Litigation & Arbitration Group

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Client Alert

The Limits of Litigation Privilege: *Qatar v Banque Havilland SA*

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In a judgment handed down on 30 July 2021 (the "**Judgment**"), the Commercial Court considered, in the context of high profile allegations of conspiracy brought by Qatar, whether litigation privilege applied to a report prepared by a financial advisor, PricewaterhouseCoopers ("**PwC**").[1] The Court found that, at the time PwC was instructed, there was little evidence to suggest that adversarial proceedings were reasonably in contemplation. The evidence of the First Defendant, Banque Havilland SA (the "**Bank**"), to the contrary had been too general and, while there were a number of purposes behind PwC's instruction, the dominant purpose was not anticipated litigation.[2]

Overall, the Judgment is an important reminder of the strict requirements of litigation privilege and the difficulties for any party seeking to rely on this privilege to protect an investigation report in the absence of anticipated or current litigation (or similarly adversarial proceedings), and/or where the report was not commissioned for the sole or dominant purpose of such litigation.

Factual Background

Qatar's claim against the Bank arises from the Bank's alleged role (among others) in an alleged conspiracy to damage the Qatari economy by manipulating (i) the market in QAR in order to put pressure on the Qatari Central Bank's pegged QAR:USD exchange rate, and (ii) the market in USD-denominated debt instruments issued by Qatar (together, the "**Conspiracy**").[3] Qatar's case is principally based on a presentation prepared by the Second Defendant during 2017, which appeared to set out a strategy in furtherance of the Conspiracy (the "**Presentation**"). The Presentation was subsequently leaked by "*The Intercept*", a US website, on 9 November 2017 in an article entitled "*Leaked Documents Expose Stunning Plan to Wage Financial War on Qatar – and Steal the World Cup*" (the "**Intercept Article**").[4]

In the course of the proceedings, Qatar's solicitors wrote to the Bank's solicitors raising a number of questions and requests in relation to the Bank's disclosure. Shortly after receiving a response on 15 March 2021, Qatar issued an application seeking orders that the Defendants take further steps in relation to their disclosure in light of a number of alleged deficiencies (the "**Application**").[5]

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[1] *The State of Qatar v Banque Havilland SA and another* [2021] EWHC 2172 (Comm) ("**Qatar v Banque Havilland**"), David Edwards QC sitting as a judge of the High Court.
[2] The Judgment, at [165] and [178] to [179].
[3] See the Judgment, at [6] to [9].
[4] See the Judgment, at [9] to [14].
[5] The Judgment, at [30] and [32]. The Application was grounded specifically on paragraphs 12.3, 14.2, 16.2, 17.1 and/or 18.1 of CPR PD51U.

Amongst other things, Qatar sought the disclosure of a report that the Bank (through its Luxembourg counsel ("**EHP**")) had instructed PwC to prepare on 13 November 2017 (i.e., in the immediate aftermath of the Intercept Article) (the "**Report**"), together with its earlier drafts and/or other documents prepared in connection with it. The Court noted that PwC had been instructed to "*carry out what was described at the time as a "forensic" or "IT" investigation*" and the terms of its engagement were set out in a letter from PwC to EHP dated 20 November 2017. Prior to the Application, the Bank had refused to disclose the Report, arguing that the document was protected by litigation privilege.[6]

At around the time that the Bank instructed PwC to prepare the Report, the Bank also communicated with its home state (Luxembourg) regulator, the Commission de Surveillance du Secteur Financier (the "**CSSF**") and the UK Financial Conduct Authority (the "**FCA**").[7] Shortly thereafter, it received a letter (dated 14 December 2017) from Paul, Weiss, Rifkind, Wharton & Garrison LLP, US attorneys for the Qatar Central Bank, which requested the preservation of documents relevant to the Conspiracy (the "**Paul Weiss Letter**").[8]

Litigation Privilege: Legal Framework

Confidential communications between parties or their solicitors and third parties will be protected from disclosure by litigation privilege "*only when the following conditions are satisfied: (a) litigation must be in progress or in contemplation; (b) the communications must have been made for the sole or dominant purpose of conducting that litigation; (c) the litigation must be adversarial, not investigative or inquisitorial*."[9]

1. Litigation must be in progress or in contemplation: In *Qatar v Banque Havilland*, the Court noted that "*where – as here – litigation is not actually in progress at the time the relevant communications are made or procured, what is required is that litigation should be reasonably contemplated or anticipated*."[10] Litigation must be a "*real likelihood*", which means that it is not sufficient for litigation to be a "*mere possibility*" or for there to be only a "*a distinct possibility that sooner or later someone might make a claim*"; however, this is not to say that there needs be a greater than 50% chance of litigation.[11]

2. The communications must have been made for the sole or dominant purpose of conducting that litigation: In this regard, the Court drew on the following principles:

    a. Where a communication has a dual purpose, and one of these is the purpose of obtaining legal advice in anticipation of litigation, this latter purpose must be the dominant or main purpose for the privilege to operate.[12]

    b. Where a communication appears to have two purposes, it may in fact be that these purposes are both part of a broader (litigation-focused) purpose.[13]

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[6] The Judgment, at [40] to [41], [64] to [65], and [85]. Qatar also sought disclosure of, to the extent that any documents referred to the contents of the Report (or any work done by PwC or any other aspect of PwC's engagement) and had either (a) not been disclosed or (b) been disclosed with those reference redacted on the basis that the Report (or PwC's engagement) was subject to privilege, those documents or the relevant redacted parts.

[7] See, e.g., the Judgment, at [44] to [46], [49], [51], [54], [60] and, in particular, [59], [61] and [74] to [76].

[8] The Judgment, at [72].

[9] *Three Rivers District Council v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, [2005] 1 AC 610, at [102], per Lord Carswell.

[10] The Judgment, at [92].

[11] *United States of America v Philip Morris Inc.* [2004] EWCA Civ 330, [2004] 1 CLC 811, at [68], per Brooke LJ; the Judgment, at [93] to [94].

[12] *Waugh v British Railways Board* [1980] AC 521, at 531A-C, per Lord Wilberforce; the Judgment, at [95] to [97].

[13] *Re Highgrade Traders* [1984] BCLC 151; *Serious Fraud Office v Eurasian Natural Resources Corpn Ltd* [2018] EWCA Civ 2006, [2019] 1 WLR 791; the Judgment, at [98] to [99].

c. In deciding whether a communication is made for the dominant purpose of litigation, what matters may not be the state of mind of the author but that of the party which commissioned or procured the document.[14]

3. The litigation must be adversarial, not investigative or inquisitorial: The Court noted the following authorities (among others):

    a. *Tesco Stores Ltd v Office of Fair Trading*, in which the Competition Appeal Tribunal held it was too general to characterise the administrative procedures under the Competition Act 1998 as investigative and non-adversarial; while there might be some non-adversarial investigations, it would be wrong to characterise *all* competition law investigations as inquisitorial.[15]

    b. *Serious Fraud Office v Eurasian Natural Resources Corpn Ltd*, in which the Court of Appeal held that: (i) while not every Serious Fraud Office manifestation of concern would properly be regarded as adversarial litigation, when the regulator specifically made clear to a company the prospect of a criminal prosecution, and when legal advisers were engaged to deal with that situation, there is a clear ground for contending that criminal prosecution was in reasonable contemplation; (ii) the fact that there is uncertainty (e.g., where the party anticipating the litigation needs to make further investigations before it can say with certainty that proceedings are likely) does not mean that the "*writing may not be clearly written on the wall*"; (iii) a court should take a realistic, commercial view of the facts, and there might be cases where it is impossible or inappropriate to distinguish two separate purposes (i.e., a litigation purpose and a non-litigation purpose); and (iv) even if litigation is not the dominant purpose of an investigation at its inception, it can subsequently become the dominant purpose (i.e., "*what may begin as a (non-adversarial) "fact-find" investigation may, at some point, become adversarial*").[16]

Where a privilege claim is challenged:[17]

1. The burden is on the party claiming the privilege to establish it. As this party is effectively a judge in its own cause (subject to the power of the court to inspect the documents), a court must be careful to consider how the claim is made out, and factual evidence in support of the claim to privilege must be as specific as possible (without waiving privilege).

2. While the factual evidence is not determinative of an assertion of privilege or a communication's purpose, it is difficult to "go behind" such evidence at an interlocutory hearing, save in certain limited circumstances.

3. Where a court is not satisfied that the right to withhold inspection is established, it may either: (i) order inspection; (ii) require that further factual evidence is produced to deal with matters that the previous evidence failed to address; (iii) as a solution of last resort, inspect the relevant document(s); or (iv) in certain limited circumstances, order cross-examination of the relevant witness.

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[14] *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027; the Judgment, at [100]. In *Qatar v Banque Havilland*, it was common ground that it was the purpose of the Bank that was relevant in relation to the preparation of the Report: see the Judgment, at [102].

[15] [2012] CAT 6; the Judgment, at [106] to [108]. The Competition Appeal Tribunal also confirmed that a process which might have started out as an investigatory process can subsequently become adversarial by the time of the relevant communication: see the Judgment, at [109].

[16] [2018] EWCA Civ 2006, [2019] 1 WLR 791, at [88] to [111]; the Judgment, at [113] to [124]. For the avoidance of doubt, the quoted text in this paragraph is from the Judgment.

[17] *West London Pipeline and Storage Ltd v Total UK Ltd* [2008] EWHC 1729 (Comm) [2008] 2 CLC 258, at [86], per Beatson J; *WH Holding Limited v E20 Stadium LLP* [2018] EWCA Civ 2652, at [39]; *UTB LLC v Sheffield United Limited* [2019] EWHC 914 (Ch), at [76] to [77], per Sir Vos C; the Judgment, at [125] to [129].

Qatar v Banque Havilland: the parties' positions

Qatar argued that litigation privilege did not apply to the Report for the following reasons:[18]

1. The Bank's assertion of privilege was based on a claim that the Report had been prepared at a time when adversarial proceedings by the CSSF, the FCA and/or emanations of the State of Qatar were reasonably anticipated. However:

    a. The evidence did not support a contention that a prospect of action by the FCA or Qatar formed part of the Bank's rationale for instructing PwC.

    b. While the Bank did have some concerns in relation to the CSSF when engaging PwC, there was no evidence as to what sort of Luxembourg regulatory action was said to have been contemplated (and, in any event, no evidence to show that adversarial proceedings were contemplated).

2. The Bank claimed that the Report was produced solely for the purpose of collecting evidence and enabling legal advice to be given to the Bank in relation to those anticipated proceedings. However, the evidence did not support the Bank's case (and the Bank had not advanced any alternative case that, if there were a number of purposes, the conduct of adversarial proceedings was the dominant purpose). To the contrary, the evidence showed there to be at least seven other purposes behind the Report.

3. Litigation privilege did not protect documents communicated to, or intended to be communicated to, the opposing party. Therefore, the provision of the Report, or the intended provision of the Report, to the CSSF caused the claim of privilege to fail, given, on the Bank's case, the anticipated adversarial litigant was the CSSF. It would also constitute a general waiver of privilege.

Conversely, the Bank argued:[19]

1. Given the allegations made in the Intercept Article, it was unsurprising that, from the time that the Intercept Article was published, the Bank reasonably anticipated that adversarial regulatory or legal proceedings would be brought against it; the Bank was not dealing with some minor regulatory issue, and while the question in its mind may have initially been "*what has happened?*", it quickly became "*what is our legal exposure as a result of these allegations?*".

2. The Bank's factual evidence as to the purpose of PwC's instruction should be treated as conclusive (i.e., the Court should not "go behind" it).

3. The Report was given to the CSSF subject to professional secrecy restrictions under Luxembourg law (and was given to the FCA under mutual assistance provisions subject to the same restrictions), so litigation privilege was not lost. Any waiver of privilege would have been only a limited waiver (i.e., in favour of the receiving authority alone).

Decision of the Court

The Court held that this was a case in which it could, and should, "*look behind*" the Bank's assertions of privilege, and the evidence as a whole did not establish that the Bank had a right to withhold inspection of the Report on the ground of litigation privilege. The Report therefore had to be produced for inspection (together with its earlier drafts and/or other documents prepared in connection with it).[20]

[18] The Judgment, at [131] to [137].
[19] The Judgment, at [138] to [155].
[20] The Judgment, at [158] and [188].

The Court reached this decision on the following basis (in summary):[21]

1. In line with *West London Pipeline and Storage Ltd v Total UK Ltd*, the Court emphasised that the burden lay on the Bank to make good its claim to privilege, and it was important for the Court to scrutinise carefully how and whether the claim for privilege was made out.
2. The Court confirmed that it was the Bank's state of mind that was most important in considering the sole or dominant purpose of the Report and, "*absent some evidence that the Bank's purpose changed, the most important point in time is the position on 13 November 2017 when PwC was instructed to carry out its work and to produce its report, its terms of engagement being retrospective to that date*." Accordingly, the Court found it difficult to see (although it nevertheless took it into account) how later correspondence, such as a letter from the FCA in February 2018 and the Paul Weiss Letter (of December 2017), could be relevant to an assessment of the dominant purpose of the Report.
3. The Court found that there was "*little or no evidence that the dominant purpose of the Bank in engaging PwC to carry out its forensic or IT investigation and in asking PwC to produce a report setting out its findings ever changed*."
4. The Court held it was "*far too general to support the claim for litigation privilege*" for the Bank to submit (as it did) that it was obvious that the Intercept Article and its disclosure of the Presentation were seen by the Bank as a serious matter which could have significant legal and regulatory consequences. The Court considered that, in light of the authorities, "[s]*omething more concrete is needed*". The Court dealt with each of the three bodies by which the Bank suggested it contemplated adversarial proceedings being brought:
    a. <u>The CSSF</u>: While the Court accepted the Bank's evidence that it recognised that the CSSF would likely want to investigate the matters raised by the Intercept Article, as at 13 November 2017 (and through to June 2018 when the Report was produced), there was "*little in the evidence to suggest that the CSSF's position was, or was regarded by the Bank as, hostile, or that adversarial regulatory proceedings were, or were regarded by the Bank, as reasonably in contemplation*." In reaching this conclusion, the Court:
        i. made specific reference to certain events within the factual matrix, such as the fact the CSSF's correspondence on 13 November 2017 *"was not particularly aggressive or adversarial and it made no threat of proceedings*";
        ii. emphasised that a claim for litigation privilege could not be based upon the existence or contemplation of an investigative or inquisitorial procedure (although it accepted that, as in *Tesco Stores Ltd v Office of Fair Trading*, what may start as a fact-finding investigation may later become adversarial); and
        iii. found that, whether viewed as at 13 November 2017 or any point up until June 2018, the CSSF's involvement did not go beyond the investigative stage, and nor was there anything to suggest that it would do so.
    b. <u>The FCA</u>: The Court held that the evidence that the FCA might have commenced adversarial proceedings against the Bank in the period prior to June 2018 was "*extremely thin.*" The decision to inform the FCA about the Intercept Article on 13 November 2017 and a subsequent request for information by the FCA in February 2018 "*f*[ell] *far short of an anticipation of adversarial proceedings.*"
    c. <u>Qatar</u>: The Court found that there was "*no evidence*" of any intimation or fear of a claim by Qatar prior to the instruction of PwC; the first contact was the Paul Weiss Letter (around

[21] The Judgment, at [159] to [190].

one month later), which only referred to a "*potential claim*" by Qatar, and no further evidence was given of further communications with Qatar prior to June 2018.

5. Overall, the Court was not satisfied that the Bank's request that PwC should produce the Report was for the dominant purpose of anticipated litigation.

6. Further, the Court held that "[t]*he assertion that the … Report was produced for the* sole *purpose of anticipated (adversarial) litigation is… untenable*" (emphasis added). And, while the Bank had not argued that, in the alternative, the anticipated litigation was at least a dominant purpose, the Court held (*obiter*) that such an alternative case would have failed. This was because the two most dominant purposes behind the instruction of PwC were in fact:*"(a) to find the facts, including how a copy of the Presentation had been obtained from the Bank's files, and (b) to satisfy the CSSF and put the Bank in a position where it could answer the CSSF's questions*." In this regard, the Court (among other things):

   a. gave limited weight to the fact that the instruction of PwC went through EHP (which appeared to have been done to support a putative claim for privilege), as "*the chronology shows that a decision was taken by the Bank to instruct PwC independently of its instruction of EHP*";

   b. considered that nothing in PwC's terms of engagement suggested a litigious purpose; and

   c. noted that the Paul Weiss Letter arrived at a time when PwC had already been instructed, and even if, from the date of the letter onwards, anticipated proceedings by Qatar had become a purpose of the Report, the Court did not consider that it would have been the dominant purpose.

7. In light of the above findings, it was unnecessary for the Court to consider Qatar's contention that litigation privilege could not cover a document that was intended to be provided to an opposing party (although the Court indicated, *obiter*, that this "*cannot, in itself, be enough*"). Similarly, it did not have to consider whether the disclosure to the CSSF, as a regulator, constituted a waiver of privilege, although the Court commented (*obiter*) that it would have required "*a good deal of persuading*" that the provision of the Report to certain regulators meant that privilege had been waived in general.

Comment

Investigation reports will often contain information which is highly sensitive concerning potential legal risks and exposures; and this is all the more so for financial institutions, given regulatory requirements to investigate and remediate misconduct and systems and controls breaches. Qatar v Banque Havilland provides a salutary reminder of the difficulties in protecting such reports from disclosure to adverse parties on the basis of litigation privilege, particularly where litigation (or other adversarial proceedings) cannot be said to have been (a) reasonably in contemplation at the time the report was commissioned and/or (b) the dominant purpose of the investigation report.

Following any incident or notification (e.g., from a whistle-blower) meriting investigation, clients would be well-advised to consider carefully from the outset whether there is any basis upon which legal professional privilege may apply to the work product of the investigation. As Qatar v Banque Havilland demonstrates, if litigation is not in reasonable contemplation and/or it cannot be said that the dominant purpose of the investigation work product is the conduct of litigation, litigation privilege will not apply. In these circumstances, clients should consider whether it is possible to structure the investigation to maximise a claim to legal advice privilege, for example by engaging legal counsel to undertake the investigation so as to advise on potential legal exposure.

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