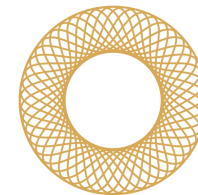


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# **Pensions Law Conference**

**Thursday 18 April 2024**

**Bristol**



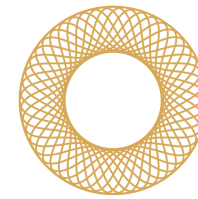
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# **Non-pension cases that Pension lawyers should know about**

2024 Edition

**Nicholas Hill**

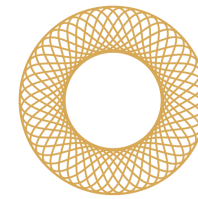
**[nicholas.hill@outertemple.com](mailto:nicholas.hill@outertemple.com)**



# *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28

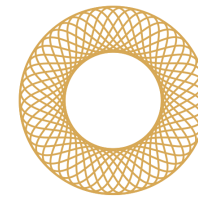
- (1) All sorts of interesting(!) points of privilege
- (2) The Iniquity exception





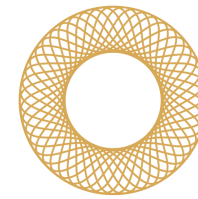
## Scenarios

- ***R v Cox and Railton*** (1884) 14 QBD 153
- ***O'Rourke v Darbishire*** [1920] AC 581
- ***R (Hallinan Blackburn Gittings & Nott (a firm)) v Crown Court at Middlesex Guildhall*** [2004] EWHC 2726 (Admin)
- ***R v Gibbins*** [2004] EWCA Crim 311
- ***Kuwait Airways Corporation v Iraqi Airways Co (No 6)*** [2005] EWCA Civ 286
- ***Al Sadeq v Dechert LLP & ors*** [2024] EWCA Civ 28



# The touchstone

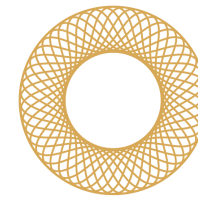
*"...the touchstone in distinguishing such cases from those where the exception applies is whether the iniquity puts the conduct outside the normal scope of such professional engagement or is an abuse of the relationship which falls within the ordinary course of such engagement."*



# Competing public policy considerations

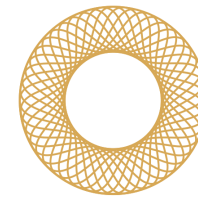
- Those underlying LPP
- Strong public interest in iniquity being uncovered:

*'In the context of litigation, this is reinforced by the imperative of the parties being able to adduce before the court all relevant evidence so that the dispute is determined fairly and correctly. If relevant evidence is concealed, there is a risk of injustice' [69]*



## **Two questions:**

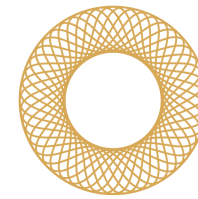
- What is the required evidential standard for establishment of the iniquity ('merits threshold')?
- What is the legal test for the relationship between the communication and the iniquity to bring the exception into play?



## The test – merits threshold

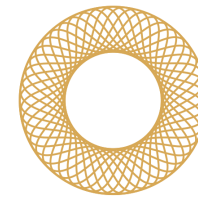
*'The merits threshold for the existence of an iniquity which prevents legal professional privilege arising ... is a prima facie case, which means that on an assessment of the material available to the decision maker, whether that be the party or its legal adviser conducting disclosure, or the court, it appears more likely than not on a balance of probabilities that such iniquity exists.' [108]*





# The test – the relationship between the communication and the iniquity

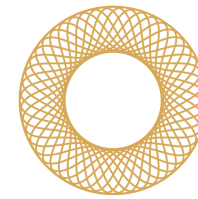
*'... where there is a prima facie case of iniquity which engages the exception, there is no privilege in documents and communications brought into existence as part of or in furtherance of the iniquity.' These are two categories, either of which is sufficient.' [166]*



# ***The Public Institution for Social Security v Al-Wazzan* [2024] EWHC 480 (Comm) (5 March 2024)**

- Proceedings brought by the Public Institution for Social Security (PIFSS), which operates the State of Kuwait's social security and pension scheme, against the estate of its former director general, Mr Al Rajaan.
- Arguments about disclosure of documents in hands of third parties.

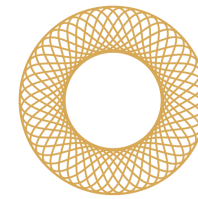




# Control

***Various Airfinance Leasing Companies and anor v Saudi Arabian Airlines Corpn*** [2021] EWHC 2904 (Comm) (Mr Peter MacDonald Eggers KC)

*"...a legally enforceable right to obtain access to such a document, but also where there is a standing or continuing practical arrangement between the party and the third party whereby the third party allows the party access to the document, even if the party has no legally enforceable right of such access..."*



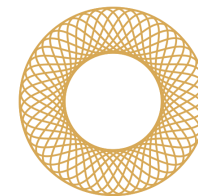
# KPMG and EY

The Draft Order:

*" PIFSS shall:*

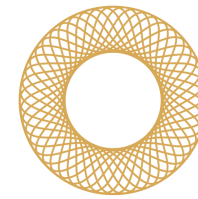
*7.1 search for and disclose documents held by KPMG by 1 March 2024, to include the following documents..."*

- Drafting illustrated the challenge of the application
- Terms of EY contract was clear
- ***Leicestershire CC v Michael Faraday*** [1941] 2 KB 205



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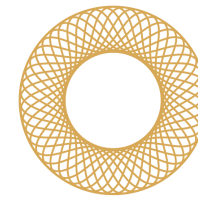




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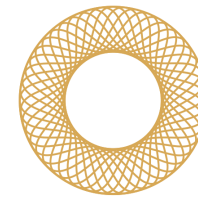
***James Churchill v Merthyr Tydfil  
County Borough Council [2023] EWCA  
Civ 1416***





## **Facts**

- LoC
- LoR averred that C "*must make use of Council's Corporate Complaints Procedure*"
- Application for a stay
- Dismissed by DDJ Kempton Rees

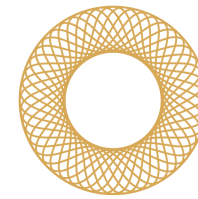


***Halsey v. Milton Keynes General NHS Trust*** [2004]

EWCA Civ 576, [2004] 1 WLR 3002 :

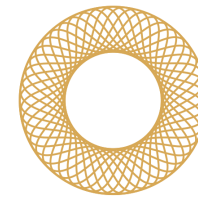
*“to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court and therefore a violation of article 6”.*





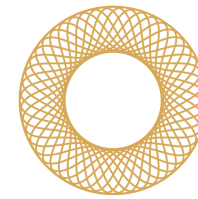
## **The question for the Court of Appeal:**

Can the court lawfully order the parties to court proceedings to engage in a non-court based dispute resolution process and, if so, in what circumstances should it?



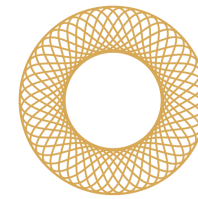
## Submissions of Council and Interveners

¶23: *"the court can lawfully stay proceedings for, or order, the parties to engage in a non-court-based dispute resolution process provided that the order made: (a) did not impair the very essence of the claimant's right to a fair trial, (b) was made in pursuit of a legitimate aim, and (c) was proportionate to achieving that legitimate aim."*



# The Master of the Rolls

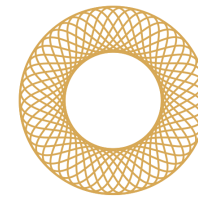
[59] '*...Experience has shown that it is extremely beneficial for the parties to disputes to be able to settle their differences cheaply and quickly. Even with initially unwilling parties, mediation can often be successful. Mediation, early neutral evaluation and other means of non-court-based dispute resolution are, in general terms, cheaper and quicker than court-based solutions....*'



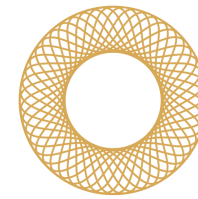
*[60] '... the characteristics of the particular method of non-court-based dispute resolution process being considered will be relevant to the exercise of the court's discretion as to whether to order or facilitate it.'*

Bar Council's 11 relevant factors

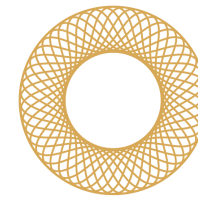
- (i) the form of ADR being considered,
- (ii) whether the parties were legally advised or represented,
- (iii) whether ADR was likely to be effective or appropriate without such advice or representation,



- iv. whether it was made clear to the parties that, if they did not settle, they were free to pursue their claim or defence,
- v. the urgency of the case and the reasonableness of the delay caused by ADR,
- vi. whether that delay would vitiate the claim or give rise to or exacerbate any limitation issue,
- vii. the costs of ADR, both in absolute terms, and relative to the parties' resources and the value of the claim,
- viii. whether there was any realistic prospect of the claim being resolved through ADR,



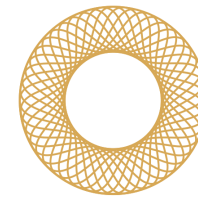
- ix. whether there was a significant imbalance in the parties' levels of resource, bargaining power, or sophistication,
- x. the reasons given by a party for not wishing to mediate: for example, if there had already been a recent unsuccessful attempt at ADR, and
- xi. the reasonableness and proportionality of the sanction, in the event that a party declined ADR in the face of an order of the Court.



*[66] 'I do not believe that the court can or should lay down fixed principles as to what will be relevant to determining those questions...*

*...*

*It would be undesirable to provide a checklist or a score sheet for judges to operate. They will be well qualified to decide whether a particular process is or is not likely or appropriate for the purpose of achieving the important objective of bringing about a fair, speedy and cost-effective solution to the dispute and the proceedings, in accordance with the overriding objective.'*



# Three observations

- (1) A new avenue for pressure?
- (2) Judicial action?
- (3) Satellite litigation?

18.04.24

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