

English High Court considers whether documents which “infer” legal advice are privileged

Introduction

In a judgment dated 10 November 2017 in *Re Edwardian Group Ltd*¹, the English High Court considered an application for disclosure of documents which had been heavily redacted on the grounds of privilege. The court was required to decide whether privilege attaches to documents from which the substance of the legal advice can be inferred, even though the substance is not expressly revealed.

Background

On 20 November 2015, the Petitioners presented a petition alleging that acts of unfair prejudice had been carried out by the Respondents dating back six years. In his Points of Defence, the First Respondent stated that because of the delay in bringing the petition (from July 2009 to November 2015), the Petitioners should not be granted the relief they had requested. In their Reply, the Petitioners stated that one explanation for the delay was that funding for the litigation had been sought “actively but unsuccessfully”.

On 12 January 2017, the Petitioners gave disclosure of documents in which they disclosed heavily redacted communications with litigation funders (the “**Litigation Funding Documents**”). The reason given for the redactions was that the Litigation Funding Documents “refer to, reproduce, summarise, embody or otherwise reveal directly or indirectly the nature, content [or] effect of privileged communications”. In the instant case, the Respondents had made an application for an order for inspection of the Litigation Funding Documents without the redactions.

The dispute

The Respondents’ application was made on the basis that it was necessary for the Respondents to see the Litigation Funding Documents in order to:

- determine why the Petitioners failed to obtain funding between 2009 and 2014;
- consider what terms were finally agreed, and how the agreed terms differed from terms offered in earlier discussions with funders; and
- test the allegation that the Petitioners had “actively but unsuccessfully” sought funding.

In response to the application made by the Respondents, the solicitor for the Petitioners stated in his witness statement that the Litigation Funding Documents “which have been withheld or redacted are privileged, in that they tend to reveal the advice which the Petitioners have received in relation to the merits of the case, in relation to strategy and tactics, and in relation to the funding itself.”

The solicitor for the Petitioners further argued that if the Respondents saw the Litigation Funding Documents, it would give them an advantage, as it would give them an insight into the Petitioners’ legal advice on the merits of the dispute and an insight into the sensitive terms of the funding and the terms as to settlement.

Applicable tests for privilege

In his judgment, Morgan J acknowledged that it is well established that communications between clients and their lawyers for the purpose of obtaining legal advice are privileged from disclosure on the grounds of public policy. This extends to other material which “evidences” the substance of such communications² and material “reproducing or otherwise revealing” the communications³.

¹ *Re Edwardian Group Ltd, Estera Trust (Jersey) Ltd and another v Jasminder Singh and others* [2017] EWHC 2805 (Ch).

² *Three Rivers DC v Bank of England (No 5)* [2003] QB 1556 at [19] and [21].
³ *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd, “The Good Luck”* [1992] 2 Lloyd’s Rep 540.

The Respondents sought to rely upon *Financial Services Compensation Scheme Ltd v Abbey National Treasury Services plc*⁴ (“*FSCS*”), in which Richards J concluded that documents which allow the advice to be inferred, but do not expressly state the substance of the advice, are not privileged.

The Petitioners, on the other hand, argued that the decision in *FSCS* is not consistent with other binding authorities, in particular:

1. *Lyell v Kennedy (No 3)*⁵ (“*Lyell*”), in which Cotton LJ said that documents which would give the other party “a clue to the advice given by the solicitor” were privileged; and
2. *Ventouris v Mountain*⁶ (“*Ventouris*”), in which Bingham LJ said that where the selection of documents “betrays the trend of the advice”, they would be privileged.

Decision of the High Court

In this case, Morgan J applied the tests set out in *Lyell* and *Ventouris*, and refused to grant an order for the Litigation Funding Documents to be disclosed without redactions. In his reasoning, he noted that in *FSCS*, Richards J had not been referred to *Lyell*, and that the test set out in *Lyell* had been applied in recent cases including the *RBS Rights Issue Litigation*⁷.

Morgan J also stated that he would adopt the distinction “between a case where there is a definite and reasonable foundation in the contents of the document for the suggested inference as to the substance of the legal advice given” (where privilege would apply) and “merely something which would allow one to wonder or speculate whether legal advice had been obtained and as to the substance of that advice” (where privilege would not apply).

Conclusions

4 [2007] EWHC 2868 (Ch).

5 (1884) 27 Ch D 1.

6 [1991] 1 WLR 607.

7 [2017] 1 WLR 1999 at [99] – [128].

Morgan J considered whether the test had been correctly applied by the solicitor for the Petitioners. He concluded that “it is possible that he has not done so”, but could not say that he was “reasonably certain” that the claim to privilege had not been properly made. In any event, he considered that it would be disproportionate to require the redaction exercise to be repeated, given the short time frame before the trial hearing in January 2018.

Despite the conflicting decision in *FSCS* favouring the alternative approach, this case makes it clear that the substance of legal advice does not necessarily need to be expressly stated within a document in order for it to be privileged. Privilege can apply to documents which “provide a clue” (as in *Lyell*) or which “betray the trend of the advice” given by a solicitor (as in *Ventouris*), i.e. where the substance of the advice can be inferred from the contents of the document.

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