Ogier

Further developments in the field of litigation privilege

Insights - 19/02/2019

Following the landmark English judgment in SFO v. ENRC [2018] EWCA Civ 2006 (as reported in our previous briefing), there have been two further significant judgments on litigation privilege. These will potentially be persuasive authorities in Jersey in this area, and should be noted by all litigants, including directors of trustees and companies in trust structures.

(1) *WH Holding Ltd and another v E20 Stadium LLP* [2018] EWCA Civ 2652 – privilege of internal communications regarding settlements

The English Court of Appeal found that certain content of emails between directors discussing a proposed without prejudice settlement of a dispute were not subject to litigation privilege.

As a reminder, litigation privilege applies in relation to communications sent/received where legal proceedings are reasonably in contemplation and for the sole or dominant purpose of the conduct of those proceedings. WH Holding held that emails between directors as to settlement strategy were not communications for the sole or dominant purpose of conducting legal proceedings. The Court found that, while internal documents recording the terms of an offer or discussing an offer would be privileged if it revealed the content of without prejudice settlement discussions or legal advice, it would not protect commercial discussions on strategy in the negotiations.

As a result, directors must be careful in what they say, and, moreover, how what they say is recorded. The general principle of without prejudice communications is to encourage parties to discuss and consider possible settlement, without fear that such communications will later be disclosed in the substantive legal proceedings to which they relate. Therefore such communications are subject to a separate class of privilege (without prejudice privilege). However, WH Holding finds that while the external settlement offers remain privileged, the internal discussions relating to them may not be – either under without prejudice privilege or litigation privilege.

It should be noted that legal advice privilege can protect communications relating to legal advice between lawyers and their clients, and such protection could extend to communications which seek advice relating to settlement offers. Furthermore, internal client discussions of such legal advice would also be subject to legal advice privilege (though a court may wish to attempt to disentangle privileged and unprivileged information in any one document by means of redaction).

The result is that great caution should be exercised by, among others, directors of trustees and companies in underlying trust structures in the way any internal discussions on settlements are recorded. As soon as settlement offers in litigation are in contemplation, legal advice should be sought at the earliest opportunity as to what privilege protection may apply to what communications.

(2) *Sotheby's v Mark Weiss Ltd [2018]* EWHC 3179 (Comm). – beware of dual purpose when relying on litigation privilege

The English High Court has confirmed that communications with an expert will not be protected by litigation privilege where they have been created for more than one purpose, but the dominant purpose was not legal proceedings.

A painting owned by the defendant was sold by Sotheby's as exclusive agent. The purchaser later alleged that the painting was a counterfeit, citing the opinion of an expert and demanding a rescission of the sale contract. Sotheby's prepared an expert report to take a decision as to whether the sale should be rescinded. On the basis of this opinion, Sotheby's agreed to rescind the sale and then brought an associated action against the defendant seeking to recover the purchase price paid.

In that litigation the defendant sought to review correspondence between Sotheby's and their expert. The question was whether this was subject to litigation privilege. This hinged on whether the report was prepared for the dominant purpose of reasonably contemplated legal proceedings. The Court found that the report was created for two purposes: (1) to enable a commercial decision as to whether it would rescind the sale to the purchaser; and (2) for contemplated (and if the sale was rescinded, very likely inevitable) later litigation with the defendant. The Court's findings were that it was not possible to determine that the second purpose was the dominant one, with both being of equal importance. As a result, it was found that the correspondence was not subject to litigation privilege.

It is of interest that the Court rejected Sotheby's attempts to draw an analogy to SFO v. ENRC [2018] EWCA Civ 2006 (as described in our briefing in December 2018), where correspondence relating to internal investigations was privileged because it was accepted that their dominant purpose was to defend contemplated criminal proceedings (and not merely assess corporate governance issues generally). The Court highlighted that in the ENRC case, criminal proceedings

were the "stick" by which corporate governance issues are enforced (and thereby in in prominent contemplation at the time), whereas in the Sotheby's case, even if civil proceedings would be an inevitable consequence of rescinding the sale of a painting, such proceedings were not in the same sense a "stick" by which the correspondence was motivated.

The case is an important reminder of the limits of litigation privilege, and that the approach in the ENRC case to the breadth of litigation privilege may not apply in all circumstances. The applicability of litigation privilege will always turn on the facts, and legal advice should be sought before any assumptions are made that any specific communications will be protected.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Nick Williams

Partner

Jersey

E: nick.williams@ogier.com

T: +44 1534 514318

Related Services

Private Wealth

Dispute Resolution

Legal

Related Sectors

Trusts Advisory Group