



LITIGATION AND DISPUTE RESOLUTION

Legal Professional Privilege: Two Interesting Decisions from the Court of Appeal in the UK

by **Muireann Granville**

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Two recent decisions of the Court of Appeal of England and Wales are worth considering in relation to legal professional privilege.

Once privileged, always privileged?

In *Addlesee and others v Dentons Europe LLP* [2019] EWCA Civ 1600, the Court of Appeal examined the issue of whether legal advice given by a law firm to a company that no longer exists remains privileged.

The case concerned a claim by a group of investors against a firm of solicitors, Dentons Europe LLP, for negligence arising from an allegedly fraudulent investment scheme. Dentons had represented a company which had marketed the investment scheme and had since dissolved.

A dispute arose regarding the disclosure of documents over which Dentons claimed legal advice privilege. The Court of Appeal held that the documents of a company which no longer existed remained protected by privilege even though there was no party entitled to assert that privilege.

The decision establishes that a document, once privileged, remains privileged forever, unless it is waived by a person entitled to waive the privilege. The doctrine “once privileged always privileged” has long been established in Ireland in respect of legal advice privilege. Ms Justice Finley Geoghegan made clear in the Irish High Court 2014 decision of *University College Cork – National University of Ireland v Electricity Supply Board* that legal advice privilege was permanent in duration. However, as different policy rationales underpin litigation privilege, it was held that litigation privilege does not last forever. In that case the Court held that there is no reason for litigation privilege to extend beyond that litigation or closely related litigation.

The iniquity principle

The second recent decision of the Court of Appeal, *Curless v Shell International Ltd* [2019] EWCA Civ 1710, concerned a claim to legal advice privilege made during an Employment Tribunal claim. In that case, the employee (Mr Curless) had taken a discrimination claim against his employer (Shell). Mr Curless was subsequently dismissed as part of a redundancy exercise and brought another claim alleging that his redundancy was a sham.

In his claim, Mr Curless referred to an email he had obtained which was exchanged between in-house lawyers at Shell. The email recommended that he be dismissed as part of the redundancy programme. Shell claimed legal advice privilege over the email.

Mr Curless also referred to a conversation he had overheard at a pub between lawyers from a solicitors’ firm which he alleged discussed his potential dismissal. Shell asserted that, to the extent that Mr Curless did overhear a conversation in the terms alleged, the discussion was protected by legal advice privilege.

The Court of Appeal examined whether the communications in question were protected by legal professional privilege or whether the “iniquity principle” was relevant. The “iniquity principle” is an exception

to the protection of legal professional privilege where advice is provided for dishonest purposes, e.g. advice on how to commit a crime or carry out an action contrary to public policy. Where such circumstances arise, privilege does not attach to the communications.

Mr Curless argued that the email and the pub conversation contained advice on how to “cloak” his dismissal as redundancy and how to victimise and discriminate against him, which is contrary to public policy and thus raised the iniquity principle.

The Court of Appeal disagreed that the advice was to act in an underhand or iniquitous way. Rather, the Court found that it was the sort of advice which employment lawyers give “day in, day out” in cases where an employer wishes to consider for redundancy an employee who (rightly or wrongly) is regarded by the employer as underperforming. The Court also held that the advice in the email could not be tainted by a conversation “involving gossip from someone else after the event”.

Thoughts

These decisions reinforce the public policy underlying legal professional privilege: when a client consults a lawyer the client is assured that what passes between them will never be revealed without the client’s consent. This is so even in circumstances where the client is no longer in existence, as can be seen in *Addlessee*, and a high threshold has to be reached to successfully argue that the iniquity principle applies, as evident from *Curless*.

While decisions of UK courts are not binding on the Irish courts, they are of persuasive value and these decisions will be of interest to those engaged in disputes in the Irish courts. It would be hoped that the Irish courts would take a similar stance in relation to protecting legal professional privilege, so that clients can feel confident to discuss issues in a full and frank manner with their lawyers, without fear of having to disclose such communications at a later stage.

For more information please contact Muireann Granville at mgranville@lkshields.ie.

About the Author



Muireann Granville
Senior Associate

Muireann is a Senior Associate in our Litigation and Dispute Resolution Department.

T: +353 1 637 1576 E: mgranville@lkshields.ie