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Legal professional privilege: breaches of a company director's duties and the iniquity exception in practice

KEY POINTS

- In *Barrowfen Properties v Patel & Ors* [2020] EWHC 2536 (Ch), a company successfully applied under para 14.2 of CPR PD 51U, the Disclosure Pilot for the Business and Property Courts, for disclosure of documents containing legal advice given by the Second Defendant to the First Defendant and the Third Defendant.
- The High Court reviewed and applied the iniquity exception (also known as 'the fraud exception'), which disappplies legal professional privilege ('LPP') where it was intended to act as a cloak for crime or fraud, to certain alleged breaches by a company director of his statutory duties to the company.
- The case is also a helpful reminder of the implications of a joint retainer of solicitors by a company and its director on the assertion of LPP by one against the other.

INTRODUCTION

LPP has been described as 'a fundamental condition on which the administration of justice as a whole rests' (*R v Derby Magistrates' Court, Ex p B* [1996] AC 487, 507). In the last few years there has been a significant amount of litigation relating to documents subject to LPP (see for instance *Sports Direct International plc v Financial Reporting Council* [2020] EWCA Civ 177 and *Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600). This is perhaps not surprising given how valuable and sensitive such documents will be in any litigation or investigation by a regulator. Each of these cases tests the boundaries of LPP. The recent decision of Tom Leech QC sitting as a judge of the High Court in *Barrowfen* is one such decision and particularly important for those who advise directors or are bringing or defending a claim against directors. *Barrowfen* is an important decision on the iniquity exception in the context of allegations of breaches by a director of his statutory duties under the Companies Act 2006.

The tensions surrounding disclosure of LPP documents are clear. On the one hand it

is important '*that actual and potential litigants, be they claimants or respondents, should be free to unburden themselves without reserve to their legal advisers, and their legal advisers be free to give honest and candid advice on a sound factual basis, without fear that these communications may be relied on by an opposing party if the dispute comes before the court for decision*' (per Bingham LJ in *Ventouris v Mountain* [1991] 1 WLR 607 at 611D). On the other hand, a client may not continue to assert LPP in relation to documents which were brought into existence for the purpose of furthering a criminal or fraudulent purpose: see eg *Kuwait Airways Corporation v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734 because the protection of such communications '*cannot be otherwise than injurious to the interests of justice, and to those of the administration of justice*' (*R v Cox and Railton* (1884) 14 QBD 153, 167).

THE FACTS

The key facts are as follows:

- The application was made under CPR PD 51U, para 14.2, of the Disclosure Pilot for the Business and Property Courts, for disclosure of documents

containing legal advice given by the Second Defendant firm of solicitors to the First Defendant and the Third Defendant.

- The application relied on two grounds, first under the iniquity exception and secondly on the basis that the documents were created in the course of a joint retainer of the solicitors by the director and the Claimant company.
- The underlying claim by the company against the First Defendant made very serious allegations against the First Defendant director. These included claims that the director had breached his duties as a director of the company including by seeking to maintain sole personal control over the company by (amongst other things):
 - improperly removing a corporate shareholder from the register of members and denying that that company was a shareholder; and
 - allegedly forging letters of resignation of another director and resisting his attempts to reinstate himself.
- A private prosecution had been brought against the First Defendant for amongst other offences forgery, fraud, using a false instrument and perverting the course of justice [26].
- The Claimant also claimed that the Second Defendant had acted in breach of its fiduciary duties and common law duty of care and dishonestly assisted the First Defendant to commit breaches of his fiduciary duties [18].

The First Defendant did not appear at the application and made no application for an adjournment [7]-[10]. The Second

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Defendant took a neutral position on the application [24].

THE STANDARD OF PROOF

The judge followed the decision of Master Clark in *Addlesee v Dentons LLP* [2020] EWHC 238 (Ch) that the standard of proof on such an application was a strong prima facie case, being lower than balance of probabilities or the summary judgment test. The court also took into account the additional guidance of Vinelott J in *Derby & Co Ltd v Weldon (No 7)* [1990] 1 WLR 1156 that an order to disclose documents for which LPP is claimed will only be made in 'very exceptional circumstances'.

A further complicating factor was that there were documents protected by both legal advice privilege and litigation privilege. The judge noted Longmore LJ's statement in *Kuwait Airways Corporation v Iraqi Airways Co (No 6)* [2005] 1 WLR 2734 at [42] in the context of litigation privilege that where fraud is one of the issues in the action a very strong prima facie case of fraud is required. The judge stated 'a very strong prima facie case requires me to be satisfied that the threshold is comfortably exceeded and that the case is one which falls at the very end of the continuous spectrum' (at [40]).

In his defence, the First Defendant had relied upon the private prosecution as a reason not to plead to or answer allegations made against him (at [26]). The judge referred to the decision of Gloster J (as she then was) in *Akcinė Bendrovė Bankas Snoras (In Bankruptcy) v Antonov* [2013] EWHC 131 (Comm) that there is no right to invoke the privilege against self-incrimination in civil proceedings. The judge held in light of that decision that it was permissible for the court to make adverse comment or draw adverse inferences from the fact that the First Defendant had chosen not to advance a positive defence or to provide explanations which would exculpate him whether or not he was the subject of a private prosecution (at [28]).

The judge's decision relied upon analysis of the pleaded cases of each of the Claimant and First Defendant, including the absence of a pleaded defence to certain of the allegations, together with evidence before him. It should be

noted that in *BBGP Managing General Partner Ltd v Babcock and Brown Global Partners* [2010] EWHC 2176 (Ch), Norris J (at [72]) emphasised that as a rule the court should not look at the closed material and that there must be some exceptional factor of real weight before the court can examine such material.

THE INIQUITY EXCEPTION

The iniquity exception applies in relation to documents which were brought into existence for the purpose of furthering a criminal or fraudulent purpose: see eg *Barclays Bank plc v Eustice* [1995] 1 WLR 1238 (a claim by a bank under s 423 Insolvency Act 1986).

The court in *Barrowfen* considered and applied the decision of Norris J in *Babcock* [2010] EWHC 2176 (Ch). Norris J there stated (at [62]) that the iniquity exception applies in cases where '... the wrongdoer has gone beyond conduct which merely amounts to a civil wrong; he has indulged in sharp practice, something of an underhand nature where the circumstances required good faith, something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy.'

At [35] the judge in *Barrowfen* held that: 'By analogy with *BBGP* I consider that the iniquity exception is engaged where breaches of sections 172 to 175 and 177 of the Companies Act 2006 are alleged against a director and the allegations involve fraud, dishonesty, bad faith or sharp practice or where the director consciously or deliberately prefers his or her own interests over the interests of the company and does so 'under a cloak of secrecy'.'

The judge held that the iniquity exception was engaged in respect of all issues and ordered disclosure of all matters, files or documents created for the purposes of giving or receiving legal advice or containing advice to the First Defendant or Third Defendant in relation to the five claims (as defined in the order).

THE JOINT RETAINER

The case also highlights the significance of the joint retainer of solicitors by a director and the company. Where a firm of solicitors is retained under a joint retainer, neither

client may assert LPP against the other in relation to any documents passing between themselves and the solicitor (at [29]). However, equally it is to be recalled that where there are joint clients, privilege can only be waived by them acting together: see *Rochefoucauld v Boustead* (1896) 65 LJ Ch 794.

Therefore in *Barrowfen*, the Claimant company was entitled to disclosure and production of all privileged documents created by the Second Defendant firm of solicitors in the course of any joint retainer from it and the First Defendant, an explanation to be given by the Second Defendant in respect of any redaction (at [30]).

COMMENTARY

This is an important decision for companies, directors and their legal advisers. First, *Barrowfen* is a reminder that the court will be very careful before requiring the disclosure of privileged material on the grounds of the iniquity exception and that a very close analysis of the pleadings and evidence will be necessary. Such orders are likely to be exceptional in practice. Secondly, it is a salutary reminder that while LPP affords considerable protection from subsequent disclosure, it is not untouchable. While the case is unusual on the facts, the express application of the iniquity exception to breaches of a director's statutory duties to a company is significant. Finally, the decision underlines the importance of clarity as to whether an instructed solicitor's retainer is joint between the company and the director. ■

Further reading

- *Barrowfen Properties Ltd v Patel and others* [2020] EWHC 2536 (Ch) www.bailii.org/ew/cases/EWHC/Ch/2020/2536.html
- Legal professional privilege: a practical guide for restructuring professionals (1) (2019) 2 CRI 64
- Legal professional privilege: a practical guide for restructuring professionals (2) (2019) 3 CRI 102