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THE PRIVILEGE OF ABSURDITY – SOME INTERNAL SETTLEMENT DISCUSSIONS NOT COVERED BY LITIGATION PRIVILEGE

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In *WH Holding Limited and West Ham United Football Club Limited (together, "West Ham") v E20 Stadium Limited ("E20") [2018] EWHC 2784 (Ch)*, the Court of Appeal considered the question of whether six emails passing between the Board Members of E20, created with the dominant purpose of discussing a commercial settlement of a dispute when litigation with West Ham was in contemplation, were covered by litigation privilege and therefore whether E20 were entitled to inspect those emails.

The Court, reversing the first instance decision, ruled that the emails were not covered by litigation privilege.

At paragraph 27 of their joint judgment, the Judges briefly summarised the law relating to litigation privilege:

1. Litigation privilege is engaged when litigation is in reasonable contemplation.

2. 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 litigation.

3. Conducting litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation.

4. Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege.

5. There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

The Judges also made the point that even if a document is not covered by litigation privilege it may nevertheless be covered by legal advice privilege, which applies to confidential communications passing between a client and the client's lawyer, and which have come into existence for the purpose of giving or receiving legal advice about what should prudently and sensibly be done in the relevant legal context. Together, litigation privilege and legal advice privilege are two heads of legal professional privilege.

Comment

This judgment is an important clarification of the criteria for claiming a document falls under litigation privilege. E20 had argued that an earlier case of *SFO v Eurasian Natural Resources Corporation Limited [2018] EWCA (Civ) 2006 ("ENRC")* had extended litigation privilege to include all documents prepared in contemplation of litigation, and passing between client, lawyer, agent or third party. The Court clarified (at [15]) that ENRC did not remove the requirement that the communications must be "*for the [sole or dominant] purpose of obtaining information or advice in connection with existing or contemplated litigation.*"

The problem that E20 had with their emails is that they were internal communications in which a commercial settlement was discussed, but did not involve obtaining information and advice (or recording information or advice obtained), and therefore were not within the ambit of litigation privilege.

It makes sense that there ought not to be any automatic legal professional privilege in general correspondence produced in contemplation of litigation. For example, there is no obvious reason why correspondence between board members regarding the contingencies that ought to be made in the company accounts ought to be privileged, particularly as the accounts themselves will be publically available. Whether such correspondence would be relevant to a dispute is a separate matter.

However, the concern expressed by Norris J at [55] of his first instance judgment are not without force:

> "*[West Ham] submitted that the discussion of settlement proposals does not fall within the scope of litigation privilege, which is confined to documents generated to obtain advice or to gather evidence. The consequence of this submission appears to be that if E20 in fact made a "without prejudice" offer to West Ham to dispose of the impending litigation then that document would not be before the Court in any subsequent case: but any document (not passing between solicitor and client) recording the terms of the proposed offer, or recording discussion of the offer, or authorising the terms and putting of the offer would be open to inspection and to inclusion in the trial bundle. That is odd.*"

That is, indeed, a curious state of affairs. At a time when the Court is emphasising the need for parties to resolve their disputes amicably, and is tightening its scrutiny of legal costs incurred by litigants, there remains a lacuna whereby correspondence between board members discussing such advice and suggestions for settlement in the light of such advice, would be privileged, but the same discussions had without the benefit of legal advice may not be privileged.

That being said, it may well be inappropriate to extend litigation privilege to cover such correspondence; more appropriate would be to extend the ambit of without prejudice privilege to cover correspondence (and other documents) created for the purpose of (or in preparation for) without prejudice discussions with the other side.

Clients should be made aware of this lacuna, so that they may take steps to mitigate (or avoid) its effects. One way in which the lacuna may be avoided is by having a lawyer present for any internal discussions on settlement of a dispute, or included in any such correspondence (as long as it was intended that the lawyer would be actively involved in such correspondence). Alternatively, clients should obtain legal advice (even preliminary legal advice) at as early a stage as possible, so that their settlement discussions may be informed by (and include references to) that legal advice.

Nevertheless, it is a far from satisfactory state of affairs, and it is disappointing that the Court of Appeal did not deal with this lacuna in any detail.

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