Al Sadeq v Dechert & Ors and the Crime-Fraud Exception to Legal Professional Privilege

by Joseph Lewin

Legal professional privilege safeguards legal advice from disclosure in legal proceedings. It comprises two main categories: legal advice privilege, which covers communications between lawyers and clients for the purpose of legal advice, and litigation privilege, which covers communications for the purpose of obtaining advice or information related to ongoing or anticipated litigation.

Whilst privilege is generally regarded as a fundamental legal right, it is subject to some exceptions. Among the most well-known of these is the “iniquity” or “crime-fraud” exception, which prevents privilege from applying to documents or correspondence intended to facilitate crime or fraud.

Recently, the Court of Appeal clarified several important principles regarding legal professional privilege, including the iniquity exception, in its judgment in *Karam Salah Al Din Awni Al Sadeq v (1) Dechert LLP, (2) Neil Gerrard, (3) David Hughes, (4) Caroline Black [2024] EWCA Civ 28.*

This judgment confirmed that, for the exception to apply, the party seeking disclosure must be able to demonstrate it on the balance of probabilities.

The decision also provided clarity on certain other areas of privilege, including on the ability of a non-party to assert litigation privilege.

A background to Al Sadeq v Dechert & Ors [2024] EWCA Civ 28

The appeal arose out of an ongoing dispute between Mr. Al Sadeq, a Jordanian citizen and lawyer, and the law firm Dechert LLP.

Mr. Al Sadeq had previously held senior positions at the Ras Al Khaimah Investment Authority. In 2014, he was arrested at his home in Dubai and taken to the Emirate of Ras Al Khaimah in the UAE (RAK), where he was tried and convicted on fraud charges.

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Dechert was engaged by the Investment and Development Office of the Government of RAK to investigate these alleged frauds. Mr. Al Sadeq claimed that during their investigations, Dechert and three of its former partners committed serious wrongs against him. This prompted him to initiate legal proceedings against them in the English courts.

In the underlying proceedings, Dechert withheld certain documents, citing legal professional privilege, and Mr. Al Sadeq challenged these claims of privilege.
Initially, the High Court dismissed his arguments.

The Court of Appeal judgment relates to an application brought by Mr. Al Sadeq against Dechert and its former partners in which he sought additional disclosure on the basis that they had misapplied privilege in a number of key respects in their original disclosure exercise. Only his appeal regarding the iniquity exception was granted.

The Iniquity Exception

The iniquity exception to privilege prevents a communication that has come into existence in furtherance of fraud, crime, or other iniquity from attracting legal privilege.

Such communications cannot be withheld from disclosure, as they might be in normal circumstances.

In *Al Sadeq v Dechert*, the parties disagreed on the threshold for the applicant to demonstrate iniquity in order for the exception to apply.

The Court of Appeal found that demonstrating that the iniquity exception applies requires a "prima facie case" on the balance of probabilities. The Court stated that there seems little justification for a test that imposes a higher burden than the balance of probabilities.

Therefore, the result of the judgment is that the decision-maker must determine whether, based on the available evidence, the existence of iniquity is more probable than not. The Court of Appeal further justified this by highlighting the inviolable nature of privilege and its role in preventing abuse of legal processes; therefore, anything less than a 50% chance of success is deemed inadequate.

The second question for the Court of Appeal was to determine the legal test that must be satisfied for the iniquity exception to apply. The Court revised the legal test slightly, stating that when there is evidence of wrongdoing, there is no privilege in documents and communications brought into existence as ‘part of or in furtherance of’ the iniquity. This addition of ‘part of’ was clarified as a document that either discloses the wrongdoing or is created in anticipation of it. However, the Court emphasised the need for a case-by-case assessment to determine whether the exception applies, focusing on whether it stems from an abuse of the lawyer-client relationship.

Litigation privilege for non-parties and the *Three Rivers* principle

The case also covered two other aspects of litigation privilege, as it applies in practice.

In its decision, the Court rejected Mr. Al Sadeq's argument that Dechert's clients were too remote from the proceedings to have their documents and correspondence covered by litigation privilege. The Court clarified that even parties who were not actual or contemplated parties to litigation can still claim litigation privilege. The Court found that, while 'extremely rare', litigation privilege could apply to documents sent by non-parties to the expected litigation, provided that the documents were created for the 'dominant purpose' of assisting in litigation proceedings. The Court found that to limit this would create a number of unjust anomalies. The examples the court gave as to non-parties who could be entitled to benefit from litigation privilege included witnesses seeking advice on whether to assist, or litigation funders considering providing financial support.

Additionally, the Court of Appeal rejected extending the Three Rivers No. 5 principle to litigation privilege. The decision in *Three Rivers No. 5* established that, in an in-house context, legal advice privilege only arises between an in-house lawyer and a narrow subset of company employees or officers authorised to request that advice internally. While legal advice privilege in an in-house context only covers communications to or from authorised individuals within a company, litigation privilege can cover a broader range of individuals. This ruling, which reflects the existing position, helps to emphasise the distinct nature of litigation privilege and underscores its applicability in the in-house context to a wider group than legal advice privilege, provided that the relevant circumstances apply.

Takeaway

The decision in *Al Sadeq* offers important guidance, especially regarding the treatment of non-parties in litigation privilege and in clarifying that the test for the iniquity exception should be on a balance of probabilities rather than having to meet a strict 'strong' or 'very strong' probability standard.

Despite the challenges of assessing documents without complete information, this clarification enhances understanding and application of the iniquity exception, which is often misunderstood.