Court of Appeal adds a "modest gloss" to existing principles relating to the inadvertent disclosure of privileged documents

In *Atlantisrealm Limited v Intelligent Land Investments (Renewable Energy) Limited*[1] the Court of Appeal has applied what it has called a "*modest gloss*" to the principles to be considered when the court decides whether or not to restrain a party that has inadvertently received a privileged document (by way of disclosure) from relying upon that document in the proceedings. The Court of Appeal held that if the inspecting solicitor did not spot that the privileged document must have been disclosed in error, but subsequently referred the document to a colleague who did spot the mistake before use was made of the document, the court could grant relief because that became a case of obvious mistake.

The Court of Appeal's judgment was delivered by Lord Justice Jackson (with whom Lord Justice Simon agreed).

The relevant principles

Legal professional privilege is a private right and, as such, a party may choose to waive its right to withhold privileged documents from disclosure.[2] However, privileged documents are sometimes disclosed by mistake.

There is a fundamental principle that:

> *"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."*[3]

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

CPR 31.20 states 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 *Al-Fayad & Ors v The Commissioner of Police for the Metropolis &Ors*[4] the Court of Appeal had outlined the following principles to be applied in consideration of whether the court would grant such permission:

i. a party giving inspection of documents had to decide what privileged documents he wished to disclose before doing so;

ii. although the privilege belonged to the client, he clothed his solicitor with ostensible authority to waive privilege in respect of relevant documents;

iii. 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;

iv. where a party gave inspection of privileged documents by mistake, it would generally be too late for him to claim privilege to try to correct the mistake by obtaining injunctive relief;

v. the court had jurisdiction to intervene to prevent the use of documents disclosed by mistake where justice required;

vi. the court could grant an injunction if the documents had been made available for inspection as a result of an obvious mistake;

1 *Rawlinson & Hunter Trustees SA & Ors v Director of the Serious Fraud Office* (No 2) [2014] Civ 1129 (the Tchenguiz case)

2 *Rawlinson & Hunter Trustees SA & Ors v Director of the Serious Fraud Office* (No 2) [2014] Civ 1129 (the Tchenguiz case)

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

4 [2002] EWCA Civ 780

vii. 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 position that a mistake had been made and it would not be unjust or inequitable to grant relief;

viii. it would be relevant to the "reasonable solicitor" test where a solicitor considered the question and honestly concluded that the documents had not been made available for inspection by mistake, although it would not be conclusive; and

ix. there were no rigid rules since the court was exercising an equitable jurisdiction.

The underlying dispute

The dispute in the substantive proceedings concerned a breach of warranty claim commenced by the respondent (**"Atlantisrealm"**) against the appellant (**"ILI"**) arising out of a share purchase agreement (**"SPA"**). Pursuant to the SPA, Atlantisrealm purchased two of ILI's subsidiary companies which were developing windfarms at two locations in Scotland.

A dispute arose in respect of whether ILI (as seller) had warranted that the two subsidiary companies had certain rights of way over land so that turbines and other necessary components could be delivered to the site. ILI denied any breach of warranty.

The inadvertent disclosure

During the course of the proceedings, 4,891 documents were disclosed by ILI, including 150 emails from ILI's solicitor which (for various reasons) were not privileged. 1,000 further emails were, however, excluded on privilege grounds.

ILI's document review exercise initially involved junior lawyers and trainees from ILI's solicitors categorising documents as being: (a) disclosable; (b) not disclosable on the basis of privilege; or (c) not relevant. To the extent a reviewer was unsure how to categorise a document, it was to be electronically "flagged" for escalation to a more senior solicitor.

ILI's disclosure inadvertently included an email from one of ILI's corporate solicitors to ILI's chief executive officer, which was (on the face of it) subject to legal advice privilege (the **"Privileged Email"**). Although the substance of the Privileged Email is not relevant for the purposes of this alert, it is relevant to note that it was helpful to Atlantisrealm's case on construction of the warranties. Whilst Jackson LJ did not consider the contents of the email to be fatal to ILI's case, he noted that it "*provided useful ammunition for Atlantisrealm*".

Having received ILI's disclosure, one of Atlantisrealm's external solicitors (who was responsible for initially reviewing ILI's disclosure) concluded that ILI had intentionally waived privilege in that email. The email was then passed onto a more senior colleague.

On 20 January 2017, in advance of a settlement meeting between the parties, the senior colleague forwarded the Privileged Email to ILI's external solicitor and noted that:

> *"I don't know whether you have started your consideration of disclosure yet? The email below will be of interest to you."* (the **"20 January Email"**)

Upon receiving the 20 January Email, ILI's solicitor responded and stated that the Privileged Email had been disclosed in error and that all copies should be deleted. In response, Atlantisrealm's solicitor claimed that privilege had been waived and, on that basis, he refused to delete it.

ILI subsequently applied for an injunction to restrain Atlantisrealm's use of the Privileged Email.

Decision

At first instance, it was held that the Privileged Email had not been disclosed in error and the court accepted that the solicitor acting for Atlantisrealm (who had initially reviewed ILI's disclosure) believed that the email had been deliberately disclosed, particularly given the number of emails from ILI's solicitors which had been disclosed. Consequently, the injunction was refused.

The Court of Appeal has now overturned that decision.

In overturning the first instance decision, the Court of Appeal applied the established principles set out in *Al-Fayad* and *Rawlinson* concerning the inadvertent disclosure of privileged documents.

In order to reach its decision, the Court of Appeal considered: (a) whether the disclosure of the Privileged Email was inadvertent; and (b) whether the mistake should have been obvious to the inspecting party.

(a) Was the disclosure inadvertent?

The disclosure of the Privileged Email came about when one of ILI's junior solicitors failed to either mark it as privileged or escalate it to a more senior colleague for further consideration when carrying out the document review exercise, in advance of ILI's disclosure.

Consequently, the Court of Appeal held, no considered decision had been taken by either ILI (as client), the solicitor overseeing the disclosure exercise or the matter partner to waive privilege in that particular document. The Privileged Email had been disclosed as a result of a mistake.

(b) Was the mistake obvious?

The Court of Appeal held that it was not able to look behind the first instance finding whereby it was accepted that it had not been obvious to the solicitor who had originally reviewed ILI's disclosure that the Privileged Email had been disclosed in error.

However, when the Privileged Email was subsequently presented to the more senior colleague (who proceeded to send the 20 January Email), the Court of Appeal held that it was clear that the more senior colleague appreciated that a mistake had been made by ILI's solicitors when disclosing the Privileged Email, not least because he drew the email to ILI's solicitors' attention in the belief that they were unaware of it. Referring to the 20 January Email, the Court of Appeal noted, when considering whether or not the senior colleague believed that the email had been disclosed in error, that "*if there had been a deliberate decision to waive privilege in respect of such an important document, it is hardly likely that Mr Cook [ILI's solicitor who oversaw the disclosure exercise] would have been unaware of it*". The Court of Appeal held, therefore, that whilst the first solicitor had not appreciated the mistake that had been made, the more senior colleague had done so (as evidenced by the 20 January Email).

In making that finding, the Court of Appeal added a "*modest gloss*" to the principles previously formulated in *Al-Fayed* and *Rawlinson* 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*".

Jackson LJ also took the opportunity at the end of the judgment to note and acknowledge that disclosure exercises in the "*electronic age*" are "*massive and expensive operations*" and that "*mistakes will occur from time to time*". Where such mistakes happen, and it is obvious that a mistake has been made, the "*lawyers on both sides should cooperate to put matters right as soon as possible*".

Finally, 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.

Comment

This Court of Appeal decision supplements the existing authorities concerning inadvertent disclosure of privileged material and clarifies the law in circumstances where two solicitors review a disclosed (but privileged) document at different times and only the second solicitor (who subsequently reviews the document) notices that a mistake has been made. Assuming the privileged document has not been relied upon before the mistake is spotted by the second solicitor, the court may restrain a party from relying on that document.

The decision also underlines the need for both parties (and their solicitors) to act honestly during the disclosure process. Where a document which, on the face of it, is privileged is disclosed, the inspecting party will need to give consideration as to whether an obvious mistake has been made to determine whether or not the disclosure (and purported waiver of privilege) was intentional, prior to placing any reliance on the document.

For more information on this alert, please contact:

Susan Rosser
Partner, London
srosser@mayerbrown.com
+44 20 3130 3358

Jonathan Cohen
Senior Associate, London
jcohen@mayerbrown.com
+44 20 3130 3536