

Litigation privilege not restricted to parties to litigation, and other helpful points regarding privilege

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PRIVILEGE

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The High Court has clarified a number of points relating to legal professional privilege in a recent decision in which it dismissed a claimant's challenges to a defendant law firm's assertion of privilege over various categories of documents: *Al Sadeq v Dechert LLP* [2023] EWHC 795 (KB).

The key points arising from the decision are:

- Litigation privilege can, in some circumstances, be asserted by non-parties to litigation, such as a victim of an alleged crime. The question is whether the non-party has a sufficient interest in the anticipated litigation such that it seeks legal advice and, in that connection, communicates with third parties to obtain information to enable its lawyers to advise.
- Legal advice privilege is likely to apply where lawyers are engaged to conduct an investigation, unless there is clear evidence that the engagement does not encompass the provision of legal advice and assistance related to the investigatory work.
- Part of a document can be redacted and withheld on grounds of privilege without needing to establish that it is severable from the unredacted parts.
- The test for the application of the iniquity exception to privilege is whether a document was created in furtherance of a fraud or other iniquity. It is not sufficient that the document was generated by or reports on the iniquitous conduct.

Background

The claimant is the former Deputy Chief Executive Officer of the Ras Al Khaimah Investment Authority ("RAKIA"), the investment authority of the Emirate of Ras Al Khaimah ("RAK"). After his resignation, he was convicted of fraud in the RAK courts and sentenced to imprisonment. He alleges that he was wrongfully arrested in Dubai and taken to RAK without proper legal process, that the trial was politically motivated, and that he was wrongfully convicted and imprisoned.

The defendant international law firm ("the Firm") acted for the Investment and Development Office of the Government of RAK, and subsequently RAK Development LLC, in the investigation concerning alleged fraud and misappropriation of public assets at subsidiary companies of RAKIA which led to the claimant's arrest and conviction.

The claimant brought proceedings against the Firm and three of its former partners contending that they had committed serious wrongs against him in the course of their work on the investigation. These included being responsible for (i) his unlawful arrest in and abduction from his home in Dubai, (ii) his extended detention in unlawful and degrading conditions, (iii) his being tortured, and (iv) his being denied proper legal representation. He also claimed that the defendants sought to draw, and to a degree succeeded in drawing, false confessions from him and attempted to interfere with the preparation of his claim.

In the present application the claimant challenged the Firm's claims to legal professional privilege over various documents on a number of grounds, including:

1. that privilege did not apply due to the crime/fraud or iniquity exception;
2. that legal advice privilege did not apply in relation to the Firm's investigatory work;

3. that litigation privilege did not apply as the Firm's clients had not been party to the relevant litigation; and
4. that the Firm had wrongly redacted various documents.

Decision

The High Court (Murray J) dismissed the application on all grounds.

Iniquity principle

In considering whether the iniquity principle applied, the Firm had applied the test of whether the document was brought into existence for the purpose of furthering an iniquity. It accepted that the claimant's allegations of kidnapping, unlawful detention, torture and inhumane treatment, denial of legal representation, threats to the claimant and his family, extracting false confessions, unlawful searches, and attempts to hamper presentation of the proceedings, would all engage the iniquity exception (if the documents were brought into existence for furtherance of this purpose), but the review team did not identify any documents to which the exception applied.

The claimant argued that the approach taken by the review team was too narrow, and that if the iniquity exception was engaged then the Firm was not entitled to withhold from inspection any documents which "have been generated by or report on" the relevant categories of conduct.

The judge noted that it was not in dispute that the iniquity exception did not require the court to find that the Firm had any knowledge of or involvement in any iniquitous conduct. That would be a matter for trial. The relevant inquiry was into the conduct of the privilege-holder or, where the privilege-holder was being used as an innocent tool by an iniquitous third party, the conduct of the third party. Further, as legal professional privilege is of fundamental importance, the iniquity exception would only be applied in an exceptional case.

The judge rejected the claimant's argument that the Firm had applied too narrow an approach. On the contrary, the claimant's approach would lead to far too broad an application of the iniquity exception. In *Dubai Aluminium Co Ltd v Al-Alawi* [1999] 1 WLR 1964, the court had found that any documents "generated by or reporting on" the relevant iniquitous conduct could not be withheld for privilege. However, those words were appropriate in that case due to the nature of the iniquitous conduct relied on, ie the conduct of a private investigator who was alleged to have used illegal means in carrying out his investigation. The facts in the present case were different, and the test remained whether the documents were produced in furtherance of the iniquity.

Legal advice privilege

The claimant's main argument in relation to legal advice privilege was that the Firm was not entitled to assert the privilege over documents created for the dominant purpose of its investigatory work. In particular, to the extent that the Firm was gathering factual information for their clients or providing that information to the RAK public prosecutor, such activities did not attract legal advice privilege as they would be for the dominant purpose of conveying factual information. There was no prospect of legal advice being given since these matters did not raise any issues of English law, but only potential criminal liability under UAE law. In other words, the claimant argued that at least some of the work the Firm carried out was investigative work in which it was not being consulted in a legal capacity.

The judge dismissed this argument, saying it was clear on the evidence that the Firm was engaged to advise and assist in their capacity as lawyers, including as lawyers experienced in conducting investigations on a cross-border basis in relation to alleged fraudulent activity, and so the work was undertaken in a relevant legal context and legal advice privilege was engaged. The judge said he was not persuaded by the evidence given on behalf of the claimant, which appeared to be based on an unrealistic and artificial distinction between "investigatory work" and legal advice and assistance. He commented:

"Where lawyers are engaged to conduct an investigation, it is a reasonable and fair assumption that the engagement encompasses the investigatory work and related legal advice and assistance as part of a continuum of legal service. It would take strong evidence to rebut this."

Litigation privilege

The claimant argued that the Firm's clients were not entitled to claim litigation privilege in relation to criminal proceedings in RAK or other jurisdictions in respect of which they were not a party, as litigation privilege can only be claimed in respect of communications between a party to the relevant proceedings or the party's lawyer, on the one hand, and third parties, on the other hand. This would not include a victim of a crime, as the victim is not a party to criminal proceedings concerning the crime. The claimant referred to *Minera Las Bambas SA v Glencore Queensland Limited* [2018] EWHC 286 (Comm) (considered [here](#)) in which Moulder J held that it is an "established principle" that litigation privilege can only arise in favour of a person who is a party to the litigation in question.

The judge commented that he had found the question of whether litigation privilege can be claimed by the putative victim in criminal proceedings to be the most interesting and difficult issue raised by the application. He noted Moulder's conclusion in *Minera Las Bambas*, but was satisfied that it was appropriate not to follow her decision on that point. In the judge's view, it was telling that, while three of the leading privilege text books support the proposition that only a potential or actual party to litigation can claim litigation privilege, each relied on a different authority and the authority relied on in each case appeared not to support the proposition.

Having regard to the underlying purpose of litigation privilege, the judge said he could see no reason as a matter of principle or policy to limit its availability to a prospective or actual party, and the leading

authorities on litigation privilege did not do so. It was not surprising that the bulk of cases and commentary on litigation privilege discussed the principle by reference to a prospective or actual party, as it would not often be the case that a non-party had a sufficient interest in the litigation to seek legal advice in relation to it, or seek relevant information from third parties to enable the lawyer to advise. However, a victim of a crime or fraud was a good example of a person likely to have a sufficient interest in litigation for this purpose.

The judge added that there is not some qualitative threshold before an interest is recognised as legitimate for this purpose. What is necessary (if not sufficient) is that the non-party has a sufficient interest in prospective or actual litigation such that it seeks legal advice and, in connection with that legal advice, communicates with third parties (directly or through its lawyer) and obtains documents to ensure that the legal advice is properly founded. In this situation, the policy underlying litigation privilege clearly applies.

Redactions

The claimant argued that the Firm's approach to redactions was flawed, including on the basis that they were not entitled to redact parts of documents unless they represented separate or severable communications from the unredacted parts. It submitted that, where a document cannot be divided into severable parts, the dominant purpose test must be applied to the document as a whole and, if it was not satisfied, the document should be disclosed in its entirety.

The judge rejected that submission, saying that he had not been able to discover any authority for the proposition that part of a document can be redacted on grounds of privilege only if it is severable from the unredacted parts and the authorities appear to be the contrary (including *GE Capital Corporate Finance Group Ltd v Bankers Trust Co* [1995] 1 WLR 172 (CA) per Hoffmann LJ). Indeed, if privileged and non-privileged information are so intertwined that redacting the privileged parts of a document is not feasible, then the balance falls in favour of withholding the entire document on grounds of privilege.



Julian Copeman
Partner
+44 20 7466 2168



Maura McIntosh
Professional support
consultant
+44 20 7466 2608



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