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## *Engaging a third party to conduct an investigation? Tread carefully - High Court finds no litigation privilege over documents produced in a preliminary investigation by an expert*

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### Case summary

- The High Court has considered whether a claimant was entitled to withhold documentation from a defendant on the basis that the documents were subject to litigation privilege, in circumstances where the documents were produced in the course of a preliminary investigation by an expert - the expert having been retained to investigate in respect of a separate (but linked) matter.

### What does this mean for you?

- This case demonstrates that - in circumstances where litigation privilege arises in respect of one potential claim - that same privilege may not extend to subsequent investigations into the underlying facts which reveal a potential counterclaim or a separate cause of action against separate defendants. This case suggests that, when determining whether litigation was in reasonable prospect, the Court will look carefully at whether litigation was in prospect in respect of *those particular matters* at the relevant time, and not extend the protection of privilege to causes of action which the parties were unaware of prior to the commencement of the expert's investigation.
- Accordingly, if you are considering retaining an expert or other third party to conduct an investigation on behalf of your organisation, it is worth remembering that the findings of the investigation will not necessarily be covered by litigation privilege. This is particularly so where the expert makes findings which do not relate directly to the matters on which they were first instructed, as litigation cannot be said to have already been in reasonable contemplation in respect of those new findings.

### Case overview

- The claim arose out of 41 forward freight agreements ("**FFAs**") entered into in 2007-8 between the first claimant (Kyla) and either the first defendant (FTL) or the second defendant (CTP). The claimants allege that the FFAs were entered into by the third defendant (CTM) as agent for them, at off-market rates, in order to enrich FTL or CTP at the expense of Kyla (the "**Mis-pricing Claim**"). The defendants deny that CTM ever acted as agent for Kyla and that the FFAs were, in fact, concluded by Kyla's own principal, Nikolas Livanos.
- In 2018, a dispute arose between Kyla and its shareholder, YPA, as to whether a dividend should be declared. As at October 2018, it was clear that this dispute had the potential to be litigious

(the “**YPA Dispute**”). One of the issues raised in correspondence between the parties was that YPA had been given authority to negotiate repayment of the FFAs with FTL on Kyla’s behalf. At the time, it was common in the industry to negotiate settlement of FFAs at a discount, but YPA failed to secure such a discount. Accordingly, Nikolas Livanos had settled the debts owed under the FFAs at full value.

- In November 2018 Nikolas Livanos, in correspondence with YPA, raised a grievance that YPA’s failure to negotiate a discount to the FFAs may form the basis of a claim for mismanagement or abuse of power. The intention was that this allegation would potentially form a counterclaim to any claim raised by YPA as to the distribution of the dividend.
- At this stage, Nikolas Livanos decided it would be appropriate to conduct an audit of the FFAs in order to make good any potential claim for mismanagement or abuse of powers. An expert was appointed in late-2018, and the expert’s findings revealed a pattern of trading on behalf of Kyla that was indicative of fraud. This was the first time that it became apparent to Nikolas Livanos (and therefore to Kyla) that the FFAs may have been deliberately mis-priced.
- In the present proceedings, Kyla claimed that certain documents relating to the expert’s investigations into the FFAs were protected by litigation privilege, as litigation relating to the FFAs had been in contemplation since at least November 2018. Kyla alleged that these documents were subject to litigation privilege as the purpose of their production was to reinforce Nikolas Livanos’s grievances regarding the mismanagement of the FFA negotiations, thereby providing a counterpoint to the YPA Dispute. The defendants argued that the instruction of an expert at that stage was merely a fishing expedition, and litigation against them was not reasonably in prospect at the time.
- The High Court agreed, reciting the principles that:
  - The party claiming privilege must establish that litigation *was reasonably contemplated or anticipated* – it is not sufficient to show that there is a mere possibility of litigation or a general apprehension of future litigation;
  - The party must also show that the relevant communications were for the *dominant purpose* of either: (i) enabling legal advice to be sought or given; and/or (ii) seeking or obtaining evidence or information to be used in, or in connection with, such anticipated or contemplated proceedings – with the ‘purpose’ to be assessed from an objective standpoint; and
  - The burden is on the party claiming privilege to prove it.
- In applying these principles, the High Court reasoned that:
  - There was no suggestion in the correspondence between Nikolas Livanos and YPA that a counterclaim was envisaged in respect of the accusations of “mismanagement”;
  - The parties to the YPA Dispute and any accompanying counterclaim would have been different parties to the present claim; and
  - The instruction of the expert seemed to have been for the purpose of trying to provide backing for the mismanagement claim, but at that stage litigation in relation to even that claim was not in reasonable prospect.
- Accordingly, the claimant could not claim litigation privilege from the date that the mismanagement claim was first conceived, in the context of the YPA Dispute, in the subsequent

Mis-pricing Claim. The claimant was ordered to reconsider the application of litigation privilege to the relevant documents, from the date at which the Mis-pricing Claim was in reasonable contemplation.

For the full case transcript, see [Kyla Shipping Ltd v Freight Trading Ltd \[2022\] EWHC 376 \(Comm\)](#)

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