Fenwick Elliott
The construction & energy law specialists

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Welcome to the August edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out about using claims consultants.

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Claims consultants: proceed with caution

There is an increasing tendency in the construction industry to use claims consultants and claims management companies as a cost-effective alternative to instructing lawyers, either in a project management function, or as a precursor to litigation being commenced.

The judgment of Akenhead J in the Technology and Construction Court[1] in *Walter Lilly & Company v Mackay and Ors* [2012] EWHC 649 will probably come as quite a surprise to many employers, developers, contractors and subcontractors who may have given very little thought to the question of whether advice given by claims consultants and claims management companies is confidential and can be withheld from an opponent if a dispute reaches court.

This fourteenth issue of Insight examines

(i) the practical impact of the decision in *Walter Lilly* and

(ii) the way in which the courts might differentiate between the role played by claims consultants and lawyers in private practice now, and in the future.

Factual background to the Walter Lilly case

A contractor, Walter Lilly, was engaged to build a large house in The Boltons, Chelsea, by Mr Mackay (who was to own and occupy the house) and DMW Developments Limited ("DMW"), of which Mr Mackay was a director. There were substantial delays, as a result of which Mr Mackay became increasingly demoralised with the project architect and he engaged Knowles claims consultants to provide what was described in the written retainer as "contractual and adjudication" advice. For the most part, Knowles were to monitor the architect and adopt a management role in relation to the conduct of the project.

During 2010, Walter Lilly issued proceedings against Mr Mackay. Part of Walter Lilly's case was that Mr Mackay had retained Knowles in order to examine and ultimately undermine the architect's authority such that Walter Lilly could be held liable for the delays. In the course of the proceedings, some of the correspondence between Knowles and DMW was inadvertently disclosed by DMW's solicitors who asserted at the time that the remainder of the Knowles documents could not be disclosed.

Walter Lilly subsequently asked for disclosure of the remaining documents on the basis that they related to the issue of responsibility for the delays. Walter Lilly's request was effectively an attempt for all legal and tactical advice that had been provided by Knowles to Mr Mackay on the issue of delay to be made available. It is likely these documents would have been prejudicial to the case Mr Mackay was running before the court.

Predictably, Mr Mackay declined to provide disclosure on the basis that the Knowles documents were created for the purpose of obtaining legal advice and were therefore protected by legal professional privilege (a communication between a client and a lawyer made in confidence for the purpose of giving or receiving legal advice). The judge, Akenhead J, disagreed.

Akenhead J held that as a matter of fact, Knowles had not been retained to provide legal advice. They had been retained to provide "contractual and adjudication" advice. Knowles did not present themselves as being a firm of solicitors and it made no difference that the two main individuals employed by Knowles who had provided the advice to Mr Mackay were apparently a solicitor and a barrister. Whilst the individuals themselves were legal professionals, the distinguishing point was that Knowles had not been expressly retained to provide legal advice:

1 A division of the High Court which specialises in the resolution of construction disputes, amongst others.

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they had been retained to provide claims and project-handling advice and assistance. If at any stage in his dealings with Knowles Mr Mackay had wanted legal advice, a procedure was available within Knowles' retainer for a firm of solicitors to be instructed to provide such advice. Knowles' function was clear.

Following *Walter Lilly*, what should I do if I wish to use a claims consultant?

It is still open to you to retain a claims consultant, but you should be fully aware of the limits of using claims consultants and the possible repercussions if your dispute reaches court.

Following the Water Lilly case, any advice, internal investigation reports, statements taken from the project team, interviews with your management, correspondence, emails, manuscript notes, spreadsheets and any other documentation or information provided by you to the claims consultant may be disclosable if your dispute reaches court. Such documentation would be very likely to contain advice of a legal nature, tactics and possibly also settlement parameters (if these had been discussed), and would have to be made available to your opponent as of right under the court rules. The documentation may be commercially sensitive and may also undermine or even be adverse to the open position adopted by you in court. In short, it could be damaging to you if it were disclosed.

The only way to ensure documents containing legal and strategic advice do not have to be provided to your opponent and the judge if any dispute reaches court is for everything to be routed through a firm of solicitors or a barrister who is specifically retained in order to provide legal advice. It is not sufficient for the advice to be given by qualified solicitors or barristers who happen to be employed by claims consultants.

What about the future?

Following the decision in *Walter Lilly*, the future for claims consultants who seek to provide a quasi-legal service appears uncertain.

That said, the court rules do make provision for advice in relation to "litigation" to be protected from disclosure before the court regardless of whether that advice is given by a legal professional who is retained to provide legal advice. This so-called "litigation privilege" prevents a document from being disclosed if it was created for the sole or dominant purpose of a dispute where litigation exists or was reasonably contemplated. It is possible (although yet to be tested or confirmed by the court) that litigation privilege may extend to litigation advice provided by claims consultants.

However, questions remain. Whether "litigation" would be extended to cover adjudication as well as litigation is still to be seen.

A further, more complicated issue is the point in time at which any such "litigation" advice would be protected by litigation privilege and thus not be disclosable. There would invariably have to be a cut-off date prior to which litigation (howsoever defined) would not have been reasonably contemplated, in which case any documents prior to this date would still have to be disclosed if the matter reached court.

Conclusion

Even on a best case scenario, some quasi-legal advice or documents which might undermine the position adopted by you in court, or commercially sensitive information, would inevitably be disclosable if you use claims consultants and claims management companies and your dispute reaches court.

The only way to ensure such documents are protected is to route all advice through a solicitor or barrister retained for the specific purpose of providing legal advice.

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
lkingston@fenwickelliott.com.
Tel +44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com