HAMMERING LITIGATION PRIVILEGE

The Court of Appeal has decided that litigation privilege only applies to communications made for the purpose of obtaining information or advice in connection with litigation. In particular, it does not apply to "purely commercial" communications discussing a possible settlement of a dispute. This creates unwelcome confusion, especially so soon after the Court in *ENRC* had tried to make privilege more workable. But "entangling" commercial discussions with legal advice or with information obtained for the litigation may save the day.

Legal professional privilege is a fundamental right that entitles parties to refuse to disclose certain communications to anyone else, whether a regulator, the police or an opponent in litigation. Legal professional privilege comes in two forms: legal advice privilege; and litigation privilege. A commonly quoted description of litigation privilege is that it applies to

> "communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation… but only if the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the dominant purpose of conducting that litigation; and (c) the litigation must be adversarial, not investigative or inquisitorial" (*Three Rivers DC v Bank of England (No 6)* [2005] 1 AC 610, [102], Lord Carswell).

In *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652, the question was whether litigation privilege applies to any communication made for the dominant purpose of the conduct of litigation or whether, in addition, the communication must be for the purpose of obtaining information or advice for the litigation. Treating Lord Carswell's description as if it were a statute limiting the scope of privilege, the Court of Appeal concluded that both these conditions must be met.

Key issues

- Litigation privilege only attaches to communications for the sole or dominant purpose of obtaining information or advice about litigation
- It does not apply to internal commercial communications about settling litigation
- But if the privileged cannot be disentangled from the non-privileged, the whole will be privileged

Hammer and tongs

The underlying dispute in *WH Holdings* concerned seating at the London Stadium (formerly the Olympic Stadium), where West Ham United now play. West Ham sought disclosure of six emails passing between board members of the stadium owners and between board members and stakeholders. Disclosure was resisted on the basis that the communications attracted litigation privilege because they were created "with the dominant purpose of discussing a commercial settlement of the dispute".

Litigation was in contemplation at the time of the emails; the stadium owners accepted that the emails were relevant to the dispute; and the Court of Appeal decided that the conduct of litigation included avoiding or settling it, following the recent Court of Appeal decision in *SFO v Eurasian Natural Resources Corporation Ltd* [2018] EWCA CIV 2006. The key issue, therefore, was whether the claim to litigation privilege failed because the communications were not for the purpose of obtaining information or advice in connection with the litigation.

The Court of Appeal considered that privilege involves an inroad into the principle that disputes should be decided with the aid of all relevant material. Despite privilege being a fundamental right, the Court concluded that litigation privilege should be strictly confined. Litigation privilege does not, according to the Court, apply to all communications created for the dominant purpose of the conduct of the litigation (including its settlement) but only to those aimed at obtaining information or advice for the litigation.

There was no suggestion that the six emails had that purpose. The content of the emails was not revealed - they may have related to the formulation, finalisation or examination of a commercial settlement proposal. As a result, the emails were not privileged.

Implications

The decision in *WH Holdings* comes as an unwelcome surprise. The general view had been that any communications for the dominant purpose of the conduct of litigation were privileged. An adversarial system might require the parties to reveal contemporaneous documents dealing with the underlying facts, but not communications about how and why the dispute should be run, or tactical considerations, still less possible terms of settlement.

The particular decision in *WH Holdings* introduces additional oddities, as the first instance judge pointed out in reaching the decision overturned by the Court of Appeal. If the internal commercial discussions led to a settlement offer being made, that offer would invariably be made on a without prejudice basis, which would prevent its being adduced in evidence to the Court. However, the Court of Appeal's decision suggests that any prior commercial discussions can be put before the Court (assuming the failure of any objection on grounds of their irrelevance to the underlying issues). The Court's decision is also hard to reconcile with the judiciary's policy of encouraging settlement.

The saving grace may be that the Court of Appeal accepted that if privileged material cannot be "disentangled" from non-privileged material, the whole will be privileged (see the box on the right). The message from *WH Holdings* is, therefore, that care is required about any internal deliberations about litigation, whether regarding settlement or other aspects. If the communications are to be privileged, they must either concern the obtaining of information or advice for the litigation or information or advice already obtained, they must seek or set out legal advice, or the commercial content must be incapable of being disentangled from the privileged material. In practice, this may require lawyers to be involved in sensitive internal communications. More work for lawyers, and more headaches for their clients.

Entanglement

"We would accept that a document in which advice or information obtained for the sole or dominant purpose of conducting litigation cannot be disentangled, or a document which would otherwise reveal the nature of such advice or litigation [sc information], would itself be covered by litigation privilege. It must also not be forgotten… that even if a document is not covered by litigation privilege it may yet be covered by legal advice privilege" (*WH Holdings*, [20])

CLIFFORD
CHANCE

CONTACTS

Simon James
Partner

T +44 20 7006 8405
E simon.james
@cliffordchance.com

Simon Davis
Partner

T +44 20 7006 8700
E simon.davis
@cliffordchance.com

Kate Scott
Senior Associate

T +44 20 7006 4442
E kate.scott
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 10 Upper Bank Street, London, E14 5JJ