

The Court of Appeal Examines the Iniquity Exception to Legal Professional Privilege in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103

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INTRODUCTION

The Court of Appeal in *Candey Ltd v Bosheh* [2022] EWCA Civ 1103 recently considered whether a solicitor can rely on otherwise privileged material in a claim against former clients where it is alleged that the clients had made false statements to their solicitors and the court.

The case concerns proceedings brought by a firm of solicitors, Candey (the “Solicitors”), for breach of retainer against its former client, Mr Bosheh, and against Mr Salfiti for procuring breach of the retainer and/or unlawful conspiracy. The Solicitors’ case relied heavily on privileged and confidential information—indeed, the disclosure of such information was the foundation of all but one cause of action raised by the Solicitors. The Court of Appeal was asked to consider:

- Whether a client was in breach of an implied duty of good faith by settling underlying litigation on terms which meant the solicitors had no entitlement to their costs under a Conditional Fee Agreement (“CFA”);
- Whether the Solicitors could rely on privileged documents in support of their claims; and
- Whether the Solicitors could rely on confidential documents which had been provided to them by a third party after the underlying proceedings had settled.

BACKGROUND

The case concerns proceedings brought by the Solicitors against in relation to a retainer entered into with their former clients (the “ex-Clients”) who had settled proceedings without providing for any recovery for the Solicitors’ costs. The Solicitors sought to

recover their costs from the ex-Clients on the basis that the clients were in breach of an implied duty of good faith and in repudiatory breach of the retainer.

The original proceedings concerned a claim brought by Sheikh Mohamed against (among others) Mr Bosheh, his son (who was also a client of Candey) and Mr Salfiti alleging fraud, knowing receipt and conspiracy. Those proceedings had been settled on a “drop-hands basis”—where neither side recovered money from the other, and each side was responsible for its own costs. One consequence of this outcome was no recovery for the Solicitors, who were acting under a CFA which only permitted recovery of costs if the ex-Clients made a recovery from their opponent.

In an earlier proposal, the ex-Clients had obtained an offer from Sheikh Mohamed whereby they would receive 50% of any monies recovered by Sheikh Mohamed from Mr Salfiti, and the Boshehs would not attend the trial of the claim to give evidence. The ex-Clients instructed the Solicitors to reject the offer and make a counter offer that was substantially less advantageous to them (but more advantageous to Mr Salfiti) and did not seek to recover any costs.

The communications between the ex-Clients and the Solicitors were essential to the Solicitors’ claim and concerned details of the allegations of fraud, the explanations for the ex-Clients’ conduct and an examination of the risks and merits of the underlying litigation.

THE COURT OF APPEAL'S DECISION

Implied Duty of Good Faith

The Court of Appeal agreed with the High Court’s decision that the ex-Clients did not owe the Solicitors an implied duty of good faith under the CFA. The Court of Appeal described such an implied duty as a “*startling concept*” and reasoned that if a duty of good faith was applicable at all, many would say that it would arise the other way round and be owed by the solicitor to the client.

Reliance on Privileged Material

The Court of Appeal considered the judge’s refusal to allow the Solicitors to rely on privileged material. The privileged material in issue comprised the material provided by the ex-Clients to the Solicitors in order to allow them to prepare for the defence of the claims made by Sheikh Mohamed. The Solicitors now alleged that the information provided to them in the original proceedings was false (and by implication that Sheikh Mohamed’s original allegations were correct). In other words, the Solicitors claimed

that they had been deceived and were used to perpetuate a fraud on the other party and on the court.

The Confidentiality Argument

The Solicitors sought to argue a novel point that because they were in possession of the relevant documents, there was no confidentiality as between the client and solicitor in relation to those documents, and therefore the documents were not privileged.

Lord Justice Coulson was reluctant to express a concluded view about this new argument but considered it to be potentially at odds with views expressed in other authorities. He also considered that it may be “*a distinction without a difference*” because, whatever the position between the client and solicitor, there would be an obligation not to disclose the material to a third party, which, for these purposes, would include the court.

Lord Justice Arnold, who provided a concurring judgment, considered that the argument was contrary to both principle and authority. It is contrary to the long-founded principle underlying legal professional privilege that “*a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth*”. The fact that the information is known to the solicitor does not mean that it does not have the necessary quality of confidence if it is not in the public domain. If the information is not in the public domain, then the solicitor owes the client a duty to keep the information confidential.

The Iniquity Argument

The Solicitors also sought, in the alternative, to rely on the Iniquity Exception to privilege on the basis that it was appropriate for a lawyer to unravel fraud by relying on privileged material.

The Iniquity Exception typically applies in relation to documents which are brought into existence for the purpose of furthering a criminal or fraudulent purpose: see, e.g., *Barclays Bank plc v Eustice* [1995] 1 WLR 1238.

In order to succeed on this ground, the Solicitors would need to meet the test set out in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm): whether the disputed communications are made in the ordinary course of the professional engagement of a solicitor or whether the alleged deceptions mean that there has been an abuse of the solicitor/client relationship such that privilege over those communications is negated.

The High Court had considered this test and gone carefully through the pleaded deception/misrepresentations. The High Court Judge concluded that the communications arose in the ordinary course of the Solicitors’ professional engagement.

The Court of Appeal considered that this analysis had not been challenged seriously on appeal, nor could it have been: *“It demonstrated that, even taking [the Solicitors’] case at its highest, the alleged false statements related back to the original fraud alleged by Sheikh Mohamed. It was not a new or different fraud relating to the proceedings which took the case out of the ordinary run. In this way, the Iniquity Exception does not apply in this case.”*

The Court of Appeal added that a court will look particularly carefully to see whether the necessary thresholds for the Iniquity Exception are met in circumstances where the allegations of fraud are no more than repetitions of the allegations of past fraud which gave rise to the original proceedings. As Viscount Findlay said in *O’Rourke v Darbishire & Ors* [1920] AC 581 at 604, where one party was seeking to displace privilege on the basis of fraud: *“it is not enough to allege fraud...there must be something to give colour to the charge...and there must further be some prima facie evidence that it has some foundation in fact”*.

Reliance on Confidential Information

The Court of Appeal also confirmed the High Court’s finding that it had been unlawful and unjustified for the Solicitors to review the ex-Client’s bank statements which had been provided to them by the ex-Client’s bank for the purposes of the underlying claim but which had only been received after the claim had settled and the retainer had been terminated.

The test identified by Master Davison in *Mustard v Flowers* requires a court to conduct a balancing exercise to consider whether the public policy interest in excluding evidence improperly obtained is trumped by the important (but narrower) objective of achieving justice in the particular case. The Court of Appeal was in no doubt that the answer to that question is “No”. This was particularly the case given the nature of the Solicitors’ claim, which alleged implied breaches of duty in order to avoid the express terms of the CFA.

SUMMARY

This decision in an unusual case confirms that the Iniquity Exception to privilege is a narrow one and requires an abuse of the solicitor/client relationship which is so serious as to put the advice or conduct outside the scope of the professional engagement. It is not enough, as it is here, that the original proceedings involve fraud, and the alleged false statements relate to the underlying fraud.

In this case, the professional engagement was at the heart of the case in circumstances where the lawyers were seeking to rely on an unprecedented implied duty of good faith on the client in a solicitor/client relationship.

The case is a salutary reminder that a firm's retainer with a client must expressly and unambiguously address the solicitor's entitlement to fees under a CFA or an ordinary retainer.

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