

# 11KBW

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## **Practice and Procedure Part 2**

Richard Leiper QC

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# Scope of legal advice privilege

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**Curless v Shell International Ltd** [2019] EWCA Civ 1710, [2020] IRLR 36 (formerly X v Y)

- Privilege does not attach to iniquity
- C argued that legal advice privilege could not attach to an email because the communication was for a dishonest purpose or otherwise contrary to public policy because it advised using ‘redundancy’ as a pretext for termination, especially since R wished to terminate because of C’s protected acts
- On its proper construction, the email was legal advice aimed at avoiding (rather than evading) possible legal action – the sort of advice given day in, day out
- A conversation overheard in a pub was inadmissible since the advice in the email could not be tainted by a conversation involving gossip from someone else after the event
- Important question left open: whether the iniquity exception is confined to dishonesty or extends to any circumstances which the law treats as entirely contrary to public policy
- It was not a sufficient basis for maintaining the anonymity of the parties that a judge hearing the case subsequently might read the very evidence which had been excluded

# Non-party access to documents

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## **Dring v Cape Intermediate Holdings Ltd** [2019] UKSC 38, [2019] 3 WLR 429

- CPR 5.4C(2) non-party access to copies of court records has two parts
  - A right of access to statements of case, and judgments and orders
  - Access with permission to any other document filed or communication with the court from the court's records
  - No definition of 'the records of the court' – must mean only those documents which the court itself keeps for its own purposes; does not extend to all the evidence placed before the court
- Inherent jurisdiction
  - All courts and tribunals have an inherent jurisdiction to determine what the open justice principle requires in terms of access to documents and other information placed before it
  - This involves a fact-specific balancing exercise
    - There is no right: the applicant must explain why he seeks the material and how granting access will advance the open justice principle (more easily established by the media)
    - Against this must be weighed any risk of harm to the maintenance of an effective judicial process or to the legitimate interests of others (eg trade secrets / commercial confidentiality)
    - Also relevant will be the practicalities and the proportionality of granting the request
  - The bundle is not the evidence or the documents in the case, albeit that granting access to the trial bundle may be the most practicable way of affording a non-party access to the material in question in a particular case

# *Henderson* abuse within the same proceedings

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## **Gruber v AIG Management Finance SA** [2019] EWHC 1676 (Comm)

- Classic *Henderson* abuse is aimed at preventing a party from being vexed by a matter which ought to have been raised in previous proceedings – there should be a finality in proceedings
- However, it is not so confined: it can apply to prevent a party from being vexed by a matter which ought to have been raised at an earlier stage in the same proceedings
- There will rarely be a finding of abuse unless the later proceeding involves what the court regards as an unjust harassment of a party by the later bringing of the claim or defence in question
- The question is ultimately whether, in all the circumstances, a party's conduct is abusive because it seeks to raise issues for determination that ought in fairness to have been raised, if that party wished to raise them, at the earlier stage
- It is a strong thing to shut out a point not actually previously decided; it may be even stronger to do so in relation only to different stages within the same action. This may depend on how the action has been case managed (eg preliminary issues; separate trials on liability and quantum; single trial, but with consequential issues of quantification left open)
- Hearing proceeded on the basis of *Henderson* abuse, rather than whether this was in truth an amendment application (which might fail for reasons short of *Henderson* abuse)
- Important guidance on what needs to be pleaded in a defence to a claim for financial remedy: reasons for denial must be pleaded; this includes any positive factual / counter-factual case that might be advanced

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