Accidents will happen

Susan Rosser and Jonny Cohen consider a recent case of accidental disclosure

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'When a document is disclosed which is, on its face, privileged, it falls to the inspecting party to determine whether the document has been disclosed in error or whether privilege has been deliberately waived.'

In the recent case of *Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd* [2017], the Court of Appeal considered again the principles that should be applied in granting equitable relief to a party which has inadvertently disclosed privileged materials to the other side.

As legal professional privilege is a private right, a party may choose to waive its right to withhold privileged documents from disclosure (see *Rawlinson & Hunter Trustees SA v Director of the Serious Fraud Office (No 2)* [2014]). On the other hand, inadvertent disclosure of privileged materials is a major hazard of any modern disclosure review. Some might say that for large cases, which can involve a review of thousands or even millions of documents, it is more or less inevitable that a few privileged documents will slip through the review net and be disclosed to the other side.

Review

Typically, in a large-scale disclosure review exercise all of the first-sift review will be done by junior legal staff, often trainees and paralegals, increasingly in tandem with some form of electronic review assistance. The accuracy of the review exercise will therefore depend on the first-line, and least-experienced, reviewers identifying whether a relevant document is, or may be, privileged. Where a document is flagged as potentially privileged, it should then be reviewed by a more experienced solicitor to determine its true status. However, where a document has been coded as relevant but not privileged, it may never be checked by a more senior reviewer. This is what happened in the *Atlantisrealm* case. In addition, there may be 'fat finger' errors where a reviewer using an electronic database has simply clicked on a box other than the one intended. In a large-scale disclosure exercise it is normally impracticable to subject more than a sampling of documents to second-level review. Thus mistakes will be made.

Error

When a document is disclosed which is, on its face, privileged, it falls to the inspecting party to determine whether the document has been disclosed in error or whether privilege has been deliberately waived. There is a fundamental principle that (*Guinness Peat Properties Ltd v Fitzroy Robinson Partnership* [1987]):

> ... the law should not encourage parties to litigation or their solicitors to take advantage of obvious mistakes made in the course of the process of discovery.

Further, the Civil Procedure Rules give some protection, in that where a party inadvertently allows a privileged document to be inspected, the party who has inspected the document may use it or its contents only with the permission of the court, in accordance with CPR r31.20.

The Court of Appeal in *Al-Fayed v The Commissioner of Police for the Metropolis* [2002] noted that a solicitor considering

the other party's documents owed that party no duty of care and was generally entitled to assume that any privilege for those documents had been waived. However, the court had jurisdiction to intervene to prevent the use of documents disclosed by mistake where justice required and could grant an injunction if the documents had been made available for inspection as a result of an obvious mistake. But when is a mistake 'obvious'? The Court of Appeal ruled that a mistake was likely to be obvious and an injunction granted where the receiving solicitor appreciated that a mistake had been made before making use of the documents or it would have been obvious to a reasonable solicitor in his or her position that a mistake had been made.

Background

In the *Atlantisrealm* case, which concerned a breach of warranty claim arising out of a share purchase agreement, the defendant's disclosure inadvertently included an email which was, on the face of it, subject to legal advice privilege. The contents of the email were apparently helpful to the claimant's case on construction of the warranties.

One of the claimant's external solicitors (who was responsible for initially reviewing the defendant's disclosure) concluded that privilege in that email had been intentionally waived. Subsequently, that email was seen by his more senior colleague, Mr Newton, who, in advance of a settlement meeting between the parties, then forwarded it to the defendant's solicitor, Mr Cook, with the words: 'The email below will be of interest to you'. Mr Cook responded and stated that the email had been disclosed in error and that all copies should be deleted. In response, Mr Newton claimed that privilege had been waived and, on that basis, he refused to delete it.

The defendant subsequently applied for an injunction to restrain the claimant's use of the privileged email. At first instance, the court held that the email had not been disclosed in error and that the solicitor acting for the claimant who had first reviewed the email had believed that the email had been deliberately disclosed. Consequently, an injunction was refused. Overturning that decision, the Court of Appeal held that, since disclosure of the privileged email came about when one of the defendant's junior lawyers who was undertaking first-line review failed either to mark the email as privileged or to escalate it to a more senior colleague for further consideration, no considered decision had been taken by the defendant or the solicitor overseeing the disclosure exercise to waive privilege in that particular document. It had been disclosed as a result of a mistake.

At first instance, the court held that the email had not been disclosed in error and that the solicitor acting for the claimant who had first reviewed the email had believed that the email had been deliberately disclosed.

The Court of Appeal decided that it was not able to look behind the finding by the judge below that it had not been obvious to the claimant's lawyer who had originally reviewed the defendant's disclosure that the privileged email had been disclosed in error. However, Jackson LJ (giving the appeal judgment) held that it was clear that the more senior colleague, Mr Newton, had appreciated that a mistake had been made by the defendant's solicitors, not least because he drew the email to Mr Cook's attention in the belief that he was unaware of it.

In making that finding, the Court of Appeal added a 'modest gloss' to the principles previously formulated in the *Al-Fayed* and *Rawlinson & Hunter Trustees* cases, whereby:

> ... if the inspecting solicitor does not spot the mistake, but refers the document to a percipient colleague who does spot the mistake before use is made of the document, then the court may grant relief. That becomes a case of obvious mistake.

Honesty

In giving his judgment, Jackson LJ noted that the disclosure procedure requires honesty from both parties, even when that is against a party's interest, and that the duty of honesty rests upon the party inspecting the documents as well as the disclosing party. Where mistakes happen, and it is obvious that a mistake has been made, it is incumbent on the lawyers on both sides to cooperate to put matters right as soon as possible, rather than troubling the courts unnecessarily. Perhaps now is the time to go further and to change the Civil Procedure Rules so that any privileged document disclosed in litigation is considered to have been inadvertently disclosed unless privilege is expressly stated to have been waived in that document by the disclosing party. ■

Al-Fayed & ors v The Commissioner of Police for the Metropolis & ors [2002] EWCA Civ 780

Atlantisrealm Ltd v Intelligent Land Investments (Renewable Energy) Ltd [2017] EWCA Civ 1029

Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027

Rawlinson & Hunter Trustees SA & ors v Director of the Serious Fraud Office (No 2) [2014] EWCA Civ 1129