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In Practice

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To disclose or not to disclose? Litigation privilege on reports commissioned by insolvency practitioners

KEY POINTS

- If a document attracts litigation privilege, it does not have to be produced to the other party in litigation as part of the disclosure process.
- The material must be confidential, made for the dominant purpose of litigation, litigation must be pending, reasonably contemplated or existing and it must be a communication between either the lawyer and the client, the lawyer and a third party or the client and a third party or a document created by or on behalf of the client or his lawyer.
- A report can serve multiple purposes, but when assessing whether litigation privilege applies, a court must decide what the dominant purpose is.
- There are various steps the insolvency practitioner can take to help secure litigation privilege over documents s/he has commissioned or created and wants to withhold in the disclosure process.

WHAT IS LITIGATION PRIVILEGE?

If a document attracts litigation privilege, it does not have to be produced to the other party in litigation as part of the disclosure process. There are four key elements to litigation privilege:

- the material must be confidential;
- it must be a communication between either the lawyer and the client, the lawyer and a third party or the client and a third party or a document created by or on behalf of the client or his lawyer;
- be made for the dominant purpose of litigation; and
- litigation must be pending, reasonably contemplated or existing. "Litigation" in this context would usually require there to be existing or anticipated adversarial proceedings, where judicial functions are exercised by a court or tribunal, as opposed to any proceeding which is merely a fact-finding or gathering exercise. Some statutes may offer some protection, for example, communications arising from statutory investigations under the Financial Services and Markets Act 2000 (FSMA) offer their own form of privilege.

WHY WOULD A LIQUIDATOR WISH TO HAVE LITIGATION PRIVILEGE?

The content of a document can be both positive and negative; it can reveal the strength of a case or contain information which could compromise a case if seen by an opponent. A document which attracts litigation privilege is protected from inspection in proceedings and, as these documents usually contain sensitive information, such protection can guard against the potentially disastrous consequences of it being disclosed in the course of litigation proceedings.

"DOMINANT" PURPOSE

It is not unusual for a report to serve multiple purposes, but a court must decide which the dominant purpose was, taking into account:

- any statement which says that the document was prepared to enable the advisor to advise on the litigation; and
- evidence that the document was in fact prepared for a particular purpose.

In *Waugh v British Railways Board* [1980 AC 521], Mrs Waugh sought disclosure of an internal enquiry report to the Railway Inspectorate, which included a number of witness statements surrounding the death of her husband when two trains collided. In Mrs Waugh's proceedings for negligence, the Railway Board withheld inspection of the report on the grounds of litigation privilege, in that the report was prepared both for operation and safety purposes and for the purpose of obtaining legal advice in anticipation of litigation. The House of Lords adopted the "dominant purpose" test used in a 1976 Australian decision (*Grant v Downs*). The House of Lords held that both reasons for the production were given equal weight by the Railways Board, and so it failed the dominant purpose test and had to be disclosed.

DISCLOSURE IN THE INSOLVENCY CONTEXT

Satellite litigation which arose during the well-documented case between the Tchenguiz brothers and the Serious Fraud Office (SFO) involved a third party disclosure application by the brothers against the liquidators of a company which formed part of the Tchenguiz discretionary trust (see *Rawlinson and Hunter Trustees SA & Ors v Akers & Anr* [2014] EWCA Civ 136). In particular, the brothers wanted sight of five reports prepared at the request of the liquidators by their firm's forensic team. These reports had been shown to the SFO in connection with the investigations and earlier judicial review proceedings; information from these reports was used to obtain the warrants.

The liquidators objected to the disclosure on three grounds, including litigation privilege. The solicitor for the liquidators produced a witness statement explaining the basis on which the reports

had been commissioned, but he had not been involved in commissioning the reports himself.

The judge at first instance rejected litigation privilege for all five reports (and it should be noted that the subsequent appeal against his decision was dismissed by the Court of Appeal):

- The witness statement said that the first report was commissioned to assist the liquidators in formulating their response to proceedings and that it was prepared "entirely" for drafting a defence and counterclaim and responding to varying scenarios. It then went on to say that it was also prepared to identify all inter-company balances that should be reversed. The judge held that the latter was almost certainly an exercise the liquidators would carry out, independent of any need of considering the issue within the context of the proceedings, and the report was not subject to litigation privilege. This did not change even when it was sent to counsel to consider.
- The second report was needed by the liquidators to fully understand the accounting treatment of the loan transactions, to enable them, it was argued, to advise on strategy for litigation proceedings in Guernsey. Again, the judge was unable to find that the report was prepared for the dominant purpose of litigation. He observed that if the report did not exist, "it also seems to me difficult to understand how the joint liquidators could perform their basic statutory duties". Although the report was also prepared with a view to advising on strategy, that was not the dominant purpose behind its creation.
- The third report, which stated on the face of it that it was "to obtain information and advice in connection with litigation which was, and remains, contemplated against various defendants", also failed the dominant purpose test.
- The judge stated that "although the magic words 'dominant purpose' are used, it seems to me significant that there were no relevant extant proceedings at that stage", adding that such contemplated proceedings had still not been issued after three years. Notwithstanding the statement that "litigation '…was, and remains contemplated…' such statement is, to my mind, entirely vague and lacks specificity". The judge again highlighted that there were no relevant proceedings at the time, or some three years later, and it was also never clear who these "various defendants" may have been.
- The fourth report looked at circumstances surrounding the entry into specific contracts and to identify "civil recovery opportunities". The report was not sent to counsel until some 12 months after it was finalised – again the test failed. The judge again pointed to the "magic words" (dominant purpose) being used, but that the test in practice was not satisfied.
- The fifth report contained wording about proceedings being "reasonably in prospect" but the judge decided that, at the time, the proceedings were no more than a "mere possibility" and that even 2.5 years after that report was produced, no litigation had been commenced.

The judge explained that it was the purpose for which the document was originally produced and not the use to which it was subsequently put which mattered. If prepared for multiple reasons, the judge will closely scrutinise these.

Also, the judge warned litigants of using vague statements when commissioning reports or preparing documents. The more detail, the greater the likelihood it will satisfy the judge that litigation was reasonably in prospect.

FURTHER CLARIFICATION HAS BEEN GIVEN

The recent first instance decision in *Starbev GP Ltd v Interbrew Central European Holding BV* [2013] EWHC 4038, adopted a similar approach to the Court of Appeal in *Rawlinson and Hunter Trustees SA & Ors vs Akers & Anr.*

The claimant challenged the defendant's claim to withhold inspection of two types of document on the ground of litigation privilege.

The claimant had acquired a brewing business from the defendant on behalf of investment funds. The claimant went on to re-sell the business and a dispute ensued as to whether the defendant was entitled to any of the proceeds. In the course of the proceedings, the defendant sought to withhold documents relating to advice received from the bank concerning the structure of the consideration for the sale of the business (bank documents) and documents relating to the defendant's dealings with a firm of accountants regarding work done in relation to a contingent right value agreement, under which the defendant was entitled to deferred consideration following the sale of the business (accountancy documents).

"The judge warned litigants of using vague statements when commissioning reports or preparing documents. The more detail, the greater the likelihood it will satisfy the judge that litigation was reasonably in prospect"

The court held:

- in relation to the bank documents, it was not satisfied that these were commissioned for the dominant purpose of litigation. In fact, it was only once the bank had investigated that there was reason to anticipate litigation. Furthermore, there were a number of contemporaneous documents at the time the bank's assistance was required, which evidenced the fact the bank was being

In Practice

Biog box

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engaged to check the position and the calculations; and

- there was no litigation privilege in respect of the accountancy documents. The accountant's retainer covered audit work, seeking agreement with the claimant and preparation of a report. There was no mention of anticipated litigation at the time of the retainer or afterwards.

WHAT CAN INSOLVENCY PRACTITIONERS DO TO ENGAGE LITIGATION PRIVILEGE?

It may be difficult for insolvency practitioners to be overly precise about the reports they commission. Part of the reasoning for commissioning a report is often to fact-find, so when the dominant purpose analysis focuses on why the document was produced in the first place it becomes something of a chicken and egg situation. An insolvency practitioner may ask: "How do I know if I want to litigate on something when I do not know if there are the grounds to do so?"

It is acknowledged that the argument can become circular, so here are some other questions that an insolvency practitioner might consider before commissioning a report:

Is there more than one issue to be considered?

If so, could it be split and separate reports requested? Such a split may be "what details might I require for the purposes of the general running of the insolvency?" and "what are possible claims involving different parties?" Severing the issues and streamlining the purposes of each individual query and report is likely to help assist a judge when reviewing the dominant purpose of that report. Note that it is acceptable for the report to cover more than one purpose, but since the judge must work out what the dominant purpose was, why not seek to make that decision easier? They may be "magic words" on paper, but it is the reality that really counts.

Have I set out my reasoning about why I want the report?

Does it include what claims I believe are, or might be, viable and against whom or if I am not sure, have I set out the facts and shown that based on those facts it appears that there is a claim for recovery etc? Can I involve my solicitors at this stage to ask for the reports and help frame the query?

What is covered in my engagement letter with my advisors?

An insolvency practitioner may have an engagement letter with the solicitors where they agree to assist in all matters in the insolvency. There may be scope to ask that the solicitor opens two or more files; one relating solely to the anticipated litigation and the other dealing with general advice.

Have I kept a good written record of my reasons for requesting the reports which I would be happy to supply to a court in a future dispute about privilege?

It would be helpful to keep file notes about the thought processes which an insolvency practitioner went through at the time of commissioning the report, rather than having to produce a witness statement from recollections and diary entries at a later stage.

If I ask for and obtain recommendations about the litigation that I am contemplating, am I in a position to action that in the next few months?

Clearly, even if a document appears to have been created for the purposes of litigation, but is then not used for a couple of years, the court may consider that reason enough to determine that litigation privilege does not attach to that document.

CONCLUSION

It is unlikely that all these recommendations could be followed on every occasion. However, in trying to secure litigation privilege over documents, this element of pre-planning will put the insolvency practitioner in the best possible place to defend a claim to litigation privilege over the documents s/he has commissioned or created and wants to withhold in the disclosure process. ■