

## Insights

# HIGH COURT UPHOLDS PRIVILEGE CLAIM, DESPITE “DECEPTIVE” LITIGATION TACTICS

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## SUMMARY

A recent High Court appeal decision in *Ahuja Investments Limited v (1) Victorygame Limited and (2) Surjit Singh Pandher* has permitted a creative, yet deceptive, litigation strategy by a claimant seeking to withhold information from its opponent. Litigation privilege was successfully relied on to withhold documents that were obtained from a third party under the cover of pre-action protocol.

## BACKGROUND

The Claimant is claiming damages from the Defendant for misrepresentation during a property transaction. During the course of litigation, the Claimant withheld two documents and the Defendant was successful in obtaining an order for disclosure of these documents.

The two documents in issue were a letter of claim written under the pre-action protocol for professional negligence and the response received to this letter. The letter of claim was sent by the Claimant's current solicitors to the Claimant's previous solicitors. The response to this letter was then sent by the solicitors' insurers.

The Claimant appealed the disclosure order arguing that the real purpose of the letter of claim was actually to obtain information from the former solicitors for use in the current proceedings against the Defendants. For that reason, the Claimant was entitled to withhold them from the Defendant on the grounds of litigation privilege.

## LITIGATION PRIVILEGE – THE TEST

Although legal professional privilege has been the subject of much debate and case law in recent years, the test for litigation privilege remains as set out in *Three Rivers District Council v Bank of England (No.6)* [2005] 1 AC 610. The test requires the following elements to be satisfied:



1. The confidential communication must be between a lawyer (acting in a professional capacity) and client, or between either lawyer or client and a third party;
2. The communication must be for the dominant purpose of use in litigation;
3. The litigation must be reasonably contemplated, or existing; and
4. The litigation must be adversarial, not investigative or inquisitorial.

On appeal, the key issue for the Court therefore was whether the Master had been wrong to order disclosure of the documents on the basis of his decision that the second element of the privilege test had not been met (the dominant purpose test).

The Claimant submitted that on account of the former solicitor's prior lack of co-operation and conduct, it was decided that the only way in which the former solicitor would give any substantive comment was to threaten to issue proceedings against them. Therefore, despite the purpose of the letter to the former solicitor appearing to be a pre-action letter, the true and only purpose of it was to obtain information for use in the current proceedings. The Claimant also added that the letter referred to the current proceedings, meaning that the former solicitor therefore would have known that the information they provided would be used for the purpose of the Claimant's claim against the Defendant. The Defendants argued that, assessed objectively, the letters had two purposes (an open purpose as a letter of claim and a secret purpose of trying to obtain information for these proceedings) and, in the circumstances on the basis of the decision in *Property Alliance Group v The Royal Bank of Scotland Plc (No.3)* [2016] 4 WLR 3 ("*PAG*") the objective, open purpose must trump the secret purpose of the Claimant.

## THE DECISION

The Claimant's appeal was allowed. Deputy Judge Robin Vos held:

1. Having assessed previous authorities on the rationale of litigation privilege, "*the main focus should be on the position of the litigant who is claiming privilege in determining whether a claim to privilege should be upheld.*" It is the purpose of the instigator which is relevant for determining objectively the dominant purpose of the material for which privilege is claimed.
2. Although the Claimant's purpose in sending the letter could have been to consider a possible claim against the former solicitors, there was no evidence on the facts suggesting that it had any intention of doing so. Therefore, on an objective assessment, the Claimant did bring the correspondence into existence for the dominant purpose of obtaining information for use in the litigation.
3. Contrary to the arguments advanced by the Claimant, *PAG* was not decided on the basis of the explicit purpose stated on the face of the letter of claim.



4. The Claimant clearly anticipated that it would not get the necessary information if it had simply requested it from the former solicitors and had issued the letter of claim to obtain the information relying on the professional negligence pre-action protocol. Despite not condoning such tactics, the Judge concluded that *“having found that the dominant purpose of the correspondence was to obtain information for the purposes of these proceedings, there is in my view no principled reason why the protection of privilege should not be available in relation to that information”*.
5. The correspondence had a sufficient degree of confidentiality in relation to the Defendants in order for a claim to litigation privilege to be maintained. The Judge considered that both the Claimant and the former solicitors would have considered the correspondence to be confidential as far as third parties (in this case – the Defendant) were concerned. The fact that the Claimant would not have been able to claim privilege in proceedings against the former solicitors (had those proceedings been issued) did not prevent the Claimant from claiming privilege in the current proceedings against the Defendant.
6. In conclusion, all elements of the test of litigation privilege, including the dominant purpose, had been satisfied. This conclusion was *“not altered by the fact that [...] [the former solicitors and their insurers] may have been misled as to the purpose for which the information was being sought”*.

## A NEW APPROACH TO SEEKING INFORMATION?

This is an interesting decision because it shows the court confirming the substance over form approach to assessing legal privilege and confirming that deception does not prevent a claim to privilege from succeeding. However, the court did not condone the Claimant's approach and it was undeniably risky. Therefore while the Claimant's strategy in this case was successful, it is unlikely to become commonly adopted but it may inspire other creative approaches to seeking information from otherwise unwilling parties.

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The author would like to thank Elisabeth Tsudikman, Trainee Solicitor, for assisting with this blog.

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