

CASE COMMENT

Clarifying the Iniquity Exception: Court of Appeal Provides Guidance on the Applicability of the Exception to Legal Privilege

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Introduction

Privilege is a fundamental legal right and a powerful tool under English law. Legal advice privilege protects communications between a lawyer and a client that are made for the purpose of giving or receiving legal advice. Litigation privilege protects communications between lawyers or their clients and any third party for the purpose of obtaining advice or information in connection with existing or reasonably contemplated litigation. Privilege is vital in allowing parties to access legal advice safe in the knowledge that confidential and sensitive information will not fall into the public domain. Were these protections not in place, parties may fail to seek legal advice or fail to communicate openly with their lawyers and there would be a risk that legal advisers would have to advise based upon an incomplete factual basis.

Despite the importance of the rules of privilege, it has long been understood that legal advice privilege and litigation privilege cannot be asserted in respect of communications that further a criminal or fraudulent purpose. This principle is known as the ‘iniquity exception’. The recent

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Court of Appeal judgment in *Al Sadeq v Dechert LLP and Others*¹ provides helpful guidance on the applicability of the exception and the threshold that must be met in order for the exception to be applied by the court. This article analyses the Court of Appeal's judgment and comment on the key take-away points for practitioners.

Background

Mr Al Sadeq, a Jordanian national, had been a senior legal advisor for the Ras Al Khaimah Investment Authority (RAKIA), the sovereign wealth fund of the Emirate of Ras Al Khaimah (RAK), before being promoted to deputy CEO of RAKIA in 2011. He remained in this post until he resigned in late 2012.

In 2012, RAKIA discovered a widespread and systematic fraud had been perpetrated against the company from within, with losses in the hundreds of millions of dollars. In connection with this fraud, Mr Al Sadeq was arrested in his home in Dubai in September 2014, taken to RAK and was detained pending his trial for fraud. Mr Al Sadeq was tried and convicted of fraud and other wrongdoings before the RAK courts and was sentenced to imprisonment. At all times, Mr Al Sadeq had maintained his innocence and asserted that he had been wrongfully convicted in politically motivated trials.

Dechert LLP ('Dechert') had been instructed by RAKIA in 2013 to assist with the investigation into the suspected fraud. Dechert carried out an extensive investigation, involving over 140 Dechert fee earners globally, between June 2013 and August 2016. The investigation resulted in civil and criminal proceedings being brought in various jurisdictions, including England, Georgia, India, Italy, RAK and Switzerland, against Mr Al Sadeq and others.

Facts giving rise to the present appeal

Mr Al Sadeq claimed that the defendants in these proceedings, Dechert and three former partners of the firm, violated his rights by threatening or mistreating him in order for him to give evidence, including, he alleged, false statements, in an attempt to build a case against the former employees of RAKIA accused of wrongdoing. Mr Al Sadeq also alleged that two of the partners had continued to attempt to threaten him since the commencement of these proceedings and, in doing so, were 'thereby directing and/or being complicit in Mr Al Sadeq's ill treatment and/or torture' causing him physical, emotional, psychological, moral and

1 [2024] EWCA Civ 28.

financial harm, loss and damage, for which he sought compensation. The defendants denied any wrongdoing.

As part of the proceedings, the defendants provided standard disclosure of documents, following receipt of which Mr Al Sadeq challenged the defendants' claim to privilege over certain categories of documents. His principal complaint was that the documents should not be considered to be privileged because of the iniquity exception. In particular, he claimed that certain of the documents may have come into existence to further the alleged activities of the defendants, namely the assistance with Mr Al Sadeq's detention and rendition to RAK, the conditions in which he was held and the lack of legal representation during his detention.

The High Court rejected Mr Al Sadeq's challenges to privilege finding that:

1. Dechert had applied the correct legal test in determining whether the iniquity exception was applicable. Murray J held that '[t]he iniquity exception will only be applied in an exceptional case'² and rejected Mr Al Sadeq's argument for a broader construction of the test allowing the disclosure of documents 'generate[d] by or report[ing] on'³ the relevant conduct.
2. RAKIA could claim litigation privilege in relation to the documents. The court considered that the victims of the crimes had a 'sufficient interest' in the contemplated criminal proceedings to justify the privilege, despite not being parties to the litigation.
3. Dechert could assert legal advice privilege in relation to documents created in the relevant legal context, namely the investigatory work it was retained to undertake, and the court was bound by the *Three Rivers* (No 5) principle.

Mr Al Sadeq appealed the High Court's decision on each of the above points.

Court of Appeal's decision

Clarifying the evidential threshold for the iniquity exception to be applied

There was a dispute as to the evidential threshold before the iniquity exception could be applied. While both parties agreed that the relevant test was that of a 'strong *prima facie* case', it was clear that they each had a very different view of what that meant. The defendants argued that it must be established that it was more likely than not that the iniquity existed. Mr Al Sadeq argued that the test that should have applied was a lesser one

² *Al Sadeq v Dechert LLP and Others* [2023] EWHC 795 (KB) at [105] (5).

³ *Ibid* [112]–[113].

akin to whether the prospect of establishing the case was more than fanciful. This question was further complicated by the fact that the iniquity alleged in the interlocutory disclosure application was the same as the underlying allegations in the case.

The Court of Appeal held that save in exceptional circumstances, the correct evidential threshold is whether there is a *prima facie* case and the party assessing whether the exception applies must be satisfied on a balance of probabilities that the iniquities existed, that is, the decision-maker must conclude that the existence of the iniquity must be more likely than not based on the information available to them. Popplewell LJ said: 'Since privilege, where it exists, is inviolable, and its loss irremediable, and as it has been described as a fundamental human right, that cannot be a satisfactory test.'

The court did, however, say that in exceptional circumstances, a balance of harm analysis may be applied in which the court would assess the harm suffered by the applicant as a result of the court denying their application for disclosure against the harm suffered by the party ordered to give disclosure, in the event that the disclosure was wrongly ordered. Popplewell LJ did not give any examples of what exceptional circumstances would warrant such an analysis.

The Court of Appeal also clarified the relationship between the relevant communications and the iniquity. The defendants had argued that the documents must have been brought into existence for the purpose of furthering the iniquity. The Court of Appeal, however, held that the correct test was slightly wider in that the communications must have been brought into existence as part of *or* in furtherance of the iniquity. A communication will be 'part of' an iniquity if it 'reports on or reveals' the iniquity – provided that the communication took place in circumstances amounting to an abuse of the lawyer–client relationship. Popplewell LJ reminded the parties that the abuse of the lawyer–client relationship was a prerequisite to the exception applying at all.

The Court of Appeal formulated the legal test for the application of the iniquity exception as follows:

'where there is a *prima facie* case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence as part of or in furtherance of the iniquity. These are two categories, either of which is sufficient. Part of will include documents which report on or reveal the iniquitous conduct in question.'⁴

4 *Al Sadeq v Dechert LLP and Others* [2024] EWCA Civ 28 at [166].

In applying this reformulation to the present case, the Court of Appeal found that the approach to disclosure taken by Dechert was too narrow and the exercise was to be redone, applying the test set out above.

The scope of litigation privilege asserted by the first defendant

In order for litigation privilege to apply, the dominant purpose test must be met, which requires that communications between a lawyer and client or a third party exist for the dominant purpose of use in the conduct of existing or contemplated adversarial litigation.⁵ Dechert argued that its former client, who was not a party to the proceedings, nor was it contemplated that it would be, could assert litigation privilege over documents that were created for the ‘dominant purpose’ of those proceedings. Mr Al Sadeq contended that litigation privilege was not capable of being asserted by non-parties. The Court of Appeal held that, provided the ‘dominant purpose’ test was met, there was no principled reason to limit the scope of litigation privilege. Popplewell LJ said that doing so could lead to unjust anomalies such as:

1. Distinguishing between public and private prosecutions, where the privilege holder would be a party to the former but not the latter.
2. Liability insurers would face a scenario where they were unable to assert litigation privilege in respect of proceedings where they have conduct on behalf of the assured, but are not themselves a party to the litigation. Popplewell LJ indicated that this could also apply to other third parties such as litigation funders, who play a significant role in the conduct of proceedings.
3. Litigation privilege applying only to class representatives or lead claimants in group litigation or collective competition proceedings. Popplewell LJ held that in these cases, ‘non-parties may well have a part to play in evidence gathering for use in actual or contemplated litigation to which they are not themselves parties, and the twin rationales for litigation privilege are equally applicable in such cases’.⁶

The Court of Appeal held that in this case litigation privilege could be asserted by RAKIA given that documents over which privilege was being asserted were created for the dominant purpose of these proceedings, and RAKIA had sufficient interest in the same. Popplewell LJ left open the question of whether the existence of a sufficient interest was an additional requirement to be met by a non-party, saying ‘[c]ases where the dominant purpose test is satisfied but the party claiming privilege is essentially a

5 *Three Rivers District Council and Others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48.

6 *Al Sadeq v Dechert LLP & Ors* [2024] EWCA Civ 28 [195(5)]

stranger to the litigation are likely to be extremely rare; and whether there is an additional requirement of a sufficient interest in the proceedings in all cases is better determined if and when it arises for decision'.⁷

Does the principle in Three Rivers (No 5) apply to litigation privilege?

The well-established principle in *Three Rivers (No 5)* states that legal advice privilege applies only to communications between lawyers and individuals at the client company who are authorised to seek and/or receive legal advice. The claimant in this case argued that this principle should extend to litigation privilege also. The Court of Appeal rejected this argument, confirming that 'litigation privilege extends to communications with third parties, and all legal and natural persons come within the scope of that description; it encompasses any legal or natural person who is not the client'.⁸ The *Three Rivers (No 5)* case did not therefore extend to legal advice privilege.

The applicability of legal advice privilege

Mr Al Sadeq had argued that Dechert could not assert legal advice privilege over documents that had been created during the course of the investigatory work it had carried out under its retainer. He argued that the documents had not been created in the relevant legal context. The Court of Appeal rejected this narrow approach to the applicability of legal advice privilege. The court held that Dechert was retained for its legal expertise, which extended beyond the black letter of the law. Citing *Three Rivers (No 6)*, the Court of Appeal stated that '[t]he skills of a lawyer extend to "taking statements", "assembling the facts and handling the evidence", and "an exercise in advocacy"'.⁹ In the present case, the court found that Dechert had been instructed to carry out the investigative work 'through lawyers' eyes' and therefore the work carried out by the firm was subject to legal advice privilege.

Comment

The clarification of the iniquity exception is likely to be welcomed by practitioners and other parties involved in litigation. Although the exception is infrequently raised, the Court of Appeal's reformulation of the test to be applied provides helpful and definitive guidance to those seeking to invoke the exception.

⁷ *Ibid* [220].

⁸ *Ibid* [223].

⁹ *Ibid* [229].

The Court of Appeal's decision also highlights the importance of lawyers keeping a record of the rationale applied to the review of documents in a disclosure exercise. This case saw no less than six witness statements filed on behalf of the defendants in response to the claimant's application explaining the approach taken. Ultimately, the erroneous approach to disclosure resulted in the defendants having to repeat the exercise, which even if it did not yield very many additional documents for disclosure, would inevitably incur significant costs for the disclosing party.

In contrast, the Court of Appeal's decision to allow a non-party to the proceedings to assert litigation privilege over certain documents as a result of their interest in the proceedings, leaves the door open for courts to apply their discretion and could potentially lead to contradictory judgments. Although it is too soon to assess the practical impact of the Court of Appeal's decision in relation to non-parties asserting litigation privilege, it is likely that the decision will be welcomed by third parties routinely involved in litigation, such as insurers and third-party litigation funders. Should this point be tested further, it will no doubt have significant ramifications on the conduct of litigation and the parties involved.