

Dominant purpose test for litigation privilege not changed by ENRC decision (Sotheby's v Mark Weiss Ltd)

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Dispute Resolution analysis: This article concerns the application of the 'dominant purpose' test for litigation privilege when there is more than one purpose, and the impact of the recent Court of Appeal's decision, in *SFO v ENRC Limited*, on that test. A piece of art sold by Sotheby's was alleged to be a counterfeit. Sotheby's engaged with both its and the buyer's experts, and then rescinded the contract with the buyer and sought to rescind its contractual arrangements with the seller. In subsequent proceedings between Sotheby's and the seller, Sotheby's disclosed its correspondence with the experts but withheld inspection, asserting litigation privilege. It claimed that the ENRC decision meant that whenever litigation is the 'inevitable' result of a particular commercial decision, the dominant purpose of documents produced for the making of that decision is necessarily their use in the contemplated litigation. The Court disagreed and ordered inspection. Written by Jon Felce, partner at PCB Litigation LLP.

Sotheby's v Mark Weiss Ltd and others [\[2018\] EWHC 3179 \(Comm\)](#)

What are the practical implications of this case?

In disputes, it is not uncommon for documentation to have been generated for more than one purpose. The *Sotheby's* decision emphasises that, even in cases where litigation is likely or inevitable as a result of a party taking a particular course of action, that does not mean that practitioners can simply assert litigation privilege and withhold inspection.

A careful factual investigation needs to be undertaken in order to establish:

- the circumstances in which the documentation was generated
- the purposes for the production of the specific documentation in question
- which of those purposes (if any) was the dominant purpose

A party's lawyer needs to take an objectively realistic and commercial view. This is particularly the case given both the obligations of the disclosing party and the professional obligations of the disclosing party's legal team.

If production of documentation is to be withheld on the basis that the dominant purpose of the documentation is to enable legal advice to be sought or given and/or to seek or obtain evidence or information to be used in or in connection with anticipated or contemplated litigation, then there needs to be robust and coherent evidence for the same which does not misconceive the character of the documents in respect of which privilege is asserted. This is particularly the case since the burden of proving privilege falls on the party claiming the privilege. It is incumbent on that party to establish that the dominant purpose test is met.

What was the background?

In June 2010, Mark Weiss Ltd had (together with Fairlight Art Ventures LLP) purchased a painting described as 'Frans Hals, "Portrait of a Gentleman, half length, wearing Black", signed with monogram lower right—FH, oil on oak panel, 13 ½ by 10 ½ in'. A year later, Mark Weiss Ltd. engaged Sotheby's to sell the piece by private treaty for a minimum of \$10.75m. Sotheby's sold the piece, albeit it was a term of the contract that the sale could be rescinded and the purchase price returned if the buyer provided written evidence raising doubts as to the piece's authenticity or attribution and Sotheby's concluded that the painting was counterfeit.

In May 2016, the buyer provided a report to Sotheby's, which then commissioned a peer review of the report. Sotheby's expert concluded that the piece was a counterfeit, and Sotheby's duly rescinded the sale and paid \$11,287,500 to the buyer. Sotheby's then sought to rescind its contract with Mark Weiss

Ltd and repayment of the purchase price. Mark Weiss Ltd resisted rescission on the basis of a 'generally accepted' proviso in the agreement between Sotheby's and the buyer and alleged that Sotheby's had acted in breach of a fiduciary duty owed to Mark Weiss Ltd.

In the proceedings, Sotheby's disclosed correspondence between, on the one hand, Sotheby's and its solicitors Freshfields, and on the other hand the two art experts. However, it withheld inspection on the basis that the documents were subject to litigation privilege. Mark Weiss Ltd challenged this proposition.

What did the court decide?

For Sotheby's to be able to successfully assert litigation privilege in respect of the documents, those documents must have been brought into existence for the 'dominant purpose' of being used in contemplated litigation.

Of particular interest is that Sotheby's suggested that the Court of Appeal's reasoning in *SFO v ENRC Limited*, [\[2018\] EWCA Civ 2006](#) changed or clarified the law for those cases where a document was brought into existence for two purposes, one of which was for use in litigation. Sotheby's suggested that the situation in *ENRC*—which concerned the prospect of criminal proceedings acting as a 'stick' to cause documents to be generated—was analogous with the present case in the context of civil proceedings.

However, the court disagreed that whenever litigation is the 'inevitable' result of a particular commercial decision, the dominant purpose of documents produced for the making of that decision is necessarily their use in the contemplated litigation. The assessment of the dominant purpose is a fact sensitive exercise and the court must take a realistic, indeed commercial, view of the facts. In the present case, whilst the two purposes of the documents (to enable Sotheby's to determine whether the painting was counterfeit and for the purpose of any ensuing litigation) were connected—and notwithstanding that it was likely, perhaps 'inevitable' that litigation would follow—the two purposes could not 'in a realistic and commercial sense be regarded as one and the same'.

Case details

- Court: High Court, Queen's Bench Division (Commercial Court)
- Judge: Teare J
- Date of judgment: 26 November 2018

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