LEGAL PROFESSIONAL PRIVILEGE: REFLECTIONS ON WAIVER AND LOSS

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serle court

OVERVIEW

We plan to cover 3 principal areas:

- Waiver of Privilege.
- Accidental Loss of Privilege.
- Loss of Privilege through the “iniquity exception”.

This handout contains a brief overview of the issues we will address within these principal areas.

(A) WAIVER OF PRIVILEGE - 1

- **Limitation of Recipients**:
  - Retention of conditions of confidence crucial – continuation of ‘privilege against the world’

    USP Strategies –v- London General Holdings Limited [2004] EWHC 373 (Ch)
  - Correlating limitation of purpose, for example with regard to auditors (and overlap with ‘common interest’ privilege)

    Berezovsky –v- Hine [2011] EWCA Civ 1089

(A) WAIVER OF PRIVILEGE - 2

- **Limitation of content**:
  - permissibility of excerpts and even-handed summaries.
  - non-permissibility of ‘cherry-picking’.

(A) WAIVER OF PRIVILEGE - 3

- **Waiver by implication**:
  - contractual.
  - in litigation.
  - special considerations applicable to disputes between lawyer and client

    Paragon Finance –v- Freshfields ([1999] 1 W.L.R. 1183)

(A) WAIVER OF PRIVILEGE - 4

- **Intentional waiver with unintended consequences**:
  - effect of disclosure in prior or ongoing criminal proceedings or investigations

    British Coal Corporation –v- Dennis Rye Limited & Anor (No.2) [1998] W.L.R. 1113
  - effect of disclosure in prior or ongoing regulatory proceedings or investigations.
  - effect of disclosure in prior or ongoing civil proceedings.
  - effect of disclosure in proceedings related to litigation costs.

(A) WAIVER OF PRIVILEGE - 5

- **Practical considerations** in drafting limited waiver wording.

- **Key differences** in substantive and practical considerations in the UK and the US.

(B) ACCIDENTAL LOSS OF PRIVILEGE THROUGH ACCIDENTAL OR INADVERTENT DISCLOSURE - 1

- **Loss of privilege** may arise as a result of unintentional or inadvertent use or disclosure of, or reference to privilege materials.

- **Protective measures** that can be taken to restrain a party from using a privileged document:
  - demand the return of the original document.
  - restrain the use of the documents.
  - action against the recipient's solicitors.

- **The relief is discretionary**. Relevant factors include whether the document has been inspected and / or put in evidence (by either side).

(B) ACCIDENTAL LOSS OF PRIVILEGE - 2

- **The principles** for granting an injunction are set out in *Al-Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780:
  - The disclosing party and his solicitor should take care and can be assumed to have done so by the recipient.
  - In general too late after inspection to obtain an injunctive to protect privilege.
  - In the absence of fraud of the recipient, the key factor is whether there has been an obvious mistake.
  - Obvious mistake depends on nature of document, the state of mind of the recipient solicitor and the state of mind of a reasonable solicitor.
  - Honest conclusion by recipient that disclosure was intentional suggests that the mistake was not obvious.
  - Different principles are likely to apply to inspection by lay persons not in receipt of legal advice.
  - Since the court is exercising an equitable jurisdiction, there are no rigid rules.

(B) ACCIDENTAL LOSS OF PRIVILEGE - 3

- **A specific example** is provided by *Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd* [2017] EWCA Civ 1029:
  - The first solicitor reviewing disclosure did not appreciate that a document had been mistakenly disclosed.
  - A partner in that firm subsequently realized the mistake (before use had been made of the privileged document).
  - Jackson LJ found that it was to be treated as an "obvious mistake" and the court has a discretion to prohibit the use of the document – which it did here.
  - The Court also made it clear that it considered disputes between solicitors about inadvertent disclosure are an unnecessary drain on resources.

(B) ACCIDENTAL LOSS OF PRIVILEGE - 4

- **What if fraud is used to obtain privileged material**? In *ITC Film Distributors v Video Exchange Ltd* [1982] Ch 431:
  - The defendant obtained document by tricking the courier who had come to collect the other side's documents from a previous hearing at court.
  - (Perhaps unsurprisingly) the Court held that a party who took possession by stealth or by trick of an opponent's documents within the precincts of the court should not be allowed to put such documents in evidence.

(B) ACCIDENTAL LOSS OF PRIVILEGE - 5

- **Other factors:**
  - Key factor is whether there has been fraud or obvious mistake, but some scope for other factors to affect the result.
  - Factors which may make it unjust or inequitable to grant relief include the conduct of the parties and any public interest.

(C) THE INIQUITY EXCEPTION

"*I lack iniquity sometimes to do me service*"
– Othello, Act I, Scene II.

(C) THE INIQUITY EXCEPTION - 1

- **Essential principle**: no privilege in documents which are created in the course of a crime or fraud, or in communications seeking or providing advice for a criminal or fraudulent purpose.
  - True irrespective of whether legal advisor ignorant of the purpose for which advice sought.
  - Can apply to litigation privilege as much as to a claim to legal advice privilege.
  - Rationale: no public interest in the protection of such documents. Classically explained by Stephen J in *R v Cox and Railton* (1884) 14 QBD 153 (at 167).
  - Obviously does not apply to advice sought after the commission of crime or fraud.
  - Gradual expansion of the doctrine in civil law beyond fraud claims: cause of action not decisive.
  - To invoke the exception in England, need to show dishonesty, not merely disreputable or unethical conduct. Cf. Australia, where deliberate wrongdoing may be sufficient: see e.g. *AG (NT) v Kearney* [1985] CLR 500.

(C) THE INIQUITY EXCEPTION - 2

- **Iniquitous conduct in the proceedings in question may suffice**: e.g. relying on perjured evidence; mounting bogus case.
  - But: risk of prejudice if the issues raised by the allegations on which an iniquity exception application is based overlap with the issues at trial.
  - "Very strong" case of fraud probably necessary where the issues raised by the application are not discrete: *Dadourian v Simms* [2008] EWHC Ch 1784.
  - In contrast, if the relevant alleged fraud is not one of the issues in the action, merely a prima facie case of fraud may suffice.
  - Inevitable difficulty where there is overlap and D denies wrongdoing. Mini-trial obviously undesirable.

(C) THE INIQUITY EXCEPTION - 3

- **The position of innocents**
  - Innocence of the lawyer immaterial if used for their client's unlawful purpose.
  - Straightforward and unsurprising: fraudster forfeits claim to privilege by his wrongdoing.
  - Position more complicated where an innocent third party is used as a conduit for the fraud.
  - Tension between *Banque Keyser Ullmann v Skandia (UK) Insurance* [1986] 1 Lloyd's Rep 336 (exception unsuccessfully invoked against the innocent assignees of a fraudster) and *R v Central Criminal Court ex parte Francis & Francis* [1989] 1 AC 346 (exception successfully invoked against the recipient – presumed to be innocent - of drug money).
  - *Owners of the Kamal XXIV v Owners of the Ship Ariela* [2010] EWHC 2531 (Comm): Burton J held that Francis & Francis represented the law.
  - Not necessarily the last word on this subject: difficult to see why an innocent party should lose their privilege by reason of the fraud of a third party.

(C) THE INIQUITY EXCEPTION - 4

- **Case study: *Accident Exchange v McLean and others***
  - Fraud by Autofocus (AF) - expert witness/car hire survey company which provided evidence in credit hire claims: "*perjury on an industrial scale*".
  - Conspiracy claim brought by Accident Exchange (AE) in the Commercial Court, alleging that three firms of solicitors conspired with AF's directors.
  - Privilege in the relevant case files vested jointly in (innocent) insurers and underlying policy holders.
  - Solicitor Defendants withheld inspection on the ground of their clients'/former clients' privilege.
  - Claimants applied on the basis that fraudulent conduct of AF (and its directors) destroyed the privilege of the innocent clients.
  - Our clients – one of the three firms – were essentially neutral.
  - Hearing of the application the week of 6 November 2017. Judgment awaited with interest. May provide much-needed guidance as to the scope of the iniquity exception.