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Litigation Privilege And Its Reach To Expert Support:When Can It Be Claimed?

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It is generally accepted that litigation privilege will only apply in circumstances where legal proceedings are already in existence or are reasonably contemplated.

However, what happens in the event when a third party expert is instructed to provide support for a specific claim and during their investigations (of the documents/correspondence provided) they uncover a further claim, completely unrelated to the claim they were instructed to support. Can litigation privilege be claimed over all the correspondence with the third party expert / instructing party?

There is no authority on this subject in the Bailiwick of Guernsey, however, according to the decision in *Kyla Shipping Co Ltd & Anor v Freight Trading Ltd & Ors* [2022] EWHC 376 (Comm) (22 February 2022) ("Kyla Shipping Co"), the answer is no.

In Kyla Shipping Co there had was a shareholder dispute which concerned the distribution of insurance proceeds following the total loss of a vessel owned by the first claimant (the "Shareholder Dispute"). During the same period certain grievances were raised in respect to certain freight forwarding agreements ("FFAs") (in light of correspondence during 2018 relating thereto) and a further potential dispute arose which concerned the settlement of exposure under this FFAs (the "Mismanagement Claim"). As a result, the claimants (via their solicitors) thought it appropriate to instruct an expert to audit these and to provide support for the Mismanagement Claim. The Mismanagement Claim was not subject to legal proceedings at the time. During the expert's audit, a new suspected claim emerged regarding the basis on which the FFAs were entered into (the "Mispricing Claim").

It was accepted that litigation was in reasonable contemplation in relation to the Shareholder Dispute and that litigation privilege may be claimed for documents created for the dominant purpose of that dispute. What was in dispute was the litigation privilege claimed over the other two potential claims and the documents created in relation thereto.

According to the claimants, the Mispricing Claim was discovered following on from the instruction of the expert and the further enquiries arising from it (in relation to the Mismanagement Claim) and therefore were protected by litigation privilege, as litigation regarding the FFAs was reasonably contemplated by late 2018. The Defendants, on the other hand, asserted that the purpose of the instruction was to see whether there was any legitimate grievance in respect of the FFAs.

The question considered by the High Court was therefore whether or not litigation privilege can be claimed for the experts audit and intervening events (termed the "ballast exercise"), prior to the crystallisation and discovery of the Mispricing Claim. This question had to be answered having due regard to:

- Whether the documents/correspondence/information was created for the dominant use in litigation; and
- Whether that litigation was in reasonable contemplation.

Dominant Purpose And Reasonable Contemplation

In Ashton v. Ansol Ltd (Guernsey Judgment 9/2003) Hancox, Lieut. Bailiff said *"…In order for litigation privilege to apply, there must be a confidential communication between client and lawyer or lawyer and agent, or between one of these and a third party* ***made for the dominant purpose of use in litigation****; that is to seek or provide information or evidence to be used in or in connection with litigation in which the client is a party. (****Own emphasis****)"*. Essentially, the document in question must be created for the dominant purpose of conducting litigation in reasonable prospect.[1]

The party claiming privilege must establish that litigation was reasonably contemplated or anticipated at the time. 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 (however this not necessarily mean a 50% or greater chance. In *United States v Philip Morris*[2], the judge had said that the person seeking to claim privilege must show that he was aware of circumstances which rendered litigation between himself and a particular person or class of persons a real likelihood rather than a mere possibility.

It is not enough for a party to only 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 (i) enabling legal advice to be sought or given, and/or (ii) seeking or obtaining evidence or information to be used in or in connection with such anticipated or contemplated proceedings[3]. An assertion of privilege and a statement of the purpose of the communication over which privilege is claimed in a witness statement are not determinative and are evidence of a fact which may require to be independently proved. The dominant purpose test derives from *Waugh v British Railways Board*[4] where the House of Lords regarded it as insufficient that a document was prepared for two equal purposes if only one of those was a privileged purpose.

The High Court's Finding

Having considered the previous authority on this subject and the limited evidence provided by the claimant (by affidavit) it was determined by the High Court that there was no suggestion in the correspondence that proceedings or a counterclaim in proceedings was envisaged in relation to the Mismanagement Claim.

The High Court said, in light of its assessment of the limited explanation provided by the claimant, the instruction of an expert appeared to have been for the purpose of trying to provide backing for the Mismanagement claim, but it does not seem to have reached a stage where it was possible to say that litigation in relation to the Mismanagement claim was in reasonable prospect. Litigation privilege may therefore not be claimed for the Mismanagement Claim but may be claimed when litigation was in reasonable contemplation in respect of the Mispricing Claim.

Conclusion

This case provides a useful reminder that legal professional privilege is not as straight forward as one would hope and that careful regard should always be had to the test for litigation privilege and instances when it may or may not apply. In particular, parties must be mindful that any investigations by a third party / expert to determine whether a party has a potential claim do not ordinarily attract litigation privilege. This is because there is no reasonably contemplated litigation in relation to the potential (or suspected) claim at the time of the investigations. This adopts the strict litigation privilege test borne out by authority and great care must be taken in these cases.

Parties are also reminded that when making a claim for litigation privilege cogent evidence must be provided by the claimant that litigation is in reasonable contemplation and that the document was created for that dominant purpose.

Because there is no authority on this subject in Guernsey, it is likely that the *Kyla Shipping Co Decision* will be considered persuasive authority before the Royal Court.

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1 Kyla Shipping Co Ltd & Anor v Freight Trading Ltd & Ors [2022] EWHC 376 (Comm).

2 [2004] EWCA Civ 330.

3 Starbev GP Ltd v Central European Holding BV [2013] EWHC 4038 (Comm).

4 [1980] AC 521.

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