

High Court Provides Reminders on Inadvertent Waivers of Privilege and the Independence of Experts

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In *Pickett v Balkind* [2022] EWHC 2226 (TCC), HHJ Matthews considered three applications which raised issues about inadvertent waivers of privilege and the independence of experts.

The claimant applied for an adjournment of the trial date. The witness statement filed in support of the application exhibited a letter (the “Letter”) from an expert instructed by the claimant. The Letter indicated that the claimant’s legal team had been providing the expert with substantive comments and suggestions on the experts’ joint statement – a serious breach of the Technology and Construction Court (“TCC”) Guide.

When the defendant raised the issue of the correspondence with the expert with the claimant, the claimant maintained that the Letter was privileged, and its disclosure was unintentional, requesting the deletion of any copies of the Letter in the defendant’s possession. The defendant refused, prompting the claimant to apply for an injunction to restrain the use of the Letter.

The defendant in turn applied for the disclosure of further documents including an aide memoire referenced by the claimant’s solicitor and for permission to cross-examine the expert at trial. The defendant also applied for the disclosure of a report relied on by another expert in their evidence.

Inadvertent Waiver. HHJ Matthews rejected the application for an injunction. The issue of granting an injunction was closely connected with whether privilege had been waived. The following key principles from *Al Fayed v Commissioner of Police of the Metropolis* [2002] EWCA Civ 780 were considered:

- If privileged material is disclosed in error, the disclosing party will usually be unable to assert privilege and obtain an injunction to undo its error; and
- The court retains discretion to grant an injunction to restrict the use of the material “where justice requires” such as cases of fraud or where the disclosure has come about “as a result of an obvious mistake”.

HHJ Matthews began by considering the claimant's solicitor's evidence that he "*did not intend to waive privilege*" and "*[his] inclusion of a complete copy of the [Letter] without redaction was an inadvertent and obvious error*". In contrast, the defendant's solicitor had the impression that the claimant intentionally, rather than inadvertently, exhibited the Letter to rely on its contents for the purposes of the adjournment application. Since numerous possible explanations could account for the Letter being exhibited, HHJ Matthews reasoned, the error could not be characterised as obvious.

HHJ Matthews went on to consider whether the inadvertent disclosure of the Letter amounted to a waiver of privilege. The central distinction emerging from the authorities was between referring to the effects of a document and deploying the document by relying on its contents. On the facts of the case, HHJ Matthews held that by exhibiting the Letter to seek an adjournment, the claimant had not "*merely referred to the letter, but [had] deployed its contents*".

It was irrelevant that the Letter was deployed in relation to an interim application rather than the case as a whole. HHJ Matthews found that "*if there is a deliberate disclosure of information by a party to its opponent, even for an interlocutory purpose, it ceases to be confidential as against that party, and hence loses its privilege*".

Since the claimant had inadvertently waived privilege through deploying the Letter and the defendant was not aware that this was a mistake, HHJ Matthews concluded that an injunction would not be appropriate. He also had concerns based on public policy grounds because the Letter's contents called into question whether the claimant's legal advisors had complied with their duty to maintain the independence of experts.

Independence of Experts. HHJ Mathews' judgment underlines the importance of maintaining the independence of experts. The TCC Guide cautions against legal representatives taking an active role in the preparation of joint statements by experts. Similar provisions can be found in paragraph 9.32 of the Chancery Guide and paragraphs H2.22 and H2.23 of the Commercial Court Guide.

HHJ Matthews described the comments and suggestions provided by the claimant's legal team on the evidence of the expert as "*a potentially serious breach of the TCC Guide*". While HHJ Matthews could not ascertain whether the documents sought by the defendants, such as the aide memoire which was said to have been provided by the claimant's legal team to the independent expert, were covered by privilege, "*the unresolved concerns*" over the independence of the expert led him to allow the defendants to cross-examine the expert on his independence at trial subject to any contrary views of the trial judge.

This highlights the practical difficulties faced by practitioners in striking the right balance when communicating with experts. The TCC Guide allows legal representatives to take a more active role only in “*exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of [the] joint statement*”.

Comment. The judgment demonstrates the dangers of exhibiting supporting materials without appropriate attention to whether inadvertent waivers of privilege will arise. Care must be taken to preserve privilege unless there is a specific desire to waive it by deploying the material in question. It also provides a reminder for all practitioners to be careful in their communications with experts and ensure that their independence is maintained. Practitioners must exercise great care with respect to the nature of communications with experts, especially regarding the joint statement, and remember that communications may become disclosable.

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