



Privilege Absolute: documents remain privileged forever, unless privilege is waived

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The Court of Appeal has taken a robust stance against an attempt to retrospectively redraw the boundaries of legal professional privilege in the recent decision of *Addlesee and others v Dentons Europe LLP*¹. The dissolution of a corporate entity did not affect the question of whether the privilege attaching to the communications between a client and its solicitor subsisted. Once privilege over a communication exists, it remains privileged forever unless waived by the client or overridden by statute.

The judgment overrules the 2015 decision in *Garvin Trustees Ltd v The Pensions Regulator*² in which the Upper Tribunal held that if there was no party able or willing to assert privilege, the communication ceased to be privileged.

The Underlying Facts and First Instance Decision

The claimants were a large group of investors who invested in what was alleged to be a fraudulent investment scheme, marketed by a Cypriot company Anabus Holdings Ltd (Anabus). Anabus engaged solicitors Dentons Europe Ltd (Dentons) to advise them. For the purposes of the appeal, it was assumed that the documents on Dentons' file were privileged in favour of Anabus. Anabus was dissolved in Cyprus in January 2016 and, in so

far as any documents (and rights attaching to them) passed to the Crown on dissolution, the Crown disclaimed any interest in them.

The claimants sued Dentons for damages for deceit or negligence arising out of certain alleged misrepresentations which they said induced them to invest in the scheme. They sought disclosure of documents on Dentons' file in support of their claim.

At first instance, Master Clark held that privilege subsisted over the documents on Dentons' file, despite the dissolution of Anabus. She distinguished the decision in *Garvin* on the basis that it remained possible for someone to assert privilege over the documents because it was legally possible to restore Anabus to the company register in Cyprus. This was in contrast to the position in *Garvin* where a restoration of the client company was no longer possible. The claimants appealed.

The Court of Appeal's decision: "once privileged, always privileged"

The Court of Appeal considered the following question:

"whether, legal professional or legal advice privilege having attached to a communication by reason of the circumstances in which the

Any comments or queries?

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1. [2019] EWCA Civ 1600
2. [2015] Pens LR 1.

communication was made, the communication remains privileged unless and until privilege is waived; or whether the privilege is lost if there is no person entitled to assert it at the time when a request for disclosure is made.”

Lord Justice Lewison gave the leading judgment, with which Lord Justices Floyd and Hamblen agreed. He started with the propositions that privilege is “a fundamental condition on which the administration of justice as a whole rests” and that “a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth”³.

After reviewing some of the key authorities and the public policy underlying those decisions, he turned to the question posed by the claimants’ counsel about the ambit of legal advice privilege. He held that the boundaries of legal advice privilege, which was absolute unless waived, are that the communication in question must be a communication between lawyer and client, made in connection with giving or receiving legal advice, otherwise than for an iniquitous purpose.

He then elucidated various key principles:

- Privilege attaches to a communication at the time that the communication is made, and subsists absolutely unless and until the client waives it (or it is overridden by statute)⁴.
- Privilege cannot attach to a communication made for an illegal or improper purpose, such as the furtherance of a crime or the commission of a fraud. Privilege is not stripped retrospectively from the communication; the communication does not attract privilege in the first place⁵.
- Privilege does not cease on the death of a living person⁶.

Counsel for the claimants sought to argue that the right to assert privilege must belong to someone, and if there is no one to whom it can be said to belong, the right cannot exist. If there is no legal person who is capable of asserting legal advice privilege, then the privilege ceased to exist. The Court of Appeal rejected that assertion.

Privilege was not lost simply because there was no person entitled to assert it. The privilege attached to the communication at the time that it was created. Once the client ceased to exist, the relevant question was whether there was anyone who had the right to waive it. This applied equally to a corporate entity as it did to an individual. No exception should be drawn for a dissolved corporation.

The Court of Appeal also held that, in so far as the Crown acquired any property belonging to a dissolved company as *bona vacantia*, any disclaimer by the Crown to the title of that property did not destroy the privilege (if any) which subsists in it. The disclaimer cannot be treated as if it were a waiver of privilege.

The Court of Appeal then turned to the decision in *Garvin* and held that it had been wrongly decided. *Garvin* had considered the question of who can assert privilege. The correct question was who can waive it and, if there is such a person, whether they have done so. Once viewed in this way, it is irrelevant whether the dissolved company can be restored to the company register or not.

The final point considered by the Court of Appeal was whether it was right for Dentons to have actively contested the application for disclosure. The claimants argued that having purported to assert privilege on behalf of its non-existent former client, it should have left the court to determine the position without intervening in the application. That assertion was rejected. It was a lawyer’s duty to assert privilege on behalf of its client⁷. It was not the case that a solicitor was bound to participate in such an application, but it may do so without overstepping the boundaries of their duty.

Commentary

This is an important reminder to law firms. A solicitor must maintain privilege over the content of a client’s file unless and until a waiver is given. If there has not been a waiver, then they should be prepared to assert the client or former client’s privilege at the least and possibly also defend any application for disclosure.

3. *R v Derby Magistrates’ Court ex p B* [1996] 1 AC 487.
4. *Three Rivers DC v Governor and Company of the Bank of England* (No 6) [2004] UKHL 48.
5. *Crescent Farms (Sidcup) Sports Ltd v Sterling Offices Ltd* (1972) 1 Ch 553.
6. *Bullivant v Attorney-General for Victoria* [1901] AC 196.
7. *Nationwide Building Society v Various Solicitors* [1999] PNLR 52.