

The scope of litigation privilege and ‘purely commercial discussions’

‘Purely commercial discussions’ within an organisation regarding settlement of a dispute prior to litigation are not protected by litigation privilege.

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‘Purely commercial discussions’ within an organisation regarding settlement of a dispute prior to litigation are not protected by litigation privilege. This clarification was made in the recent Court of Appeal decision of [West Ham United v E20 Stadium LLP \[2018\] EWCA Civ 2652](#).

History

The main proceedings related to a dispute between West Ham United (‘West Ham’) and E20 over the number of seats that West Ham were entitled to use at the London Olympic Stadium. E20 contended that West Ham were only allowed to use 53,500 seats, whereas West Ham asserted that they were entitled to use all of the seats.

West Ham applied to inspect a number of documents evidencing E20’s decision-making process, comprising six emails between E20 board members and between E20 board members and stakeholders. E20 asserted that the dominant purpose of those documents was to discuss a commercial settlement of the dispute at a time when litigation was in reasonable contemplation and that, on that basis, they benefitted from litigation privilege. West Ham however requested that the judge inspect the documents, asserting that the documents could not have been concerned with obtaining information or advice for the purposes of litigation and therefore did not fall within the scope of litigation privilege.

First instance decision

The court refused West Ham’s application. With reference to the Court of Appeal’s decision in [SFO v ENRC \[2018\] EWCA CIV 2006](#), the judge ruled that 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 settling or avoiding a claim are created for the purpose of defending litigation.

Permission to appeal was granted.

Court of Appeal decision

Appeal ground 1 – scope of litigation privilege

Allowing the appeal, the court said the case raised the issue of whether litigation privilege extends to those documents whose purpose was not to seek advice or information for the purpose of litigation, nor reveal the nature of such advice or information. Evidence gathered pre-action for use in reasonably contemplated legal proceedings would fall within the scope of litigation privilege. Furthermore, 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. However, if such documents were prepared for the purpose of generally managing a business, even if they were collated with a view to the settlement of a claim, litigation privilege would not apply. The court held:

“We were not shown any authority which would extend the scope of litigation privilege to purely commercial decisions. In particular we do not consider that ENRC extended the scope of the documents covered by litigation privilege.”

The court then provided a helpful summary of its conclusions as follows:

- Litigation privilege is engaged when litigation is in reasonable contemplation.
- 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.
- Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.
- Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.
- There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

Appeal ground 2 – inspection

Given their decision with regards to appeal ground 1, the court acknowledged that it was not strictly necessary to consider the remaining grounds, however decided to address them both.

The court said that the power to inspect a document is a matter of general discretion. Disagreeing with the narrow formulation of the test as determined in *West London Pipeline*, the court said it is not limited to cases in which the court is ‘reasonably certain’ that the test has been misapplied.

It was held that they have a wide discretion to inspect documents over which litigation privilege is claimed. The court may inspect such but must be ‘alive to the dangers of looking at documents out of context’ and their discretion must be exercised in accordance with the overriding objective. It was decided that some of those factors relevant to the exercise of discretion include: the nature of the privilege claimed, the number of documents involved and their potential relevance to the issues.

Appeal ground 3 – purpose test

West Ham appealed on the basis that the judge had failed to assess whether the disputed documents were actually created with the dominant purpose of adversarial litigation, as opposed to non-adversarial expert determination. It was stated that there was no doubt E20’s document headed ‘WH capacity commercial proposal’ related to the development of a potential settlement offer. However, it remained to be determined whether it was sent with the dominant purpose of discussing with the recipients a commercial settlement of the dispute to be put to West Ham. It was found that litigation had been in reasonable contemplation some five months before the disputed documents were produced (and, in any event, the dominant purpose requirement of litigation privilege had been met as the information had been obtained for the purposes of settling the dispute).

Comment

Clients must be aware that in the context of litigation (or potential litigation), internal communications containing commercial discussions are not necessarily subject to litigation privilege and may therefore have to be disclosed. It is advisable to ensure that any written record of internal discussions relating to a settlement are clear in that they include information or advice which has been obtained for the purpose of conducting litigation.

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