

RLC Blog: Business Crime

Al Sadeq v Dechert: the Sheikh, the Lawyers, and LPP



At some future time, a case will come before the courts in which a Jordanian lawyer working in the Emirate of Ras Al Khaimah, Mr Al Sadeq, will accuse Dechert LLP of having been complicit in his unlawful detention, kidnap, and in the use of pressure to induce him to make false confessions. Dechert were employed by the sovereign wealth fund of the Emirate, the Ras Al Khaimah Investment Authority (RAKIA), to conduct an investigation into the allegedly fraudulent activities of an engineer called Dr Massaad. Mr Al Sadeq's case will be that Sheikh Saud bin Saqr al-Qasimi was engaged in a politically motivated vendetta against Dr Massaad, and that he orchestrated the RAKIA investigation to bring down his enemy. In this endeavour, Mr Al Sadeq says, the Sheikh used Dechert as his tool to incriminate Dr Massaad by all means possible, including abusing others into giving false testimony.

As a necessary prelude to building a case against Dechert, Mr Al Sadeq sought to explore the extent to which Dechert were required to make further disclosure to his lawyers due to the iniquity exception to LPP. The treatment of these issues by the Court of Appeal in *Al Sadeq v Dechert LPP and others* [2024] EWCA Civ 28 will be of interest to any practitioner dealing with issues surrounding LPP and disclosure.

The Threshold for the Iniquity Exception

The court rehearsed the fundamental reason for the existence of legal privilege: there is a benefit to the general public if clients can be honest with their lawyers and obtain frank advice from them. Cases are more likely to be focused on real issues, and hopeless claims and spurious defences eliminated, if there can be a genuine exchange of information and advice. Confidentiality encourages candour. However, there is an equally strong public interest in iniquity being uncovered and in the lawyer/client relationship not being abused to promote criminal ends. The court characterized this abuse as "the iniquity depriving the communication of the necessary quality of confidence" in order to conclude that such an 'abusive' communication was never privileged in the first place, as opposed to an extant privilege being disapplied.

The first question the parties invited the court to resolve was the appropriate threshold for the existence of an iniquity which prevents LPP applying; what does a prima facie case of iniquity mean? The court concluded that the decision maker assessing documents for iniquity should disclose documents when it appears more likely than not that such iniquity exists. Any lower threshold would result in the disclosure of documents which were more likely than not to be privileged, which would be an irremediable loss to the privilege holder. The court did countenance the existence of some exceptional cases in which a different standard involving balancing harms may be applicable, perhaps in hearings where information is incomplete, but emphasized that it considered the balance of probabilities to be the general test.

Was the Document Part of or In Furtherance of the Iniquity?

The second issue for consideration was the necessary relationship between the document and the iniquity for the exception to LPP to apply. The court arrived at the formulation that "there is no privilege in documents and communications brought into existence *as part of or in furtherance of* the iniquity. *Part of* will include documents which report or reveal the iniquitous conduct in question".

The alternative formulation "in the course of the iniquity" was rejected as creating an arbitrary temporal limit: documents brought into existence in preparation for the iniquity which reveal its existence, or documents created reflecting back on the iniquity after its completion could form part of the iniquity exception as having come into existence as part of the iniquity. However, it was not the case that any document which would not exist but for the iniquity was exempt from privilege: if, for example, as part of their general retainer, Dechert were provided with documents revealing that Mr Al Sadeq was held in unlawful conditions, the exception to LPP would apply. If the same documents were provided to Dechert for the specific purpose of their advising on whether the detention was lawful, the documents would not be disclosable. In the latter case, this would be



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documentation provided as part of the “the ordinary run of cases” and would not be an abuse of the lawyer/client relationship.

The Scope of Litigation Privilege

The court then moved away from considering the iniquity exception to considering litigation privilege more generally. Lawyers for Mr Al Sadeq contended that Dechert could not claim litigation privilege in relation to criminal or extradition proceedings where their clients (RAKIA) were not and would never be parties to those proceedings. The court concluded that there was no principled basis for limiting the scope of litigation privilege to litigation to which the person is a party. This would create unjust anomalies: the public prosecutor in the Emirate might rely on Dechert to transmit evidence for the purpose of criminal proceedings to which neither Dechert nor RAKIA were party, and it was considered wrong in principle for this material to be privileged only in the civil sphere and not when gathered in contemplation of criminal proceedings which encompass a civil claim. The court left open the question as to whether there should be a test as to whether those claiming privilege have a “sufficient interest” in the litigation to which they are not party, and concluded this should be determined in a case which was less clear-cut than they found the present one to be.

Finally, the court determined that it would be wrong in principle to limit litigation privilege only to communications with Dechert or third parties authorized to conduct litigation on behalf of RAKIA, and to extend the Three Rivers (No 5) principle. Noting the criticism which Three Rivers (No 5) attracted, the court concluded they were nonetheless bound by it, but not required to extend a principle applicable to legal advice privilege into the arena of litigation privilege. By its nature, litigation privilege extends to communications with third parties, and all legal and natural persons who are not the client. “Third party witnesses have no role in the conduct of the litigation, and no authority to conduct it, but the privilege can nevertheless attach to communication with them”.

Welcome Clarification

This is a judgment which, at the level of principle, appears to largely preserve the current understanding of the scope of litigation privilege and the iniquity principle. However, it is apparent from the facts of the case that it is in fact a welcome and much needed clarification. The Court of Appeal found that the Judge’s first instance conclusion that the iniquities were not made out at all was flawed and that Dechert had applied too narrow a test for disclosure. Irrespective of the result of the renewed disclosure exercise which will now take place in relation to Mr Al Sadeq’s claim, this judgment has removed ambiguities about its scope.

