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Thorny developments in disputes

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Recent developments in legal professional privilege

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Legal professional privilege

Overview

- Legal Advice Privilege
  - Confidential communications between lawyer and client
  - For the purpose of obtaining or giving legal advice
- Litigation Privilege
  - Confidential communications between lawyer/client and third parties
  - Litigation must be in progress or in contemplation
  - The litigation must be adversarial, not investigative or inquisitorial
  - The communications must have been made for the sole or dominant purpose of conducting that litigation

(*Three Rivers District Council and Others v Governor and Company of the Bank of England (No. 6)* [2004] UKHL 48 at [102])

Legal advice privilege

Re RBS Rights Issue Litigation [2016] EWHC 3161 (Ch)

- Facts
  - RBS undertook interviews of 124 employees in internal investigation
  - Shareholders sought disclosure of interview notes
  - RBS claimed legal advice privilege (litigation privilege not available):
    - Information from past/current employees to enable RBS to seek legal advice from external counsel
    - Employees authorised to speak to external counsel
- Decision
  - Applying narrow definition of "client" from *Three Rivers (No 5)*, claim failed:
    - Only those seeking or receiving legal advice can engage in privileged communications
    - Did not matter that employees were authorised to communicate with outside counsel
  - Working papers and US law arguments also failed

Legal advice privilege / litigation privilege

SFO v ENRC [2017] EWHC 1017 (QB)

- Facts
  - ENRC undertook internal investigation into corruption, prior to SFO's formal investigation
  - SFO sought interview notes and other documents
  - ENRC claimed both legal advice privilege and litigation privilege
- Decision
  - Court rejected claim to legal advice privilege on same basis as in *RBS*
  - Court also said authority of in-house lawyers to obtain legal advice from external lawyers on behalf of the company "*is a question of fact to be determined on the evidence*"
  - Court rejected claim to litigation privilege:
    - Reasonable to anticipate SFO investigation, but that wasn't "adversarial"
    - Documents were not produced for dominant purpose for use in proceedings

Legal advice privilege / litigation privilege

Where does that leave us?

- Legal Advice Privilege
  - Major issue is restrictive definition of “client” in a corporate context:
    - Board of a company: yes
    - Anyone else (including in-house counsel): question of fact
  - Internal investigations need careful planning.
  - Communication needs to include legal advice in order to attract privilege

- Litigation Privilege
  - Consider carefully when “litigation” is reasonably in contemplation
  - Be wary of dual-use documents. Still need to satisfy “dominant purpose” test once litigation is reasonably in contemplation

Legal advice privilege / litigation privilege

Light at the end of the tunnel?

- ENRC appeal
- Recent cases
  - *R. v Jukes* [2018] EWCA Crim 176
    - Context of criminal prosecution. Question of whether witness statement was produced when litigation reasonably in prospect and therefore privileged
    - Court rejected privilege claim, relying on ENRC point that, whilst criminal investigation reasonably contemplated, prosecution was not
  - *Bilta v RBS* [2017] EWHC 3535 (Ch)
    - Context of internal investigation of possible HMRC claim. Question of whether interviews conducted for dominant purpose of use in litigation
    - Court accepted that they were. Other purposes e.g. to maintain good relationship with HMRC “subsumed” into overall purpose to defeat HMRC claim

Legal advice privilege / litigation privilege

Light at the end of the tunnel? (2)

- *R (on the application of AL) v SFO* [2018] EWHC 856 (Admin)
  - Novel scenario:
    - Company interviewed 4 executives in context of possible self-reporting to SFO over alleged bribes. Interviews not recorded but notes taken
    - SFO sought disclosure of notes. Company refused on basis of privilege but agreed with SFO to give summaries of interviews. Eventually, SFO and company agreed Deferred Prosecution Agreement
    - SFO charged 1 defendant for bribery. Defendant asked for interview notes, so SFO asked company again. Company refused. SFO took no further action
    - Defendant sought judicial review of SFO's decision not to take action
  - Court, *obiter*, critical of SFO's decision. Said law on privilege settled (citing *RBS, ENRC* and *Jukes*) and that "first interviews" not subject to privilege

Brave new disclosure regime

Disclosure

Need for change

- The attraction of ‘cards on the table’ litigation not worth the cost
- The Disclosure Working Group has proposed a new rule and guidelines on disclosure
- Aims:
  - Change culture and approach to disclosure by parties and Courts
  - Modernise CPR 31 to reflect reality of electronic documents
- Imposes duties on parties and their lawyers to:
  - Co-operate with each other and assist the Court
  - disclose documents adverse to its case
- Two year (mandatory) pilot in the Rolls Building Courts expected to commence late this year

Pre-CMC disclosure steps

	Step 1	Step 2	Step 3
Task	Give Basic Disclosure (**BD**) and indicate Extended Disclosure (**ED**)	Agree Issues for Disclosure for ED and disclosure model for each Issue	Agree Model C requests for disclosure, set out data-map and estimate costs
Actions	BD: Provide documents on which party has relied and/or necessary for the other party to understand the case they have to meet ED: Party to indicate if it will seek Extended Disclosure	Agree Issues for Disclosure (key documents requiring determination by reference to contemporaneous documents) For <u>each relevant</u> Issue for Disclosure, agree disclosure model: • Model A: no order for disclosure • Model B: limited disclosure (BD + adverse) • Model C: request-led, search-based • Model D: search based disclosure • Model E: wider search based disclosure Claimant to prepare first draft of Issues for Disclosure, Defendants can challenge/add. Parties to use Disclosure Review Document (**DRD**), Section 1A to track negotiation	Where a party has proposed Model C, it must formulate and agree with the other party the scope of its document request Parties to consider appropriate limits to each request, e.g. limiting search to specific: • keywords/date ranges • custodians • geographical locations • filetypes • repositories and computer systems • sampling Parties to use DRD, Section 1B to track negotiation Parties to use DRD, Section 2 to indicate data sources/storage and costs estimate
Timing	Claimant: Alongside Particulars of Claim Defendant: Alongside Defence	Claimant: within 21 days after deadline for any Reply Defendant: within 14 days after draft served	Party proposing Model C: provide requests 28 days before the first CMC Responding party: agree / refuse requests 14 days before the first CMC
Other	No obligation to serve adverse documents at this stage Parties can opt out of BD	• The parties can agree to revise/supplement the Issues for Disclosure at any time • ED ordered only if required to fairly resolve an Issue for Disclosure • No presumption entitled to Models D and E • Each model must be reasonable and proportionate	• Failure to cooperate may attract sanctions (inc. costs orders) • Adverse documents disclosed alongside ED (or 30 days from first CMC if disclosure limited to BD) • Disclosure section of costs budget deferred until after CMC

Disclosure

Practical tips

- Early data-mapping
- Test your data to identify key material:
  - understand custodian involvement (time period and Issue)
  - identify keywords and filetypes
  - propose sensible culling techniques (privilege and irrelevance)
- Prepare for negotiation (consider your must-haves and giveaways)
- TAR (presumption where 50K+ documents)
- Keep a record of uncooperative behaviour

Disclosure

Have you considered arbitration?

- More autonomy and control over disclosure
- Not bound by the CPR
- Generally, parties agree to disclose only documents:
  - upon which they intend to rely
  - the subject of a specific disclosure request
- Free to limit disclosure even further
- No duty to disclose documents adverse to party's case

Disclosure

Would you like to know more?

- http://www.elexica.com/en/legal-topics/dispute-resolution-commercial/011117-new-draft-rule-on-disclosure-unveiled
- https://www.judiciary.gov.uk/announcements/disclosure-proposed-pilot-scheme-for-the-business-and-property-courts/

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The rise (and rise) of competition litigation

Competition litigation is booming in England

2017 in numbers…

70 new claims

£1.03bn litigation funding (up 42%)

£14bn largest claim

13 Court judgments

Ongoing litigation concerning 25 cartels

The basics

- Main types of claim:
  - Anti-competitive conduct (Art 101 TFEU / Chapter I Competition Act)
  - Abuse of a dominant position (Art 102 TFEU / Chapter II Competition Act)
- Claim in tort for breach of statutory duty
- Joint and several liability for all losses
- Follow on claims v standalone claims
- Many recent regulatory decisions have been in the TMT sector
- Increased power to UK regulator (CMA) post-Brexit: TMT sector likely to be a focus

Key risks for TMT clients

- History shows that TMT sector products at risk of being cartelised
- High sales volume over long period = large claim value
- Not limited to conduct within your UK operations
- How well do you know your own supply chain?
- UK “deep pocket” defendant risk
- England an attractive jurisdiction for claimants: wide disclosure, damages
- Risks for UK anchor defendant

Key opportunities for TMT clients

- Is your company a victim of a competition law infringement?
- Claim value could be significant
- Is there a duty to shareholders to pursue claims for competition law breaches?
- Wide availability of funding options

Developments in third-party funding of disputes

Third-party funding

What is it?

- Alternative method of litigation funding
- Third-party funder pays part or all of a Claimant’s legal fees and expenses, in return for a share of any sum recovered from the resolution of claim
- Covers both litigation and arbitration
- Differs from other alternative funding options:
  - Contingency fee agreements / damaged-based agreements
  - Conditional fee agreements
  - ‘After the event’ (ATE) insurance

Third-party funding around the world

Growing in popularity worldwide…

- UK: ICCA-Queen Mary Taskforce on Third Party Funding in International Arbitration published on 1 September 2017
- Paris: Paris Bar Council adopted resolution indicating its support for third-party funding on 21 February 2017
- Hong Kong: Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Bill 2016
- Singapore: Civil Law (Amendment) Act 2017 and Civil Law (Third-Party Funding) Regulations 2017

The pros and cons of third-party funding

Benefits

- Covers legal costs
- No exposure if claim is lost (if adverse costs included, or with ATE insurance)
- Management of financial risk and internal cash flow
- Experience and due diligence of external funder

But…

- Expensive success fee if claim is won
- Funding available for only high-value claims
- ATE insurance often mandatory
- Confidentiality and privilege issues

Alternatives to third-party funding

Insurance

- A two pronged approach:
  - ATE Insurance to cover opponent's costs
  - Insurance to cover your own costs
- In the event of loss:
  - Protects against payment of opponent's costs
  - Protects a proportion of your own costs
- In the event of success:
  - Payment of premium in respect of both insurance policies
  - Premium likely to be significantly lower than success fee in third-party funding model

Comparison

	Insurance Model	Third Party Funding
Lose at trial	ATE insurance covers opponent's costs	ATE insurance covers opponent's costs
	Own costs insured up to e.g. 50%	Funder takes risk on claimant's costs
	No premium payable	
Win at trial	Assume defendant pays costs	Assume defendant pays costs
	Pay premium on ATE insurance and own costs insurance	Success fee of either % of amount recovered or multiple of costs paid by funder and premium on ATE insurance

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Implied contractual duties of good faith….

Implied contractual duties of good faith

Haven't you bored us all about this before?

- Yes
  - TMT Sector Update Day 2013 (the birth of English implied good faith…)
  - TMT Sector Update Day 2014 (more good faith)
  - July 2017 article (death of a thousand cuts by good faith)
  - January 2017 article (the death of good faith?)
  - TMT Sector Update Day 2017 (the death of good faith!)
- And yet no….

Implied contractual duties of good faith

The *Braganza* duty

- *Braganza v BP Shipping Ltd* [2015] UKSC 17:
  - *Wednesbury* unreasonableness fully extended into private contract law
  - Limb 2: a contractual discretion may be subject to an implied duty not to be exercised arbitrarily, capriciously, irrationally or for an improper purpose
  - *Braganza* establishes that a failure to take into account relevant facts/reliance on irrelevant facts in exercising it (limb 1) may be a breach of an implied duty of reasonableness
  - A form of implied obligation of good faith?
- *Faieta v ICAP Management Services* [2017] EWHC 2995 (QB)
  - *Braganza* duty threshold is not a particularly challenging one in contract law

Implied contractual duties of good faith

Yam Seng II: Leggatt's revenge

- *Sheikh Tahnoon Bin Saeed Bin Shakhboot Al Nehayan v Ioannis Kent (AKA John Kent)* [2018] EWHC 333 (Comm)
  - "*Although the observations that I made in the Yam Seng case about the scope for implying duties of good faith in English contract law have provoked divergent reactions, there appears to be growing recognition that such a duty may readily be implied in a relational contract. For example, in Bristol Groundschool Ltd v Intelligent Data Capture Ltd…*"
  - "*…I think it clear that the nature of their relationship was one in which they naturally and legitimately expected of each other greater candour and cooperation and greater regard for each other's interests than ordinary commercial parties dealing with each other at arm's length.*"
  - "*It is unnecessary and perhaps impossible to attempt to spell out an exhaustive description of what this obligation involved.*"
  - "*In my view, the implication of a duty of good faith in the contract is essential to give effect to the parties' reasonable expectations and satisfies the business necessity test which Lord Neuberger in Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd…reiterated as the relevant standard for the implication of a term into a contract.*

Implied contractual duties of good faith

What practical steps can you take?

- Discuss your, and your contract counterparty's, good faith expectations at the drafting stage
- If you want to incorporate a good-faith obligation into your contract, do so expressly and clearly
- If you don't want a general good faith clause in your contract, say so expressly or draft in something limited and innocuous

"*The Queen has been pleased to approve the appointment of…the following as Lord Justices of Appeal…Mr Justice Leggatt...from autumn 2017.*"

Press release dated 21 July 2017 from the Prime Minister's Office

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The post-Brexit disputes landscape

The post-Brexit disputes landscape

The legislative position

- The Recast Regulation with its unified rules on jurisdiction will no longer be applicable to the UK
- Exclusive jurisdiction clauses in favour of England & Wales may no longer be recognised and enforced by the EU27 Courts
- Real possibility of concurrent actions and a race to judgment
- EU27 Courts will no longer be obliged automatically to recognise and enforce English court judgments and visa versa
- Hague Convention and local law rules will apply
- Parties agreement on choice of law will be respected by EU 27. UK will incorporate the provisions of Rome I and Rome II

The post-Brexit disputes landscape

What are our options?

- The Recast Regulation and Service Regulations – the “Denmark Model”
- The Lugano II Convention (2007) – EU and Norway, Switzerland and Iceland
  - EU Consent required
  - UK Courts have to take “due account of” decisions of the CJEU
- The Hague Convention
  - EU27 consent not required
  - Only applies to exclusive jurisdiction clauses
  - Binding on English jurisdiction clauses concluded on/after 01 October 2015 (or 2019)
  - Short gap (three months) in implementation

The post-Brexit disputes landscape

The Simmons & Simmons Disputes Aviator

- “*The tool enables users to analyse factual scenarios within the framework of currently foreseeable post Brexit legislation to assess where risk may arise, and relevant factors to consider, when advising in relation to the enforceability of the jurisdiction or governing law clause.*”
- Essential for all your Brexit governing law and jurisdiction shopping needs
- Access it on elexica.com, here

The post-Brexit disputes landscape

What practical steps can you take?

- Subscribe to the Simmons & Simmons Disputes Aviator
- If you favour English courts, use an exclusive jurisdiction clause (the Hague Convention….)
- Avoid asymmetric clauses where possible
- If a dispute arises, consider issuing protective proceedings (the “Italian torpedo”….)
- Always appoint an agent for service of process
- Consider arbitration – outside the reach of the Recast Regulation

“*Brexit. Grexit. Departugal. Italeave. Fruckoff. Czechout. Oustria. Finish. Slovakout. Latervia. Byegium.*”

Rahul Goma Phulore, via Twitter

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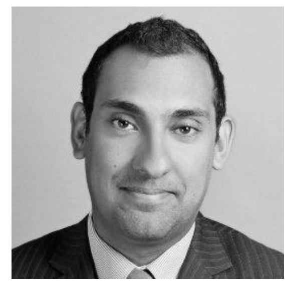

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Thorny developments in disputes

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