Privilege: A Review of Recent Decisions of the English Courts

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The English Court of Appeal has ended a debate surrounding the English Civil Procedure Rules ("CPR") and legal professional privilege by confirming that the mention of a document in the disclosure process is not necessarily an automatic waiver of privilege. However, care should be taken when references to privileged documents are made.

In *Expandable Limited & Another v Rubin* [2008] EWCA Civ 59 (the "Expandable Limited" case), the Court of Appeal had to consider whether a covering letter from a solicitor had been "mentioned" in the respondent’s witness statement for the purposes of CPR 31.14 and, if so, whether legal professional privilege for the letter was automatically and absolutely lost.

**Issues**

The Court was asked to decide two main issues:

*Was the Covering Letter “Mentioned” in Mr. Rubin’s Witness Statement for the Purposes of CPR 31.14?*

CPR 31.14 sets out a party’s right to inspect a document mentioned in a statement of case, a witness statement, a witness summary or an affidavit. The Court was content to apply the Galadari (*Dubai Bank Limited v Galadari (No 2)* [1990] 1 WLR 731) test of direct or specific allusion as an elucidation of the word “mentioned” in CPR 31.14. Subject to that, the Court said that the expression “mentioned” was as general as it could be and the test was not meant to be difficult. It was considered that the words “he wrote to me” in Mr. Rubin’s witness statement were not a mere reference to a transaction, but were a direct allusion to the act of making the document itself. The Court therefore concluded that the solicitor’s covering letter was "mentioned" in Mr. Rubin’s witness statement for the purposes of CPR 31.14.
Was the Mention of the Letter an Automatic Waiver of Privilege?

The appellants argued that the rule-makers had deliberately decided to depart from the former law, RSC order 24, rule 10, in order to make a right of inspection under CPR 31.14 supersede any ability otherwise to claim privilege. The Court confirmed, however, that there has been no fundamental change in the disclosure regime after the former law was replaced with CPR 31.14. It is still possible to claim legal privilege in respect of a document, production of which is requested under CPR 31.14. Mention of a document in a statement of case, witness statement, witness summary or affidavit is not an automatic waiver of privilege.

Implications Arising From the “Expandable Limited” Case

As confirmed in the decision, the document in question did not have to be relied on, or referred to in any particular way or for any particular purpose, in order to be “mentioned”. Similarly, the expressions, “I telephoned him” and “I made a telephone call to him” would both be direct allusions to a telephone call. Therefore, it should be noted that the use of such expressions in witness statements could lead to a potential request for disclosure of the documents referred to under CPR 31.14.

There are two main categories of legal professional privilege:

**Litigation privilege:** this type of privilege applies to documents that are created for the purposes of actual or contemplated litigation. Litigation privilege can therefore extend not only to documents created by solicitor or client but also to documents created by employees or third parties where the documents were created for the purposes of actual or contemplated litigation.

**Legal advice privilege:** this type of privilege applies to confidential communications between a solicitor and his client, provided that the communications are for the dominant purpose of seeking or receiving legal advice. Legal advice privilege is a narrower category of privilege to litigation privilege as it does not extend to communications with third parties.

There is also a further separate category of “without prejudice” privilege which applies to statements made by parties in a genuine attempt to settle a dispute. Without prejudice privilege prevents such statements being put before the court and being used as evidence of any admission against the party making a genuine attempt to settle.

In the *Expandable Limited* case, the cover letter, being a communication between a solicitor and his client for the purpose of giving legal advice on the execution of debtor’s property, falls into the category of legal advice privilege. According to the decision, privileged documents can be protected from disclosure even though “mentioned” under CPR 31.14; however, the other party can still request disclosure of a non-privileged “mentioned” document.

Latest Updates on Privilege

Under English law, privilege once obtained may be lost. This often occurs through inadvertent waiver of privilege in the course of litigation. It may also arise when privileged material is disseminated or referred to in non-privileged circumstances. The decision in the *Expandable Limited* case brings to an end the debate between commentators on CPR 31.14 and maintenance or waiver of privilege. However, the decisions in the following recent cases provide further illustrations as to the circumstances where privilege can be maintained or lost.

In *West London Pipeline and Storage Limited and another v Total UK Limited and others* [2008] EWHC 1729, the Commercial Court concluded that privilege had not been established in an affidavit sworn by a person claiming litigation privilege because of the
absence of supporting documents establishing the preparation for claims. The Court could order a further affidavit to be served in order to address certain discrepancies where it was not satisfied that the right to withhold inspection was satisfied.

In *Galliford Try Construction Ltd v Mott MacDonald Ltd [2008] EWHC 603 (TCC)*, the defendant applied for the removal of part of a witness statement of a former director of the claimant on the grounds that it related to a without prejudice discussion. The court held that the relevant discussion and subsequent correspondence between the parties did attract without prejudice privilege. There had been negotiations genuinely aimed at settlement even though, at the relevant time, no claim had been formulated.

In *Dadourian Group International Inc and Ors v Paul Francis Simms and Ors [2008] EWHC 1784 (Ch)*, the court held that if the party claiming privilege cannot prove that it believed that its solicitor (who had been struck off) continued to hold a practising certificate at the time when the documents were the subject of the claim to privilege came into existence, legal professional privilege in those documents is lost.

These cases serve as a reminder that privilege is a complicated issue and there continue to be many court decisions on the topic. For this reason it is important that all legal practitioners keep updated on recent decisions on the topic. For this reason it is important that all legal practitioners keep updated on recent case law regarding privilege. Clients should always obtain specific legal advice on documents and lines of communication at the outset of any potentially contentious matter in order to ensure that privilege is maintained.

If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings London lawyers:

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