TRAVERS SMITH

# *Litigation privilege revisited*

The Court of Appeal has upheld[1] a third party disclosure order made by the High Court in the context of the ongoing litigation between the Tchenguiz brothers and the Serious Fraud Office.

The judgment, given on 20 February 2014, reiterates the strict approach taken by the English Courts to the question of whether a document over which litigation privilege is claimed has been prepared for the dominant purpose of obtaining information or advice for litigation that exists or is reasonably contemplated. In particular, it highlights the risk of reports commissioned for insolvency officeholders in connection with the conduct of their statutory duties being discloseable in subsequent litigation proceedings.

Robert and Vincent Tchenguiz are seeking damages of approximately £300 million from the SFO for alleged financial losses and reputational harm arising out of the SFO investigation to which they were subject, which involved their highly publicised arrests in March 2011. In connection with those proceedings, the Tchenguiz brothers sought disclosure of five reports from the joint liquidators of companies previously controlled by a Tchenguiz trust. The reports in question were prepared by Grant Thornton on the instruction of the joint liquidators (a partner and a director of Grant Thornton). The reports had been shown to the SFO, which had relied on the information they contained in connection with its investigation.

The liquidators asserted litigation privilege over the reports, maintaining that they had been produced with the dominant purpose of obtaining information or legal advice in connection with litigation. These claims to privilege were rejected last year[2] by Eder J, and now again by the Court of Appeal. The liquidators have indicated that they will not be seeking to appeal the result.

## 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.

To establish whether litigation was 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 reports

The reports were created in the context of a large and complex liquidation. The liquidators estimate that the shortfall in the assets of the companies in liquidation to meet the claims of their creditors is approximately £2 billion. The liquidation has involved litigation in

[1] *Rawlinson and Hunter Trustees SA and others v Akers and another* [2014] EWCA Civ 136

[2] *Tchenguiz v Director of the SFO* [2013] EWHC 2297 (QB)

various jurisdictions. The companies have frequently found themselves on the other side of litigation to parties associated with the Tchenguiz brothers.

The five reports were prepared by Grant Thornton on the instruction of the liquidators to assist them in their work. The first two reports were drafted in the context of proceedings between Tchenguiz interests and the companies in liquidation concerning the recoverability of funds for the companies. The third report considered the formation and trading of the companies. The fourth report examined the circumstances surrounding the entry into certain finance contracts by one of the companies, and the fifth report considered the role and involvement of Tchenguiz interests in the structure and transactions of the companies. All the reports were in draft form.

## Dominant purpose not connected to litigation

Judicial examination of the first two reports, which were prepared in the context of existing litigation proceedings, focused on whether they were created for the dominant purpose of obtaining legal advice about, or evidence or information for, such proceedings. This was assessed objectively, looking at all relevant evidence, including evidence of subjective purpose. The Court of Appeal agreed with Eder J that, on the evidence, the test was not satisfied in respect of the two reports.

The identification of dominant purpose presents particular challenges where documents are created on behalf of insolvency officeholders as part of work they are bound to carry out in any event, for example liquidators' duties to identify assets and liabilities and any steps available to them to collect assets or reduce or discharge liabilities. The Courts are strict in requiring parties asserting litigation privilege to establish that, where one purpose for which the document was created was to obtain information or advice for litigation, this was in fact the dominant purpose.

Part of the evidence was that one of the two reports was produced to identify inter-company balances that should be reversed and to calculate the resulting effect on dividends to creditors. At first instance Eder J appeared to indicate that if this was an exercise which the liquidators were bound to carry out in any event, irrespective of whether litigation was pending or in contemplation, then such a purpose would necessarily be independent of the possible need to take recovery proceedings (such that the report could not be said to have been created for the dominant purpose of litigation).

The Court of Appeal has helpfully clarified that the two purposes would not necessarily be independent of each other. That is to say, in the minds of the liquidators it would not necessarily be the case that identification of inter-company balances which should be reversed (or other steps to establish the financial position of a company) would be independent of the possible or contemplated need to take recovery proceedings. The real issue is that where there are dual or multiple purposes to documents it must be established which purpose was dominant if a plausible claim to privilege is to be made out. On the evidence in these proceedings the liquidators failed to establish that the litigation purpose was dominant.

## Litigation not reasonably in prospect

The Court of Appeal also agreed with Eder J that on the evidence it could not be said that the remaining three reports were created at a time when litigation was reasonably in prospect, rather than a mere possibility. What was important was to be able to show that the party seeking to claim privilege was aware of circumstances which rendered litigation between it and a particular person or class of persons a real likelihood rather than a mere possibility. The Court of Appeal noted that even in large, complex and contentious liquidations like the present one it cannot be assumed that everything a liquidator does is in contemplation of litigation. Each case turns on its own facts.

## Comment

The Court of Appeal's judgment highlights a number of important practical points:

- Where insolvency officeholders commission reports from advisers as part of their work to identify assets, liabilities and recovery options, those reports may be capable of attracting litigation privilege. Whether the litigation privilege test is satisfied is assessed on a document-by-document basis, with the Courts being particularly strict as regards dual or multiple purposes when examining whether the dominant purpose for creating a document was connected to litigation.

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- Even where insolvency officeholders deal with a large, complex and contentious insolvency, it cannot be assumed that reports or other documents they commission will be protected by litigation privilege. These factors may make litigation more likely, but it is still necessary to show that the litigation privilege test is in fact satisfied, having regard to all the circumstances, including the subjective intention of those involved. In particular, for litigation to be reasonably in prospect there must be circumstances which render litigation with a particular person or class of persons a real likelihood rather than a mere possibility.
- It follows that 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 communication with them on various matters (including in relation to former management and investor issues) will not be protected by English litigation privilege and will have to be disclosed in subsequent litigation.
- Consideration should be given at the time that documents are created to the prospects of litigation privilege applying. Because any subsequent examination of claims to privilege by a Court will focus heavily on the contemporaneous evidence, it is helpful to record, if appropriate, that litigation is anticipated and that the sole or dominant purpose of the work is to obtain information or evidence for such litigation. Such indications are not determinative, but specific and consistent contemporaneous indications potentially increase the prospects of successfully asserting litigation privilege.
- When the Court examines claims of privilege, it is worth bearing in mind that it will generally not examine the documents over which privilege is claimed. Whilst being mindful of the need not to waive privilege over the documents in question, the evidence in support of a claim of litigation privilege should be as specific, detailed and compelling as possible. That evidence is likely to be strengthened if it is given by someone involved at the time of the creation of the documents in question and if it refers to contemporaneous material where possible.

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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