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Strict UK Litigation Privilege Test for Joint Liquidator Reports

High Court holds that reports used by the Serious Fraud Office to obtain search and arrest warrants are not subject to litigation privilege in subsequent civil proceedings.

On 26 July, the UK High Court gave its judgment in *Tchenguiz v Serious Fraud Office,* holding that five reports created by joint liquidators of a company—which had been used by the Serious Fraud Office (SFO) to gain search and arrest warrants as a part of an investigation—were not subject to litigation privilege.[1] Accordingly, the reports were to be disclosed by the joint liquidators pursuant to a third-party disclosure application in civil proceedings against the SFO for damages.

Organisations should be aware that—when important reports are created, especially by accountants or insolvency practitioners, to which they might later wish to assert privilege—the purpose of the report must be carefully considered and described. If in doubt, legal advice should be requested regarding privilege, particularly in relation to any requests for information or documents from the SFO or similar regulatory bodies.

Background

In October 2008, the Icelandic bank Kaupthing went into administration, with debts 10 times the size of Iceland's gross domestic product. This prompted an investigation by the SFO into the collapse of the bank and, in particular, the activities of brothers Vincent and Robert Tchenguiz and their related companies on the suspicion that millions of pounds of borrowings had been illegally ciphered from the bank.

Pursuant to its statutory powers, the SFO requested information from the joint liquidators of a company related to the Tchenguiz brothers, Oscatello Investments Limited.[2] Five reports (the Reports) created by the accountancy firm Grant Thornton (GT) on the instructions of the joint liquidators were shown to the SFO, which reviewed and took notes of, but did not make copies of, the Reports.

The SFO used the contents of the Reports as a part of the information presented to the Central Criminal Court in an application to obtain search orders against, and arrest warrants for, the Tchenguiz brothers. The Tchenguiz brothers were investigated by the SFO and arrested but were released without charge. They then sought a judicial review challenge in the courts.[3] During 2012, the SFO dropped their investigations due to lack of evidence, and the Tchenguiz brothers initiated legal action against the SFO, claiming up to £300 million for financial losses and reputational harm.

1. *Tchenguiz v Serious Fraud Office*, [2013] EWHC 2297 (QB) (26 July 2013), *available at* http://www.bailii.org/ew/cases/EWHC/QB/2013/2297.html.

2. As a part of complex trusts structures relating to the Tchenguiz brothers, Oscatello and related group companies carried out investments, borrowing large sums of money from Kaupthing before its collapse. They failed to meet margin calls, and, as a result, Oscatello went into liquidation.

3. Judicial review is a procedure in English administrative law by which the courts supervise the exercise of public power. An individual who feels that an exercise of such power by a government authority, including certain statutory/regulatory bodies such as the SFO, has violated his or her rights may apply for judicial review of the decision and have it set aside (quashed) and possibly obtain damages. The warrants and orders relating to the Tchenguiz brothers were quashed in a High Court judgment on 31 July 2012, which was highly critical of the SFO. *Rawlinson & Hunter Trustees v Central Criminal Court*, [2012] EWHC 2254 (Admin) (31 July 2012), *available at* http://www.bailii.org/ew/cases/EWHC/Admin/2012/2254.html.

The Tchenguiz brothers sought a third-party disclosure order pursuant to Civil Procedure Rule 31.17 against the joint liquidators for disclosure of the Reports. The joint liquidators opposed the application on various grounds, including that the Reports were covered by litigation privilege. The Tchenguiz brothers disputed this and argued further that, even if litigation privilege had initially applied to the Reports, it had been lost by virtue of the Reports (or at least the information within them) being in the public domain when the SFO's notes of them were adduced in open court during the judicial review hearing.

Judgment

The Reports were created by accountants, and, following the recent UK Supreme Court judgment in *R(Prudential plc) v Special Commissioner of Income Tax*,[4] it is clear that advice given by accountants does not trigger the legal advice privilege. Therefore, the joint liquidators had to satisfy the test for litigation privilege in order to avoid disclosure of the Reports.

In his judgment, Mr Justice Eder first established that it was prima facie necessary and appropriate to make an order against the joint liquidators for disclosure of the Reports due to the use of their content by the SFO in the search and arrest warrants. He then turned to whether the Reports, nonetheless, were subject to litigation privilege, focusing on the well-established test that a document must be produced for the "dominant purpose" of litigation and that such litigation must be actual or contemplated.

Justice Eder noted that difficulties arise where documents are produced for a dual purpose, particularly in the case of liquidators who are under statutory duties to identify what (if any) assets or liabilities exist. Such information may well be important to enable liquidators to decide what legal proceedings may possibly be pursued. Additionally, further down the line, such information may be used for, or in connection with, pending or contemplated litigation or for conducting or aiding in the conduct of such litigation. However, unless such reports were originally produced for the "dominant purpose" of litigation, they could not, in Justice Eder's view, be the subject of a proper claim for litigation privilege.

In opposing the application, the joint liquidators relied upon a witness statement of their solicitor, who sought to explain the nature and provenance of the Reports (the Witness Statement). Taking an objective and a semantic approach, Justice Eder looked carefully at the descriptions given in the Witness Statement and focused on the purpose of the Reports and whether litigation had proceeded and, if so, when. After conducting this evaluation, he held that none of the Reports were subject to litigation privilege.

For instance, one report, regarding proceedings in Guernsey brought against members of the Oscatello group of companies, was described in the Witness Statement as having been prepared "entirely to enable the Joint Liquidators and their legal advisors to respond to varying scenarios and to prepare a Defence and Counterclaim". Justice Eder found the mention of "varying scenarios" to be unequivocal and the use of the conjunctive "and" to suggest a dual purpose. Further, the report was also described as "specifically . . . to identify all inter-company balances that should be reversed and to calculate the effect of these balances/reversals on dividends to creditors." This, according to Justice Eder, was an exercise that the joint liquidators were obliged to carry out in any case, independent of the possible (rather than actual or contemplated) need to take recovery proceedings. The fact that the report was sent to Guernsey counsel three months after being produced could not have the effect of creating litigation privilege if the privilege did not exist when originally produced.

Because the Reports were not protected by litigation privilege, Justice Eder did not need to deal with loss of confidentiality. However, he did state *obiter* that only the notes of the Reports were in the public domain and not the Reports themselves.[5]

4. [2013] 2 WLR 325.

5. There is an interesting, broader question as to whether documents (or extracts thereof) disclosed to the SFO or similar statutory/regulatory bodies lose or waive privilege in relation to a more general loss of privilege, such as for related civil proceedings, when purportedly disclosed only for the limited purpose of the criminal investigation. Addressing this issue, Justice Eder cited *obiter* to *British Coal Corporation v Dennis Rye Ltd (No 2)*, [1988] 1 WLR, which is not a strong precedent. However, a definitive decision on this matter is unclear. The safest option is to assume that privilege would be lost/waived more broadly.

Implications

In this case, a strict "dominant purpose" test was applied, with Justice Eder finding that litigation privilege did not apply because there was a dual purpose to each Report due to the role of the joint liquidators. However, in previous cases, potential dual purposes have been held to be "quite inseparable". For instance, in *Re Highgate Traders Ltd*,[6] litigation privilege was held to have arisen in the case of a report by experts commissioned by an insurer that was concerned about whether a claim for fire damage was fraudulent and should be refused.

The judgment in *Tchenguiz* was more in line with the decision in *Price Waterhouse (a firm) v BCCI Holdings Luxembourg SA*,[7] a case in which litigation privilege was not found to apply to a report by a bank's auditors in relation to problematic loans, even though the report would be of use in determining which loans should be pursued in litigation by the bank.

Each case will turn on its own facts. What is clear is that, when important reports are created, especially by accountants or insolvency practitioners, the purpose must be carefully considered and described. If in doubt, legal advice should be requested regarding privilege, particularly in relation to any requests for information or documents from the SFO or similar regulatory bodies.

It is also worth noting the tactical importance of early interlocutory applications, such as for disclosure, in the scheme of big-ticket litigation. The judgment against the joint liquidators has been widely publicised as a victory for the Tchenguiz brothers and their legal team and another setback for the SFO. Further, it is reported that the Tchenguiz brothers are now seeking to bring large claims against GT in relation to its involvement in the SFO investigation.

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6. [1984] BCLC 151 (CA).
7. [1992] BCLC 583.