Client Alert | Commercial Litigation

BGC v Tradition: Court of Appeal continues to limit the scope of privilege in relation to settlements

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Following the decision in *WH Holding Limited and West Ham United Football Club Limited v E20 Stadium LLP*,[1] the Court of Appeal has recently considered the application of litigation privilege (and without prejudice privilege) in the context of a settlement in *BGC Brokers LP v Tradition (UK) Ltd*.[2]

The Court of Appeal clarified the application of both privileges in this context, reminding parties to be cautious when using previously privileged material for any purpose other than the conduct of litigation or without prejudice communications.

Summary

The Claimants ("**BGC**") entered into a settlement agreement with the Third Defendant, Simon Cuddihy (the "**Settlement Agreement**"). The First, Second and Fifth Defendants (the "**Tradition Defendants**") sought inspection of an unredacted copy of the Settlement Agreement (inspection of a redacted version already having been provided). BGC resisted inspection on the grounds of without prejudice privilege; alternatively on the grounds of litigation privilege.

On 12 and 18 October 2017, Mr Cuddihy attended interviews with BGC's solicitors. These interviews were conducted on an expressly "*without prejudice and confidential*" basis. On 16, 17 and 25 October 2017 Mr Cuddihy's solicitors sent emails to BGC's solicitors, again on a "*without prejudice and confidential*" basis. BGC and Mr Cuddihy subsequently entered into the Settlement Agreement, which became effective on 9 November 2017.

The Settlement Agreement included, in its schedules, copies of notes of Mr Cuddihy's meetings with BGC's solicitors and copies of the emails exchanged between his and BGC's solicitors on 16 and 17 October 2017. It also made reference to the email of 25 October 2017. The Settlement Agreement also included express wording purporting to confirm that privilege had not been waived in relation to the underlying communications.

This decision by the Court of Appeal confirms the position in relation to materials incorporated into settlement agreements, clarifying that if original communications subject to without prejudice or litigation privilege are

1 [2018] EWCA Civ 2652.

2 [2019] EWCA Civ 1937

incorporated into a settlement agreement, those versions will not be privileged and as such cannot be withheld from inspection by another party.

Without prejudice privilege

As the Court of Appeal noted in BGC, written or oral communications which are made for the purpose of a genuine attempt to compromise a dispute between the parties may not generally be admitted in evidence, either in the proceedings that they are attempting to settle or otherwise, as they are covered by without prejudice privilege.

While communications as to settlement terms may well attract without prejudice privilege, the written settlement agreement resulting from those without prejudice negotiations does not. Where the settlement agreement was concluded by acceptance of a without prejudice offer, the offer itself ceases to be protected by the privilege as it forms part of the contract between the parties.[3] There is a clear public policy reason for this; a party would be unable to enforce the terms of an agreement if it could not be disclosed by virtue of being subject to without prejudice privilege.

Counsel for BGC sought to argue that the communications scheduled to the Settlement Agreement were (as a matter of contractual construction) the original communications, not new communications. The Court of Appeal rejected this argument, holding that the issue was not one of contractual construction, but rather one of the purpose of the communications in question.

The Court of Appeal was, therefore, clear that the issue before it was not whether the underlying documents were subject to without prejudice privilege; it was common ground that the meeting notes and emails were privileged. The question before the Court was whether those documents as part of the Settlement Agreement (included as schedules to it and referred to therein) were subject to without prejudice privilege.

The Court of Appeal held that the Settlement Agreement and its schedules were not subject to without prejudice privilege. That the schedules included communications which were subject to without prejudice privilege in their original form was of no relevance. The Court noted that if the schedules to the Settlement Agreement could not be referred to in subsequent legal proceedings, it would be impossible for BGC to "police" the Settlement Agreement, and in particular the warranties given by Mr Cuddihy that the disclosures made in the schedules were accurate.

Further, the Court held that the position was the same in relation to the email of 25 October 2017 which was referred to in the Settlement Agreement rather than scheduled to it. The Court found that the email had been incorporated into the Settlement Agreement and it was not possible for BGC to cherry pick those parts it claimed privilege over and those it did not. It followed that the incorporated email was a new communication made by way of the Settlement Agreement (on the same terms as the original email) and this new communication was not subject to without prejudice privilege. The policy principle behind this decision was the same as for the communications which were scheduled to the agreement; if the 25 October 2017 email was held to be without prejudice, it would not be possible for BGC to refer to the it should it need to bring proceedings against Mr Cuddihy for breach of the representations and/or warranties made therein.

Litigation privilege

The English Courts recognise that communications between parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with litigation will be privileged, if all the following conditions are met:

(a) litigation was in progress or reasonably in contemplation;

(b) the communications must have been made for the sole or dominant purpose of conducting that litigation; and

[3] *Walker v Wilsher* (1889) 23 QBD 335 at 337

(c) the proceedings in question must be adversarial, and not investigative or inquisitorial.[4]

In the *ENRC* case,[5] the Court of Appeal confirmed that documents prepared for the dominant purpose of obtaining information or advice in connection with avoiding litigation before it starts or settling it once it has started are as much protected by litigation privilege as documents prepared to obtain information or advice in connection with the actual conduct of litigation. In the *West Ham v E20* case, the Court of Appeal placed limitations on the scope of this privilege, holding that documents which relate solely to commercial discussions regarding a potential settlement are not subject to litigation privilege unless they are created for the dominant purpose of obtaining information or advice in relation to that potential settlement or if they reveal the nature of any such information or advice.

In the BGC case, the Court of Appeal had to determine the sole or dominant purpose of the inclusion of the relevant emails in the Settlement Agreement. Counsel for BGC suggested that the incorporation of the communications was part of a "*single wider purpose*" of evidence gathering for the dominant purpose of the conduct of litigation. While this was the purpose of the original underlying communications (as evidenced by a witness statement given by BGC's solicitor), it did not follow that this was necessarily the purpose of the Settlement Agreement itself. The Court of Appeal found that the purpose of the incorporation of the communications into the Settlement Agreement was to "*benchmark or police*" the Settlement Agreement; that is to enable BGC take appropriate action should the representations and/or warranties made by Mr Cuddihy not be true and accurate; the dominant purpose was not to gather information, evidence or advice for the conduct of litigation reasonably in prospect.

The Court of Appeal therefore determined that litigation privilege did not apply to the Settlement Agreement, and as such there was no need for the Court to consider what it held to be complex issues around the requirement of confidentiality for litigation privilege, particularly in the context of communications between two parties to a litigation excluding other parties to the same litigation. Issues of common interest privilege were also raised in this regard. The Court left these issues asides until a case where "*their resolution matters.*"

Significance of the Decision

The decision in BGC is primarily a restatement of existing principles of privilege, albeit applied in a relatively novel situation. In light of the decision, parties should be cautious when entering into settlement agreements with some but not all parties to ongoing litigation in circumstances where material which is otherwise privileged is to be incorporated into a settlement agreement. This is the case whether the underlying materials are included in the body of the agreement or in schedules to the agreement, or even if they are only incorporated by reference.

It is also clear from the BGC judgment that even including express provisions in order to seek to preserve privilege in those documents will not necessarily be effective; any claim to privilege in a settlement agreement will be assessed on its own merits.

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

5 *SFO* v. *Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006.