

# Client Alert

## Legal professional privilege and the ‘crime-fraud-iniquity’ exception: *Don’t be so Curless*

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In the recent case of *Michael Curless v Shell International Limited [2019] EWCA Civ 1710*, the Court of Appeal handed down a judgment on the limits of the ‘crime-fraud-iniquity’ principle to legal professional privilege.

Although the facts of the case are unique, involving an overheard and indiscreet confidential conversation in a pub, anonymous disclosure to the claimant and an alleged scheme to dismiss an employee on the pretext of redundancy, the obiter remarks of the Court of Appeal provide some clarification as to the scope of the ‘crime-fraud-iniquity’ principle. Although the Court of Appeal indicated that this was an area of the law which the Supreme Court should consider, the case nonetheless serves as a reminder that the risks to legal professional privilege of *iniquitous* client conduct in the context of seeking legal advice remain very much alive.

### The ‘crime-fraud-iniquity’ principle and its limit to legal professional privilege

The ‘crime-fraud’ principle originates from the case of *R v Cox and Railton (1884) 14 QBD 153* in which it was held that, as a matter of public policy, legal professional privilege<sup>1</sup> had no application in circumstances where a client consults a lawyer in furtherance of a crime or fraud. In such cases, there is no confidence in those communications (so privilege is not capable of attaching to them) and they are therefore disclosable in litigation. The principle has since developed and extended to include the concept of ‘iniquity’<sup>2</sup> as established in *Barclays Bank plc v Eustice and others [1995] EWCA Civ 29*, which concerned an application (under s.423 of the Insolvency Act 1986) to set aside transactions alleged to have been at an undervalue for the purpose of putting assets beyond the reach of creditors.

In granting the application for inspection of the legal advice that had been given in relation to those transactions, the Court of Appeal acknowledged that these types of cases gave rise to “*difficult problems of public policy*”, but that in this particular case, the ‘iniquity’ was sufficient to lift the cloak of privilege:

<sup>1</sup> Which applies to confidential communications between a client and lawyer which have come into existence for the purpose of giving or receiving legal advice.

<sup>2</sup> Iniquity involves a person going “beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy”: *BBGP Managing General Partner Limited v Brown Global Partners [2011] CH 296*.

*“...the client was seeking to enter transactions at an undervalue the purpose of which was to prejudice the bank. I regard this purpose as being sufficiently iniquitous for public policy to require that communications between him and his solicitors in relation to the setting up of these transactions be discoverable.”*

Thus, the Court of Appeal in *Eustice* rejected the argument that the iniquity principle was limited to cases of fraud or dishonesty and instead held that a strong *prima facie* case of *iniquity* was sufficient. However, the recent decision in *Curless* has thrown this into doubt.

## The case of *Curless*

### *Background*

The claimant, Mr Curless, was employed for 17 years as a senior legal counsel by the defendant, Shell International Limited, until his dismissal for redundancy in January 2017. Mr Curless, who suffered from certain disabilities, had a history of performance concerns whilst at Shell and he made several complaints (and a formal claim) of disability discrimination between 2015 and 2016. Following Shell's acquisition of BG Group plc in 2016, a number of group-wide redundancies were made, including that of Mr Curless. Several months later, he brought a further claim against Shell, alleging discrimination, victimization and unfair dismissal – in particular, that Shell relied on a planned re-organization of its in-house legal department as a pretext by which his employment was terminated for redundancy.

### *The issue of legal professional privilege*

Mr Curless' claim relied, *inter alia*, on communications in respect of which, it was alleged, Shell was entitled to claim legal advice privilege. By way of summary, the communications in question were:

- An email dated 29 April 2016 between one of Shell's in-house legal team and a lawyer from an external law firm who had been seconded to Shell. The email, which was marked “*Legally Privileged and Confidential*”, considered the impact of the group-wide redundancy programme on Mr Curless' employment proceedings. Mr Curless received this exchange from an anonymous source.
- In May 2016, at a pub on Chancery Lane, Mr Curless overheard a conversation between two individuals, thought to be from the external law firm, in which his claim against Shell was allegedly discussed. Mr Curless claimed that one of those lawyers remarked how his “*days were numbered*” due to a planned termination by reason of redundancy.

In determining Shell's application to strike out this evidence, the Employment Tribunal (“**ET**”) held that the email was covered by legal professional privilege and that Mr Curless had failed to make out a strong *prima facie* case of iniquity. The ET considered that the advice contained in the email was the type of ‘day-to-day’ advice that lawyers give when advising on redundancy issues. The ET held that privilege in the pub conversation had not been waived by Shell and that whilst, at its highest, the conversation was “*extremely indiscreet*”, it was not excepted by the iniquity principle.

The Claimant appealed the ET's decision. In the Employment Appeals Tribunal (“**EAT**”) Slade J disagreed with the ET and concluded that the email recorded “*legal advice that the genuine redundancy exercise could be used as a cloak to dismiss the Claimant to avoid his continuing complaints and difficulties with his employment*” and that the iniquity exception to legal professional privilege applied because “*a strong prima facie case has been established that what is advised is not only an attempted deception of the Claimant but also, if persisted in, deception of an Employment Tribunal in likely and anticipated legal proceedings.*” In respect of the pub conversation, Slade J took the point shortly and concluded that “*lest there be any doubt that whether legal advice privilege can be claimed in respect of the overheard conversation in the pub in May 2016, it cannot.*”

## *The Court of Appeal's decision*

The Court of Appeal was asked to determine whether the EAT was correct in (i) its interpretation of the email; (ii) concluding that the overheard pub conversation was not covered by legal professional privilege; and (iii) holding that the 'crime-fraud-iniquity' principle was applicable. Taking each of these in turn:

- (i) Interpretation of the email: The Court of Appeal agreed with the ET that this was the sort of conventional advice which employment lawyers give “*day in, day out*” and, in these circumstances, Mr Curless had failed to establish that this was advice to “*act in an underhand or iniquitous way*”. The Court of Appeal therefore held that the email was protected by legal advice privilege and could not be relied on by Mr Curless.
- (ii) Overheard pub conversation: The Court of Appeal did not accept that such a conversation could be used as an aid to interpreting the email: “*the advice in the email cannot be tainted by a conversation involving gossip from someone else after the event*” and concluded that the conversation remained protected by legal advice privilege.
- (iii) Crime-fraud-iniquity: In light of the finding that there was nothing iniquitous in the email, the question as to the scope of the iniquity principle did not need to be determined. Nonetheless, the Court made a number of obiter statements about the scope of this principle, which are considered below.

### *Obiter remarks in relation to the crime-fraud-iniquity principle*

In recognising that privilege attaches to a communication at the time it is made, the Court of Appeal considered that the application of the iniquity principle cannot involve a retrospective evaluative judgement as to whether the purpose of seeking advice is “*sufficiently iniquitous*” to prevent privilege attaching to the communication in the first place. Further, and of significance, the Court commented that “*the iniquity exception is confined to dishonesty*” (emphasis added) and for that reason *Barclays Bank plc v Eustice* “*cannot be considered to be good law.*” In addition, in so far as there are competing public policies, the Court of Appeal considered that “*the balance has been struck in favour of legal professional privilege*”.

Despite the criticism of *Eustice*, the Court of Appeal concluded that the scope of the iniquity principle would “*no doubt have to be decided one day; but not in this case.*” As a result, the *Eustice* decision has not been overturned (at least until this issue is finally determined by the Supreme Court).

## **Conclusion**

The decision in *Curless* serves as a useful reminder to lawyers and clients about the importance of legal professional privilege and the circumstances in which a claim to privilege can be challenged. Unfortunately, there remains some uncertainty as to the type of conduct that an English court would consider to be *iniquitous*. If one applies the limits of *Curless*, such conduct must also be considered inherently *dishonest* – but as to whether the iniquity principle applies more broadly to other conduct which is contrary to public policy but not necessarily dishonest, this is uncertain and will ultimately need to be determined by the Supreme Court.

In the meantime, one obvious takeaway from *Curless* is: whether you are an in-house lawyer or solicitor in private practice (or any professional for that matter), it is best to leave work-related conversations at the office – keep those pub conversations limited to holidays, sport or the latest true-crime thriller on *Netflix*!

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