

January 03, 2019

ENGLISH COURT OF APPEAL CLARIFIES SCOPE OF LITIGATION PRIVILEGE

- Legal advice given to avoid, or even settle proceedings which are reasonably contemplated, would receive the same level litigation privilege as in cases of defending or resisting litigation.
- Litigation privilege does not cover all documents brought into existence for the purposes of actual or contemplated litigation, unless it was for the sole or dominant purpose of such litigation.
- Litigation privilege does not extend to documents concerned with the settlement or avoidance of litigation where the documents do not seek advice or information for the purposes of conducting the litigation nor reveal the nature of such advice or information.

In the recent case of *WH Holding Limited and West Ham United Football Club Limited ("WH Holding") v. E20 STADIUM LLP ("E20")*,¹ the English Court of Appeal ("Court of Appeal") held that all internal corporate communications of a company or recording commercial proposals claiming privilege, would not receive the blanket protection of litigation privilege. The documents need to satisfy the test of sole or dominant purpose of conducting litigation.

FACTUAL BACKGROUND:

Pursuant to a dispute between the parties, on the number of seats that West Ham was entitled to use in a stadium, an application was filed by the WH Holding to inspect certain documents which were in possession of E20. The application was filed before the High Court of England and Wales ("High Court"), pursuant to Rule 31.19(6)(a) of the Civil Procedural Rules.

High Court Decision

The High Court dismissed the application permitting an appeal on certain limited grounds as discussed below. The High Court held that:

- Litigation privilege does not apply to expert determination of disputes envisaged under agreement between parties but only to court related proceedings.
- Documents prepared for the dominant purpose of formulating and proposing the settlement of litigation that is in reasonable contemplation (or in existence) are protected by litigation privilege.
- The principle applied since litigation was in reasonable contemplation since 31 August 2016 and documents challenged in the proceedings, dealt with development of a potential settlement offer for resolving disputes between the parties ("Disputed Documents"). Therefore, the Disputed Documents would avail litigation privilege.

ISSUES BEFORE COURT OF APPEAL:

- Whether the doctrine of litigation privilege extends to documents concerned with the settlement or avoidance of litigation where documents neither seek advice or information for conducting litigation or reveal the nature of advice or information?
- What is the correct approach to be taken by a court to an application for inspection of documents where a claim to privilege is challenged²?
- Whether the High Court considered or applied the "*dominant purpose*" test when addressing the question of whether to inspect certain documents which were disputed ("Disputed Documents")?

Of all the documents in issue before the High Court, some were privileged for "*implicitly reflect[ing] legal advice*" and were subsequently not challenged in the appeal. There were some other Disputed Documents, in respect of which WH Holdings challenged the redactions made therein. These Disputed Documents were essentially six emails exchanged between E20 and its Board members and stakeholders.

ARGUMENTS ADVANCED:

WH Holdings contended that only documents to which litigation privilege can be attached are documents concerned with obtaining advice or evidence for use in litigation as that would be within the ambit of "conducting" the litigation. This narrow approach was erroneously rejected by the High Court misinterpreting the Court of Appeal decision in *SFO v. Eurasian Natural Resources Corporation Limited (ENRC)*.³ The ENRC decision had not removed the requirement that communications to be for dominant purpose of conducting litigation, must be concerned with advice or evidence but merely confirmed that the conduct of litigation includes its avoidance or compromise.

E20 submitted that the Disputed Documents, being internal communications, had been prepared with the **dominant purpose of discussing a commercial proposal for the settlement of the dispute between the parties, at a time when litigation was in reasonable contemplation**. "Conducting litigation" encompasses discussions relating to

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formulating, finalising, and setting out a purely commercial settlement proposal and includes avoiding or settling litigation.

DECISION OF THE COURT OF APPEAL

The Court of Appeal allowed the appeal relying on the Three Rivers DC decision⁴ and held that litigation privilege does not extend to documents concerned with the settlement or avoidance of litigation where the documents do not seek advice or information for the purposes of conducting the litigation nor reveal the nature of such advice or information.

A. Litigation Privilege

Relying on the decisions in Three Rivers DC⁵, the Court of Appeal held that legal professional privilege is a single internal privilege including litigation privilege restricted to adversarial proceedings and legal advice privilege. Legal advice privilege is dependent on the involvement of a lawyer while litigation privilege is not.

Documents exchanged between parties and lawyers seeking information or advice in connection with existing or contemplated litigation are privileged only on fulfillment of certain conditions.⁶ The general principle applicable to litigation privilege is that – ‘the documents must be produced or communications be made for obtaining information or advice in connection with existing or contemplated litigation’. This is further qualified by the pre-requisite to establish that it was done “for the sole or dominant purpose of conducting that litigation.”

Legal advice given to head off, avoid, or even settle reasonably contemplated proceedings would receive the same level litigation privilege as in cases of defending or resisting litigation.⁷ Deciding “whether” to defend or prosecute an action includes a decision to conclude it by compromise and therefore conduct of litigation include its avoidance or compromise.

The Court of Appeal held that litigation privilege would not extend to the Disputed Documents in the present case, which had been created with the dominant purpose of discussing a commercial settlement of the dispute when litigation was in contemplation. All internal corporate communications would not receive the blanket protection of litigation privilege. The Court of Appeal concluded that:

- i. Litigation privilege is engaged when litigation is in reasonable contemplation.
- ii. Once litigation privilege is engaged it covers communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation.
- iii. Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.
- iv. Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.
- v. There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

B. Appropriate Test for inspection of documents to ascertain claims of privilege

The Court of Appeal held that High Court erred in applying the test of ‘reasonable certainty’ that privilege was wrongly claimed while dealing with the issue of inspection of Disputed Documents. Further, courts may inspect documents in relation to which privilege is claimed with due caution. Discretion should be exercised based on nature of privilege claimed, number of documents involved and potential relevance to issues.

C. Purpose of creation of the Disputed Documents

WH Holdings had challenged the High Court decision on one of the grounds that it had failed to assess whether the Disputed Documents were actually created with the dominant purpose of adversarial litigation as opposed to non-adversarial expert determination.

The Court of Appeal acknowledged the findings of the High Court, notwithstanding that the latter had not analysed the purpose of each of the documents, i.e. whether they had been produced with the dominant purpose of litigation or if they were for determination of issues by an expert as a possible means of dispute resolution. The Court of Appeal held that the High Court was justified in arriving at its conclusion that the concerned documents had been produced to dispose of the litigation, for the following reasons:

- Litigation had been in reasonable contemplation since 31 August 2016, tentatively five months prior to the Disputed Documents being produced;
- In situations where there are multiple ways of resolving a dispute, one of which is adversarial litigation, and litigation is in reasonable contemplation, the dominant purpose requirement of litigation privilege is satisfied if the information or advice is obtained for settling the dispute.

CONCLUDING REMARKS:

By way of this judgment, the Court of Appeal has sought to demarcate the boundaries around the scope of litigation privilege and clarified that unless internal communications pertain to advice or information obtained for the purpose of conducting the litigation, they may be disclosed. Higher level of caution needs to be exercised by parties involved or contemplating litigation in protecting internal communications concerning settlement. Needless to say, the extent to which internal communication or such other documents prepared by a company would be protected by litigation privilege, would be governed by the facts, circumstances and the evidence adduced. This decision also invites attention towards the concept of ‘without prejudice privilege’ which excludes all negotiations genuinely aimed at settlement, whether oral or in writing, from being given in evidence. The High Court decision briefly dealt with this aspect and observed that it could lead to a scenario where a ‘without prejudice’ offer to WH Holdings to dispose contemplated litigation would not be before court but document recording terms and discussion of the offer would be open to inspection and inclusion in trial, giving rise to an odd situation. The Court of Appeal ruling does not deal with this aspect.

¹ [2018] EWCA Civ 2652

² This hotline is limited to the issues concerning legal professional privilege, and does not discuss this issue.

³ [2018] EWCA (Civ) 2006 (ENRC)

⁴ Three Rivers DC v. Governor and Company of the Bank of England [2004] UKHL 48

⁵ *ibid*

⁶ (i) Litigation must be in progress or in contemplation; (ii) The communications must have been made for the sole or dominant purpose of conducting that litigation and (iii) the Litigation must be adversarial, not investigative or inquisitorial.

⁷ *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006 (“*ENRC*”) (please refer to our hotline available at http://www.nishithdesai.com/information/research-and-articles/nda-hotline/nda-hotline-single-view/article/the-english-court-of-appeal-rules-on-privileged-documents-in-internal-investigations.html?no_cache=1&cHash=00f7460e72dd2d9539c7999d979f6d61)

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