

# Dispute Resolution Hotline

March 30, 2022

## ENGLISH HIGH COURT'S GUIDE ON LITIGATION PRIVILEGE AND WAIVER OF PRIVILEGE

- A decision to rely on privileged material in court would oblige the party to disclose other privileged material on the same issue;
- A generic mention of privileged materials would not be construed as a waiver, if no reliance is placed on those materials;
- Litigation privilege can only be claimed in respect of those categories of documents which are prepared for the "dominant purpose" of litigation that is "in reasonable prospect";
- "In reasonable prospect" means more than a mere possibility but not necessarily a 50% or greater chance.

Recently, the High Court of England and Wales ("**High Court**") in *Kyla Shipping Co Ltd & Anr v Freight Trading Ltd and others*,<sup>1</sup> clarified the law on litigation privilege and waiver of privilege. This was an interim decision in an alleged mispricing claim. An application had been filed challenging the Claimants' claim for litigation privilege. It was also contended that there has been a waiver of privilege which entitles the defendants to disclosure of additional materials referred to in a witness statement.

In this judgment, the High Court has laid down important guidelines on the options available to the court when it is not satisfied with the claim for litigation privilege.

The ruling is a good addition to the series of case laws decided by the English courts, and most recently the Court of Appeal decision in *WH Holding Limited and West Ham United Football Club Limited v. E20 Stadium LLP*<sup>2</sup> ("**WH Holding Limited**") and *SFO v Eurasian Natural Resources Corporation Ltd*<sup>3</sup>, which had set out helpful commentaries on the subject. In *WH Holding Limited*, the Court of Appeal had held 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.<sup>4</sup>

### BACKGROUND FACTS:

The claim arose out of 41 Forward Freight Agreements ("**FFAs**") entered into between the Kyla Shipping Co Ltd ("**First Claimant**") and Freight Trading Limited ("**FTL or First Defendant**"), and in one case between the First Claimant and C Transport Panamax Ltd ("**CTP or Second Defendant**") in the year 2007 and 2008. The Claimants asserted that C Transport Maritime S.A.M ("**CTM or Third Defendant**"), through Mr Luigi Cafiero ("**Fourth Defendant**") entered into FFAs at an off-market rate in order to enrich the First Defendant or Second Defendant, who were at that time part of the same corporate group as the Third Defendant, at the expense of the First Claimant. This claim was referred to as "mispricing fraud" or "mispricing claim".

There were also certain disputes between the First Claimant and its shareholders, with respect to the issue of declaration of dividend in relation to insurance monies received by them. This claim was referred to as "YPA Dispute". The Claimant was owned by YPA and Nicolas Livanos ("**NEL**") holding 30% and 70% shares respectively. Further, Peter Livanos ("**PGL**") held interests in YPA.

In the YPA Dispute, certain communications were exchanged between the parties, wherein NEL wrote a letter to PGL, asserting that there has been "a great level of mismanagement" and "abuse of power" by the Third Defendant in respect of the FFAs. Subsequently, in November 2018, the Claimants instructed an expert to audit the FFAs. The Claimants asserted that the instruction of the expert and further consequential enquiries led to the emergence of the "mispricing fraud", which was a subject matter of the underlying litigation.

In the litigation before the High Court, the Claimants claimed litigation privilege in respect of "documents relating to the investigation into the FFAs". Mr. Charles Buss ("**Mr. Buss**") of Watson Farley William (WFW) filed a witness statement in support of Claimant's application for service out of jurisdiction, explaining the purpose of third-party investigation and auditing of FFAs. Mr. Buss explained that the purpose of the third-party investigation was to provide "ballast in the correspondence with YPA/PGL".

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The Defendants objected to the Claimant's claim for litigation privilege for the "ballast exercise"<sup>5</sup> on the ground that it was merely a fishing expedition and no litigation could be reasonably anticipated and that the expert investigation was only to see if there was any genuine grievance in respect of FFAs.

ISSUES FOR CONSIDERATION:

The question before the High Court was whether litigation privilege can be claimed for the "ballast exercise" prior to the crystallization and discovery of the mispricing claim. In particular, the High Court had to delve into two issues: (a) under what circumstances, will a claim for litigation privilege be allowed? (b) whether reference to privileged materials in a document such as a witness statement constitute a waiver of privilege?

DECISION OF THE HIGH COURT:

Litigation Privilege

The High Court held that the party asserting the claim for litigation privilege must show to the court that the document in respect of which the privilege is claimed was created for the dominant purpose of conducting a litigation which was in reasonable prospect.<sup>6</sup> The High Court relied on the House of Lords judgment in *Waugh v. British Railways Board*<sup>7</sup> and observed that where a document was prepared for two equal purposes, and if only one of those was privileged purposes, that would be insufficient for the purpose of the dominant purpose test.

The High Court further observed that the burden is on the party claiming privilege to prove it; an assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement is not determinative. The High Court further laid down the options that are available with the court when it is not satisfied that the claim for litigation privilege is made out, the options are<sup>8</sup>:

- It may order the inspection of the documents;
- It may order a further witness statement on the issues which were not covered earlier witness statement
- It may inspect the documents
- It may order cross-examination on the witness statement.

The High Court opined that "in reasonable prospect" means more than a mere possibility but not necessarily a 50% or greater chance. The High Court referred to the judgment in *United States v. Philip Morris*,<sup>9</sup> to hold that the party asserting privileged must show that it was aware of the circumstances that made litigation a real likelihood.

After briefly summarising the law related to the claim for litigation privilege, the High Court ordered the Claimants to reconsider the claim for litigation privilege on the basis that litigation privilege may not be claimed for the mismanagement dispute (i.e., YPA dispute), but may be claimed when litigation was in reasonable contemplation in respect of the mispricing claim. The High Court's reasoning was primarily premised on the ground that there was no suggestion in the correspondence that proceedings or a counterclaim in proceedings is envisaged in relation to the "mismanagement" claim. The High Court also observed that the references in Mr Buss' witness statement to the purpose of the instruction being for "ballast in the correspondence" would not conform with a case for litigation privilege.

Waiver of Privilege

The High Court noted that the test as to whether a reference to privileged materials in a document such as a witness statement constitutes a waiver of privilege is complicated as there is inconsistency in the judicial precedents. It held that waiver would only be in the situation where the reliance is placed on the contents of the privileged document, and not when placed on the effect of such document.<sup>10</sup>

The High Court relied on the judgment in *Brennan v. Sunderland City Council*,<sup>11</sup> in which it was held that the effect of reference would depend on two related matters - (a) the kind of revelation made, if it is related to the content of the privileged document or its effect; and (b) the circumstances in which the revelation is made.

The High Court observed that there are two connected issues requiring consideration: first, whether there is a waiver in relation to the document in question; and second, whether the waiver in relation to one document gives rise to a collateral waiver of the other documents connected with the same transaction.

The High Court observed that if there is a finding of waiver of the privileged communication, the party is under an obligation to disclose other privileged communications on the same issue; therefore, the courts must be mindful of the consequences that flow from a finding of waiver of a privileged communication. The High Court rejected the argument of the defendants that - the statement of Mr. Buss refers to certain other documents that lead to the discovery of the alleged mispricing fraud, therefore, waiver involves internal communications and communication with the Claimants' legal team. The High Court held that Mr. Buss did not rely on or identify any particular document, he did rely on certain things only to explain the circumstances and steps taken by the Claimants leading to discovery of the mispricing fraud, and the reliance was in general terms.

ANALYSIS

The judgment is praiseworthy primarily for three reasons, first and foremost, it summarizes the law surrounding the issue of litigation privilege and also takes into consideration the recent Court of Appeal ruling in *WH Holding Limited*. Secondly, it sheds some light on the options open to the court when it decides against a claim for litigation privilege. Lastly, it warns against the far-reaching consequences of a waiver of litigation privilege and is surely an authoritative pronouncement succinctly covering the issue of collateral waiver of privilege.

In India, Sections 126 to 129 of the Indian Evidence Act, 1872 deal with confidentiality of data that the client shares with his attorney.<sup>12</sup> Privilege extends only after the creation of attorney-client relationship and not prior to that. As such, Indian law does not create a difference between legal advice privilege and litigation privilege. The Bombay High Court in *Larsen & Toubro Limited v Prime Displays (P) Ltd*<sup>13</sup> held that 'the privilege that attaches to a document

coming into existence in anticipation of litigation is the legal professional privilege'. Therefore, the entire jurisprudence on litigation privilege settled by the English judgments holds great significance in the development of the law in India.

– **Shweta Sahu, Alipak Banerjee & Vyapak Desai**

*(We acknowledge and thank Ausaf Ayyub, student Faculty of Law, Jamia Millia Islamia, for his assistance on this hotline.)*

You can direct your queries or comments to the authors

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<sup>1</sup> [2022] EWHC 376 (Comm).

<sup>2</sup> [2018] EWCA Civ 2652, please [click here](#) for our hotline.

<sup>3</sup> [2018] EWCA Civ 2006, please [click here](#) for our hotline.

<sup>4</sup> *Kyla Shipping Co Ltd & Anr v Freight Trading Ltd and others* [2022] EWHC 376 (Comm) (para 27)

<sup>5</sup> See paragraph 16:

As to the "ballast" wording in his first witness statement Mr Buss says (Buss 10/20):

*"The quoted text is true, if somewhat colloquial, but it must be kept in mind that the relevant correspondence with YPA was correspondence in which YPA was expressly threatening to sue (see above) and the preparation of a counterclaim is an effective way to "provide ballast" when responding to such correspondence."*

<sup>6</sup> See paragraph 18.

<sup>7</sup> [1980] AC 521.

<sup>8</sup> See Paragraph 24.

<sup>9</sup> [2004] EWCA Civ 330.

<sup>10</sup> See paragraph 40.

<sup>11</sup> [2009] I.C.R. 479.

<sup>12</sup> Please [click here](#) for our paper.

<sup>13</sup> (2003) 114 CompCas 141 (Bom), The Bombay High Court held that: *"..Documents [which] have come into existence in anticipation of litigation for the purpose of seeking legal advice and for use in the anticipated litigation for the purpose of defence or for the purpose of prosecuting that litigation" would be protected under the ambit of "privileged communication..."*

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