

Professional privilege in question



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Anyone can provide legal advice in respect of contracts or claims in the UK; with no requirement of professional legal membership. The growth in construction adjudication has widened the claims advice market, with claims consultancies willing to be a primary provider of adjudication advice and representation. However, this raises issues consultancies and their professional indemnity insurers should be aware of.

A recent case in the Technology & Construction Court, *Walter Lilly & Co Ltd v Mackay*, considered whether documents generated by or for a claims consultant, even one that retains legally qualified personnel, attract legal professional privilege.

A defendant appointed a firm of claims consultants to advise in relation to works being carried out by the claimant contractor that were significantly delayed and subject to claims for loss.

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The judge referred to *Prudential v Special Commissioner of Income Tax*, in which privilege was claimed in respect of advice contained in communications with an accountant on tax issues.

The court held legal advice privilege did not apply to any profession other than a qualified lawyer, acting within the legal profession. The judge in *Walter Lilly* therefore held legal professional privilege did not attach to the consultants' advice and the defendant was required to disclose it.

It should be noted, however, even if a claim for legal professional privilege would be unsuccessful it remains unclear whether advice relating to adjudication proceedings could still be protected by litigation privilege.

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The defendant gave evidence his principal contacts at the consultancy were understood to be practising barristers or solicitors and the advice received was legal in nature from "people who held themselves out to be lawyers". He therefore claimed correspondence with the claims consultants was subject to legal advice privilege and could not be produced in court.

Justice Akenhead disagreed, referring to previous cases emphasising privilege should be strictly confined to legal advisers such as solicitors and counsel, who are professionally qualified, and describing a previous judgment to the contrary as an "exceptional case".

The nature and terms of the consultants' engagement was examined by the judge. He emphasised the firm was well known as one that provides claims consultancy services and he concluded the consultancy was retained not as barristers to provide legal advice as such but

as an organisation to provide claims and project-handling advice. Consultants who do not advise a client of the risk of disclosure and the possibility of appointing solicitors or barristers so as to avoid that risk could find themselves faced with claims.

Claims consultants should be clear about the services they are providing and bear in mind the risks that can arise where they perform quasi-legal functions. They may wish to consider the use of alternative business structures now permitted under the Legal Services Act 2007 to avoid some of these issues.

It should also be noted the *Prudential* case is under appeal to the Supreme Court, due to be heard in November, so it is still possible privilege may be extended beyond the legal profession. ■

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