

English High Court applies dominant purpose test for litigation privilege to expert reports

Following the recent decision by the English Court of Appeal in *SFO v ENRC* (subject of [this](#) Legal Update) in relation to principles governing litigation privilege, the English High Court last week handed down a decision in *Sotheby's v Weiss and others* [2018] EWHC 3179 in which the “dominant purpose” test was applied to determine whether litigation privilege attached to certain correspondence passing between Sotheby's (the auction house and art dealer) and art experts regarding reports prepared in the context of an art dispute. The Court held that the correspondence was not covered by litigation privilege because it could not be said that the documents were created for the dominant purpose of contemplated litigation, even though it was clear litigation was in contemplation at the time and the experts' reports would be used for that litigation. This Legal Update examines the Court's reasoning behind this finding, which may be viewed as a strict application of the dominant purpose test for litigation privilege.

Background of dispute

The dispute underlying this decision concerns a painting sold through Sotheby's in June 2011. The contract for sale included an offer by Sotheby's to rescind the sale and return the purchase price if the buyer subsequently provided written evidence raising doubts as to the authenticity or attribution of the painting and Sotheby's determined that the painting was counterfeit.

In May 2016, the buyer invoked this provision on the basis of a report from art expert Mr Martin. In July 2016 Sotheby's, on the basis of a report from another art expert, Mr Twilley, determined that the painting was a counterfeit, rescinded the sale and refunded the purchase price to the buyer. In the main proceedings, Sotheby's seeks rescission of its contract with the seller and repayment of the purchase price.

The art expert reports

Mr Martin's investigation of the painting was pursuant to a contract with Sotheby's. His remit was to conduct an independent and objective investigation of the painting and not to provide expert consultation as a consulting expert or testifying expert. Four days in to his investigation, Mr Martin had reached a negative conclusion about the attribution and authenticity of the painting. Sotheby's wrote to Mr Martin indicating that, given his initial view, it was possible that there would be litigation involving the buyer, the seller, and/or Sotheby's. Sotheby's also stated:

“All correspondence between you and Sotheby's relating to this matter is in the context of that anticipated litigation, to enable Sotheby's to understand the strengths and weaknesses of its position and to make the right legal and commercial decisions in anticipation of that potential litigation. Such correspondence is privileged against disclosure in that litigation if it occurs”.

Meanwhile, the seller wrote to Sotheby's asserting that the offer to rescind in the sale contract was “*not engaged*”.

In late May 2016, Mr Martin issued his report and the buyer relied on it to raise doubts as to the authenticity of the painting. The report was exchanged with a report commissioned by the seller. Sotheby's instructed another art expert, Mr Twilley, to conduct a peer review of Mr Martin's report.

In July 2016, a committee was convened at Sotheby's to consider all relevant materials, and concluded that it was overwhelmingly likely that the painting was counterfeit. Accordingly, Sotheby's decided that the sale should be rescinded, and shortly afterwards returned the purchase price to the buyer.

The seller sought disclosure of the correspondence passing between Sotheby's and its experts Mr Martin and Mr Twilley. Sotheby's position was that it is under no duty to disclose those documents because they are subject to litigation privilege, on the basis that they were being prepared at a time when litigation was in prospect and for the dominant purpose of being deployed in that litigation. Sotheby's solicitors were already advising at that time regarding whether Sotheby's should rescind (which would almost inevitably result in proceedings being issued), and how the reports would be used as evidence in the litigation.

Findings

In order for documents to be subject to litigation privilege, litigation must have been in reasonable contemplation at the time the documents were created, and the documents must have been prepared for the dominant purpose of conducting (including avoiding or settling) that litigation. In this regard, the Judge emphasised that SFO v ENRC did not represent any change in the law, and that the "dominant purpose" test is a fact-sensitive exercise.

The Judge, taking a "*realistic, indeed commercial, view of the facts*" (cited from *SFO v ENRC*), held that there were in fact two purposes, not one, for the correspondence with Mr Martin:

- (i) to enable Sotheby's to decide whether to rescind the sale contract. This was to be a contractual, commercial decision; and
- (ii) litigation contemplated between Sotheby's, the buyer, and/or the seller.

Further, the Judge concluded that both purposes were of equal importance and relevance to the purpose of the correspondence and that, at any rate, Sotheby's did not establish that the second purpose (contemplated litigation) was the dominant of the two purposes.

Similarly, in relation to correspondence with Mr Twilley, the purpose of Mr Twilley's work had been two-fold:

- (i) to ensure that Sotheby's had a proper basis for rescinding the sale; and
- (ii) to ensure that Sotheby's position in the litigation was robust.

Again, the Judge found that neither of these purposes was dominant, and so the correspondence with Mr Twilley was not subject to litigation privilege.

Highgrade case distinguished

The Judge considered various authorities in reaching his decision, but perhaps the most noteworthy was Re Highgrade Traders [1984] BCLC 151, which concerned whether litigation privilege attached to a report commissioned by insurers into the cause of a fire where arson was suspected. The Court of Appeal concluded that report had been created for two purposes:

- (i) to inform the insurers' solicitors as to whether the claim should be resisted; and
- (ii) to ascertain the cause of the fire.

Here, the Judge distinguished the present case from Highgrade on the basis that in Highgrade, both purposes for the report were inextricably linked in that the insurers would not have decided whether or not to resist the claim independently of the advice as to the cause of the fire. Here, however, the purposes of Mr Martin's and Mr Twilley's reports "*cannot in a realistic and commercial sense be regarded as one and the same. They are connected in the sense that if Sotheby's determined that the painting was a fake and rescinded the contract of sale, it was likely, perhaps inevitable, that litigation would ensue with [the seller]. But I am unable to regard them as being one and the same as was the case in Highgrade*".

Accordingly, the Judge maintained that the two separate, although related, purposes for which Sotheby's had commissioned the expert reports were, at best, of equal importance, and litigation was not dominant, because the other purpose – to decide whether the sale should be rescinded – was a commercial one rather than litigation-related. That is to say, the purpose of the reports was not in the first instance so that Sotheby's could decide whether or not to bring or defend any proceedings, although Sotheby's was aware at the time that litigation would be the almost inevitable consequence if the reports concluded (as they did) that the painting had been misattributed. Some commentators may find this an artificial distinction given that commercial and litigation considerations often overlap, as they did here.

Conclusion

As the Judge emphasised, the dominant purpose of documents depends on the circumstances of each case and is a fact-sensitive issue. What this decision may reveal generally, however, is that the English courts will apply the “dominant purpose” test very closely, undertaking the exercise with precision and rigour rather than adopting a broader approach. Accordingly, parties corresponding with experts at the outset of a dispute should, before creating documents, think carefully about whether the dominant purpose test would be satisfied in order to understand whether such documents will be protected from disclosure by privilege. If litigation is the dominant purpose, consideration should be given to how this would be best expressed and documented so that the position is not later characterised in a different, unanticipated way. This decision shows that, if only for the sake of prudence, parties should prepare on the basis of a strict dominant purpose test for which the threshold is high.

If you have any questions about the issues raised in this legal update, please contact your usual Mayer Brown contact or:

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