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Claims Consultants and Legal Advice Privilege

Walter Lilly & Co Ltd v (1) MacKay (2) DMW Development Ltd [2012] EWHC 649 (TCC)

Mr Justice Akenhead has held that advice given by claims consultants was not covered by Legal Profession or Legal Advice Privilege, even if that advice was given by solicitors or barristers engaged by those claims consultants.

This case concerns a TCC action brought by the Claimant builder against the Defendant employer in relation to the construction of a substantial house. During the course of the works the Defendant employed Knowles Ltd, well-known claims consultants, to provide "*contractual and adjudication advice*". The Defendant was advised by two individuals who he understood to be qualified barristers. By the time this matter was issued in the TCC, the Defendant had instructed a firm of solicitors.

The Claimant (represented by **Sean Brannigan QC**) brought an application for disclosure of all correspondence with or documents created by Knowles. The Defendant resisted, seeking to rely on Legal Advice Privilege over those documents.

Mr Justice Akenhead allowed the Claimant's application for disclosure. He noted that Knowles did not hold itself out as a firm of solicitors or group of barristers, and was not retained to provide legal advice. No evidence had been adduced as to whether the two individuals who advised the Defendant were in fact qualified, or practising, barristers or solicitors; but Mr Justice Akenhead noted that they were not held out by Knowles as such – their services were proffered as "Advocate" and "Legally Qualified Person". The judge concluded that Knowles were not retained as barristers but as an organisation to provide claims and project handling advice. He held that the protection of privilege was not intended to extend to the relationship with a person who is not a qualified and practising lawyer, save in exceptional circumstances.

This case is of great significance to the burgeoning claims consultancy industry. Unless claims consultancies hold themselves out as giving advice as solicitors or barristers, their advice and correspondence may well have to be disclosed in the event that the matter comes to court. Mr Justice Akenhead emphasised that his judgment did not "*deal with*" litigation privilege, and that it is an open question whether litigation privilege applies to advice and communication given in connection with adjudication proceedings.

Privilege – Waiver of Privilege – Expert Reports

Expert evidence – Professional Negligence - Costs

ACD (Landscape Architects) Ltd v Overall & anor (No 1) [2011] EWHC 3362 (TCC) &
ACD (Landscape Architects) Ltd v Overall & anor (No 2) [2012] EWHC 100 (TCC)

This action arose out of two unsuccessful applications by the first defendant ("Mr Overall") and his limited company ("Cookham") for planning permission to develop land owned by Mr Overall at Kiln Lane, Bourne End, Bucks ("the Site"). Following the refusal of those applications by the local authority, Mr Overall appealed those decisions to the Planning Inspectorate and engaged Stephen Dale of the claimant landscape architectural practice ("ACD") as an expert witness.

The appeals failed and Mr Overall blamed ACD, in particular alleging that Mr Dale had been negligent in not preparing a full Landscape and Visual Impact Assessment report and that had he done so the appeals would (or might) have succeeded. Mr Overall refused to pay ACD and when ACD brought county court proceedings for its fees, he counterclaimed in professional negligence and the matter was transferred to the TCC.

In correspondence, it became apparent that Mr Overall did not have expert evidence to support the allegations of professional negligence. ACD's solicitors pointed out that this was contrary to the principles in *Pantelli Associates v Corporate City Developments No 2 Limited* [2010] EWHC 3189 (TCC) that claims of professional negligence needed to be supported by expert evidence or else face the possibility that they would be struck out. Mr Overall's solicitors disagreed and ACD therefore applied to strike out the counterclaim.

The matter first came before Mr Justice Akenhead in December 2011. Very shortly before that hearing, Mr Overall served evidence in opposition to the strike out application that included a witness statement from his solicitor stating that he had now secured a draft report from a chartered architect, a Mr David Clarke, supporting his position. The solicitor's statement set out, over five and a half pages, 18 separate points which "*can only have been culled from the report of Mr Clarke*"; however, it also asserted that Mr Clarke's draft report was privileged and that privilege was not waived.

ACD (represented by **Alexander Wright**) applied for disclosure of the report on the basis that it was a document referred to in a witness statement within the meaning of CPR r.31.14 and that privilege had been waived.

Akenhead J helpfully summarised the principles on waiver of privilege at paragraph 22, thus:

"*(c) Privilege will be waived where the otherwise privileged document is actually or effectively referred to in a witness statement and or part of its contents are deployed for use actually or potentially in the interlocutory proceedings or in the final trial, as the case may be.*

(d) A party which deploys part of the privileged document in a witness statement will, at least as a matter of general principle, be required to disclose the whole of the document because it is not just to allow a party by way of cherry picking to rely only on that part.

(e) The test of whether a document or part of it is being deployed is whether the contents of the document are being relied upon rather than the effect or impact of the document.

(f) Once having referred to the document or part of it in a witness statement, generally at least the Court will presume that it is relevant, because the very fact that it is referred to in the statement demonstrates its relevance."

On the facts, privilege had clearly been waived and ACD was entitled to disclosure of the Clarke report. The substantive application was adjourned with Mr Overall to pay the costs thrown away.

The Court returned to the case in January 2012. By that time, ACD had taken the view that in light of the Clarke report it was no longer appropriate to pursue the strike-out application. However, the parties were unable to resolve the issue of costs and the Court therefore had to determine which party would have won the application but for the late production of the Clarke report.

Akenhead J agreed that ACD would have substantially (but not entirely) succeeded in its application but regarded its approach as heavy-handed. In the circumstances, the appropriate order would be for ACD to have its costs in the case.

In determining this issue, Mr Justice Akenhead set down useful guidelines on the need for expert evidence in professional negligence actions in light of the *Pantelli* decision.

The Judge confirmed that, as in *Pantelli* itself, where a party had failed or refused to obtain expert evidence in a professional negligence action, it would be open to the Court to strike out the professional negligence allegations. However the "*fairer course*" would be for the Court to give the party a reasonable opportunity to obtain that evidence; and in some cases it would not be necessary to obtain expert evidence at all at a "*very early stage in the case, particularly where the amounts in issue may be small or where there is a sensible prospect of mediation or other amicable resolution*".

The upshot of *ACD (No 2)* is that claimants making allegations of professional negligence may expect a more benevolent approach by the Court at the early stages of litigation to an absence of supporting expert evidence than might have been suggested by *Pantelli*; however, persistent refusal or failure to obtain such evidence could eventually lead to a more draconian sanction being imposed.

Conversely, however, if expert evidence has been obtained, *ACD (No 1)* reminds parties of the importance of not "deploying" draft reports in which privilege is to be retained, since doing so is likely to mean that privilege has been waived and that the document is therefore disclosable.

Practice and Procedure – Case Management – Transfer of Proceedings – Appropriate Court – Technology and Construction Court

West Country Renovations Limited v Mr Charles McDowell and Mrs Vanessa McDowell [2012] EWHC 307 (TCC)

This is an important decision providing guidance about the extent to and circumstances in which relatively low value claims should be accommodated as High Court Judge business within the TCC. **Peter Oliver** acted for the Claimant.

This was the first CMC. The Claimant builder sought additional payments for work undertaken totalling £104,473.14, which were disputed by the Defendants.

Mr Justice Akenhead raised with Counsel whether the claim should be transferred to the TCC designated judges at the Central London County Court. This was neither requested nor agreed by either party; indeed both parties indicated their preference to stay in the High Court.

Mr Justice Akenhead nevertheless transferred the claim. He emphasised that if the Court or division in which a claim is issued is inappropriate, the Court may, on its own motion or on application, transfer it elsewhere. The Court will not usually do so when the case is already well under way, but may review the question at the first CMC and possibly before.

Mr Justice Akenhead outlined the approach to be taken by the High Court: Generally, claims for less than £250,000 should be commenced in the County Courts or other High Court centres outside London which have TCC designated judges.

This principle is subject to a number of exceptions including, but not limited to:

- Cases involving adjudications, including enforcements and arbitrations;
- International cases of any value (i.e. cases between non-UK resident parties or involving foreign projects or developments);
- Cases involving new or difficult points of law in TCC business or which have issues of technical complexity suitable for a High Court judge;
- Any test case, or case which will be joined with others and treated as a test case;
- Public procurement cases;
- Part 8 and other claims for declarations;
- Claims which cannot readily be dealt with effectively in a County Court or Civil Justice centre by a designated TCC judge;
- Complex nuisance claims brought by a number of parties, eve where the sums claimed are small; and
- Claims for injunctions.

Mr Justice Akenhead acknowledged that, if there was any other good reason why any proceedings instituted in the TCC in London should remain in the High Court, the Court will retain the case. He also suggested that transfer from the TCC in London will usually be to the Central London County Court, but other courts will be considered where more convenient.

This judgment is significant for those intending to institute proceedings in the TCC because it sets out the particular factors to take into account when considering whether or not claims of relatively low value should be transferred to County Courts or High Court centres outside London.

See also ***Collins & ors v Drumgold & ors*** [2008] EWHC 584 (TCC) covered in Construction Newsletter Issue No.4 concerning transfer from the County Court to the TCC.

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