Legal professional privilege

The application of privilege to claims consultants

Construction Briefing

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What is new?

In a recent case that came before the Technology and Construction Court, the court had to consider whether documents produced by a claims consultant are protected by legal professional or legal advice privilege.

As the decision refers to pre-litigation conduct, the judgment will be of interest to employers, developers, contractors, sub-contractors and professionals in the construction and engineering industry as a whole, not just those involved in disputes.

What is the TCC?

A decision of the TCC is a binding authority in England and Wales, unless and until overturned by a higher court such as the Court of Appeal. Decisions of the TCC are not binding on the Scottish courts, however they may be of a persuasive influence if there is no Scottish authority on the point in issue. Accordingly, this case is of interest to clients based or working in Scotland, as well as in England and Wales.

What is privilege?

Legal professional privilege is a form of privilege, which keeps communications between a lawyer and his client confidential. There are two types of legal professional privilege: legal advice privilege and litigation privilege. In summary, legal advice privilege covers communications between a lawyer and his client for the purposes of obtaining legal advice. Litigation privilege covers documents which came into existence for the sole or dominant purpose of either seeking or receiving legal advice in relation to litigation which is ongoing, or which is reasonably contemplated.

The recent case and current position

In Walter Lilly & Company Ltd v Mackay and another [2012] EWHC 649 (TCC), the contractor (Walter Lilly & Company Ltd) was employed to construct a house in London. As a result of a substantial delay in the works, the employer (Mr Giles Mackay) engaged a claims consultant for ‘contractual and adjudication’ advice. The contractor argued that communications between the employer and the claims consultant were disclosable in later proceedings. The employer argued that they were not, as they were protected by legal advice privilege.
The court held that legal professional and legal advice privilege did not attach to correspondence in connection with the construction project to and from the claims consultant. The advice provided under the retainer with the claims consultant was described as ‘contractual and adjudication advice’. The firm of claims consultants did not hold itself out as a group of solicitors or barristers. The individuals providing the advice were retained as claims consultants and were not practising solicitors or barristers.

This case follows a line of authority where the courts have refused to extend the common law application of legal professional privilege to other groups of professionals who may give advice on points of law. For now, it therefore remains the case that legal professional and legal advice privilege will only cover qualified lawyers.

What should you do?

If clients are retaining claims consultants to give advice on the merits of a claim or tactics, then they need to be aware that any advice received from them will not be privileged and will have to be disclosed, even if it is prejudicial to their case. Disclosure of any such prejudicial advice may undermine the claim.

If a situation arises which may develop into a dispute, it is sensible to obtain advice from a solicitor or barrister at the outset to ensure that the advice received is privileged and therefore not disclosable to the other side.

There is an exception to this and that is where the claims consultant employs a practising solicitor or barrister and the advice is provided by and communicated from that solicitor or barrister. Similarly, if the claims consultant is part of an alternative business structure employing practising solicitors or barristers then the advice may obtain the benefit of legal professional privilege. It is however crucial that the solicitor or barrister is practising; a legal qualification will not be sufficient for the communication to obtain the benefit of legal professional privilege.

How can we help?

With lawyers specialising in both contentious and non-contentious work, we are uniquely placed to advise clients in relation to all the stages of the construction process, providing advice on procurement methods, contract management and dispute resolution procedure. We can help you wherever you are based and wherever the project is based. Our firm also has one of the largest global Litigation and Arbitration practices, comprising of a team of experienced litigators able to represent a varied range of interests on an international basis.