

Workshop 3

Breaking Privilege: The fraud exception

Problem

Part 1

Fork Construction Limited (“FCL”) is a long-standing manufacturer of fine cutlery. In recent years it has struggled to compete with overseas competitors and now finds itself having to reschedule repayments of bank loans and implementing pay freezes. The Bank has taken security over its UK assets.

Among its supply contracts is one to supply Hilton Hotels with cutlery on demand. It receives a handsome monthly payment in return for keeping a production line solely devoted to Hilton, always ready to produce branded Hilton cutlery.

FCL owns its factory in the UK, plant and machinery, but also some overseas shops and a large collection of rare silver forks, dating from its days as the market leader. They include the diamond-studded “Coronation Fork”, made for Queen Victoria’s coronation and kept in the UK.

Two of FCL’s directors, A and B, with ostensible authority to act for FCL, seek advice from solicitors on the following proposed actions:

- a) Using the dedicated “Hilton” production line to produce cutlery for other customers, without telling Hilton, in order to increase revenue from other customers while continuing to claim the monthly payments;
- b) Transferring the machinery needed for the “Hilton” production line to a new company (“GCL”), at cost, in order to ensure that the Bank cannot interfere with fulfilment of the Hilton contract;
- c) Transferring FCL’s silver fork collection to Mrs A and Mrs B, in return for nothing but their agreement to donate them to a museum in due course;
- d) Granting a prospective new lender security over the Coronation Fork and FCL’s offshore assets in return for an injection of new money, on terms that make Wonga look reasonable.

The solicitor advises, and each of actions a) to d) are carried out.

1. In subsequent litigation in which each of those actions was relevant to the litigation, will legal professional privilege cover the advice given by the solicitor to A and B?
2. Would it make a difference if the solicitor were the owner of GCL and motivated by a desire to benefit GCL?
3. Would it make a difference if A and B had kept the rest of FCL’s Board in the dark as to the actions they proposed?
4. Will privilege cover the legal advice given by a separate solicitor, to Mrs A and Mrs B, in relation to whether they should accept the fork collection?

Part 2

FCL's business collapses and the company enters winding up. FCL's liquidator concludes that A and B have carried out a massive fraud on FCL, by channelling its overseas assets into their own pockets. The liquidator brings proceedings, obtaining a worldwide freezing injunction against A and B plus an order that they disclose their assets. A and B deny the allegations.

Prior to the proceedings, A attempted to conceal the fraud and hide his ill-gotten gains through a restructuring of his assets, by moving the money into an opaque offshore trust structure.

When the freezing injunction is later served on A, he deliberately fails to disclose the offshore assets. Soon afterwards (and long before the trial of the claim), the liquidator obtains evidence indicating that A has concealed the assets. At the interlocutory stage, can the liquidator defeat A's claim to privilege when seeking:

1. disclosure of the legal advice given to A by the transactional lawyers who were advising on the asset restructuring;
2. disclosure of the communications between A and his litigation solicitors in relation to his asset disclosure pursuant to the freezing injunction, plus drafts of A's asset disclosure affidavit.

Practical issues:

3. In order to succeed on an interlocutory application to defeat A's privilege claim:
 - a. Is it enough for the liquidator to file written evidence showing A's fraudulent purpose, or would there need to be cross-examination of A?
 - b. Would the judge need to look at the disputed documents *in camera*?
 - c. Would it be necessary to join the solicitors as respondents to the application?
4. Assuming that the liquidator succeeds in defeating A's claim to privilege, would that also entitle him to see A's communications with his co-defendant B, who is separately represented? B claims common interest privilege in the communications.

Part 3

Following the trial of the claim, the liquidator of FCL successfully obtains judgment against A and B. With a view to enforcing the judgment and further investigating the fraud, the liquidator seeks disclosure and inspection of all documents provided to or produced for or by A and B's solicitors relating to the proceedings. Will these documents be covered by privilege in circumstances where the trial judge made the following (alternative) findings:

1. A and B's evidence was unreliable, and on balance the liquidator's case that they acted fraudulently was preferred; alternatively
2. On the key points, A and B had deliberately lied in evidence; alternatively
3. A and B were wholly unreliable and dishonest witnesses who forged documents, had repeatedly lied on oath, and intentionally failed properly to disclose their assets pursuant to a fraudulent design. Their entire defence was a fabrication and they had attempted to pervert the course of justice by bribing witnesses and deceiving their own solicitors.