



Neutral Citation Number: [2023] EWHC 1999 (Ch)

Claim No. BL-2021-001208

**IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF
ENGLAND AND WALES
CHANCERY DIVISION**

Rolls Building
Fetter Lane
London, EC4A 1NL
28 July 2023

Before

MR NICHOLAS THOMPSELL
sitting as a Deputy Judge of the high court

BETWEEN:

(1) ENIGMA DIAGNOSTICS LIMITED (IN LIQUIDATION)

(2) PAUL DAVID ALLEN

(3) GEOFFREY LAMBERT CARTON-KELLY

(The SECOND and THIRD CLAIMANTS as JOINT LIQUIDATORS
of the FIRST CLAIMANT)

Claimants

-v-

HARVEY BOULTER

DLA PIPER UK LLP

CHARLES COOK

Defendants

Neil Kitchener KC and Tom Foxtton (instructed by **Macfarlanes LLP**) appeared on behalf of the Claimants

Patricia Robertson KC (instructed by **Clyde and Co LLP**) appeared on behalf of the Second and Third Defendants

JUDGMENT

DEPUTY JUDGE NICHOLAS THOMPSELL:

1. BACKGROUND

1. The Claimants in this matter are Enigma Diagnostics Limited ("**Enigma**"), a company in liquidation and its liquidators. Before going into liquidation, Enigma was a start-up company engaged in developing medical diagnostic equipment, commercialising technology originally developed by the Ministry of Defence.
2. The Claimants are pursuing claims based on a number of causes of action against the First Defendant, Mr Boulter, and the law firm used by him and his companies, which is the Second Defendant, DLA Piper UK LLP ("**DLA Piper**") as well as against one of the members of that firm who had conduct of matters instructed by Mr Boulter, the Third Defendant, Mr Cook.
3. It is not necessary for the purposes of this application to describe the nature of the claims made in detail, beyond saying that the Claimants allege that Mr Boulter acted wrongfully in relation to his dealings in shares of Enigma, via Porton Capital Limited ("**PCL**"), a company owned and controlled by him.
4. PCL was a company based in the Cayman Islands but has been dissolved since the time of the matters in question. Mr Boulter arranged for shares in Enigma to be issued to PCL and subsequently sold by PCL at a higher price, an arrangement that the Claimants describe as the "**Enigma Investment Scheme**". The Claimants allege that he did so whilst he and PCL were under fiduciary and/or contractual duties to obtain the best price for the shares for the benefit of Enigma.
5. The Claimants are also making claims against DLA Piper and Mr Cook in relation to their involvement in these arrangements.
6. There is no dispute in relation to the basic facts that Enigma issued shares to PCL and PCL sold beneficial interests in those shares to third parties (whom I will refer to as "**Investors**"), with PCL remaining on the share register as nominee for individual Investors. The matter disputed is whether it was entitled to do so without passing the entire sale proceeds, less commission, to Enigma rather than keeping a substantial profit for itself.
7. The Defendants object to the characterisation of these arrangements for investment as a "scheme" with the pejorative connotations that come with that word. For

convenience, I will use the Claimants' nomenclature but this should not be taken at this stage, before the substantive matter has been tried, as any endorsement of any pejorative connotations that may be associated with this terminology.

8. By way of background to their claim, the Claimants allege that Mr Boulter wrongfully undertook similar schemes of investment in relation to certain other companies that were in the development stage and in need of capital. The Claimants refer to these companies as the "**Porton Portfolio Companies**" and I will use the same term. This term refers to any companies in respect of which PCL sold shares where DLA Piper was involved in that sale.
9. The case before me today deals with an application for an order that:
 - (i) there is no legal professional privilege in respect of communications between DLA Piper and PCL and other members of that company's group, (collectively "**Porton**" - a term which I will also use in relation to individual companies within that group who may have been involved in the Enigma Investment Scheme or equivalent investment schemes in other Porton portfolio companies between 4 May 2004 and 29 July 2015); and that
 - (ii) the Second and Third Defendants should provide disclosure and inspection of all documents or notes of communications passing between DLA Piper and Porton and/or between either of them and (a) Porton Portfolio Companies and/or (b) actual or potential Investors in the Enigma Investment Scheme or equivalent investment schemes in other Porton portfolio companies between these dates.
10. This application is particularly important to the Claimants in this case as Enigma no longer holds its files relevant to these points and the First Defendant also claims to have lost much of his documentation. DLA Piper therefore is the only party left holding substantial contemporary documentation.
11. The basis for this application is that the Claimants consider that Mr Boulter and PCL are not entitled to legal professional privilege on the grounds of iniquity. The Claimants ask the court to base a finding in relation to iniquity on their contention that the Enigma Investment Scheme, and the similar arrangements made in respect of the other Porton Portfolio Companies, involved a fraud on the Investors that purchased shares from PCL.

12. The Claimants have helpfully provided a draft order that they invite the court to make. The Second and Third Defendants are neither resisting nor accepting the Claimants' argument but agree that if the court does find that legal professional privilege has been lost by reason of iniquity, that order is an appropriate one to make.
13. At this hearing the Claimants were represented by Mr Neil Kitchener KC and Mr Tom Foxtton of counsel, and the Second and Third Defendants were represented by Patricia Robertson KC, and these counsel also provided helpful skeleton arguments.
14. The First Defendant did not attend this hearing, despite having notice of it. His solicitors, Kobre & Kim, wrote to the Claimants' solicitors, Macfarlanes on 26 May 2023 stating that, although Mr Boulter did not accept that there was any fraudulent conduct, he did not intend to play any substantive role in the hearing of the application.
15. Kobre & Kim had been copied into a significant amount of the correspondence prior to this application and Mr Boulter had ample opportunities to answer the allegations that form the basis of this application.
16. Mr Boulter has not asked for any adjournment and I see no reason not to proceed with this hearing, so I have seen no reason not to proceed with the hearing despite his not attending and not being represented here.

2. LEGAL PROFESSIONAL PRIVILEGE

17. The principles underlying legal professional privilege and the circumstances where this may be lost are well settled. I was referred by counsel amongst other cases to the summaries of the relevant legal principles by the Court of Appeal in *Addlesee v Dentons Europe LLP* [2020] EWHC 238 (CH) ("*Addlesee 1*"); by Master Clark in relation to the same case at a later stage reported at 2020 EWHC 238 (Ch) ("*Addlesee 2*") and by Murray J in *Al Sadeq v Dechert LLP & Ors* [2023] EWHC 795 (KB) ("*Al Sadeq*").
18. For the present purposes, I will just highlight a few matters.
 - (i) The term legal professional privilege is used to encompass both advice privilege, which applies when legal advice is sought from a solicitor or barrister, and litigation privilege, which applies in relation to advice and materials in contemplation of or relating to the preparation for litigation. Slightly different rules apply in relation to the two different types of privilege.

In the current case we are concerned only with legal advice privilege - the Second and Third Defendants proposed amendments to the proposed form of order before it got to the stage currently before the court to deal with this point and these proposed amendments were accepted by the Claimant.

- (ii) The law jealously guards the principle of legal professional privilege since, in the words of Lord Hoffmann in *R (Morgan, Grenfell & Co Limited) v Special Commissioner of Income Tax* [2003] 1 AC 563 (HL) at [7], legal privilege is:

"... a fundamental human right long established in the common law. It is a necessary corollary of the right of any person to obtain skilled advice about the law. Such advice cannot be effectively obtained unless the client is able to put all the facts before the adviser without fear that they may afterwards be disclosed and used to his prejudice."

- (iii) Solicitors remain under a duty to preserve their former clients' privilege regardless of the fact that the client may be deceased or, in the case of a company, dissolved (see *Addlesee 1* where this point was considered in detail).

- (iv) However, there is no privilege in documents or communications which are themselves part of a fraud. This was established as early as 1884 in *R v Cox & Railton* [1884], 14 QBD 153 and justified there by Mr Justice Steven at 167 on the basis that:

"A communication in furtherance of a criminal purpose does not come into the ordinary scope of professional employment."

- (v) Popplewell J in *JSC BTA Bank v Ablyazov* [2014] EWHC 2788 (Comm) found at [68]:

"The principle is not confined to criminal purposes but extends to fraud or other equivalent underhand conduct which is in breach of a duty of good faith or contrary to public policy or the interests of justice."

Since this judgment, it has been more common to refer to the exception or exclusion of such behaviour from the protection afforded by legal

professional privilege as the "iniquity exception", replacing terminology used earlier such as the "crime/fraud" exception and the "fraud exception".

- (vi) The application of the iniquity exception does not depend on the conduct of the lawyer, or the lawyers' having knowledge of the iniquity. See *Al Sadeq* at [69].
- (vii) Given the fundamental importance of legal professional privilege as I have highlighted, the iniquity exception will only be applied in an exceptional case. The court will be slow to deprive a defendant of the privilege particularly on an interlocutory application (see *Al Sadeq* at [71]).
- (viii) There is no simple formulation to determine the strength of the case that is needed for the court to overturn privilege on the grounds that a document or communication is part of an iniquitous conduct or seeks legal advice about how to facilitate the commission of iniquitous conduct. See Vinelott J in *Derby & Co Limited v Weldon (No. 7)* [1990] 1WLR 1156 (ChD) at 1173.
- (ix) However, at least a strong (or perhaps, as suggested by Longmore LJ in *Kuwait Airways v Iraqi Airways Co (No. 6)* [2005] EWCA Civ 286 at [42], a "very strong" *prima facie* case is usually needed. However as he noted at paragraph [40] in that case:

"it is easier to establish the case whether facts justifying the fraud exception have come into existence if the fraud does not relate to the very issue that is to be tried"

and this he finished his summary at [42] by saying:

"A *prima facie* case of fraud may be enough as in the *Hallinan* case [2005] 1WLR 766."

3. THE EVIDENCE RELIED UPON

19. For the present purposes the Claimants are not relying on the breaches of duty and/or contract and/or trust that they allege in their Amended Particulars of Claim as the basis for finding iniquity sufficient to displace legal professional privilege. They instead base this on evidence they brought before the court that the Enigma Investment Scheme and similar schemes in relation to the Porton Portfolio Companies involved a fraud on Investors. They argue therefore that the lower standard of a mere

prima facie case (rather than a "strong" or very strong" *prima facie* case) may be appropriate.

20. In essence, the fraud alleged is that the Investors were misled into thinking that the amount they paid for shares in Enigma or other Porton Portfolio Companies would, except for any usual commission, go to Enigma or the other Porton Portfolio Company in question, whereas in fact the majority of these monies (something like £61 million out of the £103 million raised) were retained by PCL.
21. The First Defendant denies this and points to the fact that the application forms used by Investors were clear that Investors were buying shares from PCL not directly subscribing for shares.
22. The Claimants cite the following matters as evidence for their claim in this regard.

(a) The evidence of Mr Furber-Smith.

23. Mr Gavin Furber-Smith, who worked for PCL as a sales director between May 2005 and March 2012, has provided a detailed witness statement corroborated by instances of his communications to proposed Investors, in which he has detailed what Investors were told about the way the nominee arrangements would work. He is clear that:

"It was certainly not the case that Porton was taking shares from Enigma at its own risk so that Porton could then sell the shares if and when it wanted to in some secondary market."

and that:

"The money that Porton was raising was intended to go to Enigma. That was my understanding on the basis of what I was told by Mr Boulter and that is how I sold the shares to Investors."

24. He recalls Mr Boulter describing the allotment of shares to Porton and the sale to Investors as "back-to-back" transactions and that Mr Boulter had stated that the money would be sent to DLA who would pay it to the underlying companies with commissions being paid to Porton with the money raised.
25. He stated that he was often asked to explain the structure of the investment model and always answered as he was "directed to by Harvey" (that is Mr Boulter) that they

were buying newly allotted shares in Enigma through a nominee platform and were sending their money to Enigma for Enigma's development purposes. He stated further that:

"In all the years I worked at Porton, from 2005 to March 2012, Harvey never told me that Porton was entitled to keep the Investors' money."

26. Of course this evidence has not been challenged in cross-examination but nevertheless, coming from a source that was central to PCL's operations, it is compelling evidence.

(b) The evidence of Investors.

27. The Claimants also produced witness statements from a number of the Investors who invested in Enigma or other Porton Portfolio Companies or intermediaries representing such Investors, including a Mr Baker, Mr Clink, Mr Litster, Mr Al Roumi, Mr Shardlow, Mr Woods and Mr Temple. All these Investors confirmed that they had had a similar understanding that the purchase price they paid for shares in Enigma or another Porton Portfolio Company would be ultimately received by that company. Some of these witnesses are clearer than others as to the source of this understanding.

28. Mr Baker indicates that he derived that understanding from Mr Boulter and his team.

29. Mr Clink says that he was under the impression that the money he was investing was ultimately going to Enigma having been told by a representative of Porton that it was raising funding for Enigma and based on receiving presentations and memoranda that included statements regarding "*Use of Funds*" which implied that the funds raised would be used by Enigma for particular purposes.

30. Mr Litster says that:

"My understanding, which was based on the way in which the 'direct investment' model was portrayed by Mr Boulter and Porton, was that the funds paid by investors in exchange for shares would all go to the underlying company, in order to progress the commercialisation of the technology."

31. Mr Al Roumi says that from meetings with Mr Boulter he understood that Porton was raising funds from Enigma and that funds raised would go towards developing Enigma's technology (although it appears that these discussions took place after his first investment in 2007).
32. Mr Shardlow cites an email from Darren Hughes at Porton, which included updates on Enigma and another Porton Portfolio Company called Cellcrypt and spoke of the funding round being necessary for the growth of the company.
33. Mr Woods was an Investor in Smart Holograms and Acolyte Direct Equity, two other Porton Portfolio Companies. He cannot remember the fine detail of his conversations with Gavin Hayman of Porton but his impression that the funds were to be raised for these companies was backed up by slides and business plans explaining the use of funds.
34. He later invested into Enigma, dealing with Mr Boulter and Augustus Greaves, and on the basis that this would raise funds for Enigma for product development and manufacturing. He cannot remember the conversation but it was clear to him that any investment he made was intended to meet the funding needs of Enigma.
35. Mr Temple's evidence is that his clear understanding that a share purchase would be invested into and received by Enigma was derived from Jim Armitage, a sales representative for Porton.

(c) Contemporaneous documentation

36. The court was taken to multiple examples of exchanges of emails where Mr Boulter personally informed various Investors or their financial advisers that the monies they would be paying for shares in Enigma or various other Porton portfolio companies would be received by the company issuing the shares.

(d) Application forms.

37. In approximately 130 out of some 1400 application forms, principally received between approximately mid 2010 and late 2011, the text which instructed Investors how to pay for the shares they were purchasing which began:

"DLA Piper is a leading global law firm and acts on behalf of Porton Capital INC to receive investment funds ..."

continued with additional wording stating that DLA Piper was:

"... to transfer those funds to Enigma Diagnostics Limited."

38. None of the Defendants have provided any explanation for this additional wording. However, to counter this it may be noted that in a larger number of application forms, around 500 principally received from late 2011 onwards, the text instead continued:

"... which are held on behalf of Porton Capital Inc."

4. CONCLUSION

39. Taken individually holes can be picked in various of the items put forward by the Claimants as evidence for the proposition that Investors were misled. Indeed the Second and Third Defendants have itemised in their letter dated 30 May 2023 various points that could reasonably be made by way of criticism in relation to various witness statements and other documentation referred to. There is the evidence only of seven investors out of hundreds of investors.

40. Nevertheless, taken as a whole I consider that the evidence put together is impressive and compelling that PCL was systemically telling Investors that the monies paid to DLA Piper would go to Enigma or the other Porton portfolio companies whose shares were being purchased, whilst the truth was that it was in fact trading for its own purposes and kept a substantial proportion of the money, over 60 per cent overall, in the case of Enigma. Mr Furber-Smith's compelling direct evidence is backed up by the other evidence provided to the court. No clear evidence is before the court that suggests that Investors knew that PCL was selling on its own account at a profit.

41. Mr Kitchener rightly remarked on the point that if the First Defendant had any credible challenge to this evidence, he had had an opportunity to bring this challenge and had chosen not to and the court was entitled also to take this into account in judging the credibility of the case put forward in relation to investor fraud.

42. This body of evidence in my view is sufficient to provide a very good arguable case that DLA Piper's services were being used by PCL to assist PCL in a fraud on Investors. As such, I accept it as meeting the standard of demonstrating "iniquity" so that the court should conclude that PCL has no right to legal professional privilege in relation to material held by DLA Piper in providing its legal services to PCL in relation to sales of shares made using the services of DLA Piper.

43. I confirm therefore that I approve in principle the draft order and I will now ask Mr Kitchener to take me through the draft order in order to finalise it. I will also hear from the parties in relation to costs.