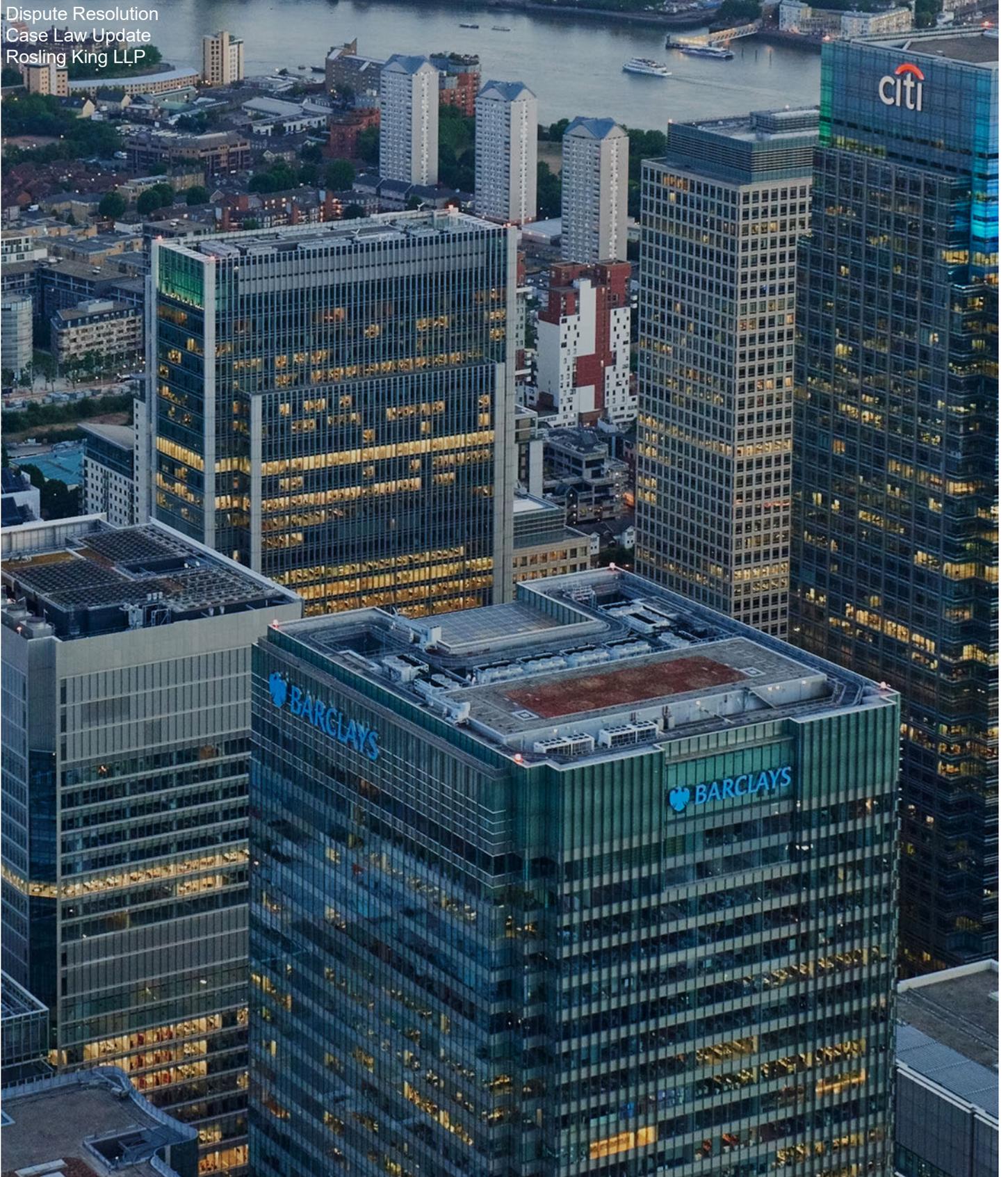


Dispute Resolution
Case Law Update
Rosling King LLP



Background

This appeal concerned a group of investors (the “**Investors**”) who had invested in a scheme marketed by a Cypriot company called Anabus Holdings Ltd (“**Anabus**”). Anabus instructed lawyers named Salans LLP, later Dentons Europe LLP (“**Dentons**”). Inevitably, over the course of dealing, Anabus’ lawyers obtained documents that were presumed to have attracted legal advice privilege and which were currently within Dentons’ possession.

Anabus was dissolved on 11 January 2016 and its rights passed to the Crown as *bona vacantia*. The Crown subsequently disclaimed their interest in the documents without confirming whether legal advice privilege was asserted or surrendered. The Investors later argued that the scheme with Anabus was fraudulent and subsequently issued claims for deceit and negligence against Dentons. The Investors were eager to review the documents passed between Anabus and Salans LLP as they hoped that they would contain relevant information and potential evidence supporting their position and enabling them to bring a claim against Dentons. Within the initial application, Master Clark held that legal advice privilege perseveres through the dissolution of a company however the Investors appealed Master Clark’s decision.

Decision

The Court affirmed that, once the privilege has been associated with correspondence, this cannot be waived unless consent has been obtained. This principle applies even in circumstances where a company has been dissolved.

Whilst there are limited exceptions (i.e. the furtherance of crime, fraud or iniquity) in which communications between a client and lawyer do not attract privilege, it was confirmed that none of these applied to the Investors’ claim. The Court stated that legal advice privilege is held to be absolute, unless waived, when:

- 1 The communication in question had to be a communication between lawyer and client;
- 2 It was made in connection with giving or receiving legal advice; and
- 3 It was otherwise than for an iniquitous purpose.

Mr Grant acting on behalf of the Investors, argued that privilege is a right, a right belongs to a person or entity and accordingly, once it ceases to exist, that right is extinguished. However, Lewison LJ disagreed and held that, so long as the person or entity was in existence when the privileged communication took place, the right of privilege was established, and the only remaining question was whether anyone then held the right to waive it.

The Investors further submitted that the dissolution of a corporation is under its own control (unlike the death of an individual). It does not leave behind any estate to be protected for the benefit of others and thus a conclusion that privilege does not survive dissolution would not expose a company to any risk that it is already exposed to.

The Court, however, disagreed with this view and held that it was a question of reviewing the

circumstances and potentially extending those when privilege would cease to apply. Lewison LJ subsequently explained that, if one exception was to be made, then the circumstances where exceptions were permitted could be extended to a variety of other situations (i.e. charities or trusts). In addition, an exception would undermine the recognised certainty associated with privileged communications. The Court therefore concluded that legal advice privilege could not be waived without consent, unless overridden by statute.

In exploring the ambit of legal advice privilege, the Court stated:

- 1 legal advice privilege is in the public interest, it is not merely a private right;
- 2 privilege does not cease on the death of a living person although it may be acceptable for a personal representative to hold the right to waive it; and
- 3 with regards an individual in bankruptcy, the right of privilege is more than just a personal right of refusal for the bankrupt, as privilege attaches to a document or communication.

The initial decision was made by Master Clark and she referred to the case of *Garvin Trustees Ltd v The Pensions Regulator [2015] pens LR 1* in which Judge Herrington noted that the Northern Irish Company in this case had no possibility of being restored. Master Clark distinguished the Investors' position as this was still a legal possibility for Anabus and therefore legal advice privilege continued to persist after dissolution. However, Lewison LJ held that the basis of the decision in *Garvin* was incorrect. It should have been a question not of who can assert privilege, but who is entitled to waive it.

Furthermore, if there is any person who is entitled to waive privilege, it was a question of whether they had done so. In the case of *Anabus*, the company's rights and assets had passed to the Crown *bona vacantia* although the Crown had neither asserted nor waived privileged. The Court held that the issue of whether the Crown could have waived privilege over *Anabus'* communications with the Respondents was irrelevant, but that privilege, once established, could not be removed unless waived.

Commentary

It is worth noting that the judgment expressly confirms that it only deals with legal advice privilege, not litigation privilege. The appeal provides clarity not only on the status of privilege once a company has been dissolved, but on the ambit of legal advice privilege more generally. The Court has reiterated throughout the judgment that when privilege attaches to a document or communication, the default position is that it is absolute unless waived (subject to the exceptions of iniquity or being overridden by statute).

The decision to award 80% of Dentons' costs is also a reassurance to lawyers when defending any applications in relation to the disclosure of privileged correspondence that the Court will allow them to actively contest such applications.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.