



Check your privilege:

Sarah Bayliss and Tim Koch review recent cases on privilege including the decision on the ‘iniquity exception’ by the Court of Appeal in *Al Sadeq v Dechert* [2024] EWCA Civ 28.

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OLD BUILDINGS

Litigation – when is it in reasonable contemplation?

- ***State of Qatar v Banque Havilland SA & Ors*** [2021] EWHC 2772 (Comm)

Waiver – how far does it go?

- ***Kyla Shipping Co Ltd v Freight Trading Ltd*** [2022] EWHC 376 (Comm)

WP material – when is it admissible?

- ***Ocean on Land Technology (UK) Ltd v Land*** [2024] EWHC 396 (IPEC)

The iniquity exception – how bad is bad enough?

- ***Al Sadeq v Dechert*** [2024] EWCA Civ 28

Overview: Litigation Privilege

1. Litigation must be in progress or in reasonable contemplation
2. Communications must be for sole or dominant purpose of litigation
3. Litigation must be adversarial (i.e., not investigative or inquisitorial)

(See further: *Three Rivers (No.6)* [2005] 1 AC 610 (HL))

“more than a mere possibility but not necessarily a 50% or greater chance”

...substantial uncertainty (and scope for dispute) over the dividing line.

1) *State of Qatar v Banque Havilland SA* [2021] EWHC 2172 (Comm)

2) *Kyla Shipping Co Ltd v Freight Trading Ltd* [2022] EWHC 376 (Comm)

Banque Havilland

“LEAKED DOCUMENTS EXPOSE STUNNING PLAN TO WAGE FINANCIAL WAR ON QATAR – AND STEAL THE WORLD CUP”

- BH knew this leak “*could have serious legal, regulatory and legal consequences.*”
- Held: PWC forensic investigation into leak was not subject to litigation privilege
 - 1) No *adversarial* regulatory proceedings (in this case)
 - 2) Litigation by third parties not yet anticipated at that stage

Kyla Shipping – going on a fishing expedition

“...the instruction of an expert appears to have been for the purpose of trying to provide backing [(i.e., evidential support)] for the [contemplated] claim, but it does not seem to have reached a stage where it was possible to say that litigation in relation to [this] claim was in reasonable prospect.” (at [35])

Waiver of privilege in litigation

Whether or not there is a waiver is a fact sensitive question taking into consideration:

- whether reliance has been placed on the privileged material;
- the purpose for which it was relied upon; and
- the particular context.

PCP Capital Partners LLP v Barclays Bank Plc [2020] EWHC 1393
Comm, Waksman J

Extent of waiver

“Voluntary disclosure of a privileged document may result in waiver of privilege of other material but not necessarily of all documents in the same category...however a broader waiver may result where the voluntary disclosure is partial or selective such that unfairness or misunderstanding may result if there is not a broader waiver.”

R (Jet2.Com Ltd) v Civil Aviation Authority [2020] EWCA 35

Kyla Shipping and Collateral Waiver

“On the one hand where one party relies on privileged material, it is only fair to the other party that the latter has an opportunity to satisfy itself that what has been disclosed is not a partial account. On the other hand, privilege is a fundamental right and it is only fair to the disclosing party that what must be disclosed is the minimum consistent with fairness to the other.”

Charles Hollander QC sitting as a deputy High Court judge

Overview: The Key Exceptions to WPP

- 1) Dispute re: existence / rectification / construction of a Settlement Deed
- 2) Unambiguous impropriety (threats, perjury, blackmail, fraud etc.)
- 3) Estoppel
- 4) Explanation of delay and/or apparent acquiescence.
- 5) Offers made WPSAC

(see further: *Unilever plc v Procter & Gamble Co* [2000] 1 WLR 2436)

The Interpretation Exception

- First established in *Oceanbulk Shipping & Trading SA v TMT Asia Ltd* [2011] 1 A.C. 662. Incremental development of existing exceptions!
- Considered in two very recent decisions:
 - 1) *Ocean on Land Technology (UK) Ltd v Land* [2024] EWHC 396 (IPEC)
 - 2) *Glencore Energy UK Limited v NIS J.S.C. Novi Sad* [2023] EWHC 370 (Comm)

Ocean on land (at [114])

- 1. Admissibility as a matter of contract law:** *“The material must be evidence of facts within the common knowledge of the parties forming part of the factual matrix relevant to construction.”*
- 2. Admissibility as an exception to WPP:** *“Given the without prejudice context, material will fall within the exception only when it clearly satisfies the criteria for admissibility of precontractual materials”*

The Iniquity Exception

Al Sadeq v Dechert [2024] EWCA Civ 28

- No privilege in documents or communications brought into existence "as part of" or "in furtherance of" a fraud, crime or other iniquity.
- Abuse of lawyer/client relationship
- The merits threshold for the existence of an iniquity which prevents legal professional privilege arising, whether legal advice privilege or litigation privilege is a balance of probabilities test.
- Exceptional cases – balance of harm.



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