

Privilege not lost where party gave impression of threatening separate litigation in order to obtain information (Victorygame Ltd v Ahuja Investments Ltd)

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Dispute Resolution analysis: A unanimous Court of Appeal upheld the widely publicised decision of Mr Justice Vos in this case, ruling that a controversial tactical rationale behind a letter of claim does not deprive the prospective litigant of privilege in connected proceedings over pre-action correspondence and its enclosures. Lady Justice Andrews rejects a Canadian-style public interest exception and sets out a helpful framework for determining if privilege arises and whether any exceptions, such as waiver or estoppel apply. This case is also a useful reminder for litigants to be cautious when choosing their information-gathering strategies. Written by Natalie Todd, partner, and Anastasia Tropsha, lawyer, at PCB Byrne LLP.

Victorygame Ltd & another v Ahuja Investments Ltd [\[2021\] EWCA Civ 993](#)

What are the practical implications of this case?

This decision clarified that there is no principle of law which obligates a party to divulge the purpose for which information is sought and any non-disclosure of such a purpose is immaterial to the question of litigation privilege.

The test of dominant purpose is not limited to an objective analysis of the form in which communication occurred, such as a letter before action ostensibly being in contemplation of proceedings. The court will evaluate the purpose taking account of all the circumstances, 'particularly when it is the intention of the instigator of the documents that matters' para [48].

The starting point in such cases is a presumption that documents are privileged. This presumption can be rebutted and privilege lost in specific circumstances, such as:

- the person entitled to the privilege can waive it
- estoppel can prevent a party from asserting privilege, where it had previously acted in a way that would make it unfair or unconscionable for it to assert it. Any such actions would need to have been clear, unequivocal and proven by very cogent evidence
- statute can override privilege
- potentially, in a case of active deception as to the nature of the exercise altogether where the disclosing party is not aware that it is party to an information-gathering exercise at all

There is no principle in English law that a competing public interest could outweigh privilege.

What was the background?

In an expedited appeal against the order of Vos J, Victorygame sought to challenge the decision that correspondence between current and former solicitors of Ahuja was confidential and to obtain its disclosure.

The underlying claim arose out of the purchase by Ahuja from Victorygame of a commercial property in Middlesex. Ahuja claims that it was induced to enter into the sale contract and a related loan

agreement by fraudulent or negligent misrepresentations about the duration of the leases and the rental income. Victorygame accept that there was a misrepresentation, which they say was due to an innocent mistake, but deny that there was any operative inducement due to Ahuja's knowledge of the true position. This knowledge is alleged to stem from Ahuja's solicitors' possession of underlying documents and the advice to Ahuja on the subject.

Ahuja's conveyancer refused to provide its file to Ahuja's solicitors and was forced to do so following a successful third-party disclosure application. However, further information was required and a strategic decision was made by Ahuja in light of the conveyancer's non-co-operation to send a letter of claim as a way to obtain this information, although, it had no intention at the time to actually issue proceedings. It is this letter of claim and the response to it that Victorygame sought disclosure of, as it hoped to reveal the state of Ahuja's knowledge of the true position being contrary to that pleaded in the main proceedings.

What did the court decide?

At first instance, the Master ruled that the correspondence was not privileged, because the correspondence came into existence to obtain information, not for the purposes of litigation. On appeal, Vos J identified the key question as to whether the communications were made for the dominant purpose of conducting litigation with the main focus on the position of the litigant claiming privilege, and allowed the appeal.

On this appeal, Victorygame argued that there is no principle of law to the effect that if one party deliberately misleads another party as to the purpose for which information is required, and that party provides the information, the requesting party cannot thereafter maintain privilege over the information; and any such principle would not extend to third parties in any event.

A unanimous Court of Appeal disagreed that a party otherwise entitled to claim litigation privilege over correspondence with a third party should lose it simply because in order to obtain the information it needed, it was forced to bring pressure on a third party by threatening litigation (even if it did not then intend to carry out the threat)—especially where it was entitled to that information. Andrews LJ saw no basis for concluding that the reasoning of the court below was inconsistent with the rationale underlying litigation privilege (para [69]). Arguments as to waiver were also unsuccessful, as disclosures regarding Ahuja's intentions to rebut allegations of deception were not unfair.

Case details

- Court: Court of Appeal
- Judges: Lord Justice Baker, Lady Justice Andrews and Sir Stephen Irwin
- Date of judgment: 05 July 2021

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