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INSIGHT

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A year of privilege

Much has been written over the past year on developments or otherwise in the realm of legal professional privilege. As the summer vacation period is upon us, we thought it might be helpful to provide, by way of a round-up, a brief overview of some of the recent case law, flagging a number of themes to watch in the coming months.

Legal Professional Privilege - by way of a reminder:

> ***Litigation privilege*** *applies to: confidential communications between a client and their lawyer, or either of them and a third party, when litigation is in reasonable contemplation or has been commenced; and the communication is made for the dominant (although not necessarily sole) purpose of obtaining information or advice in connection with, or of conducting or aiding the conduct of, such litigation.*

> ***Legal advice privilege*** *applies to: confidential communications between a client and their lawyer; which came into existence for the purpose of giving or seeking advice in a relevant legal context.*

When is litigation in contemplation?

The decision of the Court of Appeal in ***SFO v ENRC*** [2018] EWCA Civ 2006 in September 2018 provided welcome mitigation of the high bar for claiming litigation privilege that had been set in the much discussed first instance decision of Andrews J in that case. The Court of Appeal held that, on the facts in that case, litigation had been in reasonable contemplation even before internal investigations could reveal with certainty that such proceedings were likely, such that the disputed documents were covered by litigation privilege.

The Court of Appeal also held (contrary to the disquieting musings of Andrews J), in relation to dominant purpose, that: "*legal advice given so as to head off, avoid or even settle reasonably contemplated proceedings is as much protected by litigation privilege as advice given for the purpose of resisting or defending such contemplated proceedings*".

Of most interest though, perhaps, were the observations which the Court of Appeal made, in the context of considering both litigation privilege and legal advice privilege, about the difficulty of applying *Three Rivers* principles to large corporate or quasi corporate entities facing disclosure requests. In particular, the Court of Appeal appeared to acknowledge, obiter, the difficulties flowing from the fact that (unlike with an individual or small corporation) extensive internal investigations are often required before those currently understood to be able to cloak their communications in legal advice privilege (i.e. typically board members) can make themselves aware of, and take advice on the kind of relevant underlying facts which an individual facing any subsequent request for disclosure would obviously have had knowledge of without the need for any investigation. The Court of Appeal stated, however, that it was not open to it to depart from the decision in *Three Rivers* (No. 5) and that such questions could therefore only be resolved by the Supreme Court.

Will all communications concerning the settlement or avoidance of litigation be privileged?

Another relevant Court of Appeal decision in ***WH Holding v E20 Stadium LLP*** [2018] EWCA Civ 2652, concerned a commercial dispute regarding rights to use the London Olympic Stadium. The issue identified by the Court of Appeal as being the subject of the application was whether communications concerning the settlement or avoidance of litigation attracted litigation privilege, where those communications neither sought nor revealed the nature of legal advice or information obtained for the purposes of conducting litigation. It held that they did not. As with many cases on privilege, this one seems to turn very much on its facts, which appear to have involved (although it is difficult to know, without sight of the relevant underlying documents) a perhaps unusual set of settlement related emails, circulated between board members and stakeholders, in which no mention of legal advice or litigation tactics was made.

More generally, the Court of Appeal reasoned that neither *ENRC* nor any other authority extended the scope of privilege to purely commercial discussions, and that the only possible 'change' attributable to the decision in *ENRC* was the confirmation that the conduct of litigation includes its compromise (although the Court of Appeal indicated that it did not regard this as a new proposition). The Court of Appeal did accept, obiter, that a document where privileged and non-privileged information could not be disentangled might itself be subject to privilege, although this was not being advanced by the parties as a basis for privilege.

The Court of Appeal also rejected submissions that there was privilege for internal communications within a corporate body finding that *"we cannot see any justification for covering all internal corporate communications with a blanket of litigation privilege*" as "*quite apart from anything else we do not see why corporations should have greater protection than, say, partners or bodies of trustees who in principle are equally likely to discuss matters among themselves*". It appears that, on the facts of this case, the Court of Appeal avoided the more interesting question of the extent to which privilege should attach to internal communications where a

large corporation, partnership or trust entity is later faced with disclosure obligations in civil litigation or some other context.

- **Beware dual purposes: when are documents created for the dominant purpose of conducting litigation?**

There have also been a series of High Court decisions, which to varying degrees raise points of general application, including ***Sotheby's v Mark Weiss Ltd*** [2018] EWHC 3179, where Sotheby's sought to resist, on the basis of litigation privilege, disclosure of communications with two experts commissioned following a buyer questioning the authenticity of a painting.

Sotheby's sale to the buyer had been subject to rescission and return of the purchase price if the buyer questioned the authenticity of the painting and Sotheby's determined that it was indeed a counterfeit. Having obtained two expert reports, Sotheby's concluded that the painting was a fake and the sale to the buyer was rescinded. The subsequent action brought by Sotheby's against the defendant sought rescission of the agency contract and repayment of the purchase price.

Teare J held that litigation privilege did not apply because Sotheby's failed to establish that the dominant purpose of the communications was for the conducting of or obtaining information in connection with litigation. Rather, he held that they had been created for the dual and equally important purpose of Sotheby's having to establish, in the context of its contractual agreement with the buyer, whether the painting was counterfeit. In particular, he rejected evidence from Sotheby's external lawyers that the fact that the matter could end up in court was the perspective from which the expert report was being prepared and was the very reason why lawyers were involved.

The judge also rejected arguments that *ENRC* must be read as deciding that whenever litigation is the inevitable consequence of taking a particular commercial decision, the dominant purpose of documents produced for the making of that decision is necessarily their use in the contemplated litigation.

- **Does the 'dominant purpose test' also apply in the context of legal advice privilege?**

An interesting aspect of the High Court's decision in ***R (on the application of Jet2.com) v Civil Aviation Authority*** [2018] EWHC 3364 (Admin) was that Morris J rejected the idea that the dominant purpose test did not apply to legal advice privilege, holding instead that "*claims for legal advice privilege are, in principle, subject to a dominant purpose test, namely whether the communication or document was brought into existence with the dominant purpose of it or its contents being used to obtain legal advice*". Morris J expressly stated that this finding was in line with the current legal authorities including obiter observations in the Court of Appeal, although he had evidently been referred to the decision in *ENRC*, where, in obiter remarks, the Court of Appeal had said that it was "*tautologous*" to say that "*legal advice privilege can only be claimed where the communication is created for the dominant purpose of seeking legal advice*".

The issue arose in a disclosure application made in the context of judicial review proceedings, which concerned (amongst other things) whether drafts of a letter, created by executive officers of the Civil Aviation Authority ('CAA') and subsequently circulated to the CAA's in-house lawyers, attracted legal advice privilege. Morris J held that they did not, because the drafts were to be regarded as 'raw materials' which had not been created for the purpose of obtaining legal advice.

Permission to appeal has been granted on the issue of whether the dominant purpose test applies to legal advice privilege, and the Court of Appeal is due to hear the appeal on this and other grounds on 4/5 December 2019. It will be interesting to see the judgment that emerges. However, Morris J's reasoning on dominant purpose in the context of legal advice privilege sought to reflect two aspects of modern day

practice, namely: i) the fact that in-house lawyers are often consulted for commercial as well as legal advice; and ii) the frequency with which communications (typically emails) are nowadays sent to multiple recipients. Morris J was evidently concerned that, in light of both of these aspects, communications might have dual purposes, and therefore regarded the dominant purpose test as a necessary hurdle which parties must clear to avoid legal advice privilege being unfairly relied upon in order to restrict access to relevant documents.

- **Can a pleaded claim be based on privileged material?**

In ***Winstone v MGN Limited*** [2019] EWHC 265 (Ch), which concerned an application to strike out part of a claim and for an injunction restraining the claimants (in the second wave of hacking litigation against the Mirror Group) from referring explicitly or implicitly to privileged documents in pleaded claims for aggravated damages, Norris J considered the issue of whether confidentiality had been lost in material which would otherwise be subject to legal professional privilege.

Norris J held, on the facts, that confidentiality had been lost in relation to some, but not all of the material. To the extent that the material relied upon therefore remained privileged, the defendants were entitled to injunctive relief preventing the claimants from relying upon it. However Norris J declined to strike out any part of the claimants' pleading on the basis that it made no specific reference to the privileged material and it was open to the claimants to prove their allegations using other evidence.

- **Court inspection of documents and the impact of CPR PD 51U**

The question of privilege arose in ***Sheffield United Limited v UTB LLC*** [2019] EWHC 914 (Chd), a case in which the disclosure pilot set out in Practice Direction 51U of the Civil Procedure Rules ('PD51U') was considered.

The decision of Sir Geoffrey Vos CHC to uphold a claim to privilege turns on its facts, but two aspects were of interest: firstly the fact that he reluctantly agreed to inspect un-redacted versions of the disputed documents; and secondly his indication that it is not required under PD51U for a party claiming privilege to make that claim with particularity in relation to each document for which privilege is claimed (but that it may be in some circumstances) and the exercise of giving disclosure should be a collaborative exercise.

- **Privilege in the context of a Subject Access Request**

In **Robin Rudd v John Bridle** [2019] EWHC 893 (QB) Warby J held, on the facts, that the privilege exemption had not been made out by the defendant in the context of a Subject Access Request ('SAR') made under the Data Protection Act 1998, as the evidence did not explain how the solicitor concerned in responding to the SAR reached the conclusion that the relevant tests were satisfied.

Where does all this leave us?

Whilst the Court of Appeal in ENRC was seen as taking a more pragmatic approach to litigation, subsequent High Court judgments make clear that it is not being interpreted as having materially extended the scope of what is subject to either litigation or legal advice privilege. This also remains an area where many cases turn very much on their own particular facts. However, given the obiter comments of the Court of Appeal in *ENRC* and the upcoming appeal in *Jet2.com*, it seems likely that there will continue to be developments in this area, as the Courts grapple with the appropriate scope and limitations of privilege in the context of both the trend towards ever larger corporate and quasi corporate structures, and the proliferation of email traffic generated within those structures.

In the meantime, from a practical perspective, it is worth bearing in mind the following:

- Where an internal investigation is to be undertaken, identify at the outset how far this needs to go to achieve its aim. Interviews with witnesses and detailed consideration of all the underlying documents may not be required, if a high-level review of the most relevant files by an appropriate individual within the legal team would be sufficient.
- Where litigation is in contemplation, prepare a contemporaneous written record of the reasons why this is understood to be the case (in addition to putting any document destruction policy on hold in accordance with the new PD51U).
- The appointment of external lawyers to assist in the investigation may subsequently be regarded as a factor weighing in evidence that litigation was contemplated, but care should be taken in agreeing the terms of their retainer to ensure that their work product is not ultimately held to have been created for a dual or other dominant purpose.
- It is obviously important to take steps to manage the creation and circulation of new documents in the context of an investigation, ensuring that key staff involved are aware from the outset of the limits of privilege, particularly where litigation is not in contemplation. As a rule of thumb, documents should only be created if they are essential, their circulation should be restricted and legal advice (whether internal or external) should not be circulated outside the group comprising the 'client' in the Three Rivers sense.
- Where investigations cross boarders the impact of local law on privilege should be considered, as documents which would be privileged in one jurisdiction may not be in another. This may have a bearing on decisions taken in relation to the creation and storage of documents.
- If a privileged or potentially privileged document is shared with a regulator or prosecutor, consideration should be given to doing so only on the basis of a limited waiver of privilege.

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