

CAN LAWYERS EVER DISCLOSE THEIR CLIENTS' PRIVILEGED DOCUMENTS?

It is well established that under English law Legal Advice Privilege (LAP) can protect the confidentiality of lawyer / client communications where legal advice is being sought. However, a recent decision has confirmed the principle that such privilege does not attach to communications between lawyer and client if the lawyer is instructed for the purpose of furthering crime, fraud or iniquity.

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What is legal advice privilege?

LAP is a category of Legal Professional Privilege designed to protect confidential lawyer / client communications from compulsory disclosure to third parties or the court, provided that the dominant purpose of these communications was the giving or receiving of legal advice.

However, limited exceptions apply: the person entitled to LAP may waive their right, LAP can be overridden by statute and (as in this case) no privilege will attach to communications where the purpose was to further crime or fraud; the ‘fraud exception’.

The facts

*Addlesee v Dentons Europe LLP*¹ concerned a fraudulent investment scheme in which 240-claimants, who collectively lost €6.5 million, were invited by Dentons’ former-client, Anabus Holdings Limited, to invest ‘risk free’ in gold dust for four times the return. Dentons (formerly Salans LLP) acted for Anabus throughout the life of the scheme and, it was claimed, had recklessly and/or negligently induced the claimants to invest in the scheme by affording it apparent respectability. Particular weight was placed on a letter sent on Dentons’ notepaper which endorsed it as Anabus’ legal advisor.

Dentons had previously disputed disclosure on two occasions,² arguing that LAP required clients to be secure in the knowledge that protected files would never be disclosed, notwithstanding the fact that Anabus had gone into liquidation and title to the privileged documents now vested in the Crown.

The court was asked to determine whether the burden of proof on the party seeking disclosure was either a strong prima facie case or a very strong prima facie case of fraud and whether such a burden had been established.

The decision

Master Clark noted the parties’ agreement as to the applicable legal principles:

- privilege did not attach to communications between lawyer and client where the lawyer was instructed for the purpose of furthering crime (the fraud exception);³
- instructions given for such a purpose fell outside of the ordinary scope of a lawyer-client relationship and was an abuse of that relationship;⁴
- the fraud exception applied whether or not the lawyer (or

client) was aware of the wrongful purpose;⁵ and

- for the court to apply the fraud exception, the claimant must be able to show prima facie evidence of fraudulent wrongdoing.

In her judgment, Master Clark concluded that the fraud exception applied and ordered the disclosure of the otherwise privileged documents.

The Standard of Proof

As Dentons had not admitted that the scheme was fraudulent, the claimants were required to prove fraud and as such, the standard of proof was higher than where fraud was not in dispute. The applicable standard of proof was whether there was a “*strong prima facie case*” of fraud, which was fact dependent. Whilst there had been no judicial determination of whether fraud had occurred, Master Clark was satisfied that the claimants had established a very strong and compelling case that Dentons had been instructed for the purposes of furthering the fraudulent scheme. Relevant circumstances included:

- materials available to the Master (despite the interim stage) being substantially identical to those which would be available to the trial judge;

¹ [2020] EWHC 238 (Ch).

² *Addlesee v Dentons Europe LLP* [2018] EWHC 3010 (Ch); *Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600.

³ *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156.

⁴ *JSC BTA Bank v Ablyazov* [2014] WWHC 2788 (Comm).

⁵ *Kuwait Airways Corp v Iraqi Airways Co (No 6)* [2006] EWCA Civ 286.



- Dentons had not denied that the scheme was fraudulent (neither had they admitted it);
- Dentons had not committed the relevant fraud; and
- Anabus had since been dissolved so the potential invasion of its right to privilege was limited.

The 'normal' lawyer-client relationship

Master Clark found that Dentons had been instructed to and did produce comfort letters with the purpose of encouraging, directly or indirectly, investment in the fraudulent scheme. This was a purpose which fell outside of the normal lawyer-client relationship and so whilst such documents would normally attract LAP – and be protected from disclosure – LAP did not apply. Master Clark noted that the investment scheme bore the classic hallmarks of a fraud with a promise of impossibly high returns and fees payable in advance; cautioning about deals that seem “*too good to be true*”.

What does this mean for you?

This judgment is interesting because it establishes that where the existence of fraud is not admitted in the underlying claim, the appropriate standard of evidence to apply in

deciding whether the fraud exception can apply, will be a strong (rather than very strong) prima facie case of fraud. However this decision is fact dependant and leaves open the possibility of alternate standards of proof being applied in other circumstances.

The fraud exception to privilege seeks to prevent perpetrators of fraud (or those assisting them) from relying upon protection where otherwise LAP would prevent evidence of their fraud from being disclosed. Now it can be seen that at any stage in proceedings, disclosure of documents can be compelled if wrongdoing in the underlying claim is suspected and a compelling case presented to the court.

Whilst this judgment goes a long way to clarifying the standard of proof applicable to the fraud exception, Legal Professional Privilege remains a complex area and legal advice should be taken to ensure it is not inadvertently waived.

For more information on privilege, please access our client guide⁶ or previous briefings on the subject (available on our website.^{7,8,9})

For more detailed discussions, please contact your usual HFW contact, or the author of this article:



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6 <https://www.hfw.com/downloads/HFW-client-guide-privilege.pdf>

7 <https://www.hfw.com/Legal-Advice-is-Dominant-Jan-2020>

8 <https://www.hfw.com/English-Litigation-Privilege-February-2018>

9 <https://www.hfw.com/Putting-privilege-behind-bars-legal-privilege-in-criminal-investigations-June-2017>

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