Fountain Court

Commercial Crime Newsletter:

CASE REVIEW

Al Sadeq v Dechert LLP and others [2024] WLR 403

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Introduction

The Court of Appeal's decision in *Al Sadeq v Dechert LLP and others* [2024] WLR 403, in which Tamara Oppenheimer KC and Simon Paul of Fountain Court appeared for the appellant, Karam Al Sadeq, is an important decision covering various aspects of legal professional privilege ("**LPP**"), and is of particular interest to practitioners involved in investigations. Whilst the facts of the case are on any view extreme, the decision has important implications for the application of LPP in the investigations context which we explore here. In particular, the decision addresses the application of the iniquity exception, as well as the scope of litigation privilege ("**LiP**") and legal advice privilege ("**LAP**") more generally.

It is worth noting that one issue which the decision does not address, is the question of who may constitute "the client" for the purposes of the application of LAP. Whilst the Defendants had intimated that they might seek to appeal to the Supreme Court on (amongst others) that issue, no appeal is being pursued. The widely voiced objections to the Court of Appeal's decision in *Three Rivers District Council v Governor and Company of the Bank of England (No 5)* [2003] QB 1556 as to who may constitute the client in the corporate context for LAP purposes therefore remain to be addressed in a future case.

Background

Mr Al Sadeq is a Jordanian lawyer who, from 2008-2012, held various positions (including General Counsel and Deputy CEO) in RAKIA, the investment arm of the Emirate of Ras Al Khaimah ("**RAK**"), in the United Arab Emirates. On 5 September 2014, Mr Al Sadeq was taken from his home in Dubai and transported across the border to RAK by men acting on behalf of the Ruler of RAK, Sheikh Saud. Mr Al Sadeq has been detained in RAK ever since, including a period of over a year in solitary confinement, the bulk of which at a military camp of the Ruler's private militia. Mr Al Sadeq has been convicted of various financial crimes in RAK and is serving a circa 30-year prison sentence there.

The context for Mr Al Sadeq's detention was an investigation into alleged frauds in RAKIA, in which Dechert LLP ("**Dechert**") was instructed in 2013 by a RAK government entity. The principal suspect in the investigation was Dr Khater Massaad, a former close associate of the Ruler of RAK, who served as Chairman and CEO of RAKIA from 2005-2012.

In 2020 Mr Al Sadeq issued proceedings against Dechert and three of its former partners (including Neil Gerrard) under UAE law causes of action, alleging serious wrongdoing including complicity in his unlawful detention and rendition from Dubai to RAK, detention in conditions amounting to torture and inhuman or degrading treatment, and denial of legal representation.

A central issue in the case is whether the investigation into the alleged frauds in RAKIA was prompted by *bona fide* suspicion of fraud, or whether it was a vehicle for the Ruler to pursue a private vendetta/dispute with Dr Massaad, arising in part in the political context of a succession dispute between the Ruler and his brothers. Mr Al Sadeq contends that he has been subjected to serious mistreatment in RAK, the purpose of which was to procure him to assist in targeting Dr Massaad.

Given the nature of the claim, and the seriousness of the allegations advanced, it was plain from the outset of the proceedings that the application of LPP would be important and challenging. Prior to standard disclosure taking place, the parties agreed that the Defendants would provide a significant amount of information about their privilege claims, including an explanatory witness statement from the partner with conduct of the claim, and a log itemising in the case of each LPP claim or redaction, the nature of the claim to privilege. Following disclosure, Mr Al Sadeq was dissatisfied with the approach taken by the Defendants and brought an application seeking various declarations and directions, including that the Defendants conduct a re-review of their disclosure in accordance with correct principles. Three main areas of challenge were advanced by Mr Al Sadeq: iniquity, LiP and LAP.

The iniquity exception

As regards the iniquity exception, Mr Al Sadeq had sought an order that the Defendants should not be entitled to withhold from inspection documents (or parts thereof) which had been "generated by, or report on", three categories of iniquitous conduct: (1) unlawful detention/rendition, (2) detention in conditions amounting to torture/inhuman or degrading treatment, and (3) denial of access to legal representation. It was common ground that these areas of conduct were in principle sufficient to engage the iniquity exception, if

established on the facts. By the time of hearing before Mr Justice Murray to determine the privilege challenge, it was also common ground that the evidential threshold was met in relation to category (2) for part of Mr Al Sadeq's detention. In the event, Mr Justice Murray dismissed the challenge, accepting the Defendants' argument that as a matter of law, the iniquity exception did not extend to documents "generated by or reporting on" the iniquities, and it was therefore unnecessary for him to consider the evidence in detail.

The Court of Appeal (Popplewell LJ giving the judgment with which Underhill and Males LJJ agreed) allowed the appeal on the iniquity issue, characterising the issues which arose for determination as follows:

- Issue 1: Had Mr Al-Sadeq established the existence of the 3 iniquities to the required evidential standard ("the merits threshold"). That issue was then to be broken down further:
  - Issue 1(a): what is the merits threshold?
  - Issue 1(b): was that threshold met?
- Issue 2: Assuming Issue 1 was satisfied, what is the legal test for the relationship between the communication and the iniquity which needs to be established for the exception to come into play?
- Issue 3: Were there documents which the Defendants had failed to disclose which they ought to have done in light of the answers to Issues 1 and 2?

On Issue 1A, the Court of Appeal confirmed that the merits threshold is a balance of probabilities test, save in exceptional cases (see [63] and [108] of the Judgment). That is, the existence of iniquity must be more likely than not on the material available to the 'decision maker'.

The decision maker can mean the party/legal adviser determining whether to withhold disclosure, or the court on any application in which the issue arises. The threshold is expressed as being 'prima facie', because it is an assessment made on a provisional basis, having regard to the evidence available at the time. Contrary to previous authority which had suggested that a strong, or a very strong, prima facie case might be required where the iniquity in question is one of the issues in the case (see *Kuwait Airways Corporation v. Iraqi Airways Corp (No.6)* [2005] 1 WLR 2734), the Court of Appeal held that the merits threshold does not vary from case to case.

As to Issue 1B, the Court of Appeal found that each of the 3 identified iniquities were made out on the evidence before the Court. Amongst other things, the Court of Appeal placed reliance on the fact that Mr Al Sadeq's pleaded case (supported by a statement of truth) was not contradicted or disputed by any factual evidence adduced on behalf of the Defendants. The Court of Appeal also analysed and placed reliance on supportive contemporaneous documentation.

As regard the legal test for the requisite relationship between the communication and the iniquity (Issue 2), the Court of Appeal noted that the Judge had erred in starting with Issue 2 before considering Issue 1. The proper legal test is whether documents and communications had been "*brought into existence as part of or in furtherance of the iniquity*". As to the proper interpretation of that phrase, the Defendants' approach was too narrow. "As part of" was not restricted to documents which are "iniquitous in themselves". Rather, "part of" includes documents which report on reveal the iniquitous

conduct, and also includes documents brought into existence for the preparation of the iniquity. Moreover, there is no temporal limit to the documents which may be subject to the exception. It may include documents which come into existence after the iniquity is complete. However, in considering the application of the test, regard needs to be had to the "touchstone" for the application of the iniquity exception[1], namely whether the iniquity puts the conduct outside the normal scope of the professional lawyer/client engagement, or is an abuse of the relationship which falls within the ordinary course of such engagement. The exception will therefore not extend to documents where bona fide legal advice is being sought: those instances would form part of the 'ordinary run of cases'.

Turning to the final issue (3), as to whether there were documents which the Defendants had failed to disclose by reason of an erroneous approach, the Court of Appeal did not accept that the various categories of documents that had been identified by Mr Al Sadeq would necessarily be caught by the exception. However, the Court of Appeal held that the Defendants needed to re-do the disclosure exercise in light of the Court of Appeal's findings on the correct approach.

The decision brings some welcome clarity to the application of the iniquity exception, in particular with respect to the evidential burden to be met. Prior to the Court of Appeal's clarification, the commonly understood threshold of strong or very strong *prima facie* case in cases where the iniquity overlaps with allegations in the claim, is likely to have discouraged many

That said, it should be noted that there was no specific consideration in the case of what amounts to sufficiently 'iniquitous' conduct to engage the exception - given that it was common ground that the categories of conduct relied upon by Mr Al Sadeq were in principle sufficient to engage the exception. Nevertheless, the decision supports the proposition that the exception extends to non-criminal conduct falling short of dishonesty. Indeed, in his summary of the general principles, Lord Justice Popplewell noted (at [55]) that "*the principle is not confined to fraudulent or criminal purposes, but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contract to public policy or the interests of justice*." The "touchstone" for the application of the exception – namely whether the iniquity puts the conduct outside the normal scope of the professional lawyer/client engagement – also now seems to be well established, although it can also fairly be said that it will not always necessarily be an easy test to apply.

Litigation privilege

The vast majority of the Defendants' privilege claims were based on LiP, arising in respect of one or more of 11 actual or contemplated civil and criminal proceedings in various jurisdictions. The LiP claims were evidenced by a table provided by Defendants as part of the explanatory witness statement of the partner with conduct of the case, Mr Allen, with a column for the date on which litigation was said to be in reasonable contemplation. Otherwise, there was no (or very limited) documentary or other evidence adduced by the Defendants in

[1] As expressed by Popplewell J *in JSC BTA Bank v Ablyazov & Ors* [2014] EWHC 2788 (Comm) and subsequently approved and applied by the Court of Appeal in *Candey Ltd v Bosheh* [2022] 4 WLR 84 at [70]-[71], [82]-[83].

support of their LiP claims (the Defendants having contended that any further evidence would require them to divulge privileged material).

Mr Al Sadeq advanced two limbs of challenge. The first was a general challenge based on the contention that the Defendants had failed to discharge the evidential burden of establishing that litigation was in reasonable contemplation at each of the claimed dates. The second concerned the issue of whether the Defendants' clients were entitled to claim LiP in respect of actual or contemplated litigation (i.e. criminal proceedings) to which they were not, or were not expected to be, party (the so-called "non-party issue"). Mr Al Sadeq contended that the Defendants were not entitled to do so, in line with the decision of Moulder J in *Minera Las Bambas SA v Glencore Queensland Ltd* [2018] EWHC 286, and also having regard to the rationale for LiP, namely that the privilege exists so as to enable a *party* to proceedings to prepare its case safe in the knowledge that those preparations will not be required to be disclosed to its adversary.

The Court of Appeal rejected both aspects of the LiP challenge, upholding Mr Justice Murray's decision on those issues. As to the general challenge, the Court of Appeal confirmed that the relevant principles were those set out by Hamblen J in *Starbev v Interbrew* [2013] EWHC (Comm). The Court of Appeal then rejected Mr Al-Sadeq's submissions as to the insufficiency of Mr Allen's evidence, and accepted Mr Allen's explanation that it was not possible to give any further detail or supporting documentation without disclosing the very matters which the privilege is designed to protect. There was, the Court of Appeal found, no reason to doubt 'the accuracy of that evidence'. Whilst this aspect of the decision may provide comfort for any party needing to substantiate its claim to privilege, we suggest it would be unwise for litigants generally to proceed on the basis that privilege challenges can successfully be defended on the basis of what was, in effect in this case, little more than an assertion that litigation was reasonably in contemplation on certain dates. Indeed, it is instructive to note that a more rigorous approach to the sufficiency of the evidence required to support a claim to LiP was taken in *West London Pipeline v Total UK Ltd* [2008] 2 CLC 258, *SFO v ENRC* [2019] 1 WLR 791 and *Qatar v Banque Havilland SA* [2021] EWHC 2172 (Comm).

On the non-party issue, the Court of Appeal held that LiP could in principle be claimed by a non-party, provided that the usual requirements for LiP were met. The Court of Appeal stated that there are two separate rationales for LiP which supported such a conclusion (the implication being that Mr Al Sadeq's submissions had (wrongly) focused exclusively on the second rationale). The first is that parties should be free to unburden themselves without reserve to their legal advisers, and legal advisers should be able to give honest and candid advice on sound factual basis, without fear of subsequent disclosure. The second is that in an adversarial system each party should be able to prepare his case fully without risk that opponent will be able to recover that material. (This aspect of the Court's justification might fairly be questioned given that the first rationale is generally recognised to be the rationale for LAP, being the privilege which is concerned with communications between client and lawyer, as opposed to the privilege protecting communications with third parties).

The Court of Appeal held that if the dominant purpose limb of the test is

fulfilled, there is no principled basis for limiting the scope of LiP to a person who is a party, and to find otherwise would produce unjust anomalies. The Court of Appeal considered that one such anomaly would arise in circumstances where compensation can be awarded to a victim in criminal proceedings as part of the criminal process, but without victim being a party (as in RAK).

While the Court of Appeal stated that such a conclusion was supported by the decisions of *Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987] 1 WLR 1027 and *Winterthur Swiss Insurance Company v AG (Manchester) Ltd (in liquidation)* [2006] EWHC 839 (Comm), it is difficult not to regard this as a surprising extension of the application of LiP, whose consequences remain to be properly worked through. In particular, such an extension is arguably at odds with the criminal disclosure regime which applies in England and Wales, a point which was the subject of only limited consideration by the Court (see [199]-[201] of the judgment).[2]

Legal advice privilege

As regards LAP, Mr Al Sadeq argued that the Defendants should not be entitled to withhold from inspection documents on grounds of LAP which involved communications created for the dominant purpose of the Defendants' investigatory work, on the basis that such work was to be characterised as a type of evidence gathering for the RAK Public Prosecutor (and encompassed roles typically performed by the RAK police), rather than as material created for the dominant purpose of seeking or receiving legal advice.

The Court of Appeal, upholding the Judge's finding, found that all Dechert's work was undertaken in a relevant legal context and accordingly rejected the LAP challenge. The Court of Appeal noted that the 'legal context' for such an engagement "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, even to the extent … of bringing it to the prosecutor on a golden platter." The fact that the work might also have been undertaken by a non-lawyer, such as a policeman or public prosecutor, did not mean that it fell outside the legal context in which Dechert was instructed as a global law firm. It also did not matter that the individual lawyers performing the relevant work, as English solicitors, were not

[2] Victims of crime are treated as third parties for the purpose of the Criminal Procedure and Investigations Act 1996. Thus, communications between victims and the police or other third parties are treated as disclosable where they undermine the prosecution case. That is of course with good reason: a communication between the victim and (say) an actual or potential witness about the case (and thus for the dominant purpose of the criminal proceedings) is potentially important evidence that could be crucial to the fairness of the proceedings. By way of example, suppose an issue in the criminal case turns on medical evidence, and the victim decides (s)he wants to instruct a medical expert, with a view to bolstering the prosecution case, if the evidence is favourable. The victim does so, yet the evidence is to the opposite effect, and undermines the prosecution case. Following the Court of Appeal's decision in *Al-Sadeq*, those communications would be subject to LiP, which the victim would be entitled to assert to prevent the prosecution from disclosing it. That outcome would undermine the fairness of the proceedings and the safeness of any subsequent conviction.

themselves able to advise on whether crimes had been committed under the relevant RAK and UAE law.

Whilst it had been accepted by the Defendants that any document created as part of a *purely* investigative role, divorced from the respondents' role as lawyers, would not be privileged, the Court of Appeal found that that the available evidence did not suggest that a 'purely investigative role' properly characterised the Defendants' role. Rather, they had been instructed as *lawyers*, and their investigatory work was generally carried out in that context and capacity.
This aspect of the decision is likely to be of welcome news to practitioners instructed on investigations, confirming the broad scope of LAP as set out in Three Rivers DC v Governor and Company of the Bank of England (No 6) [2005] 1 AC 610. It appears to support the proposition that a global investigation will provide a relevant legal context sufficient for LAP to attach to the vast majority of lawyer-client communications occurring in that context, albeit the dominant purpose test will still need to be satisfied.

LPP and use of investigators

Finally the *Al Sadeq* decision raises some interesting – but as yet unresolved – issues as to the implications for LPP of using private investigators in the evidence gathering process.

After the first instance hearing, evidence emerged that Dechert and/or the Ruler had instructed private investigators who had engaged in an extended hacking campaign, targeting Dr Massaad and associates (including his advisors and lawyers), and that the fruits of the hacking had been shared with Dechert/the Ruler. As Mr Al Sadeq was held not to have satisfied *the Ladd v Marshall* test for the admission of new evidence, there was no extensive consideration in the Court of Appeal judgment of the use of investigators.

However, one can anticipate some of the LPP issues which are likely to arise where investigators are used. In particular, if investigators deploy unlawful or suspect methods it is likely that the iniquity exception will be engaged, in which case issues of scope of that exception will arise. Such issues could include whether the exception applies to (i) communications instructing the investigators, and/or (ii) lawyer-client communications which comment on, or are prompted by, the documents which have been unlawfully/improperly obtained. Equally, issues may arise as to the proper application of LAP even in the absence of the iniquity exception. For example, a "relevant legal context" may be in doubt where the investigator's activities are targeted at issues or information which are not related in any way to the underlying litigation.

Conclusion

Al Sadeq v Dechert LLP has important implications for the application of LPP in the context of cross-border investigations, including those involving criminal elements:

- It seems likely that the iniquity exception will arise more frequently in the future in the light of the Court of Appeal's clarification of the evidential threshold, which may be perceived as easier to surpass (and in any event, is a clearer standard for practitioners and judges to apply, than the *prima facie* case or strong/very strong *prima facie* case standard). Practitioners should therefore be alive to the wider context of their instruction, and maintaining a firm

distinction between investigating past conduct on the one hand, and becoming, arguably, caught up in an ongoing iniquity. This may involve assessing whether there is an ulterior motive for the investigation/selective briefing.

- LiP will be available in principle where the contemplated litigation is criminal in nature, and in respect of persons who are not anticipated to be a party to civil or criminal litigation. Such non-parties might include overseas related entities and/or parent companies, as well as the victims of crime.

- The Court of Appeal's reinforcement as to the breadth of the "relevant legal context" is likely to mean that LAP is available for most aspects of investigation work in which solicitors become involved. Claims to LPP will likely be assisted by engagement letters which are drafted with sufficient breadth to capture the full scope of the lawyer's activities.

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