

Limitations on litigation privilege

A recent case has highlighted the dangers of seeking advice from public bodies without making clear that the advice is sought in the context of court proceedings.

In the case of *Hallows v Wilson Barca LLP* [2015] EWHC 3188 (CH), John Jarvis QC (sitting as a Deputy Judge of the High Court) found that a solicitor had waived privilege in his communications with a local authority by failing to inform them that advice sought was for the purpose of litigation.

Background

The Claimant (*Hallows*) brought a claim against the Defendant (*Wilson Barca LLP*), alleging that they had been negligent in registering his title to a plot of land, by failing to register that the land benefitted from certain rights of way, significantly affecting its development potential.

To assist the claim, the Claimant's solicitor sought to establish whether planning permission would have been granted for development of the land, had the rights of way been registered. He contacted the planning department of the London Borough of Camden, stating that he was instructed by his client to consider the merits of a possible application for planning permission to erect a single dwelling. He requested pre-planning advice as to whether permission was likely to be granted.

Crucially, the solicitor did not inform the planning department that the advice was sought for the purpose of litigation (although he did ask that the request be treated confidentially). The decision not to refer to the litigation was a deliberate one. Had he informed the planning department that he was not seeking advice on a genuine application, but a hypothetical one to assist his client in litigation, it was likely that the planning department would have been unwilling to provide the advice.

The planning department reviewed the application on its merits (including attending the site and discussing matters with the Claimant) and provided the advice sought. The Defendant's solicitors made a request for information on planning matters pursuant to the Freedom of Information Act 2000 (FOIA), and were provided with the advice given to the Claimant's solicitors. The Claimant sought an injunction restraining the Defendant's use of the advice in the proceedings.

The Judgment

The Deputy Judge considered (1) whether the advice provided by the planning department was privileged, (2) whether the privilege had been lost or waived, and (3) if privilege existed and had not been waived, what relief should be granted.

The Deputy Judge found that litigation privilege attached to the advice the Claimant's solicitor had received. It was advice sought from a third party for the dominant purpose of aiding the Claimant in existing litigation, namely to establish whether planning permission would have been available to the Claimant but for the Defendant's negligence. Had it been, then the damages were likely to have been over £2 million.

However, the Deputy Judge found that where advice had been sought from a public body with no indication that the advice was sought in the context of litigation, the solicitor requesting the advice had to bear in mind the body's statutory duty to provide information to the public under the FOIA. By acting in a way that put the information at risk of coming into the public domain, the solicitor had impliedly waived the privilege that existed and accordingly, privilege could no longer be attached to the advice the moment it was made public under the FOIA.

The Deputy Judge concluded that even if the privilege had not been waived, it would not have been equitable to grant injunctive relief in any event, not least because the way in which the Claimant's solicitor had handled the matter had led to the advice coming into the Defendant's hands. There was also a public interest in ensuring that the evidence came before the Court.

Conclusion

The Court found that the Claimant's solicitor had been in a difficult position. Had he informed the planning department that the advice was sought in the context of litigation, the advice would have retained litigation privilege (and been exempt from disclosure under section 42 of the FOIA), but would most likely not have been provided at all. Whilst the Deputy Judge did not criticise the solicitor for taking the course that he did, he found that in doing so he had run the risk of the advice coming into the public domain.

What is not known is whether the solicitor made his client aware that in seeking advice from a public body without referring to the litigation, he was exposing him to a risk that potentially unfavourable advice could come into the hands of his opponent. It is also arguable that this was an unnecessary risk to take, given that the Court had ordered expert evidence on the subject of both planning and valuation.

The lesson all practitioners can learn from this judgment is that communications with third parties, and particularly public bodies, can be disclosed to the other side in litigation, particularly if the third party is unaware that the communication is being entered into for the purpose of existing or contemplated litigation. When corresponding with third parties it is important to consider both the content and purpose of the correspondence to ensure the client's position is protected.

Andrew Pavlovic

Associate

+44 (0)20 8394 6455

Andrew.Pavlovic@russell-cooke.co.uk

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