



Cayman Insurance Litigation Q3 2017 Review

Welcome to the Q3 2017 Stuarts Insurance Litigation Review. In this edition, we address privilege in the context of Accident Report/Claim Notification Forms. Stuarts acts for a number of leading Cayman Islands Insurance Companies and specifically advises and acts for Insurers on a range of matters including defending large loss personal injury claims. We hope you will find the review of interest.

Accident Report/Claim Notification Forms - Asserting Privilege

Introduction

At the outset of any proceedings, it is necessary to undertake a search for all documents that are in a party's custody or power that are relevant to the issues in dispute. Whether a document supports or undermines a particular party's case, the general rule is that it must be disclosed. The most common exception to this rule, of course, is if the document can be said to be protected by 'privilege'.

In this Quarterly Review, we specifically address whether accident/incident report forms (the "Form(s)") completed by an Insured for and at the request of their Insurer following an accident or incident, can be withheld from disclosure on the grounds of privilege. As this article goes on to suggest, the answer will be dependent upon what the primary purpose of the Form is.

This is self-evidently important as such Forms are likely to often be a contemporaneous record of the accident or incident. They are also documents provided to the Insurer which are prepared by the Insured and therefore it is not within the Insurer's control as to what information (or concessions) may be included in such Forms. The information provided may be prejudicial to the Insurer's case or may support it. Either way, consideration will need to be given to its disclosure in the event that proceedings are commenced.

It is in Insurers and Claims Manager's interests to be wide awake as to the potential need to disclose such materials and indeed how Insurers can take steps to protect their own interests in such respect.

Common types of privileged documents

Communications passing between a client and lawyer, the latter communicating in their professional capacity so as to assist/advise the former (including on non-contentious matters), are privileged even though no litigation is contemplated or pending.

Communications passing between a client/lawyer and non-professional agent or third party may also be privileged but only if they come into existence after litigation is either contemplated or commenced and made with a view to such litigation, either for the purpose of obtaining or collecting evidence to be used in it, or obtaining information which may lead to the obtaining of such evidence. Accordingly, if litigation is reasonably in prospect, documents brought into existence to enable attorneys to advise whether a claim shall be made or resisted are protected by privilege, importantly, whether or not a decision to instruct attorneys has been made at the time the documents are brought into being, subject only to establishing that such purpose is the 'dominant purpose' of their creation.



Key Contacts



Richard Annette

Head of Litigation
Tel: (345) 814-7920

richard.annette@stuartslaw.com

Accident/Incident Report Form or Claim Notification Form

The Accident/Incident report form or the Claim Notification Form is a standardised form that Insurers ask their Insureds to complete following an accident. Insurers will have their own discreet Forms, but typically the Form asks for details as to the accident circumstances (often with a space for a diagram/drawing if appropriate), the details of the party's involved and resulting loss/damage perceived to have been sustained by one or both parties.

The Form may serve as formal notification of an incident that may give rise to a claim under the policy; however, it will be only protected by privilege if and only if, as a communication between client and non-professional agent or third party (i.e., the Insurer), it comes into existence for the purpose of obtaining legal advice in either anticipated or existing legal proceedings.

It is in the context of proceedings pursued by a third party as against the Insured that the question of whether privilege can be said to attach to these Forms may arise. In dealing with a dispute over this, the Courts will attempt to discern what the Insurer's intentions are in procuring the information that the Form asks for.

In practice, difficulties may arise in determining whether a document is privileged, where a document is created for more than one purpose. In these circumstances, for privilege to attach, the "dominant purpose"¹ of insurers in procuring the document must be its submission to legal advisors for advice on whether the claim should be paid or resisted. A subsidiary purpose is not sufficient. Such privilege can be claimed by a party to a claim notwithstanding that it is the Insurers rather than that party who seek to use the document to obtain legal advice.

As broad guidelines to the Court's approach:

1. where fraud is suspected² or where the claim is in a complicated area of indemnity involving large sums of money,³ the document is more likely to be held to be privileged; and
2. the document is less likely to be privileged if the claim is simple and the dominant purpose of the Insurers in procuring the Form is the assessment of the quantum of the claim rather than obtaining of legal advice on liability.

The English Court of Appeal in the case of *Guinness Peat Properties* held that *"by reference to the intention of insurers who procured its genesis; that so viewed the dominant purpose was to produce a letter of notification which would be used in order to obtain legal advice or to conduct or aid in the conduct of litigation which was at the time of its production in reasonable prospect"*.⁴

It is therefore easy to see how such Forms can fall on either side of the line. A Form which does not probe as to the cause of the incident but asks only for details as to apparent damage is unlikely to be protected by privilege. However a Form that asks for a whole host of information relevant to the issue of liability and with the aim of establishing who is at fault is more likely to be considered to be privileged.

Disclosure – List of Documents

When it comes to notifying the other party in any proceedings as to what documents are discoverable (by way of List of Documents) consideration should expressly be given as to whether or not any Form should properly be disclosed.

If it is the case that it is concluded that the Form is privileged, consideration should be given to making reference to the privileged document (or set of documents) as, for example, *"communications between insurer and insured the dominant purpose for the creation of which was to obtain legal advice"* and to include that express claim to privilege in the appropriate section in the List of Documents.

Affidavit

If there is then an issue as to whether a Form is privileged or not, it is likely to fall to the Insurer's Claims Manager to be required to swear an Affidavit confirming (if that is the case) that the *"dominant purpose"* of the Insurer in procuring the Form was its submission to legal advisors for advice on whether the claim should be paid or resisted.

¹ *Waugh v Appellant and British Railways Board Respondents* [1979] 3 WLR 150

² *Highgrade Traders Ltd* [1984] BCLC 151, CA (English case)

³ *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1.WLR. 1027 (English case)

⁴ *Ibid* at 1028



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Generally, the Court will not go behind an unchallenged statement in an Affidavit unless there is something obviously wrong on the face of it, but where the affidavit evidence is clearly wrong the Court is entitled to go behind it.⁵

Conclusion

There is no prescribed rule and each case will turn on the facts, with reference to the relevant Form and its purpose(s), as can be discerned from the information it seeks to obtain.

The “*dominant purpose*” test is objective, however the question of whether a form is privilege is open to interpretation depending on the facts of the case and the type of accident, therefore it cannot be said that a Form that asks certain specific questions will automatically be privileged. However, there are certain questions and formatting which if deployed are more likely to show that the intention of the Insurer is to enable legal advice to be given on the issue of liability.

Suggested features of an Accident/Claim notification form

In addition to routine questions about the accident date, time, location and conditions, the following is a non-exhaustive list of requests for information that Insurers may wish to consider include/address in the Forms they ask their Insureds to complete following an accident:-

- to provide full details about the accident circumstances i.e. - how the accident occurred. This section of the Form should include a large space for this question to be answered (not just a couple of lines);
- space should be given and the Insured asked to provide a diagram to show both accident location and where/how accident occurred;
- in the case of a road traffic accident, the speed at which the Insured was travelling when the contact occurred;
- details of all persons involved - including specifically any independent witnesses;
- whether a personal injury was sustained and if yes, asks for a description;
- requests a full descriptions of the damage sustained by both parties;
- in the case of a road traffic accident, diagrams of two vehicles could be printed onto the Forms and the Insured could be asked to mark the areas of accident related damage;
- the Form should have a clear headed section which states “*please answer fully; this document will be used to obtain legal advice on your behalf*”;
- consideration should be given as to whether a Form should also expressly be marked “privileged” on each page where that is the intention of the Insurer in seeking the information; and
- consideration should also be given to how the Form is delivered to the Insured and what explanation is given to the Insured as to the purpose of the completion of the Form.

This publication is for general guidance and is not intended to be a substitute for specific legal advice. Specialist advice should be sought about specific circumstances. If you would like further information please contact:



Richard Annette
Head of Litigation
Tel: (345) 814-7920
richard.annette@stuartslaw.com

Our Organisation

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⁵ Matthews – See page 343.



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