Emails about whether to settle litigation had to be disclosed

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EMAILS ABOUT WHETHER TO SETTLE LITIGATION HAD TO BE DISCLOSED

Six emails had been sent between members of a Company’s Board, and between the Board and Shareholders. It was claimed that the emails were composed with the dominant purpose of discussing a commercial proposal for settling the parties’ dispute at a time when litigation was in reasonable prospect.

On appeal, the court held that:

- Litigation privilege was engaged when adversarial litigation was in reasonable contemplation;
- Once engaged, it covered communications between the parties or their solicitors and third parties for the purpose of obtaining information or advice in connection with the conduct of litigation, provided it was for the sole or dominant purpose of conducting litigation. This

included deciding whether to litigate and whether to settle the dispute giving rise to the litigation.

- However, there was no justification or authority for extending the scope of litigation privilege to purely commercial discussions. Documents created with the dominant purpose of discussing a commercial settlement did not fall within the scope of the privilege.

This surprising decision highlights that employers should take great care when recording internal discussions relating to litigation.

WH Holding Ltd and another v E20 Stadium LLP [2018] EWCA Civ 2652

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