

UPDATE

English Court of Appeal: No justification for blanket of litigation privilege

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Privilege is a fundamental and well-established legal right which is intended to ensure that clients can discuss legal issues freely with their lawyers and so their lawyers can advise them without those discussions and that advice having to be disclosed to the other side. However, defining the precise boundaries of what is and is not privileged is often more difficult than one might assume. Just because a document or conversation is intended to be confidential and/or is commercially sensitive does not make it privileged (nor does marking a document as "privileged and confidential", or merely copying a legal adviser on an email communication).

In the recent English Court of Appeal judgment in *WH Holding Ltd v E20 Stadium LLP* [2018] EWCA Civ 2652, the Court commented that it could not "see any justification for covering all internal corporate communications with a blanket of litigation privilege", confirming that confidentiality does not automatically equate to privilege.

The case of *WH Holding* considered whether privilege could be claimed in respect of emails between members of a company's Board of Directors which had been prepared to discuss a commercial proposal for the settlement of a dispute. The issue for determination was whether, to fall within the scope of litigation privilege¹, a communication must be: (i) prepared for the dominant purpose of obtaining advice or evidence in relation to the conduct of litigation; or alternatively (ii) in a wider sense, for the dominant purpose of conducting litigation generally.

In favouring the narrower approach at (i) above, the Court emphasised that "it has always been recognised that privilege is an inroad into the principle that a court should be able to decide disputes with the aid of all relevant material." In reaching its conclusion, the Court set out a useful summary of the state of the law in respect of litigation privilege in particular:

- Litigation privilege is engaged when litigation is in reasonable contemplation;
- 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 the litigation;
- Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation;
- Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege; and

¹ In broad terms, "litigation privilege" protects confidential communications which come into existence once litigation is in contemplation or has commenced and which is for the dominant purpose of use in the litigation. "Legal advice privilege" is less specific and protects confidential communications between a lawyer and a client for the purpose of obtaining legal advice.

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

On that basis, the Court of Appeal ordered that the company must give disclosure of the documents despite the fact that they recorded the grounds on which the dispute might be settled. The Court held that litigation privilege does not extend to documents dealing with the avoidance and/or settlement of litigation in circumstances where such documents do not reveal the nature of any legal advice sought or information regarding the conduct of the prospective litigation.

Although the Court's helpful list and the decision provide further clarity on a particularly complex subject, it may prove difficult in many cases to decide whether it is possible to "disentangle" information and there are likely to be occasions where it is unclear whether records of settlement discussions contain advice for these purposes. It is clear that this is not the final word on the ever-changing subject of legal professional privilege.

Mourant has acted on cases which have shaped the law of privilege in recent times. In the context of seeking disclosure of witness statements filed in other related proceedings, where Cayman defendants asserted that such statements were privileged, Mourant successfully argued that the public interest in ensuring that parties are not prejudiced in preparing and conducting litigation does not outweigh the public interest in full disclosure and transparency. Our full update on this decision in Madoff-related proceedings from late-2016 can be found [here](#).

Mourant has also published updates on the difficulties in maintaining privilege over documentation produced by internal investigations (see our multi-part series at the following links: [Part 1](#), [Part 2](#) and [Part 3](#)).

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