

a lawyer must be able to give the client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent.

5. This is not a peculiarity of English law. In the Three Bayers decision, Lord Scott set out authorities not only from this jurisdiction but also from the United States, Europe, Canada, Australia and New Zealand which all speak with one voice (see para 31-34). Lord Scott concluded that all these authorities

recognise that where the client can be assured that what they tell their lawyer will not be disclosed by the lawyer without their (the clients) consent, there will be cases in which the requisite conduct will be exact

and concluded that it is necessary as a matter of policy that

communication between clients and lawyers, whereby the clients are hoping for the assistance of the lawyer's legal skills in the maintenance of their (the clients) rights, should be immune against the possibility of any scrutiny from others, whether the police, the executive, business competitors, investigative journalists or anyone else.

6. Unsurprisingly, this state of the law is reflected in the Code of Conduct issued by the Solicitors Regulation Authority: *see rule 401 ("You and your firm must keep the affairs of clients and former clients confidential except where disclosure is required or permitted by law or by your client (or former client).")* There are very few circumstances in which disclosure is either required or permitted by law, none of which arise in this case. The only one which could have any relevance is what is known as the "spouse exception": privilege never attaches to communications between lawyer and client if the client has a secret intention of using the services to enable him to further or facilitate crime or fraud. Please note that this applies only where the client consults a lawyer with the motive of obtaining advice which will assist him in the commission of an offence (not privileged, as distinct from a client consulting a lawyer about an offence which has already been committed (privilege)). This distinction runs through all the authorities which neatly encapsulated in a dictum of Lord Stanger in *O'Rourke v Darbishire* [1920] AC 581 at 615:

To consult a solicitor about an intended course of action, in order to be advised whether it is legitimate or not, or to be taken in order to exclude the court relating to a charge of fraud, is usually made or solicited, and such a consultation is with the object of being advised about the best way to meet it, in a very different sense from consulting him in order to learn how to gain, execute or flee an actual fraud.

For the lawyer to appreciate that this exception is engaged, however, the lawyer must have prima facie evidence suggesting that he is being used by the client in that way. The firm had no such evidence (and for the avoidance of doubt, is making no suggestion in this response that News International had such a purpose).

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