

## New Merits Threshold for the ‘Iniquity Exception’? Latest Court of Appeal Judgment Considers Important Areas of Legal Privilege and Exposes the Difficulties of Applying the ‘Iniquity Principle’

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In a judgment handed down earlier this year (the “**CoA Judgment**”),<sup>1</sup> the Court of Appeal provided detailed guidance on the relevant tests to be satisfied before a party may invoke the so-called ‘iniquity exception’, being the exception which lifts the cloak of privilege over communications with lawyers that are in furtherance of a crime or fraud.<sup>2</sup> The CoA Judgment also clarified a number of important points of law regarding the scope of legal professional privilege. Significantly, the Court of Appeal found that litigation privilege<sup>3</sup> can, in certain circumstances, extend to non-parties to proceedings (including alleged victims or witnesses) and that legal advice privilege<sup>4</sup> may apply to investigatory work conducted by lawyers.

### Factual Background

The dispute arises in the context of a claim brought by Mr Al Sadeq, a former legal adviser and Deputy Chief Executive Officer of the Ras Al Khaimah Investment Authority (“**RAKIA**”), the sovereign wealth fund of the Emirate of Ras-Al-Khaimah, UAE (“**RAK**”).

In 2014, Mr Al Sadeq was arrested, detained, and subsequently convicted of fraud in the RAK local courts. Mr Al Sadeq maintained that he was innocent and alleged that there were serious violations of his rights during the conduct of the investigation which led to his conviction. He later commenced proceedings in the English High Court against Dechert LLP (“**Dechert**”) and three of its former partners (together with Dechert, the “**Defendants**”) who had assisted the RAK government entities with the investigation into RAKIA’s historical transactions and investments. Mr Al Sadeq contended that the Defendants had acted without any

<sup>1</sup> *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28.

<sup>2</sup> *R v Cox and Railton* (1884) 14 QBD 153. The principle also extends to fraud or other underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice: CoA Judgment, paragraph 55.

<sup>3</sup> Litigation privilege attaches to communications between a lawyer and its client or third parties which are brought into existence for the sole or dominant purpose of use in the conduct of existing or contemplated adversarial litigation.

<sup>4</sup> Legal advice privilege applies to communications between a lawyer and its client, which were created for the dominant purpose of giving or receiving legal advice.

proper due process, including questioning him while he was detained in inhumane conditions without legal representation, and making threats against his family to force Mr Al Sadeq to give false evidence.<sup>5</sup>

When providing standard disclosure, the Defendants asserted legal professional privilege over various categories of documents and claimed that a careful review had been undertaken to ascertain whether any documents fell within the ‘iniquity’ exception to privilege. Mr Al Sadeq challenged the Defendants’ claim to privilege and the issue came before Mr Justice Murray in December 2021.

Mr Justice Murray rejected the challenges in their entirety, finding that: (i) the Defendants had applied the correct test in concluding that privilege was not negated in respect of any documents due to the iniquity exception; (ii) the Defendants’ former clients could assert litigation privilege in connection with criminal proceedings despite not being parties to those proceedings; and (iii) the Defendants were entitled to claim legal advice privilege over documents created for the dominant purpose of their investigatory work, as they were assisting with the investigation in their capacity as lawyers.<sup>6</sup>

Mr Al Sadeq appealed that decision and raised a further point which had not been determined by the judge; namely whether the test in *Three Rivers (No 5)*, which tightly defines who the ‘client’ is for the purposes of legal advice privilege, should also apply to litigation privilege.<sup>7</sup> The Defendants cross-appealed on the latter point to preserve their position for an appeal to the Supreme Court.

### **CoA Judgment**

The Court of Appeal unanimously allowed Mr Al Sadeq’s appeal on the iniquity exception challenge but rejected his other grounds of appeal.

#### Iniquity exception

The iniquity exception is a well-known English law principle that prevents legal professional privilege arising in the context of documents which have been brought into existence in the course of, or in furtherance of, a fraud, crime or other iniquity.<sup>8</sup> For the exception to apply, it must be established that there has been an abuse of the lawyer/client relationship, such that communications fall outside the usual course of professional engagement and, therefore, are deprived of confidentiality (being the cornerstone to privilege).<sup>9</sup> This ‘iniquity exception’ applies irrespective of whether the legal adviser is a party to, or aware of, the iniquity.<sup>10</sup>

Two principal issues arose in the present case: (i) whether a party seeking to invoke the exception need only establish a *prima facie* case of iniquity or whether some other higher or lower merits threshold is required; and (ii) what legal test must be satisfied for the iniquity exception to apply. Popplewell LJ (giving the leading judgment) held as follows:

- **Merits threshold:** Save in exceptional cases which could justify a court taking the view that a balance of harm analysis was required, a party must establish a *prima facie* case of iniquity in order for the exception to apply. In other words, the existence of the iniquity must be *more likely than not* on the material available to the decision maker determining whether to give or withhold disclosure, or the court on any application in which the issue arises.<sup>11</sup> The Court of Appeal rejected the

<sup>5</sup> CoA Judgment, paragraphs 24 – 26.

<sup>6</sup> Ibid, paragraphs 37 – 40.

<sup>7</sup> *Three Rivers Council v The Governor and Company of the Bank of England (No 5)* [2003] EWCA Civ 474.

<sup>8</sup> Supra fn 4.

<sup>9</sup> *R v Snaresbrook Crown Court Ex pte DPP* [1988] QB 532 at pp. 537 - 538; *JSC BTA Bank v Ablyazov (No 13)* [2014] EWHC 2788 (Comm), [2014] 2CLC 263 at paragraph 93, cited with approval and applied by the Court of Appeal in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103, [2022] 4 WLR 84 at paragraphs 70 – 71 and 82 - 83.

<sup>10</sup> For an unusual case that explored (potential) iniquitous conduct in the context of an employment dispute, see our previous client alert [here](#).

<sup>11</sup> CoA Judgment, paragraphs 63 and 77.

argument that the test should be elevated to that of a 'strong' *prima facie* case; and similarly declined Mr Al Sadeq's invitation to lower the threshold to 'a real prospect of success' standard (on the basis that this could result in the disclosure of communications which were more likely than not to be privileged).<sup>12</sup>

- **Relationship test:** If there is sufficient evidence of alleged iniquities to meet the required merits threshold, a party seeking to invoke the exception is then required to undertake an assessment as to whether a document was created as 'part of' or 'in furtherance of' the iniquity; these are two separate categories, either of which, if satisfied, would be sufficient for the test to be met. As to what that actually meant, Popplewell LJ rejected the argument that the principle should encompass any document which would not exist *but for* the iniquity and similarly determined that it would be too narrow to limit the test, as the Defendants contended, to "*communications [which are] iniquitous in themselves*".<sup>13</sup> He clarified that the reference in the test to 'part of' could include documents which "*report on or reveal*" the iniquitous conduct provided that there had been an abuse of the lawyer/client relationship such that the iniquitous conduct must be revealed ("*the abuse of the lawyer/client relationship is a prerequisite to the exception applying at all*").<sup>14</sup>

Applying these tests to the present case, the Court of Appeal found that the material before it established a *prima facie* case of at least three iniquities relating to Mr Al Sadeq's detention, the conditions, and his lack of access to legal representation while being detained.<sup>15</sup> In light of this, the Court ordered the Defendants to carry out the disclosure exercise afresh to determine whether any documents had been erroneously withheld from inspection on grounds of legal professional privilege.<sup>16</sup>

#### Litigation privilege: the rights of non-parties

The Court of Appeal rejected Mr Al Sadeq's submission that litigation privilege is not capable of applying in relation to litigation to which the person asserting privilege is not and does not expect to be a party.<sup>17</sup> In this instance, Mr Al Sadeq argued that Dechert's former clients were not contemplated parties to the criminal proceedings or extradition proceedings, but were merely victims of the alleged fraud.

However, Popplewell LJ confirmed that litigation privilege can extend to non-parties, provided the party claiming privilege is able to establish that the relevant communications were created for the dominant purpose of either: (i) enabling legal advice to be sought or given; and/or (ii) seeking or obtaining evidence or information to be used in, or in connection with, anticipated or contemplated litigation proceedings.<sup>18</sup>

#### Litigation privilege: Three Rivers (No 5) principle

The Court of Appeal declined to expand the *Three Rivers (No 5)* principle to litigation privilege on the basis that such an extension was unnecessary. As noted above, *Three Rivers (No 5)* establishes that legal advice privilege only applies to communications between a lawyer and a narrowly defined set of individuals who have been authorised to obtain legal advice on behalf of the 'client' company.<sup>19</sup> In this regard, since legal advice privilege does not extend to communications with third parties, it is necessary to have a rule which strictly defines which natural persons qualify as 'the client'. Litigation privilege, by contrast, extends to

<sup>12</sup> The Court of Appeal viewed this outcome as unsatisfactory given that privilege "*has been described as a fundamental human right*" and "*where it exists, [it] is inviolable, and its loss irremediable*" (paragraph 72). See too CoA Judgment, paragraphs 52 and 75.

<sup>13</sup> CoA Judgment, paragraph 169.

<sup>14</sup> Ibid, paragraphs 166 - 168.

<sup>15</sup> Ibid, paragraphs 111 -134.

<sup>16</sup> Ibid, paragraph 183.

<sup>17</sup> Ibid, paragraph 195.

<sup>18</sup> Ibid, paragraphs 52 and 195.

<sup>19</sup> For a reminder of the Court's approach to legal advice privilege, see our article on the 'dominant purpose test' confirmed by the Court of Appeal in the case of *The Civil Aviation Authority v Jet2.Com Ltd* [2020] EWCA Civ 35 [here](#).

communications with third parties, and includes all legal and natural persons irrespective of whether they are authorised to seek or receive legal advice. In those circumstances, there is no need for a separate rule which defines who ‘the client’ is.<sup>20</sup>

Popplewell LJ also dismissed the cross appeal from the Defendants on this issue, noting that, although the principle (as it relates to legal advice privilege) has “*received considerable criticism, both judicially and by leading commentators*” and “*has not been followed in other jurisdictions*”, it remains binding on the English courts below the Supreme Court.<sup>21</sup> In other words, its application to legal advice privilege was a matter which could only be reconsidered by the Supreme Court.

### Legal advice privilege

The Court of Appeal confirmed that documents created for the dominant purpose of investigatory work could still fall within the scope of legal advice privilege.<sup>22</sup> Mr Al Sadeq argued that some of the documents or parts thereof from the Defendants’ investigatory work could not be withheld from inspection because a large part of the work involved no legal skill or analysis, but were instead the type of activities ordinarily carried out by the police or a public prosecutor. Popplewell LJ rejected Mr Al Sadeq’s submission that, because the work might also have been undertaken by a non-lawyer, it fell outside the legal context in which Dechert was instructed.<sup>23</sup> Popplewell LJ stated that there was no real doubt that Dechert was appointed for its legal expertise and, applying *R (Jet2.com) v Civil Aviation Authority* [2020] EWCA Civ 35 and *Three Rivers District Council & others v Governor and Company of the Bank of England (No 6)* [2004] UKHL 48, such legal expertise “*will generally cover investigatory work such as interviewing those suspected of crimes, or potential witnesses, and the presentation of evidence to a public prosecutor in a form which assists in relation to a potential prosecution...*”.<sup>24</sup>

### **Conclusions and key takeaways**

The CoA Judgment has provided further clarity on aspects of legal professional privilege, namely: (i) the relevant thresholds that must be met before the cloak of privilege can be lifted on communications that were created as part of, or in furtherance of, an iniquity; (ii) the extension of litigation privilege to non-parties; and (iii) the application of legal advice privilege to investigatory materials.

Although the Court of Appeal passed over the opportunity to reconsider the narrow definition of ‘client’ in *Three Rivers (No 5)*, leaving that issue to be revisited by the Supreme Court in a future case, the decision serves as a reminder of the importance of carefully managing and reporting on the evidence gathering process during an investigation or litigation, including the need to maintain detailed records of any decisions made to withhold categories of documents from inspection. A failure to do so (or not doing so properly) risks a party having to carry out its entire disclosure exercise again, a step which the Court of Appeal was plainly not afraid to order in this case, despite the inevitable (and likely very significant) cost consequences. This decision potentially emboldens claimants to consider this doctrine as another strategic tool in their arsenal to apply pressure on defendants in claims based on conspiracy, fraud or other inequitable conduct.

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<sup>20</sup> CoA Judgment, paragraphs 223 - 224.

<sup>21</sup> Ibid, paragraphs 222 and 239.

<sup>22</sup> Ibid, paragraph 230.

<sup>23</sup> Ibid, paragraph 229.

<sup>24</sup> Ibid, paragraphs 228 - 229.

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