Proskauer

Ballast in Litigation Privilege: Commercial Court Finds No Privilege in Expert's Investigations but No Waiver of Privilege in Solicitor's Witness Statement

Minding Your Business Blog on **April 15, 2022**

In the recent case of *Kyla Shipping Co Ltd v Freight Trading Ltd* [2022] EWHC 376 (Comm) the English Commercial Court rejected a claim to litigation privilege over preliminary investigations conducted by a party appointed expert on the basis that litigation in respect of the matter being investigated was not in reasonable prospect at the relevant time. However, the court also held that there was no waiver (or a wider collateral waiver) of privilege in respect of documents relating to how the mispricing claim was discovered (including the expert's investigations) by the claimant's solicitor having referred to them in a witness statement.

Litigation privilege applies to confidential documents or communications where at the time the communication or document was created litigation was in reasonable prospect; and it was created for the dominant purpose of the litigation.

Background

The underlying claim in *Kyla Shipping* relates to 41 forward freight agreements ("FFAs") entered into between the first claimant ("Kyla") and the first and second defendants in 2007 and 2008. The claimants allege that the FFAs are void on the basis that they were concluded on their behalf by the third defendant ("CTM") at off market rates in order to enrich the first and second defendants, which were in CTM's corporate group (the "mispricing claim" or "mispricing fraud"). Kyla's 30% shareholder, YPA, is also in the same corporate group. The defendants deny that CTM ever acted as Kyla's agent and say that the claims are time barred.

In 2018, there was a separate dispute between Kyla and YPA as to whether a dividend should be declared in relation to certain insurance proceeds (the "YPA dispute" or the "mismanagement claim"). In the YPA dispute, allegations of mismanagement in relation to the FFAs were made, which led the claimant to instruct an independent expert to carry out an investigation to audit the FFAs (the "FFA investigations"), the purpose of which, as explained in a witness statement of Kyla's solicitor, was "*to provide ballast in its correspondence with YPA*". The claimants allege that the FFA investigations led to the discovery of an alleged mispricing fraud, which became the subject of the claim in the *Kyla Shipping* case.

The claimants claimed litigation privilege in respect of documents relating to the initial FFA investigations. It was agreed that by the end of October 2018 litigation was in reasonable prospect in relation to the YPA dispute, so documents created for the dominant purpose of that dispute would be privileged. It was also accepted that litigation privilege applied once the mispricing claim "had been identified and crystallised". The defendants argued, however, that litigation privilege could not be claimed for the "ballast exercise", prior to the crystallisation and discovery of the mispricing claim. They also argued that any privilege relating to the FFA investigations had been waived as a result of the statements in the solicitor's witness statement.

Decision

The judge, Charles Hollander QC, a leading authority on the law of privilege, rejected the claimants' claim for litigation privilege in relation to the "ballast exercise", but found that there was no waiver of the privilege in relation to other documents relating to the discovery of the mispricing fraud and underlying documents and communications referred to in the solicitor's witness statement.

- **No litigation privilege in the expert's audit in relation to "ballast exercise"**

In order to make good a claim for litigation privilege, the Court emphasised that it must be shown by the party asserting a privilege claim that the document in question was created for the dominant purpose of conducting litigation which was in reasonable prospect.

The Court concluded that the dominant purpose of instructing the expert did not satisfy this threshold for the following reasons:

- There was no suggestion in correspondence that proceedings/counterclaim were envisaged in relation to the mismanagement claim;
- The parties to any such litigation would have not been the shareholders of Kyla, so the dispute is with different parties;
- The references in the solicitor's witness statement that the instruction was for "*ballast in the correspondence*" were difficult to square with a claim for litigation privilege;
- The instruction of an expert appears to have been for the purpose of trying to provide backing for the YPA dispute, albeit that the parties to such a claim would have been different, but it does not seem to have reached a stage where it could be said that litigation in relation to the YPA dispute was in reasonable prospect.

Further, the evidence supporting the claimant's privilege claim was limited, and insufficient to demonstrate its claim for privilege, possibly due to the claimant's solicitor's concern that, by providing more information, he would be waiving privilege in the underlying material.

- **No waiver of privilege by references in solicitor's witness statement**

The defendant argued that the claimant had waived privilege by explaining the discovery of the mispricing fraud in a witness statement and that such waiver encompassed internal communications and communications with the claimant's legal advisers.

The judge found that the solicitor's references to how the mispricing fraud was discovered in his witness statement did not constitute a waiver of privilege or a collateral waiver over other documents and communications concerning the mispricing claim. The test for waiver is whether there is reliance on the contents or the effect of the privileged material, with only reliance on the *contents* giving rise to a waiver, but not reliance on the *effect*. The Court recognised that the test is not easy to apply in practice and that there is conflicting case law.

The Court referred to *PCP Capital Partners LLP v Barclays Bank plc* [2020] EWHC 1393 (Comm) which said that the content/effect distinction cannot be applied mechanistically but should be viewed "*through the prism of (a) whether there is any reliance on the privileged material adverted to; (b) what the purpose of that reliance is; and (c) the particular context of the case in question. This is an acutely fact-sensitive exercise.*"

The judge clarified how courts should approach questions of collateral waiver and noted that there are two connected questions: (1) whether there is a waiver in relation to the document in question; and (2) whether the waiver gives rise to a collateral waiver in other documents on the same issue or "transaction". The judge also noted that "fairness" mentioned in the case law often indicates a discretion for the court. He concluded that there was no discretion here; "fairness" in this context is a fact-specific judgment for the court.

The judge considered the answer in the present case to be clear cut: there was no express reference to any particular document in the witness statement, merely an explanation of the steps the claimant had taken which led to its discovery of the fraud. The investigations had been described only in general terms and there was no reliance on any particular document. Accordingly, the allegation of waiver of litigation privilege was rejected.

Comment

The decision in *Kyla Shipping* is a good example that where a party anticipates a claim in relation to one matter, it should not assume that litigation privilege will necessarily be available for an investigation into other potential claims or counterclaims, even if the two are related. The court will look carefully at whether litigation was in reasonable prospect in respect of those matters at the relevant time, and determine whether litigation privilege can be claimed on that basis.

The Court's determination of the waiver issues emphasises the fact-specific nature of the assessment which a court will need to undertake, and is a good reminder to practitioners that when considering referring to privileged materials in witness statements or in correspondence, care should be taken to ensure that privilege is not inadvertently waived in the underlying privileged material (or in a worst case-scenario) the underlying privileged material *and* in other documents on the same issue or "transaction" due to a collateral waiver.

View Original

Related Professionals

- **Julia Bihary**
  Pro Bono Counsel
- **Steven Baker**
  Partner