

England & Wales Court of Appeal clarifies boundaries of litigation privilege

Introduction

The Court of Appeal has clarified the ambit of litigation privilege in a judgment (*WH Holding and anr v E20 Stadium LLP* [2018] EWCA Civ 2652) concerning the treatment of internal communications regarding a commercial settlement of the dispute.

Significantly, the Court of Appeal held that litigation privilege only applies to communications for the dominant purpose of obtaining information or advice in connection with the conduct of litigation.

The Court of Appeal also clarified that the recent decision in *SFO v Eurasian Natural Resources Corporation Ltd* [2017] EWCA Civ 2006 (“**the ENRC case**”, on which we reported [here](#)) had not extended the scope of litigation privilege.

Litigation Privilege

Litigation privilege protects the confidentiality of communications in a broad range of contexts, including litigation and regulatory investigations. In order to attract this valuable protection, communications must satisfy a number of tests, set out authoritatively by Lord Carswell in *Three Rivers District Council v Bank of England (No. 6)* [2004] UKHL 48:

“Communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation are privileged, but only when the following conditions are satisfied:

- (a) *litigation must be in progress or in contemplation;*
- (b) *the communications must have been made for the sole or dominant purpose of conducting that litigation;*
- (c) *the litigation must be adversarial, not investigative or inquisitorial”.*

Background

In 2016 West Ham United FC ended a 112-year stay at the Boleyn Ground, moving to the stadium constructed for the 2012 London Olympics. The new arrangements were embodied in a concession agreement between West Ham United Football Club Ltd and its holding company (together, “**West Ham**”) and the owner of the stadium, E20 Stadium LLP (“**E20**”).

West Ham and E20 fell into a number of disputes culminating in legal proceedings, during which E20 withheld from disclosure a number of documents on the basis that they were subject to litigation privilege.

The documents in question consisted of emails between E20 board members discussing a commercial proposal for the settlement of the dispute. West Ham challenged E20’s claim to privilege in these documents, on the grounds that they were not communications “*for the purpose of obtaining information or advice*” and therefore fell outside the scope of litigation privilege.

Judgment at first instance

At first instance, Norris J found in favour of E20, holding that the documents in question were privileged.

West Ham argued that litigation privilege only attached to documents concerned with obtaining advice or evidence for use in litigation, because only such communications related to ‘conducting’ the litigation. Norris J rejected this “*narrow formulation*” of the test in *Three Rivers (No. 6)*, holding that:

“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”.

This conclusion was principally based upon the decision in the ENRC case that documents prepared for the purpose of settling or avoiding a claim are created for the purpose of conducting litigation and therefore subject to litigation privilege.

Court of Appeal

Norris J's judgment was overturned by a unanimous Court of Appeal. The problem with E20's position, in the Court of Appeal's view, was that it applied the tests in *Three Rivers (No. 6)* in the wrong order.

The correct position was that the requirement for documents to have been created "for the purpose of obtaining information or advice" is a threshold test which must be satisfied in all cases.

Applying the relevant passage from Lord Carswell's speech in *Three Rivers (No. 6)*, documents which meet the 'information or advice' test are privileged, provided that they also satisfy the conditions at sub-paragraphs (a) – (c), including the 'dominant purpose' test at sub-paragraph (b).

It follows that documents which were not created for the purpose of seeking information or advice are not subject to litigation privilege, whether or not they were created for the dominant purpose of conducting litigation.

The ENRC case did not change this position: all of the documents in issue in that case related to the seeking of information or advice.

Separately, the Court of Appeal rejected an argument by E20 for the existence of a separate head of privilege which covers internal corporate communications falling outside the ambit of litigation privilege.

The test clarified

The Court of Appeal formulated the test in the following terms:

"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."*

An odd result?

The Court of Appeal interpreted the relevant passage of *Three Rivers (No. 6)* strictly and literally. First, the Court will consider whether the communication concerns the seeking of information or advice, and only then will it consider whether the requirements in sub-paragraphs (a) to (c) are satisfied.

Will this literal reading create difficulties in practice? One potential issue was identified at first instance.

Norris J considered the situation where E20 made a without prejudice offer to settle the proceedings. That document could not be placed before the Court, as it would be protected by without prejudice privilege.

However, Norris J's view was that on West Ham's case, any document (not passing between solicitor and client, and therefore attracting legal advice privilege) recording discussion of that offer would be disclosable. Norris J thought that such a result would be "odd".

We see some force in Norris J's concerns. Commercial parties may be surprised and concerned to learn that internal discussions regarding commercial settlement terms might not attract privilege.

However, the results of *WH Holdings* are unlikely to be this stark in practice. The concern should be softened by the Court of Appeal's confirmation that documents which would reveal information or advice are covered by the privilege.

Nevertheless, the separation of the 'information or advice' test and the 'dominant purpose' test may make it more difficult to rely upon litigation privilege in some cases, and may require fine distinctions to be drawn between communications in a manner which appears artificial.

Practical steps

Above all the judgment stands as a reminder of the risks associated with generating documents during a dispute. Commercial parties should be aware that their communications may come before the Court, and exercise caution accordingly. Although *WH Holding* related to emails, the same risks apply to other documents, including board minutes.

Where possible, parties should take steps to bring discussions regarding litigation and settlement within scope of the privilege (and/or legal advice privilege, where possible). Where internal correspondence is based upon information and advice which is itself privileged this should be made clear, particularly if another party challenges a claim to litigation privilege.

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

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