

Addlesee v Dentons Europe LLP [2019] EWCA Civ 1600, 2 October 2019

The claimants had invested in a scheme operated by a Cypriot company called Anabus. Anabus became insolvent and was dissolved. The claimants lost money as a result. They sued the defendants, who were Anabus's former solicitors, on the basis of alleged misrepresentations of the defendants in letters which, according to the claimants, had caused them to invest in the scheme. The claimants sought disclosure from the defendants of documents which were the subject of Anabus's legal advice privilege, because they had come into existence while the defendants were acting for Anabus.

Privilege: the position where the claimant is a former client of the solicitor defendant

Where former clients sue their former solicitors, by making a claim against the solicitors the former clients impliedly waive privilege in the retainer the subject of the claim. Legal advice privilege therefore does not prevent the solicitors from defending themselves. As a result, the solicitors in this example may deploy formerly privileged documents in their defence.

Privilege: the position where the claimant is not a former client of the solicitor defendant

But the same does not apply in a case where a third party, who is not a former client of solicitors, sues the solicitors. The third party was not the person entitled to the privilege, and the lawyers are obliged to uphold the former client's privilege, because it has not been waived. Hence neither the third party nor the solicitors may use the privileged documents in the litigation.

In the present case it was Anabus, not the claimants who had invested in Anabus, whose privilege was in issue. The claimants argued, however, that when Anabus was dissolved the privilege ceased to exist. They said that there had to be someone who was entitled to assert privilege, and that once a company had been dissolved it could no longer assert it, so that the privilege had ceased to exist. Alternatively, if the result of the dissolution was that the privilege had passed to the UK Crown as *bona vacantia*, then the Crown had 'disclaimed' the privilege and that too had had the effect of destroying the privilege.

The Court of Appeal rejected those arguments. It held that legal advice privilege is a fundamental human right. It comes into existence at the time when a communication is made by a client to a lawyer, or vice versa, for the purpose of the client obtaining legal advice. At that time, there plainly does have to be a client entitled to the privilege. But, once privilege has initially attached to a communication, the communication remains privileged until the privilege is waived, or (in a few cases) is overridden by statute. That is the position regardless of whether the client, if an individual, is still alive; or, if a company, still exists. Once legal advice privilege has come into existence in the first place, the question is whether there is anyone who is entitled to waive the

privilege, and whether such person has waived it. If, as in the instant case, there is no one to waive privilege because the holder of the privilege is a company which has been dissolved, the communication remains privileged forever. This is because of the policy underlying privilege, which is that clients must be safe in the knowledge that their lawyers' mouths will be 'shut forever' so that they may be candid with their lawyers.

The Court of Appeal acknowledged that no privilege would subsist in a document if it had been created for the furtherance of crime, fraud, or 'other iniquity'. But it held that there would never have been any privilege in such a document in the first place. This was because, in that case, there was no need to give effect to the policy of clients' communications with lawyers remaining confidential, since fraudsters are not entitled to such protection.

As to the UK Crown, it had issued a disclaimer which expressly did not waive the privilege. Hence, even if the privilege had passed to the Crown, the Crown had not waived the privilege.

The position of solicitors faced with a claim by a third party for the privileged material of a former client

The Court of Appeal also re-affirmed that 'it is the lawyer's duty to assert privilege'. It held that the solicitors were entitled, without over-stepping the limits of their duty, to appear and oppose the application for the disclosure of the privileged documents, even though (i) the privilege was that of their former clients, Anabus, and was not their own privilege, and (ii) Anabus had not asked them to uphold the privilege. It is suggested that this is an important confirmation, at Court of Appeal level, of the decision of Blackburne J in *Nationwide*, 20 years ago, that solicitors may properly appear at hearings about the privilege of their former clients, even if they are not instructed by the former clients to do so.

Beyond that, the case provides a ringing endorsement of the importance of upholding legal advice privilege in cases to which the iniquity exception does not apply.

William Flenley QC, 7 October 2019.