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CROSS-BORDER CIVIL LITIGATION AND LITIGATION PRIVILEGE CONSIDERED

Minera Las Bambas SA & anor v Glencore Queensland Ltd & ors [2018] EWHC 286 (Comm)

Introduction

By a decision handed down on 21 February 2018 in *Minera Las Bambas SA v Glencore Queensland Ltd* [2018] EWHC 286 (Comm), the English Commercial Court held that Litigation Privilege could only arise in favour of a person who was a party to the litigation in question – with the consequence that a person who was controlling litigation could not assert Litigation Privilege against the party that it was controlling.

Disclosure and Privilege in English Law

- Under the rules contained in the English Civil Procedure Rules ("CPR"), litigating parties are required to undertake a reasonable and proportionate search for relevant documents in their possession, custody or control. "Standard disclosure" is a form of disclosure under English law that requires a party to disclose documents on which it relies which support or adversely affect its case or which support or adversely affect another party's case or which is otherwise required to be disclosed by a relevant CPR Practice Direction.

- Each side must then provide a list of relevant documents to the counterparty (including documents that the party does not think it ought to have to provide because of a claim to privilege). The list will also contain a 'Disclosure Statement' which, *inter alia*, sets out the extent of the search made.

- Each party is then, *prima facie*, entitled to inspect the documents disclosed by the other.

- The English courts can impose strong sanctions on a litigating party that does not comply with the CPR disclosure obligations.

- A litigating party does not have to disclose to the counterparty documents that are 'privileged'. Amongst the different kinds of privilege that exist in English law

are "Legal Advice Privilege" (which attaches to confidential lawyer-client communications created for the purpose of giving or obtaining legal advice) and "Litigation Privilege" (which attaches to confidential documents that were created for the dominant purpose of actual or pending legal proceedings).

Background

By a Share Purchase Agreement dated 13 April 2014, the claimants acquired the defendants' 100% shareholding in Xstrata Peru SA which, at that time, indirectly owned the "Las Bambas" mining project. Subsequently, the first claimant became the direct owner of Las Bambas. Following the sale, the Peruvian tax authorities commenced an investigation which ultimately led to the issuance of a tax assessment that effectively increased the first claimant's tax liability. The first claimant commenced proceedings challenging that tax assessment in the Peruvian courts. Under the Share Purchase Agreement, the defendants were entitled to assume control of one particular aspect of the Peruvian proceedings – and they did so (acting in the name of the first claimant). In England, proceedings were commenced concerning whether the defendants were obligated to indemnify the claimants in respect of the tax liabilities that were the subject of the Peruvian proceedings.

Standard disclosure took place in April 2017. The defendants filled in Form N265 disclosure statements and gave lists of documents. The defendants indicated there were 4408 disclosable documents, but that 1393 of those documents were privileged. Furthermore, the defendants indicated that 25 documents were entitled to Litigation Privilege arising out of the Peruvian proceedings. Only some of those 25 documents fell within the 1393 privileged documents.

In January 2018, the claimants applied under CPR 31.19(5) for the court to determine whether the defendants were entitled to assert Litigation Privilege in these circumstances – where the right to Litigation Privilege was said to arise out of proceedings to which the defendants were not themselves a party.

The defendants submitted: (1) the 25 documents had not in fact been disclosed and, therefore, inspection would not be appropriate; (2) alternatively, if the 25 documents had been disclosed, then inspection nevertheless should still be refused because the 25 documents had been produced for the dominant purpose of the Peruvian proceedings and therefore attracted Litigation Privilege; (3) in any event, the court, in the exercise of its inherent jurisdiction, should refuse inspection because the test for standard disclosure was not met as regards the 25 documents and, furthermore, the claimants' application had come too late in the proceedings.

Decision

Moulder J granted the claimants' application.

As regards the issue about whether the 25 documents had been disclosed, Moulder J rejected the defendants' submission that they had not been disclosed. By virtue of CPR 31.2, when a party stated that a document "*exists or has existed*", that party disclosed that document. It was not a requirement, as contended by the defendants, that each individual document needed to be mentioned. That was apparent when

CPR 31.2 was read in the light of the overall CPR scheme as regards disclosure. Furthermore, the commentary to CPR 31.10 contained in the White Book suggested that there was no requirement to give detailed descriptions of documents in respect of which privilege was asserted. The fact that the documents in respect of which the defendants claimed Litigation Privilege were identified by class (by a reference to the Peruvian proceedings) did not entail that those documents had not been disclosed as a matter of civil procedure.

Moulder J then moved to consider the defendants' submissions on their purported entitlement to assert Litigation Privilege against the claimants. The defendants, in their assertion of Litigation Privilege, relied upon certain English cases in support of the proposition that any Litigation Privilege arising out of the Peruvian proceedings belonged to them and not to the claimants. However, Moulder J, having examined the case law put forward by the defendants, considered that those cases did not establish the proposition that a person controlling litigation could assert Litigation Privilege against the party it was controlling. In English law, Litigation Privilege could only be relied upon by a party to the litigation in question. Therefore, any Litigation Privilege arising from the Peruvian proceedings would belong to the claimants (because the first claimant was party to the Peruvian proceedings) and not the defendants (who were not). The defendants could not, in the English proceedings, assert Litigation Privilege against the claimants arising out of the Peruvian proceedings.

As regards the defendants' invocation of the court's inherent jurisdiction, Moulder J held that, as a general rule of English litigation, a party to whom documents had been disclosed was *prima facie* entitled to inspect them, although the court retained a discretion to refuse inspection if the counterparty could demonstrate that the CPR principles militated against the operation of the general rule. In the instant case, the defendants were unable to show sufficient reason to avoid the general rule. The defendants' conclusion that they did not need to disclose the 25 documents was not relevant – the defendants had elected to carry out a disclosure exercise in which their claim to privilege had been in respect of a class of documents as opposed to an assessment of each individual document. The defendants had purported to carry out a CPR-reliant disclosure exercise and the defendants had signed a disclosure statement. Litigating parties had no entitlement to revisit their disclosure exercise merely because their approach to it had been other than as strictly required by the CPR. Further, there was no suggestion that an order for inspection would cause any prejudice to the defendants.

As regards the defendants' submissions regarding delay, Moulder J held that, in the ordinary course of events, the court expected disputes concerning disclosure to have been resolved before such a late stage. Although there had been some delay by the claimants in the instant case, it was not sufficient to justify a denial of their right to inspection. Further, it had not been shown that an order for inspection would be disproportionate. Up until a comparatively late stage, the parties were still in correspondence about whether the 1393 documents included those documents in respect of which the asserted privilege stemmed from the Peruvian proceedings. In fact, the defendants did not confirm that some of the 25 documents were included within the 1393 documents until the instant hearing.

Concluding Remarks

Under English law, litigating parties and their lawyers potentially face harsh consequences from the court if they do not comply with the requirements of the CPR and its Practice Directions concerning disclosure obligations. Issues of privilege and disclosure are therefore often hotly contested in English litigation. Moulder J's judgment will be of significance to parties receiving legal advice in relation to cross-border litigation.