Case Note: *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd (1) Ashurst LLP (2)* [2020] EWCA Civ 11

The last few years has seen a raft of higher court authority dealing with questions of the nature of the law of the various types of privilege when it comes to disclosure of documents. In the latest case, the Court of Appeal has held that confidentiality and privilege is not lost in respect of documents pertaining to client instructions simply because a solicitor makes a statement to a third party pursuant to those instructions.

The Claimant bank ("the Bank") in *Raiffeisen Bank International AG v Asia Coal Energy Ventures Ltd (1) Ashurst LLP (2)* [2020] EWCA Civ 11 appealed against the earlier refusal of its application by Mrs Justice Moulder for specific disclosure from the Second Defendant solicitors ("the Solicitors") of documents relating to their instructions from their client in respect of the matters subject to the underlying action.

The Solicitors acted for an Indonesian company which was to provide finance in connection with a share sale agreement. They provided to the Bank a written confirmation that they had been put in funds in an amount not less than US $85 million and that they had irrevocable instructions to transfer these finds into an escrow account, or in the event that the proposed escrow agreement was not signed within 30 days, to continue to hold the funds pending agreed alternative arrangements. It was the Bank's case that it relied upon this confirmation when releasing security to allow the transaction to proceed. It transpired that whilst the Solicitors indeed did receive the US $85 million in their client account, this had been reduced to zero within around two-and-a-half months.

The Bank commenced an action against the buyer ("the First Defendant"), which obtained the shares, but failed to pay the price agreed. A claim was also issued against the Solicitors on the basis that by issuing the confirmation, they undertook obligations to the Bank which were breached and made representations which were untrue.

The Bank sought documents by way of specific disclosure relating to the instructions which the Solicitors had received from their client. The Bank argued that the instructions were not confidential because the client had authorised them to make the statements contained in the confirmation. It argued that *Conlon v Conlons* [1952] 2 All E.R. 462 was authority that legal professional privilege did not extend to a communication which a client had instructed his solicitor to repeat, that being a case where a client had denied that his solicitors had had authority to make a settlement, which rendered it necessary to inquire into what instructions he *had* given to his solicitor.

The first instance court disagreed. Moulder J distinguished *Conlon* and held that the Solicitors' client's irrevocable instructions remained confidential and privileged as they were inextricably bound up with the legal advice the Solicitors would have provided. She also held that the Solicitors had not made representations on behalf of their client, but had provided the Bank with an independent assurance and that privilege was not waived by the client merely authorising the Solicitors to make statements as to the instructions they had received in those circumstances.

The Bank appealed and the matter came before the Court of Appeal (Lewison, Baker and Males LJJ, the latter giving a judgment with which the former both agreed) on 21 January 2020. The appeal was dismissed.

It was first observed that the application for specific disclosure could have been refused on the grounds that the documents sought were irrelevant to the real issue in the litigation, which was the proper construction and scope of the Solicitors' obligation to the Bank under the confirmation (in effect, the reach of any undertaking given). Lord Justice Males said that confidential documents giving rise to the making of the confirmation were irrelevant to its true construction in a commercial context as that depended upon how, objectively, and by reference to its language and context, the confirmation was to be construed (see paragraphs 32-34). Nevertheless, even though the relevance of the documentation was questioned, the Court had to address the question of whether it was privileged, as the Solicitors took no point on relevance.

The Court first provided a short précis of the relevant general principles pertaining to legal advice privilege (see paragraphs 35-41). It was noted that this concept has existed for many years (*R v Derby Magistrates' Court ex p B* [1996] 1 AC 387 per Lord Taylor of Gosforth CJ); and that the same was a *"fundamental human right long established in the common law"* (*R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2002] UKHL 21, per Lord Hoffmann); and absolute in nature unless waived by the client (*Addlesee v Dentons Europe LLP* [2019] EWCA Civ 1600). The Court also reiterated the test for legal advice privilege from the judgment of Taylor LJ in *Baalbek v Air India* [1988] 1 CH 317 (approved by the House of Lords in *Three Rivers DC v Bank of England (no.6)* [2004] UKHL 48): *"… the test is whether the communication or other document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client … there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context."*

The Bank had submitted (see paragraphs 50-51) that instructions by the Solicitors' client for the making of the confirmation lacked the confidentiality necessary for privilege to be claimed and in any event were not concerned with the giving or receiving of legal advice: (a) because the client authorised the Solicitors to make a promise and representations to the Bank as to their instructions in respect to the terms on which they held the money; (b) because the client had provided implied authorisation to the Solicitors to waive privilege by authorising them to make statements about their instructions; and (c) as the instruction to make a statement about the terms on which money would be held was not a kind of communication which could attract legal advice privilege. The Bank relied on *Conlon*.

The Solicitors supported the reasoning of the Judge below (see paragraph 52). It was submitted that a statement by a solicitor to a third party as to the substance of his instructions from a client does not automatically and without more give rise to a loss of confidentiality in the documents which contain or evidence those instructions, but that privilege will only be lost if the client expressly or implied agrees to a waiver. It was argued that that was the way the case of Conlon should be understood and that the instructions of the client in this case had to be regarded as within a continuum of legal advice relating to the financing transaction and the protection of its interests.

The Court of Appeal considered the reasoning in and ratio of two Australian cases: *Benecke v National Australia Bank* (1993) 35 NSWLR 110 and *Moreay Nominees Pty Ltd v McCarthy* (1994) 10 WAR 293, and held that *Conlon* should be understood in the same way. The Australian cases held that initial instructions provided by a client were confidential and subject to privilege, but that this could be waived if the content of those instructions was put in issue by the client, as had happened in the *Conlon* case when the client disputed his solicitor's authority to settle his claim as had apparently occurred. It was held that *Conlon* was not authority for the different proposition that legal advice privilege did not extend to a communication containing information which a solicitor had been instructed to repeat (see paragraphs 61-63).

Hence, the Court of Appeal held, a statement to a third party by a solicitor in relation to instructions received from that solicitor's client did not automatically and without more cause confidentiality and thus privilege to be lost in the documents evidencing the giving of those instructions. It was held that the giving by the Solicitors in the instant case of a confirmation that they were in funds on the instruction of their client amounted to the assumption of an independent obligation to the Bank and did not mean that the Solicitors were authorised to say anything more about the instructions they received (see paragraphs 66-68). The instruction to the Solicitors' must also have inevitably formed part of a continuum of ongoing advice provided by the Solicitors in a relevant legal context and thus were privileged (see paragraphs 69-71).

It is suggested this decision of the Court of Appeal is a welcome one. Other recent authorities have sought to define the limits of legal professional privilege, and *Raiffeisen Bank* is of further assistance in confirming that where a solicitor refers to instructions that does not ordinarily lead to a loss of privilege in those instructions unless the circumstances are such that privilege is impliedly waived by a client, such as where the client puts the existence of those instructions in issue. In its reassertion of the importance of privilege it may also reassure practitioners and commentators questioning whether the doctrine is likely to remain a *"long established"* creature of our common law or one which may at least partially fall victim to what can sometimes seem an inevitable movement towards a universal greater openness of information.

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