MACFARLANES

PRIVILEGE DENIED: DEFENDANTS' ATTEMPTS TO WITHHOLD DISCLOSURE OF DOCUMENTS ON THE GROUNDS OF LITIGATION PRIVILEGE REJECTED

BANKING AND FINANCE LITIGATION

INTRODUCTION

In two recent cases, *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm) ("*Starbev*") and *Rawlinson and Hunter Trustees SA v Akers* [2014] EWCA Civ 136 (*"R&H"*), it has been held that professionally prepared correspondence and reports were not protected by litigation privilege.

In this note we briefly consider these cases, in the context of the requirements to be met for a successful claim to litigation privilege.

OVERVIEW

In *Starbev*, it was held that the defendant had failed to demonstrate that certain correspondence, created during investigations carried out by a bank (B) and a firm of accountants (A), on behalf of the defendant, Interbrew, were protected by litigation privilege. The Court found that litigation had not been reasonably anticipated at the time of the correspondence and, therefore, had not been the dominant purpose behind its creation.

In R&H it was held that a third party firm of accountants (F), could not withhold disclosure of five reports which it had prepared for a financial institution (K) which had provided funding to a group of BVI companies. Partners in F had subsequently been appointed as joint receivers and thereafter joint liquidators of the companies and their appointment had been recognised in England and Wales by order of the English Court pursuant to the Cross Border Insolvency Regulations 2006.

The Court found that the reports either did not satisfy the dominant purpose test because they were prepared as much for summarising and assessing the financial condition of the companies as for litigation, or because they were prepared so long before litigation (as long as two and half years) that litigation could not be said to have been reasonably in prospect.

BACKGROUND - *STARBEV*

The claimant investment vehicle had acquired a brewery business from the defendant for investment purposes. However, when the claimant entered into an agreement to re-sell the business, a dispute arose as to whether and to what extent the defendant was entitled to a share of the proceeds of the re-sale.

The dispute turned on the proper construction and application of an agreement known as a Contingent Value Right Agreement (CVR) pursuant to which the defendant was entitled to a deferred consideration (an excess return payment) following the original sale of the business to the claimant. During the course of the litigation, the defendant sought to withhold two categories of documents on the grounds of litigation privilege.

These were:

- documents relating to advice received by the defendant from B concerning the structure of the consideration for the re-sale by the claimant of the business it had previously acquired from the defendant; and
- documents relating to the defendant's dealings with A regarding a report prepared by A in relation to the CVR.

BACKGROUND – R&H

Prior to the appointment of partners in the accountancy firm, F, as receivers and liquidators, F, through its insolvency and forensic departments had conducted an investigation on behalf of the Financial Institution, K. Facts and matters identified during this investigation formed the basis for the five reports about the BVI companies, which were prepared by F/the Joint Liquidators between August and December 2010. In resisting a third party disclosure order in respect of these reports, the Joint Liquidators' evidence described them as follows:

- Report 1 (23 August 2010) – prepared in the context of proceedings in the Channel Islands involving the BVI Companies;
- Report 2 (21 December 2010) – considering the broader implications of the Channel Islands proceedings for the BVI Companies;
- Report 3 (17 September 2010) – on the formation and trading of the BVI Companies;
- Report 4 (25 October 2010) – considering the circumstances surrounding contracts for differences and credit default swaps entered into by one group company; and
- Report 5 (22 December 2010) – considering the role and involvement of certain advisers, directors and other employees of the companies.

THE REQUIREMENTS FOR LITIGATION PRIVILEGE

The legal requirements of a claim to litigation privilege are as follows:

1. The burden of proof is on the party claiming privilege[1].

2. An application for litigation privilege will include a witness statement by the applicant outlining the arguments as to why privilege should be granted. However, an assertion of privilege and a statement of the purpose of the communication over which privilege is claimed are not determinative and are evidence of facts which may require to be independently proved. The Court will scrutinise carefully how the claim to privilege is made out and the witness statements should be as specific as possible[2].

3. The party claiming privilege must establish that litigation was reasonably contemplated or anticipated. It is not sufficient to show that there is a mere possibility of litigation, or that there was a distinct possibility that someone might at some stage bring proceedings, or a general apprehension of future litigation[3]. Where litigation has not been commenced at the time of the communication, it must be "reasonably in prospect"; this does not require the prospect of litigation to be greater than 50 per cent but it must be more than a mere possibility[4].

4. It is not enough for a party to show that proceedings were reasonably anticipated or in contemplation; the party must also show that the relevant communications were for the dominant purpose of either: a) enabling legal advice to be sought or given, and/or b) seeking or obtaining evidence or information to be used in, or in connection with, such anticipated or contemplated proceedings. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that the dominant purpose was litigation. If there is another purpose, this test will not be satisfied[5].

THE COURT'S APPROACH TO THE EVIDENCE

In assessing the evidence in support of a claim to privilege, the Court should subject it to "anxious scrutiny", in particular because of the difficulties in going behind the evidence[6].

The Court will look at "purpose" from an objective standpoint, considering all relevant evidence including evidence of subjective purpose[7]. Furthermore, it is desirable that the party claiming privilege "should refer to such contemporary material as it is possible to do without making disclosure of the very matters that a claim for privilege is designed to protect"[8]. The written evidence will be conclusive unless it is reasonably clear that (i) a party has erroneously represented or has misconceived the character of the documents[9]; or (ii) the witness statement/affidavit is incorrect, whether based on analysis of the statement/affidavit itself[10], or other evidence before the Court[11].

THE RIGHT TO WITHHOLD INSPECTION NOT ESTABLISHED

Where the Court is not satisfied, on the basis of the witness statement and the other evidence before it, that the right to withhold inspection has been established, the Court may:

- order disclosure and inspection;
- order that a further witness statement be produced to deal with matters which the earlier witness statement did not cover or on which it was unsatisfactory;
- inspect the documents (see CPR 31.19(6)), although inspection should be a solution of last resort, as there is a danger of looking at documents out of context at the interlocutory stage[12]; or
- in certain circumstances, potentially order cross examination of a person who has provided a witness statement or sworn an affidavit, although unlike an affidavit of assets, the weight of authority is that cross-examination may not be ordered in the case of an affidavit of documents[13].

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[1] See e.g. *West London Pipeline and Storage v Total (UK)* [2008] 2 CLC 258 at [50].
[2] See e.g. *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* (14 February 2001) at [30] and [39]; *West London Pipeline* (supra) at [52], [53] and [86]; *Tchenguiz v Director of the Serious Fraud Office* [2013] EWHC 2297 (QB) at [52].
[3] See e.g. *United States of America v Philip Morris Inc* [2004] EWCA Civ 330 at [68]; *Westminster International v Dornoch Ltd* [2009] EWCA Civ 1323 at [19] – [20].
[4] See *Tchenguiz v Director of SFO* (supra) at [48(iii)].
[5] See *Price Waterhouse (a firm) v BCCI Holdings (Luxembourg) SA* [1992] BCLC 583, 589-90 (cited in *Tchenguiz v SFO* at [54]-[55]); *West London Pipeline* (supra) at [52]).
[6] See *Tchenguiz v Director of the SFO* (supra) at [52].
[7] *Ibid* at [48(iv)].
[8] *West London Pipeline v Total (UK)* (supra) at [53].
[9] See *Frankenstein v Gavin's House to House Cycle Cleaning and Insurance Co; Lask v Gloucester Health Authority.*
[10] See *Neilson v Laugharane; Lask v Gloucester HA* (supra); and see *Frankenstein* (supra).
[11] See *Jones v Montivideo Gas Co*; *Birmingham and Midland Motor Ominibus Co. v London and North West Railway Co*; *National Westminster Bank plc v Rabobank Nederland.*
[12] Inspection should not be undertaken unless there is credible evidence that those claiming privilege have either misunderstood their duty, or are not to be trusted with the decision making, or there is no reasonably practical alternative.
[13] See *Frankenstein* (supra); *B and M Motor Omnibus Co. v L and NW Railway Co.* (supra); *Fayed v Lonhro.*

THE DECISIONS

Starbev

Hamblen J dismissed the defendant's application. After considering the requirements for a successful claim to litigation privilege, he concluded that the documents should be disclosed.

In regard to B's documents, a number of contemporaneous documents showed that B's role had been investigatory. Although the defendant had suspicions regarding the re-sale of the business by the claimant and had instructed B to investigate those suspicions, until the suspicions were found to have any substance, there had been no real reason to anticipate litigation. Therefore, Hamblen J had not been satisfied that the dominant purpose for instructing B had been litigation. Accordingly the claim for litigation privilege relating to B's advice had not been made out.

As to A's documents, the primary purpose of the defendant instructing A was to conduct an audit pursuant to the defendant's rights under the CVR. This was borne out by a number of contemporaneous documents including A's written retainer letter. The retainer made no mention of litigation and indicated that the next stage contemplated was discussion and agreement. Further, an email sent by the defendant to A on the day on which the defendant claimed litigation privilege incepted, made no mention of anticipated litigation.

It was held that there was an inherent implausibility in the claim to privilege in relation to these documents. The defendant had asserted that not only had litigation been a purpose for instructing A, but it had become the dominant purpose. It claimed that within a couple of weeks the original purpose of instructing A had been relegated to a purely subsidiary one. However, there had been no explanation in the evidence as to why and how the original purpose had become so diminished. There was no record of A's retainer being changed or extended. Hamblen J was not, therefore, satisfied that it had been shown that the dominant purpose for instructing A had been litigation. For that reason the claim for litigation privilege was not made out.

R&H

The Court of Appeal dismissed the joint liquidators' appeal against an earlier decision of Eder J that they must disclose the five reports. In considering each report in turn, the Court held that:

- Although Reports 1 and 2 were prepared after commencement of proceedings, they had at least a dual purpose, including: identification of inter-company balances and the effect on dividends to creditors; and a summary and analysis of information from books and records to enable understanding of the accounting treatment of loans. Therefore, the dominant purpose test was not satisfied.

- Although the joint liquidators' claimed that Report 3 was prepared for the dominant purpose of enabling them to obtain information and advice in connection with litigation which "was and [remained] contemplated", their evidence also stated that the Report concerned the formation and trading history of the BVI Companies. The assertion as to contemplated litigation was vague. Most importantly, the language in the evidence of "[identifying] potential causes of action as well as the defendants to possible claims", fell short of the threshold of the litigation being "reasonably in prospect"; this requires awareness of circumstances which render litigation a real likelihood.

- Report 4 was not provided to legal advisers until almost one year after its production. This delay conflicted with the joint liquidators' evidence as to dominant purpose. In any event, although the evidence suggested that the Report addressed "civil recovery opportunities", once again this language fell short of the threshold of the litigation having to be reasonably in prospect.

- Report 5 came closest to satisfying the tests for litigation privilege because it was provided within three weeks of a request by the joint liquidators' counsel. However, the evidence described the Report as enabling advice "on potential claims against various possible defendants", and so it too fell short of establishing that there was relevant litigation "reasonably in prospect" at this stage, as opposed to a mere possibility. This conclusion was fortified by the fact that some two and a half years later, no litigation had yet been commenced.

COMMENT

Litigation privilege is important because it is the only way of obtaining legal professional privilege outside the context of solicitor-client communications. These cases demonstrate the dangers of assuming that, because litigation is "in the air", a party will be able to rely on litigation privilege. For litigation privilege to apply, a communication must have been created for the dominant purpose of litigation and the relevant litigation must be "reasonably in prospect" at the time the document was created. These tests have a high threshold and the burden of proof will be on the party seeking to claim privilege.

The dominant purpose test may be more difficult to satisfy if the relevant document is commissioned to obtain information or establish facts, which the person who commissioned the document would need in any event to perform his/her other, non-litigation related, functions and whether or not litigation subsequently ensued. In some circumstances, it may be better to produce two documents which cover broadly the same ground: one for use in the litigation and one for more general purposes. The contents of the different documents can then be tailored accordingly. Any additional expense and/or inconvenience is likely to be a price worth paying if this avoids the need to disclose damaging documents in the litigation.

Conversely, there will be situations where the only purpose for commissioning the production of documents will be for use in connection with possible litigation. However, even in those circumstances, the relevant documents may not attract litigation privilege. This is because litigation must be more than a mere possibility; it must be "reasonably in prospect". In *Starbev*, for example, part of the problem was that documents were created to investigate the defendant's suspicions (which, if substantiated, might lead to litigation), rather than to provide evidence in actual or contemplated litigation.

In view of these difficulties, it is important, at the time documents are commissioned/produced, to:

- record the fact that a document is being/has been created for use in litigation on the face of the relevant document and in instructions to the persons responsible for producing the document; and

- identify the litigation, in respect of which documents are being produced, with as much specificity as possible. If a number of different claims are contemplated, they should all be identified.

If it is not possible to do both these things, that is likely to be a good indicator that it will be difficult to substantiate a claim to litigation privilege in any future litigation. If that is the case, consideration should be given either to not recording the findings of the relevant investigation in writing or to involving internal and external counsel in a way which would result in the relevant document being covered by legal advice privilege.

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