IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 15th March 2012

Before:

MR JUSTICE AKENHEAD

Between:

WALTER LILLY & COMPANY LIMITED
- and -
(1) GILES PATRICK CYRIL MACKAY
(2) DMW DEVELOPMENTS LIMITED

Claimant
Defendants

Sean Brannigan QC and Annaliese Day (instructed by Reynolds Porter Chamberlain LLP) for the Claimants
David Sears QC, Serena Cheng and David Johnson (instructed by Nabarros LLP) for the Defendant

Hearing dates: 12-13 March 2012

JUDGMENT
Mr Justice Akenhead:

1. The Claimant has issued an application in this matter for disclosure of all correspondence with or documents created by Knowles Ltd ("Knowles") relevant to the issues in these proceedings. The application was heard on the first day of the trial. It raises issues as to whether documents generated by or towards a claims consultant, even one which retains legally qualified personnel, attract legal professional privilege. It may therefore be of some interest to those organisations and those who engage them.

2. The background is that Walter Lilly and Company Limited ("WLC"), the Claimant, was employed by DMW Developments Ltd ("DMW"), the Defendant, to construct a substantial house in the Boltons in London. The Architects were Barrett Lloyd Davis Associates ("BLD"); DMW also retained Gardner Theobald ("GT") as quantity surveyors for the project. The work started in 2004 and, all things being equal, it was initially hoped or anticipated that the works would be finished within 18 to 20 months. It is common ground that there were delays and from time to time WLC put in claims for extensions of time and, it is argued, claims for related loss and expense.

3. By June 2006, the delays were substantial but BLD appears to have formed the view that WLC was entitled to some significant extension of time. There were regular progress and other site meetings between the various parties. Indeed, ultimately extensions of time were granted until February 2007.

4. The correspondence in the trial bundles, at least on one reading, indicates that Mr Giles Mackay, who with his wife were to be the owners and occupiers of the house, became increasingly disillusioned with BLD and in October 2006 retained the well-known claims consultants, Knowles. Knowles remained involved until about March 2008, when their services seem to have been dispensed with. The written retainer was dated 19 October 2006 and by that document Knowles was 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"

5. Clause 11 or of the conditions of this retainer stated:

   "In cases where it appears to the Company that this appointment may or is likely to result in a need for the Client to appoint Solicitors to act for, advise or otherwise provide a service to the Client then, by this appointment, the Client appoints the Company as the Clients agent for the purpose of assisting in the definition of the scope of the conduct of Solicitors and for the purpose of inviting suitable Solicitors to approach the Client direct with a view to them receiving whatever instructions the client may choose to give such Solicitors in this regard"

6. It has been suggested by the Claimant, based on disclosed documentation, that a "strategy" was embarked upon between Mr Mackay and Knowles by which in effect the authority of the nominated Architect was constantly monitored, if not undermined
and by which WLC was manoeuvred into a position in which it could be held liable for any delays. Of course, at this stage I have formed no views one way or the other about whether this is true or correct.

7. It is certainly the case that some of the correspondence to and from Knowles has been disclosed by DMW. However, it now appears that DMW’s solicitors took the view at the time of disclosure, and in particular in the electronic disclosure exercise, that much of the Knowles documentary material attracted privilege.

8. However, on 16 February 2012, they 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 an exchange of correspondence by which WLC’s solicitors put forward the view that this documentation was not likely to be privileged. By its letter dated 1 March 2012, DMW’s solicitors wrote that they had "revisited the Knowles’ correspondence…and we now provide inspection by copies of the Knowles’ documents"; thereafter and, about 2 weeks before the trial commencement, three lever arch files were then disclosed.

9. This has led to this application. Witness statements have been put in by the solicitors on both sides recounting the procedural history, with DMW’s solicitors claiming privilege in relation to the balance. Mr Mackay has put in a short witness statement stating this:

“My two principal contacts at Knowles were Andrew Rainsberry and Adam Tomlinson, both of whom provided DMW with legal advice and both of whom are understood to be qualified, practising, barristers or solicitors. We already had a Contract Administrator, and employer’s agent/site presence, and a Project Manager - what we needed was a lawyer. The questions that we posed to Knowles when we took them on were all of a legal nature and it was very clear to me that the advice I received was both legal in nature and from people who held themselves out to be Lawyers. Knowles also provided programming advice to us, but I understand that that category of Knowles’ work has been disclosed.

Knowles worked for DMW until about March 2008 and at no time did my understanding of Knowles’ role as legal advisers providing legal advice to DMW change.”

10. Effectively, legal professional or legal advice privilege is claimed in relation to the balance of the Knowles’ documentation. The primary argument revolves around whether or not Knowles were engaged as Solicitors or Barristers. There is no suggestion however that Knowles as a firm was qualified or certified to provide legal advice. However, it is argued 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. No direct independent evidence about Messrs Rainsberry and Tomlinson’s professional status at the time has been put in although some internet based information has been put before the Court about them. This does not reveal whether either of them had any right between 2006 and 2008 to practise as a Barrister or Solicitor or in effect to call themselves by either designation. It does appear that each may have qualified as a
barrister, Mr Tomlinson doing the Bar vocational course in 2002-4 and Mr Rainsberry at some undisclosed time.

The Law

11. In R (Prudential plc and or another) v Special Commissioner of Income Tax [2010] EWCA Civ 1094, the Court of Appeal was concerned with a claimant which had obtained advice from accountants on tax law aspects of the proposed transaction in question and privilege was claimed in respect of communications between them. Many of the underlying authorities were referred to. Lord Justice Lloyd gave the lead judgement:

“82. I consider that this court is bound to hold that LPP does not apply, at common law, in relation to any professional other than a qualified lawyer: a solicitor or barrister, or an appropriately qualified foreign lawyer. That is the effect of Wilden Pump, and it is binding on us despite Lord Pannick's arguments, whether based on human rights or on an attempt to distinguish the case.

83. Even if we were not so bound, I would conclude that it is not open to the court to hold that LPP applies outside the legal profession, except as a result of relevant statutory provisions. It is of the essence of the rule that it should be clear and certain in its application, since it is not the subject of any ad hoc balancing exercise but is, to all intents and purposes, absolute. As applied to members of the legal professions, acting as such, it is sufficiently clear and certain. If it were to apply to members of other professions who give advice on points of law in the course of their professional activity, serious questions would arise as to its scope and application. To which accountants should it apply, given that "accountant" does not by itself denote membership of any particular professional body, or the obligation to comply with any, or any particular, professional obligations? To which other professional advisers would it apply? To what areas of the law would it apply as regards the advice of any adviser who is not a lawyer as such? These questions are serious and important, and would require a clear answer in order that the scope and application of the extended LPP should be known and understood.”

12. There was reference in the judgement is to the old case of Wilson v Rastall (1792) 4 Durn & E 753 in which Buller J said at page 759:

"The privilege is confined to the cases of counsel, solicitor, and attorney; but in order to raise the privilege, it must be proved that the information, which the adverse party wishes to learn, was communicated to the witness in one of those characters; for if he be employed merely as a steward, he may be examined."

13. Reference was also made to the case of Calley v Richards (1854) 19 Beaver 401 which concerned involvement of a gentleman who had been a solicitor working for a solicitors firm who had unknown at the time ceased to practice as such although he was held out by the firm as still being part of it and therefore in practice. It was held that privilege did apply but at Paragraph 38 in the judgement of Lord Justice Lloyd he said:
“However, that is an exceptional case, and it seems to me that it does not take out what Lord Pannick needs to take from it, if function had been the test, then it may be that a person who had been a solicitor but had recently retired might be regarded as every bit as qualified to give legal advice as he had been before retirement. But the judgement makes it clear that if the client had known that Mr Mullings was no longer a solicitor, then the privilege would not be available. This is an exception which proves (i.e. tests) the rule, but it does not seem to me that the recognition of the exception, by itself, altered the nature of the rule so as to apply more generally beyond the seeking and giving of legal advice from and by professional lawyers."

14. Finally, at Paragraph 45 he refers to an Employment Appeal Tribunal decision, New Victoria Hospital v Ryan [1993] ICR 201 in which the tribunal, Mr Justice Tucker presiding, said at pages 203 and 204:

“In our opinion the privilege should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, who are members of professional bodies, who are subject to the rules and etiquette of their professions, and who owe a duty to the court. This is a clearly defined and easily identifiable qualification for the attachment of privilege. To extend the privilege to unqualified advisers such as personnel consultants is in our opinion unnecessary and undesirable."

Lord Justice Lloyd comments on the words "such as solicitors and counsel" which Counsel had relied on:

“I do not see that the use of the phrase "such as", rather than "namely" or some other such phrase, can be taken as showing that the rule is not restricted to members of the two English legal professions but extend to others who could be called legal advisers, but are not professional lawyers as such. As such it does not add to other previous cases, and of course it does not bind the Court of Appeal."

**Discussion**

15. The first step is to see what the nature of the engagement of Knowles was. This firm is well known as one which provides claims consultancy services. It does not hold itself out as a firm of solicitors or group of barristers, albeit that it employs some lawyers. It was retained to provide "contractual and adjudication advice". It is notable that it was not retained to provide legal advice as such. It is also clear from the proffered types of service for which rates were offered that no rates were offered for "barrister" or "solicitor". A neutral word is used to describe two of the possible services which were "Advocate" and "Legally Qualified Person"; again it should be noted that care is taken not to offer the services of a "barrister" or "solicitor". One adds to this observation that the standard terms make it clear that "Solicitors" can be retained and a procedure is set up to enable that to happen; that suggests that legal practitioner services were not covered by the initial retainer. I therefore conclude that Knowles were not retained as solicitors or barristers, even if Messrs Rainsberry and Tomlinson were barristers and solicitors. I am supported in this view by the fact that the already disclosed Knowles documents demonstrate at least to a significant extent that they were undertaking
another professional role which was monitoring BLD and indeed adopting a management role in relation to the conduct of this project.

16. If it was necessary to deal with the issue, the onus must be on the party seeking to rely upon legal advice privilege to establish the essentials to support it. I am satisfied that the Defendants have not established that either Mr Rainsberry or Mr Tomlinson were practising barristers (or solicitors). Although Mr Tomlinson now refers to himself in his promotional literature as a Chartered Surveyor and Barrister of the Middle Temple, it is and remains unclear whether he was in the 2006 to 2008 period a practising Barrister; he apparently left Knowles after their services were dispensed with by the Defendants in this case. Mr Rainsberry still apparently works for Knowles as a Vice-President and references in Knowles’ promotional literature suggest that he is a barrister, albeit that he does not appear to practice as such. Again, no evidence has been put before the court that he was at the relevant time a practising barrister. Mr Mackay is himself a qualified barrister, albeit that he does not practice and he has been, I presume, careful in saying, that the two gentlemen from Knowles “held themselves out to be Lawyers”; he does not say that they held themselves out as Barristers or Solicitors.

17. The reality is that the Defendants retained Knowles not as barristers but as an organisation to provide them with claims and project handling advice. In this respect, their position is no different from the claimants in the Prudential case who employed accountants. The fact that Mr Mackay honestly understood that the two gentlemen with whom he was dealing at Knowles were qualified and practising barristers or solicitors is immaterial because their employer was not retained by the Defendants to provide the services of barristers or solicitors. The fact that he was mistaken in his understanding is immaterial. Policy considerations come into this because a party to litigation might casually meet someone who he honestly believed was a qualified solicitor (but who was not) and might receive legal advice. The protection of privilege is not intended to extend to the relationship between a person and another who is not in fact a qualifies and practising lawyer, save in exceptional circumstances like those which arose in the Calley case, which is completely different from the current case: here, the Defendants had no good reason to believe that they were employing solicitors or barristers because they were employing Knowles which does not profess to be offering the services of qualified practising solicitors and barristers.

18. It follows from this that legal professional or legal advice privilege does not apply in this case as between the Defendant and Knowles and otherwise discloseable documents should have been disclosed.

19. An additional argument was deployed by Counsel for the Defendants which was that the application was too late and that it would impose a disproportionately onerous task on the Defendants during the trial to provide such further disclosure. However, this is a case in which the Defendants should have provided the disclosure in the first place but they decided not to disclose it under the mistaken belief that it was privileged. However, they did disclose some of the Knowles documents and, very belatedly, some two weeks before the trial, provided three files’ worth of Knowles documents. Unsurprisingly that attracted the interest of the Claimant’s legal team who then, following attempts by correspondence to resolve the matter, issued the disclosure application. All documents withheld from disclosure are held electronically, I am told, and it should be relatively easy for these documents to be searched and provided. Since
I indicated informally to the parties that I would be ordering disclosure, the solicitors sensibly have agreed a simple procedure to provide the further disclosure. There is nothing therefore in the further point argued by the Defendants.

**Conclusion**

20. The Claimant’s application for disclosure succeeds. I should point out that this decision relates only to legal profession or legal advice privilege. It does not deal with litigation privilege and 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.