



Legal update — April 2019

Commercial Litigation Legal Professional Privilege

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Privilege remains an important issue and cornerstone of the English legal system. As we previously reported, the Court of Appeal in *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA (Civ) 2006 (ENRC) had reversed its previous decision and upheld that certain documents (including notes of evidence, summaries of reviews of documents and information about work being undertaken, presentations made to the Board or internal committees, and reports prepared by forensic accountants), were covered by litigation privilege and legal advice privilege. Our previous article can be accessed [here](#).

The scope of litigation privilege was revisited by the High Court and subsequently the Court of Appeal in *WH Holding Limited (1) West Ham United Football Club Limited (2) v E20 Stadium LLP*.

WH Holding Limited (1) West Ham United Football Club Limited (2) v E20 Stadium LLP [2018] EWHC 2784 (Ch)

The dispute between the parties concerned the number of seats WH Holding Limited and West Ham United Football Club Limited (**West Ham**) were entitled to use in the London Olympic Stadium under an agreement with E20 Stadium LLP (**E20**). West Ham had applied to inspect a number of documents (over which privilege had been asserted) by way of a sample of redacted disclosure. The sample of documents included six emails, all dated 30 January 2017, between E20 Board members and stakeholders (the **Disputed Documents**).

E20 asserted privilege over the Disputed Documents and argued that they had been created with the dominant purpose of discussing a commercial settlement of the dispute between the parties at a time when litigation was in reasonable contemplation. West Ham argued that the Disputed Documents did not attract privilege because they were not concerned with obtaining advice or evidence for use in litigation (and

that that is the meaning of "conducting" litigation), but rather the Disputed Documents were concerned with strategy or settlement offers and therefore fell outside the ambit of litigation privilege.

The High Court rejected West Ham's application and held that the Disputed Documents did attract litigation privilege. The court held that litigation was in reasonable contemplation from 31 August 2016 and that it was accepted that "*litigation privilege relates to documents brought into existence for the purpose of the conduct of litigation, and passing between client, lawyer, agent or third party*".

In considering the scope of litigation privilege the High Court relied on the Court of Appeal's decision in ENRC: "*legal advice given to head off, avoid or settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of defending those proceedings*" and that "*documents prepared for the purpose of settling or avoiding a claim are created for the purpose of defending litigation*".

WH Holding Limited (1) West Ham United Football Club Limited (2) v E20 Stadium LLP [2018] EWCA Civ 2652

On appeal West Ham maintained its stance that litigation privilege covers "*communications which are directed at obtaining advice or evidence, including information or documents which might lead to evidence and that that is the meaning of the phrase "conducting" litigation*".

The Court of Appeal held that the Disputed Documents did not attract litigation privilege. The correct formulation of litigation privilege is as set out in the House of Lords decision of *Three Rivers DC v Governor and Company of the Bank of England* (No.6) [2]04] 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

Published by
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must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial".

Conditions (a) to (c) are not sufficient in themselves to attract litigation privilege. They are qualifications to the principle that the communications must seek advice or information in connection with actual or contemplated litigation. The Court of Appeal agreed that ENRC had confirmed that "conducting" litigation included avoiding or settling litigation, but it did not extend the scope of litigation privilege to include purely commercial discussions.

The difference between the Disputed Documents and the documents in ENRC was that the Disputed Documents were purely commercial discussions (despite satisfying the qualifications set out above, the Dispute Documents did not seek advice or information for the purpose of conducting litigation nor did they reveal the nature of such advice or information).

The Court of Appeal further held that the scope of litigation privilege did not cover internal corporate communications:

"We cannot see any justification for covering all internal corporate communications with a blanket of litigation privilege...we do not see why corporations should have greater protection than, say, partners or bodies of trustees who in practice are equally likely to discuss matters among themselves. Nor is the fact of agency sufficient of itself to attract litigation privilege".

In summary, not all internal communications will attract litigation privilege.

Litigation privilege is engaged where there are confidential communications between a solicitor and a client, or a client and a third party, or a solicitor and a third party for the purpose of obtaining information or advice in connection with the conduct of actual or contemplated litigation, and where:

- There is actual or contemplated litigation;
- The communications have been made for the sole or dominant purpose of conducting that litigation (conducting litigation includes deciding whether to litigate and/or whether to settle the dispute giving rise to the litigation); and
- The litigation is adversarial.

Documents in which the advice or information obtained in communications cannot be separated or disclosure would otherwise reveal that advice or information will be covered by privilege.

What now?

It is important that organisations are mindful of the documents created during the course of litigation or contemplated litigation. In particular, we recommend:

- Updating internal risk management and document retention policies (relating to crisis response and the conduct of investigations);
- Ensure that communications protocols are used when a legal team is instructed;
- Ensure that, where possible, only those authorised to give or receive instructions from the legal team are the ones communicating about a matter (so as to ensure that confidentiality is retained in those communications); and
- Training staff on the scope of litigation privilege and the communications protocol.

To discuss any element of the judgment, or should you require assistance in amending or implementing risk management policies, please get in touch with us.

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