TRAVERS SMITH

Litigation privilege:

on prospects and purpose

The recent Commercial Court decision in *Starbev*[1] is a useful reminder of the test applied to determine whether a document is subject to litigation privilege under English law, and highlights the risk of potentially unhelpful documents produced by corporate advisers being disclosed in subsequent litigation proceedings.

The underlying dispute between the parties arose out of the purchase by Starbev of a brewing business from Interbrew. Starbev subsequently sold on the business. Interbrew contended that it was entitled to a share of the proceeds of the onward sale, which Starbev denied. The question for the Court in this case was whether Interbrew was entitled to withhold inspection of two categories of documents on the grounds of litigation privilege, namely: (i) documents relating to advice received from Barclays in April 2012 concerning the structuring of the consideration for the onward sale (the "Barclays documents"); and (ii) documents relating to Interbrew's dealings with KPMG after 20 July 2012, in the course of work done for Interbrew by KPMG in relation to the agreement relevant to Interbrew's rights to deferred consideration following the onward sale (the "KPMG documents"). The Court rejected the claims to litigation privilege in respect of both categories of documents.

Litigation privilege

Litigation privilege protects from inspection: a confidential communication (written or oral) (i) between (a) a lawyer or client, on the one hand and (b) a third party, on the other hand; (ii) made at a time when litigation is existing, pending or reasonably contemplated; and (iii) provided that the communication is made for the sole or dominant purpose of obtaining legal advice about, or evidence or information for, such litigation. It is for the party which claims litigation privilege to prove that the test is satisfied.

In *Starbev*, Hamblen J held that Interbrew had failed to prove that the test was satisfied in relation to the two categories of documents in question, and therefore that it was not entitled to withhold inspection on the grounds of litigation privilege. The decision emphasises that the English Court will subject evidence in support of a claim to privilege to *"anxious scrutiny"*. This is a particular issue because of the difficulties inherent in going behind the evidence; Hamblen J considered it undesirable for the Court to consider the material in which privilege is asserted because it would not be shown to one of the parties.

The Barclays documents

The evidence in the case was that, upon becoming aware of the onward sale structure, Interbrew became suspicious that Starbev had adopted the structure to deprive it of a share of the proceeds of the onward sale. It seemed to the relevant Interbrew representative that Interbrew *"would end up in another dispute with Starbev"*. Interbrew sought advice from Barclays Capital as to the steps available to challenge the onward sale structure, with a view to discussing it with legal advisers. Interbrew contended that the evidence demonstrated both that litigation was reasonably anticipated and that the dominant purpose of instructing Barclays was connected to that anticipated litigation.

Hamblen J found that the evidence did not show that litigation was reasonably anticipated at the time that Barclays was instructed to provide advice, still less that litigation was the dominant purpose of their instruction. Rather, Barclays was instructed to investigate Interbrew's suspicion in order to see if it had substance. Unless and until Barclays confirmed that there was substance there was no real reason to anticipate litigation.

[1] *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038 (Comm)

"... when determining whether documents are subject to litigation privilege, the Court will attach significant weight to the contemporaneous evidence."

Hamblen J went on to find that Interbrew's contention that it considered that it *"would end up in another dispute with Starbev"* suggested no more than that such a dispute was a possibility. It did not connote that it was reasonably anticipated that there would be such a dispute, nor that it would result in litigation. Whether or not it would do so was unlikely to be known until Barclays investigated and reported (and this position was not changed by the sharing of Barclays' advice with legal advisers). This fell short of the reasonable prospect test, namely that, to establish whether litigation is reasonably contemplated or anticipated, it is not sufficient for a party to show that there was 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. The prospect of litigation need not be greater than 50%, but it must be more than a mere possibility.

The KPMG documents

As to the KPMG documents, the Court focussed on the dominant purpose for their creation. Where communications may have taken place for a number of purposes, it is incumbent on the party claiming privilege to establish that those communications were for the dominant purpose of obtaining information or advice for the litigation. If there is another equal or dominant purpose, the test will not be satisfied. The dominant purpose test is assessed objectively, looking at all relevant evidence, including evidence of subjective purpose.

In early July 2012 Interbrew instructed KPMG to carry out an audit of the various notices that Starbev had sent it under the agreement relevant to Interbrew's rights to deferred consideration. Interbrew was specifically entitled to conduct such an audit under that agreement. Interbrew contended that, as a result of KPMG's investigations, by 20 July 2012 (on which date Interbrew requested a written report from KPMG) not only was litigation reasonably anticipated, but the dominant purpose of instructing KPMG thereafter became such litigation. The Court conducted a careful inquiry into the contemporaneous evidence, including the terms of the instructions to KPMG, and found it to be inconsistent with the assertion of privilege being made. It also pointed to, among other things, *"an inherent implausibility"* in the claim for privilege being made, in that no explanation was given for why at the date of the retainer on 4 July 2012 litigation was not reasonably anticipated and the primary purpose for instructing KPMG was to carry out the relevant audit, but by 20 July 2012 litigation was said to have become the dominant purpose for instructing KPMG.

The Judge declined to inspect the relevant documents himself to resolve the point, indicating that was a matter of last resort when determining claims to privilege, and that if Interbrew had a good claim to privilege it should have been able to make it good without reference to privileged material.

Comment

Starbev is a useful reminder of the following important points: -

- There is always a risk, where non-legal advisers are instructed in the early days of a matter that subsequently turns contentious, that their work product, and communications with them, will not be protected by English litigation privilege and will have to be disclosed in subsequent litigation.
- This is the case even where the advisers are instructed to investigate the matter which subsequently becomes the subject of the litigation, and where the work they produce is relevant to any subsequent litigation.
- An assertion of privilege and a statement of the purpose of the document over which privilege is claimed will not be determinative. The Court will carefully scrutinise the basis of a claim to privilege.
- In particular, when determining whether documents are subject to litigation privilege, the Court will attach significant weight to the contemporaneous evidence. Where a party instructs a non-legal adviser to carry out an investigation in potentially contentious circumstances, consideration should be given to whether litigation privilege might be engaged and, if appropriate, the terms of the instruction and other communications should clarify that litigation is anticipated and that the sole or dominant purpose of the work is to obtain information or advice for such litigation. While such indications are not conclusive, they potentially strengthen a party's claim to litigation privilege.
- While a document is often created for more than one purpose, the Court generally takes a strict approach to the question of whether it has been prepared for the dominant purpose of obtaining information or advice for litigation. In this regard, *Starbev* echoes the approach of the High Court in *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB). In that case Eder J considered that reports prepared for the liquidators of a company for a dual purpose (namely the conduct of the liquidator's statutory duties in collecting and distributing assets, and potential litigation) were not protected by litigation privilege on the ground that obtaining information or advice for the prospective proceedings was not the dominant purpose of the reports. The decision is currently being appealed to the Court of Appeal (the appeal hearing took place on 30 January 2014).

If you would like any advice as to the circumstances in which privilege applies, or how to protect it, please speak to your usual contact at the firm. Please note that concepts of privilege vary between jurisdictions and that local advice should always be taken where proceedings outside England are concerned.

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