Client Alert | Commercial Litigation

West Ham United FC and the London Stadium: West Ham score as internal discussions on settlement proposals may not be privileged

February 2019

Authors: **Amanda Cowell**, **Richard Coopey**, **Ethan Wang**

In the latest round of legal issues relating to West Ham United FC's move to the London Stadium, the Court of Appeal found that confidential internal emails between board members and other stakeholders, for the purposes of discussing a settlement proposal, were not covered by litigation privilege.[1]

Summary

- Since West Ham United FC ("**West Ham**") were awarded the right to use the London Stadium (formerly known as the Olympic Stadium) in 2013, the move has been fraught with legal difficulties. This decision was (unsuccessfully) challenged by way of judicial review by both Tottenham Hotspur FC and Leyton Orient FC. Now, after kicking off their 99 year lease at the London Stadium, West Ham have been involved in a variety of disputes with the owners of the stadium, E20 Stadium LLP (the "**Owner**") over, among other things, the number of seats that it is entitled to use in the stadium on match days.

- During the course of legal proceedings between West Ham and the Owner, West Ham sought inspection of six internal emails sent between the Owner's Board members and other stakeholders. These emails contained confidential commercial discussions on a potential settlement proposal to West Ham (the "**Documents**"). The Owner refused to allow inspection on the basis that litigation privilege applied to the Documents, by virtue of being created "*with the dominant purpose of discussing a commercial settlement of the dispute when litigation with* [West Ham] *was in contemplation*". The High Court had agreed with the Owner's position, and West Ham appealed that decision.

- The Court of Appeal found that notwithstanding the Documents discussing the potential settlement, they were not protected by litigation privilege and should therefore be provided for inspection to West Ham (and could be referred to at trial).

[1] *WH Holding Limited and West Ham United Football Club Limited* v. *E20 Stadium LLP* [2018] EWCA Civ 2652.

- This case clarifies the position in relation to commercial documents prepared in contemplation of settlement, confirms there is no blanket of litigation privilege for internal communications, and is a timely reminder for parties involved in any anticipated or ongoing litigation to be cautious about the contents of any internal correspondence.

The Court of Appeal's Reasoning

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

(c) The proceedings in question must be adversarial, and not investigative or inquisitorial.[2]

In the recent *ENRC* case, 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.[3]

However, there was some uncertainty over whether the communications must be for the dominant purpose of *obtaining information or advice* in connection with litigation, or whether the communications were privileged as long as they were created for the dominant purpose of conducting the litigation more generally.

In the *West Ham* case, the Court of Appeal found that internal company communications were not privileged *per se*.[4] The Court of Appeal further held that the narrower approach to privilege should prevail – specifically, 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.

Therefore, the fact that the Documents were created to discuss a potential settlement of the litigation did not make them privileged in and of themselves. The Documents were not created for the dominant purpose of obtaining information or advice in connection with the litigation and nor did they reveal the nature of any such advice or information. As a result, they were not protected by litigation privilege and could be inspected by West Ham.[5]

The Court of Appeal did emphasise that if a document could not be disentangled from privileged documents and/or would otherwise reveal the nature of any information or advice sought in connection with the litigation, it would be covered by litigation privilege. However, this did not apply to the Documents.

Significance of the Decision

The Court of Appeal concluded with a clear and concise statement on the law on litigation privilege as it stands:

- Litigation privilege is engaged when litigation is in reasonable contemplation;

---

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

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

4 In this respect, the Court of Appeal overruled *Mayor and Corporation of Bristol* v. *Cox* (1884) 26 Ch D 678 (Ch).

5 The documents were not communications with legal advisers, so issues of legal advice privilege were not engaged.

- Once litigation privilege is engaged it covers communication between parties or their solicitors and third parties for the purposes of obtaining information or advice in connection with the conduct of the litigation, provided it is for the sole or dominant purpose of the conduct of the litigation;
- Conducting the litigation includes deciding whether to litigate and also includes whether to settle the dispute giving rise to the litigation;
- Documents in which such information or advice cannot be disentangled or which would otherwise reveal such information or advice are covered by the privilege; and
- There is no separate head of privilege which covers internal communications falling outside the ambit of litigation privilege as described above.

Parties to litigation or potential litigation would be well advised to hold these conclusions in mind when preparing documentation which relates to litigation but which is not also protected by legal advice privilege.

This decision serves as a timely reminder that internal communications relating to anticipated or ongoing litigation will not necessarily be privileged and therefore great care should be taken in producing such internal documents, particularly when documents reveal what a party would be prepared to receive or pay to settle a claim.[6]

There is a real risk that confidential internal discussions relating to the strategy of the litigation, settlement proposals and other commercial decisions related to or contingent on the litigation may be subject to inspection, and relied upon at trial, by the other party. Companies should therefore take appropriate steps to ensure that its employees are aware of these risks and that internal communications do not contain information which may be prejudicial to the litigation. As a matter of practice, this may mean limiting written internal communications relating to the matters in dispute so far as possible.

As West Ham and the Owner have reached a settlement in the underlying proceedings, there will be no replay and the Supreme Court will not have the opportunity to examine this Court of Appeal decision. There remains a question as to how this decision will be applied in the future, and in particular whether the Supreme Court may take a different approach in another case. In principle, any good faith attempts to settle proceedings will be privileged.[7] It is therefore perhaps surprising that internal commercial discussions which take place prior to, but might feed into the making of, a settlement offer are not. In fact, in line with a party's ongoing duty of disclosure while proceedings are underway, the logical conclusion of this decision seems to be that a party may be required to disclose and provide for inspection internal documents reflecting commercial discussions relating to any potential settlement proposals to the other party (to the extent that those documents are otherwise disclosable).

Unless and until the Supreme Court is given the opportunity to reopen the position, for now, parties to litigation should be aware that not all of their tactical plans may be protected by privilege from being open to inspection by the opposing team.

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

[6] Note however, that this decision does not affect the general rule that communications between clients and solicitors for the purposes of obtaining legal advice are privileged. This is a distinct aspect of legal professional privilege known as legal advice privilege.

[7] Known as without prejudice privilege.