The crime-fraud exception in Anglo-American jurisprudence: comparative dimensions and optimal reform proposals in the taxation context.

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Abstract

The crime-fraud exception to legal professional privilege is both well established and widespread in common law jurisdictions. The exception generally arises in circumstances where the client consults a lawyer for legal advice in connection with the perpetration of a criminal or fraudulent act before or during the commission of that act. This article analyses the crime-fraud exception to claims of privilege by lawyers in England, and by lawyers and tax practitioners in the US. It considers the significance of the exception in the taxation context, contrasts its limited use in this context in England and Wales compared to the US and discusses the markedly different approach in the English and Welsh First-tier Tribunal (Tax) in relation to information notices when compared to appeals to the tribunal and other judicial proceedings. Following comparative analysis and consideration of the barriers to greater use of the exception in the taxation context in England, proposals are made for a revised approach in English law.

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Introduction

The crime-fraud exception to claims of legal professional privilege is well established and is found in many common law jurisdictions. The exception generally arises in circumstances where the client consults a lawyer for legal advice in connection with the perpetration of a criminal or fraudulent act either before the commission of that act or during its commission. For the exception to apply, the lawyer need not be complicit in the crime or fraud - the key issue is the clients' behaviour and knowledge (or sometimes that of a third party on whose behalf the client has instructed the lawyer). In the taxation context, the crime-fraud exception can be used by tax collection agencies to try and defeat claims of privilege, and can therefore be regarded as an aid to the relevant agency in uncovering activity characterised as tax evasion, or iniquitous forms of tax avoidance. In the US, the Internal Revenue Service (IRS) has adopted this approach in the context of both attorney/client privilege and tax practitioner/client privilege. The authors believe that the process by which the English and Welsh courts currently consider challenges to legal professional privilege makes a similar approach by HMRC much less viable, other than in relation to information notices.

The article begins by discussing the nature of the crime-fraud exception (now often referred to as the iniquity exception) in England and Wales. The operation of the exception in the taxation context and the barriers to its use potentially imposed by article 8 of the European Convention on Human Rights are then considered. The nature of those circumstances in which the courts and the Tax Tribunal will be prepared to order inspection of allegedly privileged material under the exception and the limited extent to which they will be prepared to conduct in camera review of allegedly privileged documents are reviewed.

The nature of the crime-fraud exception in the US, where arguably greater development has taken place and where the exception seems to be used more frequently in the taxation context, is then discussed. The exception is considered in relation to both lawyers and tax

practitioners and in circumstances involving IRS summons. Finally the circumstances and threshold tests for in camera review of material under the exception are considered.

The article concludes with comparison of the position in England and Wales with that in the US, identifying reasons why the exception is less likely to be relied on by HMRC. Proposals that would potentially allow wider use of the exception in the taxation context in England and Wales are made, including suitable safeguards derived from US practice, to strike the appropriate balance between the information gathering powers of tax enforcement bodies and the rights of taxpayers.

The Crime-Fraud Exception in England and Wales (The Iniquity Exception).

The crime-fraud exception to legal professional privilege (now commonly referred to in both civil and criminal proceedings as the iniquity exception[1]) encompasses both communications that are themselves criminal and communications that are intended to further a criminal or fraudulent purpose.[2] A rare example of a communication falling into the former category is provided by a threat to "rip someone's throat out" made during a telephone conversation to his solicitors by a client dissatisfied with a quotation for conveyancing who sought the identity of the conveyancer who had given the quotation.[3] An example of communications falling into the much more commonly encountered latter category is provided by communications between a client and his solicitor for the purpose of effecting a share purchase which to the client's knowledge was intended to defraud the Revenue by resulting in the evasion of capital transfer tax.[4]

[1] For example, Lord Phillips of Worth Matravers in *Re McE* (*McE*) [2009] 4 All ER 335 at [11] and also, *R v Brown* [2015] 2 Cr App R 31 at [29] and [33] and Popplewell J in *JSC BTA Bank v Ablyazov* (*Ablyazov*) [2014] EWHC 2788 (Comm) at [63].
[2] *R v Cox and Railton* (*Railton*) (1884) 14 QBD 153.
[3] *C v C* (*C*) [2001] 3 WLR 446. The telephone message amounted to an offence under s.43 of the Telecommunications Act 1984.
[4] *Jobson v Johnson* (*Jobson*) (unreported 12 December 1986).

Under the crime-fraud exception, communications which are intended to further a criminal or fraudulent purpose are not privileged even though the legal adviser is not aware that the client has such a purpose.[5] Similarly, such communications will not be privileged even though the client is unaware of the criminal or fraudulent purpose and is merely the innocent tool of a third party who intends to achieve it.[6] Indeed, it is possible for the operation of the crime-fraud exception to prevent legal professional privilege attaching to communications between legal adviser and client even though neither of them is aware that they are being used to further the criminal or fraudulent purpose of a third party.[7]

The crime-fraud exception may apply to communications whether or not litigation had commenced by the time they were made. The exception may apply whether the form of legal professional privilege that is relied upon is legal advice privilege or is litigation privilege.[8] The exception will not apply so as to prevent a client from obtaining legal advice, either to determine the legitimacy of an intended course of conduct or to determine how best to defend pending or contemplated allegations of fraud or criminality. It will not apply merely because the client intends to put forward a defence to allegations which the client knows to be untrue.[9] It may apply to communications made during the commission of criminal or fraudulent activity (if made, for example, for the purpose of covering up or stifling criminal or fraudulent activity). It may also apply to communications made after such activity has taken place (if made, for example, for the purpose of "salting away" the proceeds such activity).[10]

[5] *Railton,* above fn. 2 and also, for example, *Jobson* above fn.4.
[6] *R v Central Criminal Court, ex parte Francis and Francis* (*Francis*) [1989] 1 AC 346.
[7] See, for example, *The Owners of the Dredger Kamal XXVI v The Owners of the Ship Ariela* [2011] 1 All ER (Comm) 477.
[8] *Kuwait Airways Corporation v Iraqi Airways Company* (No 6) (*Kuwait*) [2005] 1 WLR 2734 and Popplewell J in *Ablyazov* above fn. 1 at [69].
[9] See, respectively, Lord Sumner in *O'Rourke v Darbishire (O'Rourke)* [1920] AC 581 at 613, Lord Parmoor in *O'Rourke* at 621-622 and Popplewell J in *Ablyazov* above fn.1 at [71]..
[10] See, respectively, Stephen J in *Railton* above fn. 2 at 175, Dillon LJ in *Finers v Miro* [1991] WLR 35 at 40 and Lord Goff of Chieveley in *Francis* above fn. 6 at 393-394 and also, B. Thanki et al *The Law of Privilege*, (2nd ed., Oxford University Press, Oxford, 2011) at [4.51].

Arguably, the crime-fraud exception should not be regarded as an exception to legal professional privilege.[11] The basis of this argument is that when it operates, the effect of the "exception" is that privilege does not arise in the first place.[12] This is so because communications in furtherance of crime or fraud do not fall within the normal ambit of a legal adviser's professional employment as the legal adviser must either have conspired to further the criminal or fraudulent purpose or must have been deceived into so doing.[13] The operation of the crime-fraud exception is based on a provisional finding of criminality or fraud, and where disclosure takes place under the exception privilege will effectively be lost, even though it subsequently transpires that the allegations of criminality, or fraud, were unfounded.[14] Thus, Thanki[15] has propounded the attractive proposition that the crime-fraud exception should be regarded as a "procedural exception" to the privilege. The basis of this proposition is that, if the allegations of criminality or fraud are subsequently shown to have been unfounded after disclosure has been ordered under the crime-fraud exception, it is inaccurate to say that privilege never attached to the communications even though the operation of the exception resulted in the frustration of the privilege.

The iniquity exception

The operation of the crime-fraud exception is not restricted to fraud in the criminal sense, but is applicable whether the fraud is criminal or civil in nature.[16] Indeed, whilst it has been held that the ambit of the exception is not so wide as to encompass, "any act or scheme which is unlawful in the sense of giving rise to a civil claim"[17], and that fraud for this purpose must involve dishonesty and not merely disreputability or poor ethical standards[18], "fraud" is

[11] C. Passmore, *Privilege* (3rd Ed, Sweet and Maxwell, London, 2013) at [8-063].
[12] Stephen J in *Railton* above fn.2 at 167-168 and also Viscount Finlay in *O'Rourke* above fn. 9 at 604, Lord Carswell in *McE* above fn. 1 at [82] and Popplewell J in *Ablyazov* above fn. 1at [68].
[13] See Stephen J in *Railton* above fn. 2 at 167-168 and also Popplewell J in *Ablyazov* above fn. 1 at [93].
[14] See Lord Phillips of Worth Matravers in *McE* above fn.1 at [11].
[15] B. Thanki et al above fn. 10 at [4.40].

[16] See Kekewich J in *Williams v Quebrada Railway, Land and Copper* Company [1885] 2 Ch 751 at 756.
[17] See Goff J a J in *Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd* (*Crescent*) [1971] 3 All ER 1192 at 1199-1200.
[18] See Goff in *Crescent* above fn. 17 at 1200 and the extract from Goff LJ's judgment in *Gamlen Chemical Co*

currently given a relatively broad meaning in this context.[19] Adopting this broad approach, the Court of Appeal in *Barclays Bank plc v Eustice*[20] held that "iniquity" in the form of entering into transactions at an undervalue for the purpose of prejudicing the interests of a creditor was sufficient to bring the exception into operation. This was so even if there was no dishonesty and even if the client and the legal adviser had misunderstood the law such that they did not believe that the transactions were at an undervalue, and/or did not believe that a court would find that the purpose of the transactions had been to prejudice the creditor's interests.[21]

In reaching its decision, the Court of Appeal considered whether public policy required that the allegedly privileged documents should not be disclosed, or whether the purpose of the defendants in entering into the transactions was sufficiently iniquitous that public policy required disclosure. It concluded that the defendants' purpose had been sufficiently iniquitous to require disclosure.[22] Accepting that its decision might discourage persons considering engaging in sharp practice from consulting legal advisers who might have dissuaded them from adopting an iniquitous course of conduct, the Court of Appeal believed that the absence of legal assistance would make it more difficult for such persons to implement their iniquitous schemes, and that its decision would not discourage "straightforward citizens" from consulting their legal advisers.[23] The iniquity exception is applicable both to legal advice privilege and to litigation privilege.[24]

(UK) Ltd v Rochem Ltd (No 2) (unreported) December 7 1979, set out in *Barclays Bank plc v Eustice* (*Eustice*) [1995] 4 All ER 511 at 522.

[19] *Brent LBC v Estate of Owen Kane, Deceased* [2014] EWHC 4564 (Ch).

[20] *Eustice* above fn. 18.

[21] *Eustice* above fn. 18 (see, in particular, Schiemann LJ at 523-525).

[22] See Schiemann LJ in *Eustice* above fn. 18 at 524.

[23] See Schiemann LJ in *Eustice* above fn. 18 at 525.

[24] See cases at fn.8

The breadth of the approach adopted by the Court of Appeal in *Eustice* has a number of possible consequences, which are explored further below. These include both its potential to encompass not only tax evasion, but also forms of tax avoidance, and the possibility that its uncertain ambit could result in violation of article 8 of the European Convention on Human Rights in circumstances in which its application would require the disclosure of otherwise privileged material. It is also suggested below that the breadth of the *Eustice* approach may be nullified in practice by the reluctance of the courts' to engage in in camera review of privileged material.

The Court of Appeal in *Eustice* identified the existence of a conflict between the desirability of the court having access to all relevant documents prior to reaching its decision and the rationale underlying the existence of legal professional privilege[25]. This rationale is essentially that legal advisor/client confidentiality "must be protected if proper legal advice is to be obtained".[26] Its decision that the defendant's purpose was sufficiently iniquitous to require disclosure, to the extent to which it broadened the ambit of the crime-fraud exception, has potential to erode this rationale. It is arguable that this rationale is less easy to justify in cases where the litigation privilege form of legal professional privilege is relied upon, because not all communications to which litigation privilege attaches would "disclose the seeking or giving of legal advice" [27]. *Eustice* itself concerned legal advice privilege to which the rationale is inherently applicable.

[25] See Schiemann LJ in *Eustice* above fn.18 at 521
[26] *R (on the application of Prudential plc) v Special Commissioner of Income Tax* [2013] 2 AC 185, per Lord Sumption [114]
[27] Lord Scott of Foscote suggested in *Three Rivers District Council and others v Governor and Company of the Bank of England* [2005] 1 AC 610 at [29] that, given the rationale for the existence of legal professional privilege, the reason why communications that are made for the purposes of litigation but do not "disclose the seeking or giving of legal advice" is not easy to understand.

Whilst it has been suggested that the decision in *Eustice* may not have been correct[28], it has been relied upon on a number of occasions.[29] The crime-fraud exception in its modern post *Eustice* guise as the "iniquity exception" applies not just where communications are made in furtherance of a criminal purpose but also where there is a purpose which breaches a duty of good faith, is contrary to public policy or is contrary to the interests of justice.[30] Conduct capable of amounting to iniquity for the purpose of the crime-fraud exception includes, for example, "sharp practice, something of an underhand nature where the circumstances required good faith [and] something which commercial men would say was a fraud or which the law treats as entirely contrary to public policy".[31] An example is provided by circumstances in which legal advice relating to plans which favoured the interests of limited partners in a group of companies to those of the managing partner (also a company) was obtained via a breach of a duty of fidelity (honesty and good faith). The advice came via a director of the managing partner, who was also a director of other companies in the group, and had failed to disclose the various plans to the managing partner.[32]

In determining whether the crime-fraud exception is applicable, the fundamental question is whether in the context of the iniquity the communications fall outside the normal ambit of a legal adviser's professional engagement or amount to an abuse thereof.[33]

[28] See Lord Neuberger In *McE* above fn. 1 at [109]. Passmore regards *Eustice* as "pushing at the boundaries" of the crime-fraud exception (C. Passmore, above fn. 11 at [8-063]) and Thanki believes that it is a pity that the case was not reviewed by the House of Lords and recognises that it is yet to be reviewed by the Supreme Court (B. Thanki et al, above fn. 10 at [4.47]).

[29] For example: *Nationwide Building Society v Various Solicitors* [1998] All ER (D) 26; *Dubai Aluminium Co Ltd v Al Alawi* [1999] 1 All ER 703; *Owners of the cargo lately laden on board the ship 'DavidAgmashenebeli v Owners of the 'David Agmashenebeli'* [2000] All ER (D) 2324; *C v C* [2008] 1 FLR 115; *BBGP Managing General Partner Ltd and others v Babcock & Brown Global Partners* (*BBGP*) [2011] Ch 296; *Brent LBC v Estate of Owen Kane, Deceased* [2014] EWHC 4564 (Ch). Zuckerman supports its correctness, apparently on the basis that, as the Court of Appeal had suggested, discouraging those who wish to embark on iniquitous schemes from consulting legal advisers will make the implementation of such schemes more difficult (A Zuckerman, *Civil Procedure Principles of Practice* (3rd ed., Sweet and Maxwell, London, 2013) at [16.109]).

[30] Popplewell J in *Ablyazov* above fn. 1 at [68].

[31] Norris J in *BBGP* above fn. 29 at [62].

[32] *BBGP* above fn. 29.

[33] See Popplewell J in *Ablyazov* above fn. 1 at [93].

The crime-fraud exception in the taxation context

It has long been recognised that the court will exercise considerable care before ordering the disclosure of allegedly privileged communications under the crime-fraud exception and will only do so in highly exceptional circumstances.[34] Passmore[35] believes that the increased ambit of the crime-fraud exception, via the iniquity case law referred to above, has the potential to make examples of its successful invocation "much less exceptional." Indeed, whilst it is clear that legal advice privilege can encompass legal advice concerning the efficacy of a tax avoidance scheme[36], Higgins and Zuckerman have suggested that it is "reasonably arguable" that the iniquity exception is sufficiently broad to encompass "very many cases" of legal advice concerning such schemes.[37] It is also clear that the concept of tax avoidance is a "grey area", subject to ambiguity, which encompasses a spectrum of activity from normal, sensible, and acceptable tax planning at one end, to conduct with no genuine commercial purpose, which the public regard as being "unacceptable or illegitimate and unfair", at the other.[38]

The question to which there does not currently appear to be a clear answer is to what extent conduct which does not amount to tax evasion, but falls towards the latter end of the

[34] See Stephen J *Railton* above fn. 2 at 176 and Vinelott J in *Derby & Co. Ltd. and Others v Weldon and Others* (No. 7) [1990] 1 WLR 1156 at 1173.

[35] C. Passmore, above fn. 11 at [8-063].

[36] *R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner of Income* Tax (*Morgan*) [2003] 1 AC 563.

[37] A. Higgins and A. Zuckerman "Re Prudential Plc [2013] UKSC 1: the Supreme Court leaves to Parliament the issue of privilege for tax advice by accountants, what Parliament should do is restrict privilege for tax advice given by lawyers" (2013) C.J.Q. 32(3) 313 at 318.

[38] See Sales J in *R on the application of Ingenious Media Holdings plc* [2013] EWHC 3258 (Admin) at [10].

spectrum of tax avoidance, may potentially amount to iniquity for the purposes of the crime-fraud exception. Moreover, whilst it has been said that the border between tax avoidance and tax evasion is crossed when false statements are deliberately and dishonestly made to the Revenue[39], it is important to note that statutory intervention may result in adjustments to the positioning of this borderline. This means that conduct which previously did not fall within the remit of the criminal justice system may do so as new or modified criminal offences are created (such as the proposed introduction by the Government in the Finance Act 2016 of a new offence which will remove the need to prove intent in the context of serious examples of failure to declare offshore income and offshore gains[40]). The consequence of such statutory intervention, so far as the crime-fraud exception is concerned, is that legal adviser/client communications concerning such conduct will be brought within the ambit of the exception via its criminality element whether or not they would previously have been regarded as iniquitous for the purposes of the exception.

A problem arising from the uncertain ambit of the crime-fraud exception in its iniquity guise, identified by Thanki[41], is that whilst it may not be difficult for legal advisers to determine whether the conduct in which a client seeks to engage is criminal or fraudulent, it may be more difficult for them to determine whether a client's proposed course of conduct is iniquitous, as this may depend upon whether the legal adviser's view of the law at the time when the advice is given differs from that which is subsequently taken by the court. Legal advice requested, and given to keep the client's conduct within the ambit of the law, may not be sufficient to prevent the successful invocation of the crime-fraud exception if the court

[39] See Stanley Burnton J in *R (on the application of Inland Revenue Commissioners) v Crown Court at Kingston* [2001] EWHC Admin 581 at [2].

[40] HM Treasury Policy paper, Spending review and autumn statement 2015 Available at www.gov.uk/government/publications/spending-review-and-autumn-statement-2015-documents/spending-review-and-autumn-statement-2015.

[41] B. Thanki et al above fn. 10 at [4.50].

subsequently regard's the client's conduct as iniquitous.[42] Consequently, if communications concerning certain forms of tax avoidance do potentially fall within the ambit of the crime-fraud exception it may be difficult, or impossible, for legal advisors and their clients to determine in advance of legal proceedings seeking disclosure whether communications between them for the purpose of achieving tax avoidance are subject to legal professional privilege.

The crime-fraud exception, taxation and article 8 of the European Convention on Human Rights

It has been suggested that, to the extent to which the exception now encompasses imprecisely defined iniquity, its operation may have the potential to result in violation of article 8 (right to privacy) of the European Convention on Human Rights.[43] This suggestion relies upon jurisprudence of the House of Lords concerning proceedings in which disclosure was sought in the context of tax avoidance (although the crime fraud exception was not invoked).[44]

It is clear that article 8 gives "strengthened protection" to legal adviser/client communications[45], and that any interference with this right may only be justified if, in the words of article 8(2), it is "in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". In order to be in accordance with the

[42] Indeed, C. Passmore, above fn. 11 at [8-063] suggests that the defendant in *Eustice* above fn. 18 had acted on legal advice given to him in order that he might regulate his conduct in accordance with the law.

[43] R. Glover, *Murphy on Evidence* (14th ed., Oxford University Press, Oxford, 2015) at [14.14].
[44] *Morgan* above fn.33. This may become a moot point if the UK withdraws from the European Convention on Human Rights, see R. Mitchell "Comparative standards of legal advice privilege for tax advisers and optimal reform proposals for English law" 2015 International Journal of Evidence & Proof Vol 19(4), 246, 266
[45] See *Michaud v France* (2013) (application no 12323/11) at 118.

law, the existence of a legal basis for interfering with the article 8 right is not in itself sufficient, rather, the legal basis for interfering must be both "accessible" and "foreseeable".[46]

As was recognised above, a consequence of the uncertain ambit of the exception is that legal adviser and client may well face difficulty in attempting to work out whether a proposed course of conduct is iniquitous in advance of the invocation of the exception in subsequent legal proceedings. There would appear to be a cogent argument that the operation of the crime-fraud exception upon the basis of iniquity in the context of tax avoidance could give rise to a violation of article 8. The court amounts to a public authority for the purposes of s.6 of the Human Rights Act 1998[47], and it is thus unlawful for it to act incompatibly with a Convention right[48]. Therefore, the legality of the operation of the crime-fraud exception must be in doubt in circumstances in which, when communications took place, legal adviser and client would not have been able to predict with accuracy whether or not communications between them would fall within the ambit of legal professional privilege, due to the uncertain ambit of the exception.

Even if the definition of the crime-fraud exception is sufficiently precise to avoid article 8 violations, another article 8 issue falls to be considered in this context. The question is to what extent could it be said that requiring the disclosure of communications relating to different forms of non-criminal tax avoidance, which fall at different points along the spectrum referred to above, is "necessary in a democratic society in the interests of…the economic well-being of the country"? In order for interference with the article 8 right to be

[46] *Foxley v United Kingdom* (*Foxley*) (2000) 8 BHRC 571 at [34].

[47] s.6(3)(a).
[48] s.6(1).

necessary, it must correspond to a pressing social need and must be proportionate to the legitimate aim that is being pursued.[49]

When the crime-fraud exception in its iniquity guise was recently considered judicially, the court recognised[50] that proportionate interference with the article 8 right may be justified in circumstances in which there has been an abuse of the legal adviser/client relationship[51] and held that the interference on the facts of the case could be justified both on the basis of protecting the private law rights of the applicant for disclosure and upon that of "upholding the efficacy of the administration of justice and the rule of law".[52] The case was not one which concerned tax avoidance but, rather, concerned an application by a bank for disclosure of documents relating to the assets of its former chairman who it alleged had fraudulently misappropriated its funds.

It would presumably be considerably more difficult to establish that it was necessary to interfere with article 8 rights in the context of tax avoidance that fell towards the tax planning end of the spectrum as opposed to that of tax avoidance that fell at the tax evasion end of that spectrum. Interference with the article 8 right may potentially, however, be justified where there is reasonable cause to believe that legal professional privilege is being abused (i.e. in the context of facts or information that would satisfy a reasonable observer that this was so)[53]. Moreover there may be forms of tax avoidance which would otherwise appear sufficient to amount to iniquity for the purposes of the crime-fraud exception but would not justify classification as an abuse of the legal adviser-client relationship for the purposes of article 8.

[49] *Campbell v United Kingdom* (*Campbell*) (1993) 15 EHRR 137 at [44].
[50] With reference to the decision of the European Court of Human Rights in *Campbell v United Kingdom* (1993) 15 EHRR 137.
[51] See Popplewell J in *Ablyazov* above fn. 1 at [94].
[52] See Popplewell J in *Ablyazov* above fn. 1 at [94]-[95].
[53] See *Campbell* above fn. 49 at [48] and also *Foxley* above fn. 46 at [44].

Whilst the arguably vague and apparently increasing ambit of the crime-fraud exception may have the scope to encompass forms of tax avoidance as well as tax evasion, the operation of article 8, in conjunction with s.6 of the 1998 Act, would appear to limit the extent to which judicial extension of the ambit of the common law exception to encompass forms of tax avoidance would be lawful. This is one reason why the authors assert that Passmore's view that successful invocation of the crime-fraud exception may become much less exceptional is unrealistic. The other reason, considered below, is the reluctance of the courts to conduct in camera review of privileged material.

What is required in order to invoke the crime-fraud exception and what material will the court be prepared to consider in reaching its decision?

In order to invoke the crime-fraud exception it is not necessary to persuade the court either to the criminal or to the civil standard of proof that the exception is applicable.[54] Rather, in order to obtain inspection of documents under the crime-fraud exception, the party seeking inspection must make out a prima facie case of the truth of the party's allegations which "has some foundation in fact" and which rests "on solid grounds".[55] It has been suggested on a number of occasions that what is required in order to obtain inspection under the crime-fraud exception is evidence which discloses "a strong prima facie case of iniquity".[56] It appears, however, that the strength of the prima facie case that is required may vary with the circumstances of the case. It seems that if the alleged fraud is itself an issue in the proceedings a strong or very strong prima facie case will be required, whereas if there is freestanding evidence of fraud the evaluation of which does not require the court to reach a

[54] See Potter LJ in *R v Gibbins* [2004] EWCA Crim 311 at [49].
[55] *See O'Rourke* above fn. 9 per Viscount Finlay at 604 and Lord Wrenbury at 632.
[56] For example, Norris J in *BBGP* above fn. 29 at [68] and also *Kuwait* above fn. 8 and *Ablyazov* above fn. 1.

judgment in relation to an issue in the proceedings, a prima facie case may be sufficient to enable the court to determine whether the crime-fraud exception is applicable.[57]

There does not appear to be a defined list of the material which may be relied upon to support the existence of a prima facie case for the purposes of the crime-fraud exception.[58] The authorities do, however, provide a degree of guidance. They demonstrate that such material might include, for example, "[e]vidence, admission, inference from circumstances which are common ground, or "what not"."[59] Indeed, in determining whether a prima facie case has been established it seems that the court is entitled to consider "the whole chronology of events".[60] The material may also, potentially, include the allegedly privileged communications themselves.[61] There is authority for the proposition that the court can examine the documents where this is necessary in order to determine whether the crime-fraud exception applies[62] and, consequently, that "the court may look at the position in the round including the contents of the document(s) of which disclosure is sought".[63]

The most recent authorities suggest that the court will only exercise its power to examine the allegedly privileged documents "very sparingly"[64] and that it will only do so if this is justified by an "exceptional factor of real weight".[65] The justification for the court's unwillingness to examine privileged documents where the existence of privilege is disputed is that when the court exercises its power, a judge other than the trial judge will be required to examine the relevant documents out of context and to receive submissions from one party in the absence

[57] See Longmore LJ in *Kuwait* above fn. 8 at [37] and [42] and Rose LJ in *R (on the application of Hallinan) and others v Middlesex Guildhall Crown Court and another* [2005] 1 WLR 766 at [25].
[58] *See: O'Rourke* above fn. 9 [1920] AC 581 per Lord Sumner at 614.
[59] *See: O'Rourke* above fn. 9 [1920] AC 581 per Lord Sumner at 614.
[60] See Mr S Monty QC in *Brent LBC v Estate of Owen Kane, Deceased* [2014] EWHC 4564 (Ch) at [50].
[61] See *Railton* above fn. 2 per Stephen J at 176; *R v Governor of Pentonville Prison* ex parte Osman (*Pentonville*) (1990) 90 Cr App R. 281; *Gibbins* above fn. 51.
[62] See *Pentonville* above fn. 61 at 311.
[63] *Gibbins* above fn. 54 per Potter LJ at [43].
[64] Munby J in *C* above fn. 3 at [67].
[65] For example, Norris J in *BBGP* above fn. 29 at [72].

of the other. Consequently, the court will be reluctant to inspect the documents in the absence of "credible evidence" that the legal advisers of the party claiming privilege have either misunderstood their duty to the court, or that they cannot be trusted[66].

It seems that the fact that the other material before the court does not establish a prima facie case does not in itself amount to an exceptional factor of real weight.[67] The requirement for such an exceptional factor in the context of the crime-fraud exception is derived from case law which does not relate to the operation of the crime-fraud exception but, rather, concerns those circumstances in which the court is determining whether a claim of privilege has been made out.[68] Current practice when the court is considering whether a claim of privilege has been established in such circumstances is that it will only examine the allegedly privileged documents as "a solution of last resort" and only if there is credible evidence that the lawyers claiming privilege have not understood their duty to the court, or cannot be trusted or in the absence of a reasonably credible alternative.[69]

Thanki et al[70] assert that requiring the existence of an exceptional factor of real weight in the context of the crime-fraud exception, based upon case law drawn from a different context, is "controversial" and "puts the test too high". Similarly, Hollander [71] asserts that it is wrong to suggest that the existence of an exceptional factor of real weight forms a condition precedent to the ability of the court to examine the privileged documents in camera in the context of an allegation of iniquity. In particular, he questions why the court should not view the allegedly privileged documents in circumstances in which, in consequence of mistaken

[66] National Westmister Bank plc v Rabobank Nederland [2006] EWHC 2332 (Comm) per Simon J at [53] – [60]
[67] Munby J in *C* above fn. 3 at [72].
[68] See Norris J in *BBGP* above fn. 29 at [71]-[72].
[69] Beatson J in *West London Pipeline & Storage Limited v Total UK Ltd* [2008] EWHC 1729 (Comm) at [86].

[70] B. Thanki et al, above fn. 10 at [4.66].
[71] C. Hollander, *Documentary Evidence*, (11th ed,. Sweet and Maxwell, London, 2012) at [25-20].

disclosure by legal advisers acting for the party claiming privilege, legal advisers who have specially been instructed by the party relying on the crime-fraud exception to make submissions under the exception have also seen them.[72] Even in this situation, the current judicial approach is that it would be exceptional for the court to view the communications.[73] The fact that the courts impose such a high bar before conducting in camera review provides the second justification for the authors' view that successful invocations of the crime-fraud exception in England and Wales are unlikely to become less exceptional in the near future.

Hollander[74] suggests that where the court is prepared to examine allegedly privileged documents to determine whether the crime-fraud exception applies, and rules that the documents are privileged, the judge will normally be able to put the material out of his or her mind. He accepts that there may be circumstances in which such an application should be heard by a different judge. In a recent case which did not concern the crime-fraud exception in which the court ordered that allegedly privileged documents be produced under CPR 31.19(6)[75] in order to enable the court to determine whether they were privileged, counsel suggested that a different judge should inspect the documents. The original judge indicated that he would hear submissions from the parties as to whether the task of inspecting the documents should be undertaken by a different judge.[76] Subsequently, the original judge directed that the task should be undertaken by a different judge who, having inspected the

[72] C. Hollander, above fn. 71 at [25-19]-[25.21].Where solicitors realise that the documents have been disclosed by mistake but suspect that the crime-fraud exception is applicable the instruction of distinct legal-advisers to deal with the crime-fraud exception issue becomes desirable, as was the case in *BBGP* above fn. 29. Special counsel was also appointed in *Stiedl v Enyo Law LLP and others* [2011] EWHC 2649 (Comm), though in *Stiedl* the crime-fraud exception was not relied upon and the issue was whether solicitors could act in the proceedings and could make use of privileged documents that had come into their possession.
[73] See Norris J in *BBGP* above fn. 29 at [72].
[74] C. Hollander, above fn. 71 at [25-21].
[75] In civil proceedings a claim of privilege is made under CPR 31.19(3) and the court, under CPR 31.9(6)(a) may require the person who seeks to withhold inspection of the allegedly privileged documents to produce them to the court.
[76] *Property Alliance Group Limited v The Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch) see Birss J at [40].

documents, held that they were privileged.[77] The second judge noted that his ability to review the documents was a "marked distinction" to the difficulties that the first judge had faced when attempting to determine whether the documents were privileged, in the absence of the ability to inspect them.[78]

The current judicial reluctance to examine allegedly privileged documents in camera, both when the crime-fraud exception is relied upon and more generally when objections to the status of allegedly privileged communications is challenged for other reasons, clearly makes it much more difficult for parties seeking to rely upon the exception to establish a prima facie case of iniquity. Higgins and Zuckerman, with reference both to the reluctance of the courts to examine privileged documents in camera, and also to the difficulties faced by tax authorities in identifying privilege claims that have not been properly made out if they are not aware of the contents of the allegedly privileged communications, believe that judicial scrutiny of claims of legal professional privilege is unlikely to be effective in tax cases.[79] The authors' agree with this as a general proposition. They believe that one area in which there is currently potential for increased successful invocations of the crime-fraud exception is where privilege is asserted before the First -tier Tribunal (Tax) in the context of an information notice.

Examination of allegedly privileged documents by the First-tier Tribunal (Tax)

So far as judicial reluctance to examine allegedly privileged documents in order to determine whether they are privileged is concerned, it seems that a distinction may be drawn between

[77] *Property Alliance Group Limited v The Royal Bank of Scotland plc* (*Alliance*) [2015] EWHC 3187 (Ch) see Snowden J at [2] and[46].

[78] *Alliance* above fn. 76 see Snowden J at [6].

[79] A. Higgins and A. Zuckerman, above fn. 37 at 318.

those cases in which legal advice privilege is relied upon in the context of appeals to the First-tier Tribunal (Tax) (the Tribunal) and those in which it is relied upon when the Tribunal is required to resolve a privilege dispute which arose following the giving of an information notice by an officer of Revenue and Customs.

Appeals to the Tribunal are governed by The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Rule 27(3) makes clear that the duty to allow inspection of certain documents which it imposes upon the parties does not encompass "any documents which are privileged". In one appeal before the Tribunal, the parties were agreeable to it inspecting documents in camera in order to determine whether a waiver of privilege in relation to other documents had given rise to an implied waiver of privilege in relation to the documents in question. The Judge, in determining that there had not been an implied waiver, did not find it necessary either to inspect the documents or to decide whether it would have been appropriate for her to have done so.[80] It may be that, in the light of the civil authorities referred to above, judges who are required to determine issues of privilege in the context of tax appeals will only be prepared to undertake in camera inspections of documents to which claims of privilege relate in exceptional circumstances.

Privilege disputes arising out of the giving of information notices (i.e. notices requiring a person to provide information or produce documents which an officer of Revenue and Customs reasonably requires to enable the officer to check a person's tax position[81]) are governed by The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009, which were made under Schedule 36 to the Finance Act

[80] See Judge Barbara Mosedale *in Fisher v The Commissioners for Her Majesty's Revenue &* Customs [2012] UKFTT 335 at [91].

[81] Paras 1 and 2 of schedule 36 to the Finance Act 2008.

2008.[82] Paragraph 23(1) of Schedule 36 to the 2008 Act provides that an information notice neither requires a person to provide privileged information nor to produce any part of a privileged document. Where a person who has been given an information notice during the course of correspondence with an officer of Revenue and Customs applies to the Tribunal to have a privilege dispute resolved, the Regulations require the person to include copies of the disputed documents with the application[83]. If the information notice was given during an inspection of premises under Part 2 of Schedule 36, the documents are given to the officer in a sealed, labelled, signed and countersigned container which the officer delivers to the Tribunal with the seal intact together with an application to have the dispute resolved. [84] In either case the Tribunal determines whether and to what extent the documents are privileged, and directs which parts must be disclosed, but must ensure that neither the documents nor copies thereof are inappropriately disclosed prior to the Tribunal determining their status.[85]

Reported decisions of the Tribunal relating to claims of privilege in the context of information notices demonstrate that the Tribunal does inspect the privileged documents when determining whether all or part of them are privileged.[86] Whether, as the Tribunal becomes accustomed to inspecting allegedly privileged documents in camera in the context of disputes arising out of the giving of information notices, it will also expect to conduct such inspections when privilege disputes arise in the context of tax appeals remains to be seen. A distinction that might be drawn in attempting to justify a divergence in practice is that in the former context the tribunal's role is that of determining an issue of privilege under regulations that specifically require the applicant to provide the Tribunal with copies of the allegedly

[82] The Regulations were made under para 23(3)-(4) of Schedule 36 to the 2008 Act.
[83] The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 r.5(5).
[84] The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 r.6(3)-(5).
[85] The Information Notice: Resolution of Disputes as to Privileged Communications Regulations 2009 r.8-9.
[86] See *Behague v The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 596 (TC), *Behague v The Commissioners for Her Majesty's Revenue & Customs* [2013] UKFTT 647 (TC) and *Lewis v The Commissioners for Her Majesty's Revenue & Customs*[2013] UKFTT 722 (TC).

privileged documents, whereas in the latter context the issue of privilege will arise via a disclosure hearing in the context of a tax appeal under rules that do not impose such a specific requirement. Logically, it would not seem to make sense for the information available to a Tribunal required to determine whether communications are privileged (i.e. whether that information does or does not include an inspection of the relevant documents themselves) to differ depending upon the procedural route via which the privilege dispute arrived before it.

The Crime-fraud exception in the United States for lawyers and tax practitioners

The crime-fraud exception to claims of attorney-client privilege is well established in the US.[87] The exception applies to both legal advice privilege and attorney-client work product privilege.[88] In tracing the history of the crime-fraud exception, Fried considered the origins of the exception in English law and observed that: "The subsequent development of the future crime or fraud exception to the attorney-client privilege has taken place almost entirely in the United States."[89] In reaching this conclusion, Fried referred to: "The paucity of cases in Great Britain …".[90] To put his trans-Atlantic comparison in context, it is important to note that Fried was writing in 1986, i.e. prior to the expansion of the English doctrine through development of the concept of iniquity.

It is argued by a number of commentators, including Fried, that the exception has expanded significantly in the US through a combination of the increasing criminalisation of corporate wrongdoing or breaches of administrative law in situations that would not amount to civil fraud, coupled with a lowering of the evidentiary standard required to establish the

[87] S. Jennison "The Crime or Fraud Exception to the Attorney-Client Privilege: *Marc Rich* and the Second Circuit" 1984-1985 *Brooklyn Law Review* Vol 51, 913, 916
[88] A. St.Peter Griffith "Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence" 1993 *University of Miami Law Review* Vol 48, 259,261.
[89] J. Fried "Too high a price for truth: the exception to the attorney-client privilege for contemplated crimes and frauds" 1986 *North Carolina Law Review* Vol 64, 443, 460.
[90] See Fried, above fn. 89, fn 82.

exception.[91] This expansion may, in part, explain the greater utilisation of the exception in the US. As was indicated above, the authors' primarily attribute the limited utility of the exception in England and Wales to judicial reluctance to engage in in camera review of privileged material. In contrast, as is demonstrated below, the US courts are much more ready to examine allegedly privileged material in camera. This approach must clearly encourage greater use of the crime-fraud exception by the IRS than by HMRC.

The exception does not encompass past wrongdoing - it is limited to ongoing or future illicit activities[92]. When considering the operation of the exception, the importance of the client's intent when seeking legal advice is difficult to pin down. One could argue that, where a client sought legal advice and *at the time* had no intent to commit a crime or fraud but later did so, then the exception should not apply. This would be the case even though the advice may in some way be relevant to the crime or fraud later committed. A similar hypothetical point was made in *In Re: Grand Jury Subpoena*.[93] However, establishing the intent of the client when advice is sought is particularly difficult because of what Gerson and Gladieux describe as the "inherent *post-hoc* nature"[94] of the exception. Inevitably, the obvious difficulty in establishing intent is solved by finding sufficient evidence that a crime has been committed or a fraud perpetrated to meet the threshold for further enquiry into the application of the exception. Arguably, a range of approaches towards intent are evident. It has been suggested that the exception has expanded to include situations where, although the client may not have had criminal intent when seeking legal advice, a crime was later committed.[95] Conversely, in *Marc Rich & Co. A.G. v United States of America (Marc Rich)*, the court's view was that:

[91] For example Fried, above fn. 89, 445 and A.Daily and S. Britta Thornquist "Has the Exception Outgrown the Privilege?:Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege" 2003 *Georgetown Journal of Legal Ethics* Vol 16, 583, 591.
[92] C.Galanek "The impact of the Zolin decision on the crime-fraud exception to the attorney-client privilege" 1989-1990 *Georgia Law Review* Vol 24, 1115, 1121
[93] *In Re: Grand Jury Subpoena* 745 F.3d 681, 692 (3rd Cir. 2014)
[94] S. Gerson and J. Gladieux "Advice of counsel: eroding confidentiality in federal health care law" 1999-2000 *Alabama Law Review* Vol 51, 163, 190.
[95] See Gerson and Gladieux, above fn.94, citing a trend noted by the 10th Circuit, and also Daily and Thornquist, above fn 91, 586.

"The crime or fraud need not have occurred for the exception to be applicable; it need only have been the objective of the client's communication."[96] In *In Re: Grand Jury Investigation, Glen J.Shroeder, Jr.,(Shroeder)*[97] the court identified, as the second part of a test used to decide if the crime fraud exception applies, that it must be shown "that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related."[98] The court's view was that this 'related' requirement should not be interpreted in too restrictive a fashion.[99] In the 3rd Circuit, the requirement seems to be that the legal advice must be used 'in furtherance' of the crime or fraud and that "a more relaxed "related to" standard…." has been rejected[100].

The range of approaches adopted by different Circuits in relation to the question of intent in general is one result of the greater development that has taken place in the US regarding the operation of the crime-fraud exception. Arguably, different approaches might result in some 'activity' being caught in one Circuit but not another. For example, the more relaxed 'related to' standard evidenced in the 11th Circuit in *Shroeder* might catch activity that would not be caught under the 3rd Circuit's requirements. As will be shown later, intent can be particularly relevant in the taxation context.

With regard to the breadth of activity covered by the exception in the US and whether it covers iniquitous conduct, as is the case in England, it has been suggested that activity amounting to abuse of the attorney-client relationship might come within the exception. In relation to opinion work product there is dicta to support the view that such work product

[96] *Marc Rich & Co. A.G. v United States* 731 F.2d 1032, 1039 (2nd Cir. 1984)
[97] *In Re: Grand Jury Investigation, Glen J. Shroeder, Jr.* 842 F.2d 1223 (11th Cir. 1987)
[98] *Shroeder* above fn. 97 at 1226. The first part of the test required a "showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice."
[99] *Shroeder* above fn. 97 at 1227
[100] *In Re: Grand Jury Subpoena* above fn.93 at 692

cannot be privileged if work "was performed in furtherance of a crime, fraud or other type of misconduct fundamentally inconsistent with the basic premises of the adversary system."[101] This perhaps suggests a move towards an English iniquity style exception, covering cases where the client abuses the attorney-client relationship.[102] However, if as Fried suggests there has been a significant expansion of criminalization, to the extent that in both the civil and criminal context "it is almost always possible to allege that the defendant has consulted an attorney in furtherance of a federal crime",[103] is the extension of crime-fraud in the US to situations involving iniquitous conduct even necessary?

The crime-fraud exception in the taxation context

Unlike the position in English law, in the US there is a tax practitioners' privilege, found in s. 7525 Internal Revenue Code, that is based on the attorney-client privilege, although narrower in scope and subject to a number of limitations.[104] Claims that communications are protected by the tax practitioner privilege in s. 7525 are subject to challenge, both under the tax shelter exception found in that section[105] and under the crime-fraud exception.[106] In *United States v BDO Seidman, LLP (BDO)*, the court upheld a District Courts' ruling that, following in camera review of a number of documents, one document was not protected by privilege because it was a communication made in furtherance of a crime or fraud.[107] The litigation arose from Internal Revenue Service (IRS) summons issued in connection with an investigation into the involvement of BDO in potentially abusive tax shelters.[108]

[101] *In Re: Sealed Case* 676 F.2d, 793, 812 (7th Cir. 1982)
[102] See Gerson and Gladieux above fn. 94, 190
[103] See Fried above fn. 89, 478. Fried also cites an example where the crime-fraud exception was applied without the wrongdoing being characterised as either crime or fraud.
[104] See Mitchell above fn 44, 247-248. The privilege applies to any individual authorised under federal law to practice before the IRS – Internal Revenue Code §7525(a) (3) (A)

[105] Internal Revenue Code, §7525(b)
[106] *United States v BDO Seidman, LLP* 492 F.3d 806, 818 (7th Cir.2007)
[107] *United States v BDO Seidman, LLP* above fn. 106 at 820
[108] Internal Revenue Code §6112(a) (2000). The relevant provisions have since been amended to refer to 'reportable transactions'.

In the context of enforcement proceedings relating to the IRS summons, clients of BDO intervened to try and protect their identity and prevent the disclosure of documents to the IRS. In the District Court, the IRS failed to establish a prima facie case that BDO and the intervenors were engaged in fraudulent or criminal activity. The complexities and uncertainties of the tax code and related regulations and the consequent determination of whether BDO had or had not complied with the code and regulations was regarded as "one of the ultimate questions for this litigation."[109]

The court in BDO did go on to consider the crime-fraud exception in its *in camera* review of individual documents and, as part of this process, considered some indications of fraud in the tax shelter context that might be sufficient to establish the prima facie showing of fraud required in the Seventh Circuit. The court identified eight non-exclusive indicators of fraud including, for example: the marketing of pre-packaged transactions; communication from the intervenors to BDO, the purpose of which was to engage in a pre-arranged transaction having the sole purpose of reducing taxable income; attempting to conceal the true nature of the transaction and knowledge that the intervenors lacked a legitimate business purpose for entering into the transaction.[110] These indicators of fraud are simply "guideposts" and must be considered with all the other circumstances surrounding the relevant documents to determine whether there is enough evidence to give sufficient "colour" to the charge of crime-fraud.

The position of the IRS regarding application of the crime-fraud exception in cases involving tax shelters was made clear throughout the BDO litigation. The IRS clearly regard a failure to register or report a potentially abusive tax shelter "the likely effect of which would be to

[109] *United States v BDO Seidman, LLP* 2005 U.S.LEXIS 5555, 30 (N.D.ILL 2005)
[110] *United States v BDO Seidman, LLP* above fn. 109 at 41

mislead or conceal an avoidance of tax" as an indicator of fraud, sufficient to bring such communications within the crime-fraud exception.[111] They argue that:

> "If an in-camera inspection of the documents discloses that the taxpayer-investor's purpose in seeking "advice" was to enter into a sham transaction or a transaction which otherwise could give rise to the imposition of a civil fraud penalty, then any right to confidentiality is voided under the crime-fraud exception."[112]

The IRS must obviously establish a prima facie case of fraud to succeed and, from *BDO*, it is clear that this requires more than simply describing transactions as pre-packaged, abusive tax shelters.

It may be that guideposts such as those provided in *BDO* would be of value if the crime-fraud exception is relied upon in England in the tax shelter context. How valuable some of them would be might depend upon the willingness of the English and Welsh courts or the Tribunal to conduct in camera review.

Considerations around intent and identified crime or fraud referred to earlier are particularly relevant in the taxation context and, within that context, particularly in relation to tax planning schemes. The fluid nature of what is or is not an abusive tax scheme and more importantly what becomes regarded as an abusive scheme makes the clients' intent when consulting their lawyer about the scheme particularly important. Gerson and Gladieux make a similar point in the medical context.[113] Volz and Ellis identify tax shelter cases as having a "special importance as illustrations of the IRS's attempts to assert the crime-fraud exception to the

[111] W.Volz and T.Ellis "An attorney-client privilege for embattled tax practitioners: a legislative above response to uncertain legal counsel" 2009 *Hofstra Law Review* Vol 38:213, 224 at fn. 68
[112] See Volz and Ellis above fn. 111, 224 at fn. 68
113 See Gerson and Gladieux above fn. 94, 191.

attorney client privilege."[114] and note that although legal commentators "have indicated that the IRS is unlikely to pursue the crime-fraud exception to the privilege in tax planning or shelter cases" there are plenty of examples of the government raising the exception.[115] Faced with burgeoning information gathering powers, taxpayers inevitably respond by more frequent assertions of attorney client privilege[116], and promoters of schemes have clearly been regarded by the IRS as making unmeritorious claims of privilege to avoid disclosing both investor lists and details of transactions.[117] In response, as one of a number of arguments used to challenge claims of privilege, the IRS raises the crime-fraud exception.

In the taxation context, it is clear that the exception covers a range of activities involving what is described in the case law as tax evasion. In *Shroeder*, the court noted that "tax evasion undoubtedly qualifies as a crime sufficiently serious to justify overriding the attorney-client privilege"[118]. There is some evidence that activities characterised as tax limitation or planning do not come within the ambit of the crime/fraud exception. In *Marc Rich,* documents relating to tax advice sought in connection with forms of employee compensation plan and a proposed corporate reorganisation were not covered by the exception - it was concluded that the advice was not being sought in furtherance of a crime or fraud.[119] As in England, the difficulty is in establishing at what point legitimate advice on tax strategy or relating to tax planning schemes, such as those referred to in *Marc Rich* begins to stray into the realms of potentially abusive tax avoidance or tax evasion. This is particularly problematic given that reportable transactions for tax purposes include those having a *potential for tax*

[114] See Volz and Ellis above fn.111, 242
[115] See Volz and Ellis above fn. 111, 224 (citations ommitted) and, for example, *United States v BDO Seidman, LLP* above fn. 106
[116] See Volz and Ellis above fn. 111, 230
[117] C.E Watson "Legislating Morality: The duty to the tax system reconsidered" 2002-2003 *Kansas Law Review* Vol 51 ,1197, 1231 and *Doe v Wachovia Corporation* 268 F. Supp. 2d 627, 635-636 (W.D.N.C. 2003)
[118] *Shroeder* above fn. 117 at 1227
[119] *Marc Rich* above fn. 114 at1039.

avoidance[120]. In this context, the tax practitioner privilege and the tax shelter exception to it provide an interesting comparison.

As has already been discussed, the tax practitioner privilege[121] is modelled on the attorney-client privilege and is therefore subject to the same exceptions as that privilege, obviously including crime-fraud.[122] The legislators included a specific limitation to the tax practitioner privilege by excluding written communications connected with the promotion of participation in tax shelters from the privilege.[123] For this purpose, "tax shelter" covers arrangements having the significant purpose of avoiding or evading Federal income tax.[124] Therefore, it would appear that arrangements characterised as tax avoidance, rather than tax evasion can come within the tax shelter exception to the tax practitioner privilege, leading to the denial of privilege for related written communications.[125] In contrast, communications relating to arrangements characterised as tax avoidance rather than as tax evasion are in less danger of losing privileged status under the crime-fraud exception to attorney-client privilege, because a prima facie case of fraud would have to be established in these circumstances. So, where tax advice is received from a tax practitioner, the crime-fraud exception and the tax shelter exception can both be used to try and set aside tax practitioner privilege claims in cases of tax evasion.[126] In addition, the tax shelter exception explicitly covers tax avoidance and therefore can be used to try to set aside such privilege claims in tax avoidance cases. If tax advice is given by a lawyer, attorney-client privilege claims can only be challenged using the crime-fraud exception regardless of whether tax evasion or tax avoidance is asserted and will only be set aside if a prima facie case of crime or fraud is established.

[120] Internal Revenue Code § 6707A
[121] Internal Revenue Code, §7525
[122] Mitchell above fn. 44, 247
[123] Internal Revenue Code, §7525 (b)
[124] Internal Revenue Code, § 6662 (d) (2) (c) (ii)
[125] *Valero Energy Corp v United States (Valero)* U.S. Dist. LEXIS 105609, 40 (N.D. Ill 2008)
[126] *United States v BDO Seidman, LLP* above fn. 106 at 810

Unfortunately, during Congressional debate when the addition of the tax shelter exception to the tax practitioner privilege was proposed, it does not appear that any consideration was given as to whether the crime-fraud exception already covered similar situations.[127] It is therefore difficult to draw conclusions from this approach concerning the extent to which the ambit of the then proposed tax shelter exception was regarded as exceeding that of the crime-fraud exception. In Australia, where this question has been specifically considered during a review of proposals for a tax advisers' privilege, the Australian Law Reform Commission concluded that a tax shelter style exception would not be desirable because "this kind of advice already should be covered by the general fraud or crime exception (which is not a feature of the US model)."[128] The point was not considered further by the Commission and it is not clear why the exception was referred to as not being "a feature" of the US model. On the contrary, the exception has been raised in US cases involving both attorney-client privilege and tax practitioner privilege.

IRS Summons and the Crime-Fraud exception

Under provisions in the Internal Revenue Code, a summons can be issued to "examine any books, papers, records, or other data which may be relevant or material..'" to an inquiry into the accuracy of a tax return, to the making of a return where none has been filed and to the determination of tax liability.[129] Oral examination of the taxpayer, his/her adviser is also provided for.[130] Where documents requested in a summons are not produced, a petition can be made to a federal district court for an order compelling compliance with the summons.[131] Under the requirements set out in *United States v. Powell*,[132] to obtain such an order the IRS must establish that the investigation, pursuant to which the summons is being sought, has a legitimate purpose and that the inquiry or the materials sought may be relevant to that

[127] See Mitchell above fn. 44, 249
[128] Australian Law Reform Commission (2007) Privilege in Perspective: Client Legal Privilege in Federal Investigations. ALRC Report 107, para 6.285. Available at: http://www.alrc.gov.au/report-107
[129] Internal Revenue Code § 7602 (a) (1)
[130] Internal Revenue Code § 7602 (2), (3)
[131] Internal Revenue Code § 7604
[132] *United States v Powell* 379 U.S. 48 (U.S. 1964)

purpose, that this information is not already within the possession of the IRS and that relevant administrative steps have been taken. A prima facie case can be made that these requirements have been met on the face of the summons and by supporting affidavits. It is clear that "the obligation imposed by a tax summons remains 'subject to the traditional privileges and limitations'". [133] Therefore, as illustrated in *BDO*, attorney-client privilege can be claimed but the crime-fraud exception can be raised by the IRS.

The examination regime in the English Tribunal in the context of information notices is in clear contrast to the process followed in the US regarding an IRS summons. Privilege disputes relating to material required by information notices issued by HMRC are dealt with by an apparently automatic delivery up to and review by the Tribunal of the relevant material. In contrast, material required by an IRS summons can be withheld pursuant to a claim of privilege. The IRS is then obliged to petition the court, at which point the court may choose to conduct an in camera review of the material. Where a claim of privilege is challenged using the crime-fraud exception, this review will not take place simply at the request of the IRS. Instead, a threshold evidential test must be met.

This contrast is particularly striking given the apparent reluctance of English courts in other contexts to examine allegedly privileged documents at all, and then only where justified by an exceptional factor of real weight. The very different regime in the English Tribunal in the context of information notice disputes would seem to disadvantage the party claiming privilege, because documents are routinely reviewed, and no threshold test must be met for review to take place. Although the threshold applied in the US for in camera review to take place is, arguably, quite low,[134] there is at least some evidential standard to be met. This seems to strike a more appropriate balance between the investigatory function and

[133] *Upjohn Co. Et Al v United States* 449 U.S. 383, 398
[134] C. Bricker "Revisiting the crime-fraud exception to the attorney-client privilege: a proposal to remedy the disparity in protections for civil and criminal privilege holders" 2009-2010 *Temple Law Review* Vol 82 149, 154

information gathering powers of tax enforcement bodies and the rights of taxpayers vis a vis the ability to claim privilege.

Quantum of Proof and process – Crime-fraud exception

Assuming that the required elements for establishing attorney-client privilege have been met, the burden of proof is placed on the party opposing the privilege to establish that the crime/fraud exception applies.[135] In *Clark v United States*, the Supreme Court referred to the requirement that prima facie evidence is needed to support allegations of fraud in order to set aside the attorney/client privilege.[136] This requirement has not been further clarified in terms of quantum of proof; in the most recent Supreme Court case concerning crime/fraud, *United States v Zolin et al (Zolin)*, the court chose to duck this issue whilst acknowledging that the use of the phrase "prima facie" had caused some confusion.[137] Galanek observes that:

> "the quantum of evidence necessary to defeat the attorney-client privilege is unsettled at best. Inherent in each formulation is a great deal of judicial discretion as to whether the required threshold has been reached;"[138]

It is suggested by Lipman that at least three versions of the prima facie standard have been adopted by lower courts amongst the various circuits. These range "from "probable cause" to a "reasonable basis to suspect" to "evidence that if believed by the trier of fact" would establish the exception."[139] In *BDO*, the court confirmed that the 7th Circuit had rejected the view of some circuits that, to invoke the exception, enough evidence to support

[135] K. Rolandelli "Confidentiality and the Crime-Fraud Exception" 1989-1990 *Georgetown Journal of Legal Ethics* Vol 3, 139, 143.
[136] *Clark v United States* 289 U.S. 1, 14 (U.S. 1933)
[137] *United States v Zolin et al* 491 US 554, 565 (U.S. 1989)
[138] See Galanek above fn.92,1127.
[139] B. Lipman "Invoking the crime fraud exception: why courts should heighten the standard in criminal cases" 2015 *American Criminal Law Review* Vol 52, 595, 598 (footnotes/citations omitted).

a verdict of crime or fraud is required.[140] Instead, the court required that the party seeking to invoke the exception bring forward sufficient evidence to ""give colour to the charge" by showing "some foundation in fact"'.[141] Of course, as Lipman points out,[142] it is in question whether this differing language leads to different results - whether the crime/fraud exception is more easily established in some circuits than others. There would certainly seem to be a practical difference between a standard that requires enough evidence to support a verdict of crime or fraud to establish the exception (the standard in the D.C. Circuit[143]) compared to evidence sufficient to give "colour to the charge".

If there is sufficient evidence to persuade the court of a prima facie case, in civil cases due process considerations determine that the other party should be given the opportunity to provide a satisfactory explanation in order for the privilege to remain.[144] In the criminal context in grand jury proceedings, although the court has a wide discretion around how in camera review is conducted,[145] this opportunity is unlikely to be given; a practice justified by the need to maintain secrecy, the court relying only on ex parte submissions.[146] Lipman argues that this differential approach between criminal and civil proceedings justifies the use of a preponderance of the evidence standard in criminal the proceedings, to "allow for a more critical assessment of the government's evidence"[147] when assessing whether a prima facie case has been established.

There are certainly similarities of language between the English and US courts when considering the evidence required to establish that the crime-fraud exception applies. Both refer to prima facie evidence, albeit that the English courts require more when fraud is a

[140] *BDO* above fn.106 at 819
[141] *BDO* above fn. 106 at 819
[142] Lipman above fn.139, 606 -607.
[143] *In re Sealed Case* 754 F.2d 395, 399 (D.C.Cir. 1985)
[144] *In Re: Grand Jury Subpoena* 223 F.3d 213, 218 (3rd Cir. 2000)
[145] Lipman above fn. 139, 619.
[146] *In Re: Grand Jury Subpoena* above fn. 197 at 219
[147] Lipman above fn.139, 620.

central issue in the proceedings, in which case the *strength* of the case is considered an important element in establishing whether the exception applies. Some US courts seem closer to this requirement than others. For example, the D.C. Circuit's standard seems close to the 'strong' or 'very strong, prima facie case standard, although this does not seem to be based on whether or not fraud is a central issue. In contrast, the 7th Circuit uses language more similar to the 'foundation in fact' language in assessing whether a prima facie case has been established. In absence of Supreme Court authority on the point there is clearly scope for a divergence in approaches to the threshold required to establish a prima facie case amongst the various Circuits.

In contrast to the reluctance of the English and Welsh courts to conduct in camera review of allegedly privileged communications, the US approach seems to be for the trial judge to hold in camera review. [148] The court in *Zolin* provided guidance on the use of in camera review as part of the process of establishing whether the exception applies. In *Zolin*, the court held that in camera review of privileged communications was appropriate to help the court determine if the crime-fraud exception to privilege applies.[149] In camera review can be of written materials and oral communications and can involve the oral examination of an attorney.[150] On the question of the circumstances in which in camera review would take place, the court held that such review should not take place simply at the request of the party asserting that the communications were not privileged due to the crime-fraud exception. There should be some evidence produced by the party challenging the claim of privilege and this evidence must meet a threshold test. The test set out by the court required evidence of a "factual basis adequate to support a good faith belief by a reasonable person."[151] It was made clear

[148] See Bricker above fn. 134, 154.
[149] *Zolin* above fn. 137 at 564
[150] *In Re:Grand Jury Subpoena* 745 F.3d 681, 688 – 689 (3rd Cir. 2014)
[151] *Zolin* above fn.137 at 572

that “a lesser evidentiary showing is needed to trigger in camera review than is required ultimately to overcome the privilege.”[152]

The guidance in *Zolin* also covered the type of evidence that could be used towards meeting the evidentiary threshold required for both in camera review to take place and to establish a prima facie case. Any relevant evidence, whether or not “independent” of the privileged communications in issue, can be used both to meet the in camera review threshold test and as prima facie evidence that the exception applies.[153] Previous case law had suggested that evidence independent of the privileged communications was required to establish a prima facie case of crime/fraud.[154]

The approach to the type of evidence that the court will consider in assessing whether a prima facie case has been established seems consistent between English and US courts, but there is an entirely different approach to in camera review. This difference relates both to the frequency of the practice and the threshold test to be met for review to take place. The factual basis adequate to support a good faith belief threshold test in the US is much lower than the exceptional factor of real weight test in English courts. The exception is the English Tribunal where there is no threshold test at all in the context of disputes arising out of the giving of information notices. Criticisms of the very high threshold test applied by the English courts could be met by adopting the US approach, before both the courts and the Tribunal. This might increase the potential success rate of such challenges and, thus, their frequency. Arguably, the demands on judicial time, consequent delays in the civil process and increased expense for the parties which could potentially result if in camera reviews of voluminous documents became the norm rather than the exception in England and Wales in the context of privilege disputes could conflict with the overriding objective of the Civil

[152] *Zolin* above fn. 137 at 572
[153] *Zolin* above fn. 137 at 574
[154] K. Dunson “The crime-fraud exception to the attorney-client privilege” 1995-1996 *The Journal of the Legal Profession* Vol 20, 231, 237.

Procedure Rules (CPR), namely, that of "enabling the court to deal with cases justly and at proportionate cost."[155]

Conclusion

Anglo-American legal systems have clearly seen the ambit of the crime-fraud exception broaden in recent decades. In the US, this broadening is seen through the low evidentiary standard required to establish the exception and through increasing criminalisation of wrongdoing that would not amount to civil fraud. There is also some evidence of the exception extending to activity amounting to abuse of the attorney-client relationship. In England and Wales, the broadening is seen through the development of the iniquity exception, encompassing breaches of a duty of good faith or purposes contrary to the interests of justice or public policy. It may also result from statutory intervention which criminalises conduct that formerly would not have fallen within the ambit of the exception.

Despite this broadening of the exception, in both the US and England, the range of tax related behaviours covered by it is still somewhat opaque. It seems clear that activity amounting to tax evasion is encompassed by the exception. What is much less certain is how far activity characterised as tax avoidance falls within its ambit. In this context, the US tax practitioner privilege with its tax shelter exception offers an interesting comparator, although the circumstances of its introduction do not assist in drawing conclusions as to the extent to which the crime-fraud exception in the US was regarded by the legislature at that time as encompassing tax avoidance. It is certainly arguable that, in the US, the exception is now applied in a sufficiently broad manner to potentially catch some activities characterised as tax avoidance where the relevant evidentiary threshold is met. In England, whilst the iniquity exception may also be sufficiently broad to catch forms of tax avoidance, the potential for HMRC deploying it in this way may be limited by the reluctance of the courts to conduct in camera review of privileged documents. Moreover, the lack of precision in

[155] CPR 1.1(1).

defining iniquity has potential consequences under article 8 of the European Convention on Human Rights where the exception is used in the taxation context, and it may be that interference with the taxpayer's article 8 rights is difficult to justify in the context of some forms of tax avoidance. The US system in contrast is not faced with challenges similar to those imposed by article 8.

Similar language is used in both jurisdictions when considering the evidence required to establish that the crime-fraud exception applies, that is prima facie evidence, although there is a lack of precision and consistency between and within both jurisdictions. The key difference between the two jurisdictions regarding the crime-fraud exception relates to the circumstances in which, and the frequency with which, in camera review of allegedly privileged material takes place. The English courts are reluctant to conduct in camera review of such material, requiring "an exceptional factor of real weight" before they will do so. In contrast, in the US there seems to be a relatively low evidentiary threshold for conducting in camera review - the factual basis adequate to support a good faith belief by a reasonable person - and, therefore, much greater use of this process.

In marked contrast to the approach in the English criminal and civil courts, when the English Tribunal deals with privilege claims in the context of information notices, it will view the allegedly privileged material. The rules which govern appeals to the Tribunal do not make equivalent provision. Given the public disquiet relating to many forms of tax avoidance, HMRC might, like their US counterparts, be tempted to make greater use of the broad iniquity exception to challenge claims of privilege made in the taxation context. In order for this to become a viable approach, one possibility would be to make amendments to the 2009 rules which govern tax appeals to bring them in line with the 2009 regulations which govern privilege disputes in the context of information notices. This would mean that in camera review would become a matter of routine with no threshold test being imposed by the rules. An alternative, arguably more attractive and balanced approach, would be to amend both the

rules and the regulations to impose a threshold test and right of rebuttal similar to that encountered in the US in relation to all proceedings before the Tribunal. Such a test would impose a lower threshold than that currently applied in English law and would arguably strike the appropriate balance between the investigatory function and information gathering powers of tax enforcement bodies and the rights of taxpayers vis a vis the right to claim legal professional privilege. Without such changes, Higgins and Zuckerman may be correct when they suggest that the judicial scrutiny of privilege claims is unlikely to be effective in tax cases.

Even if the rules governing proceedings before the Tribunal are amended in this way, this does not guarantee that a more generous approach to in camera review will be adopted by the criminal and civil courts. Factors mitigating against the adoption of such an approach might include conflict with the rationale for the privilege, increased delays and expense and the court being required to view documents out of context and in the absence of submissions from one of the parties. Indeed, in *Zolin*, the US Supreme Court recognised concerns that the blanket use of in camera review in the context of the crime-fraud exception would conflict with the policy underlying attorney-client privilege and place unduly onerous burdens upon the courts[156].

The development of US style guideposts, whether via case law or by statutory reform, would be helpful in circumstances in which the courts or the Tribunal are required to consider the operation of the crime-fraud exception in the context of alleged tax avoidance or tax evasion. In particular, more specific guidance, whether judicial or statutory, concerning the ambit of the iniquity exception would be desirable in order to mitigate against the possibility of challenges based upon alleged article 8 violations. Such guidance should not be too specific or exhaustive in nature as it would need to encompass both the fluid nature of tax planning schemes and the wide range of potential forms of iniquitous activity that may be devised by

[156] *Zolin* above fn.137 at 571

tax planners. Ideally it would be formulated so as to provide the courts/the Tribunal with a reasonable degree of assistance when they are attempting to apply the borderline between those forms of tax avoidance which amount to iniquity and those which do not bring the exception into play. Such guidance should also safeguard article 8 rights by enabling lawyers to determine with a greater degree of precision whether the advice they are giving to their clients falls within the ambit of the privilege. Ideally, it would also be formulated in such a way as to reduce the possibility that the use of the exception in relation to tax avoidance activities that fall well away from the tax evasion end of the spectrum might result in a disproportionate interference with the taxpayers' article 8 rights.

The low threshold test for, and greater readiness with which, the US courts conduct in camera review of allegedly privileged material where the crime-fraud exception is raised would seem to make the exception a useful tool that the IRS can utilise in gathering information about both tax avoidance and tax evasion in the US. The wide iniquity exception in England arguably covers a range of tax related behaviour and could be used in a similar fashion to aid HMRC in gathering more information about tax avoidance and evasion, but this is subject to the reluctance of the courts to utilise in camera review and the potential for article 8 challenges if the exception is deployed more often. The continuing high public profile of activities perceived as tax avoidance would seem to suggest that revenue collection agencies need as many weapons in their armoury as possible to combat any such iniquitous arrangements. It is clear that the current regime in England and Wales relating to in camera review would require significant changes in approach if the application of the exception was to become more commonplace, thus enabling HMRC to follow the lead of the IRS.