

ESSEX COURT CHAMBERS

BARRISTERS



DISCLOSURE AND PRIVILEGE IN FRAUD LITIGATION



Anna Dilnot QC



Tom Ford



James Sheehan

DISCLOSURE AND PRIVILEGE IN FRAUD LITIGATION

1. After initial two years (from 1 Jan 2019) the Disclosure Pilot Scheme (which currently applies only to cases in the Business and Property Courts) has been extended to the end of 2021. Scheme has been subject to quite a lot of adverse comment in terms of costs/additional complication. However, seems many of the changes to the disclosure process which it introduced are likely to be long term.
2. Steps introduced which require the parties to cooperate, including in completing the Disclosure Review Document (“DRD”) prior to the first Case Management Conference. The disclosure pilot requires parties to take a collaborative approach throughout: *AAH Pharmaceuticals Ltd v. Jhoots Healthcare Ltd* [2020] EWHC 2524 (Comm).
3. Requirement for parties to agree issues for disclosure, and to disclose documents in two stages: “Initial” (usually when serving statements of case) and “Extended”, with the latter including a menu of disclosure “Models” to choose from.
4. The scope of Issues for Disclosure was considered in *McParland v Whitehead* [2020] EWHC 298, with the court concluding that these are different from the issues for determination at trial. Issues for Disclosure are “issues to which undisclosed documentation in the hands of one or more of the parties is likely to be relevant and important for the fair resolution of the claim”.
5. Disclosure Guidance Hearings - now to be more easily available. Revisions to the PD allow guidance to be sought “on any point concerning the operation of the pilot in a particular case”: PD 51U para 11.1.
6. The requirement to disclose known adverse documents (PD 51U para 3.1(2)) has also been considered by the court, with Stuart-Smith J holding in *Castle Water v Thames Water Utilities* [2020] EWHC 1374 that a party must undertake “reasonable and proportionate checks”. If a party discovers that it has, or has had, known adverse documents, it must then undertake “reasonable and proportionate steps” to locate them.
7. Seeking further orders or Extended Disclosure (PD 51 paras 17 and 18). Recent cases include: *Astra Asset Management UK Ltd v. Musst Investments LLP* [2020] EWHC 1871; *Revenue and Customs Commissioners v IGE USA Investments Ltd (formerly IGE USA Investments)* [2021] Bus. L.R. 424 and *Roman Pipia v BGEO Group Ltd (formerly BGEO Group Plc)* [2021] EWHC 86 (Comm).
8. Challenge to privilege (PD 51 para 14.2). NB on status of lawyers, see recent decision in *JSC Tatneft v Bogolyubov and others* [2020] EWHC 2437 (Comm).

Iniquitous conduct exception: recent developments

9. *Court of Appeal in Addlesee v Dentons Europe llp* [2020] Ch 254 has clarified that the boundaries of legal advice privilege, within which it is absolute unless and until waived, are that the communication in question must be a communication between lawyer and client, made in connection with giving or receiving legal advice, otherwise than for an iniquitous purpose. Thus, absent iniquity (or absent being able to establish it to the requisite standard), privilege subsists, even where it belonged to a dissolved corporate entity no longer able to assert the privilege.

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10. Notoriously difficult to establish at an interlocutory stage because of the high threshold test of “strong prima facie case” (a) of fraud and (b) that the document came into existence as part of that fraud. Test sits somewhere above ‘good arguable case’ but below ‘balance of probabilities’ or the defence having no real prospect of success. Where a claimant has or could get a search or imaging order, use of the exception should be considered.
 11. In terms of what constitutes ‘iniquity’, the concept is broad, encompassing criminal or fraudulent conduct, as well as conduct which would satisfy the test in s.423 IA 1986. That list has been added to recently in *Barrowfen Properties v Patel* [2020] EWHC 2536 (Ch) which has confirmed that iniquitous conduct will include breach of statutory duty by a company director (including s.172 CA 2006), where the conduct involves dishonesty, fraud, bad faith or sharp practice, or the director deliberately prefers his or her own interests over those of the company and does so under a cloak of secrecy.
 12. Note also the recent restriction of the related “unambiguous impropriety” exception to ‘without prejudice’ privilege in *Motorola Solutions Inc v Hytera Communications Corp Ltd* [2021] 2 WLR 679. Only going to be able to use the exception in truly exceptional cases where there is no scope for dispute over what was said in the ‘wp’ meeting. Note also that threats to move assets so as to make enforcement more difficult will not necessarily fall within the exception.

Waiver of privilege

13. The relevance of privileged material in fraud cases

Fraud cases are often concerned with a defendant’s state of mind. Did an alleged assister act dishonestly? Did an alleged inducer of a breach of contract know they were inducing a breach of contract? Did a party to an alleged sham contract believe it was creating genuine obligations? As to the latter, see *PCP Capital Partners LLP v Barclays Bank* [2020] EWHC 1393 (Comm).

A defendant’s state of mind can often be informed by legal advice. The defendant supports their honesty by saying they took legal advice: *PCP; Fortress Value Recovery Fund I LLC v Blue Skye Special Opportunities Fund LP (a Firm)* [2014] EWHC 1052 (Comm); *Digicel (St Lucia) Limited v Cable & Wireless Plc* [2009] EWHC 1437 (Ch). Or they say they took legal advice as to a party’s contractual obligations and did not believe they were inducing a breach.
14. The difficulty: collateral waiver

Not open to a party to cherry-pick. Reliance on legal advice can trigger a waiver not just in the part of the advice relied on but more generally.
15. The test for collateral waiver and its scope

The test as recently restated by Waksman J in *PCP*. Also drawing briefly on examples in the case law: *PCP, Blue Skye, Digicel, PJSC Tatneft v Bogolyubov* [2021] 1 WLR 1612.
16. Practical considerations

Including how to decide whether to waive privilege, and how and when to allege a waiver if you are on the other side.

ESSEX COURT CHAMBERS
BARRISTERS

24 Lincoln's Inn Fields
London WC2A 3EG, UK

Tel +44 (0)20 7813 8000
Fax +44 (0)20 7813 8080
clerksroom@essexcourt.com

essexcourt.com