

High Court Finds Report of Accounting Firm Not Covered by Litigation Privilege

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In the recent decision of *State of Qatar v Banque Havilland SA and Others* [2021] EWHC 2172 (Comm), the High Court has required the disclosure of an investigation report prepared by an accounting firm. The report was originally withheld from disclosure on grounds of litigation privilege.

Background. The proceedings involve allegations of conspiracy arising out of the blockade of Qatar by a number of Arab nations in 2017. The conspiracy was said to involve market manipulation of currency issued by the Qatar Central Bank, and manipulating the market in USD-denominated bonds issued by Qatar. An individual, Mr Bolelyy, was alleged to have been part of the conspiracy with Banque Havilland SA (the “Bank”) while he was employed there; in the course of his employment, Mr Bolelyy had prepared a seven-slide presentation entitled “*Distressed Countries Fund*” (the “Presentation”), which formed a key part of Qatar’s case on the alleged conspiracy.

The recent decision of David Edwards QC (sitting as a Judge of the High Court) concerns a number of applications made by Qatar in respect of disclosure in the proceedings, the most noteworthy of which sought the disclosure by the Bank of a report prepared by PwC.

The Investigation Report. The report was prepared as part of an investigation by PwC which came about as a result of the publication of the Presentation in The Intercept (an online publication) in November 2017. At the point at which PwC was appointed, the present litigation was not on foot, and the purpose of the appointment was to investigate a potential hack or leak, which the Bank considered must have led to the publication of the Presentation. The Bank notified its regulators in Luxembourg and London of the publication of the Presentation, and following completion of PwC’s report into the potential leak in June 2018 (the “PwC Report”), a copy was provided to the Luxembourg regulator.

The Bank relied on the contentious circumstances surrounding the blockade of Qatar and the publication of the Presentation in support of its assertion that the PwC Report was subject to litigation privilege. It argued that the PwC Report had been prepared for

the purpose of collecting evidence and enabling the Bank to take legal advice in respect of proceedings that were in reasonable contemplation. In support of its argument, the Bank also relied on the fact that the lawyers acting for Qatar had written to the Bank in December 2017 requesting that it place a litigation hold on its documents. This litigation hold request took place after the Bank had engaged PwC (November 2017), but before the PwC report was provided to the Luxembourg regulator in June 2018.

Findings. The Court ordered disclosure of the PwC Report on the basis that although the Bank clearly believed that the publication of the Presentation could have significant regulatory and legal consequences, this was not sufficient to ground a claim for litigation privilege. Litigation privilege requires a “*more concrete*” apprehension of adversarial proceedings, and the contemporaneous evidence did not support such a finding.

Aside from the question of the apprehension of adversarial proceedings, the Court did not consider that the dominant purpose of the PwC Report was anticipated litigation. The Bank had argued that in fact the sole purpose of the PwC Report was connected to the anticipated litigation; the Court disagreed, finding that the PwC Report was also prepared to find facts and to answer questions from regulators. In respect of answering questions from the Luxembourg regulator, the Court also noted that although the regulator may have instituted adversarial proceedings at some point, at the time the PwC Report was prepared this was not the case.

Takeaways. Although *State of Qatar v Banque Havilland SA and Others* does not represent a change in the law of privilege, it serves as an important reminder for commercial parties who anticipate future litigation – until there is a specific threat of proceedings, it is better to err on the side of caution and avoid creating documents that you would prefer not to disclose later, as it is not certain that they will be privileged.

Parties should also be careful when making disclosures of potentially privileged materials to regulators, and only do so where they are confident they may do so on a limited waiver basis, to avoid any inadvertent waiver of privilege.



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