



LEGAL BRIEFING

Walter Lilly & Company Ltd v (1) Giles Patrick Cyril Mackay (2) DMW Developments Ltd [2012] EWHC 649 (TCC)

Part 31 of the Civil Procedure Rules concerns the disclosure and inspection of documents in civil litigation. In summary, a party discloses a document by stating that the document exists or has existed. A party to whom a document has been disclosed has a right to inspect that document except where, amongst other things, the party disclosing the document has a right or a duty to withhold inspection of it.

The term 'privilege' is used to describe the right or duty to withhold evidence in the form of inspection of a document or answering questions on various grounds. One such ground is the common law principle of legal professional privilege, which includes legal advice privilege, litigation privilege and common interest privilege. Legal professional privilege is important because it protects a client's ability to access the justice system by encouraging full and frank disclosure to legal advisers without the concern that any disclosure of those communications may be used against the client in future litigation. This case concerns legal advice privilege under which records of communications between clients and their lawyers are privileged if they are written for the dominant purpose of giving or receiving legal advice.

The Facts

Walter Lilly & Company Ltd ("WLC") was employed by DMW Developments Ltd ("DMW") to build a substantial house for Mr Mackay. There were delays to the project and WLC made claims for extensions of time and related loss and expense. A firm of architects and a quantity surveying firm were retained to administer the project but Mr Mackay later retained Knowles Limited ("Knowles") as claims consultants to provide "contractual and adjudication advice". Rates were quoted for various types of services including Senior Consultant, Consultant and Secretarial Support as well as "Advocate/Director/Legally Qualified Person [and] Adjudication Manager/Delay Analyst/Expert Witness".

A dispute between the parties ended up in litigation. Some of the correspondence to and from Knowles had been disclosed by DMW during the proceedings but DMW's solicitors decided at the time of disclosure that much of the Knowles' documentary material attracted privilege. DMW's solicitors later wrote to WLC's solicitors claiming that four privileged documents relating to Knowles had mistakenly been disclosed and should not have been in the trial bundle. That led to WLC's solicitors suggesting that this documentation was not likely to be privileged. DMW's solicitors then revisited the Knowles' correspondence and disclosed three further lever arch files of Knowles' documents.

This led to WLC making an application for disclosure of all correspondence with or documents created by Knowles relevant to the issues in the proceedings. In response, Mr Mackay stated in a witness statement that his two principal contacts at Knowles provided DMW with legal advice and he understood them to be qualified, practising, barristers or solicitors. It was common ground that Knowles also provided programming advice to DMW.

Legal professional or legal advice privilege was claimed in relation to the balance of the Knowles' documentation. The primary argument revolved around whether or not Knowles was engaged as solicitors or barristers. There was no suggestion that Knowles as a firm was qualified or certified to provide legal advice. However, it was argued by Mr Mackay and DMW that a client who in good faith instructs an organisation or person which he mistakenly believes is a qualified solicitor or barrister and then receives legal advice from them is entitled to the privilege protection.

The Issue

Did correspondence with and/or documents generated by Knowles in relation to the project attract legal advice privilege?

The Decision

Mr Justice Akenhead allowed WLC's application for disclosure by deciding that legal advice privilege did not apply in this case as between DMW and Knowles and the documents should have been disclosed.

At common law, legal professional or legal advice privilege does not apply in relation to any professional other than a qualified lawyer. Akenhead J held that the first step was to see what the nature of the engagement of Knowles was: Knowles provides claims consultancy services but does not hold itself out as a firm of solicitors or group of barristers, although it employs some lawyers. It was retained to provide "contractual and adjudication advice" and was not retained to provide legal advice as such. The types of service for which rates were offered did not include rates for "barrister" or "solicitor"; the words "Advocate" and "Legally Qualified Person" were used.

The Judge concluded that Knowles was not retained by DMW as solicitors or barristers, even if the two principal contacts were barristers. In support of that conclusion the Judge noted that the already disclosed Knowles documents demonstrated that Knowles was also undertaking another professional role which was monitoring the architect and adopting a management role in relation to the conduct of the project.

The onus is on the party seeking to rely upon legal advice privilege to establish the essentials to support it and Mr Justice Akenhead was satisfied that DMW had not established that either of the two principal contacts were practising barristers (or solicitors). The fact that Mr Mackay honestly understood that the two contacts with whom he was dealing at Knowles were qualified and practising barristers or solicitors was immaterial because their employer was not retained by DMW to provide the services of barristers or solicitors.

Comment

The retention of claims consultants for the provision of all manner of advice is common throughout the construction industry. This Judgment provides essential guidance to parties who are considering using a claims consultant for advice during a project in terms of what is required for documents relating to that advice to attract legal advice privilege. Serious thought must be given to this issue at the time a consultant is retained if disclosure is to be avoided during litigation.

Akenhead J did however point out that this decision related only to legal profession or legal advice privilege. It did not deal with litigation privilege, which has a much wider scope than legal advice privilege. In this regard the Judge stated that:

"there remains an outstanding possible issue as to whether or not advice and other communications given by claims consultants in connection with adjudication proceedings are privileged. There is little authority on this latter issue and consideration might have to be given to issues of policy if and when this argument arises on another case."

It is now more likely that claims consultants will try to link project advice to anticipated adjudication proceedings or litigation in order to attract litigation privilege, but it is important to be aware that the actual purpose of the correspondence and documents created will still be the dominant factor in determining whether they are privileged or not.