Disclosure, privilege & waivers

Rules governing the waiver of privilege over instructions to expert witnesses are frequently misunderstood. Chris Pamplin explains why

IN BRIEF

▶ Covers the rules of waiver of privilege over instructions to expert witnesses, with relevant case law.

The rules governing waiver of privilege over instructions to expert witnesses, whether express or implied, and the circumstances in which the court can order disclosure, have frequently been misunderstood. The basic rule is contained in Civil Procedure Rule 35.10(3) and (4):

'(3) The expert's report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written.

(4) The instructions referred to in paragraph (3) shall not be privileged against disclosure but the court will not, in relation to those instructions—

(a) order disclosure of any specific document; or

(b) permit any questioning in court, other than by the party who instructed the expert,

unless it is satisfied that there are reasonable grounds to consider the statement of instructions given under paragraph (3) to be inaccurate or incomplete.'

Legal professional privilege is a jealously guarded concept, and the court will, in most cases, be reluctant to order disclosure. Two of the most common difficulties arise in relation to: (i) whether privilege has been waived; and (ii) showing that reasonable grounds exist to consider that the statement in the expert's report is inaccurate or incomplete within the meaning of CPR 35.10(4).

Pickett: mistaken disclosure

In *Pickett v Balkind* [2022] EWHC 2226 (TCC), the parties had instructed expert witnesses on structural engineering and arboriculture. The claimant's structural engineering expert advised that he would not be available on the listed trial date because he was recovering from surgery. Consequently, the claimant asked the defendant to agree to an adjournment. The claimant's solicitors sent the defendant's solicitors a draft adjournment application supported by a draft witness statement from the claimant's solicitor which referred to a letter from the expert. An unredacted copy of the letter was sent to the defendant's solicitors with the witness statement. As well as referring to the surgery, the letter appeared to indicate the claimant's counsel had been involved in drafting or amending the structural engineering experts' joint statement. The defendant's solicitors raised concerns that the principle of expert independence had been breached.

The claimant asserted that relevant parts of the letter were privileged, had been disclosed by obvious mistake, and could not be relied upon. The claimant made an injunction application with a further witness statement from his solicitor saying the expert's comments referred to an aide-memoire the solicitors had prepared regarding the joint statement.

Judge Paul Matthews found the court has the power to prevent the use of documents that have been mistakenly disclosed where justice required. However, the mere fact of mistaken disclosure did not give rise to an automatic assumption that a party should be restrained from using the document or the information it contained. The judge considered that some other element was required.

In *Pickett*, the judge considered that some of what had been written in the document had the necessary quality of confidence to be privileged. However, it was doubtful whether the paragraphs of the letter that revealed a potentially serious breach of expert independence were privileged. If they were privileged, the question was whether privilege survived the sending of the unredacted letter to the defendant. The letter had been sent in error, but the defendant's solicitors had not realised the error and it had not been obvious. Further, it would leave a sense of injustice to let the concern about the potential breach remain unanswered. It would not be right to grant an injunction.

It was argued that, had privilege been waived, then that waiver should apply only to the use of the document in the interlocutory proceedings (in this case, the application to adjourn). The judge said this would depend on whether the content of the disclosed document was relevant only to the interlocutory matters, or went to the merits of issues at trial. There was no justification for treating the different parts of the letter differently.

Turning to the application made in relation to disclosure of the aide-memoire and the defendant's submissions that there were reasonable grounds to consider the statement of instructions to the claimant's expert was inaccurate or incomplete, Judge Matthews said that for CPR 35.10(4) to be engaged, a broad interpretation of the term 'instructions' in CPR 35.10(3) was required. However, CPR 35.10(3) did not require an expert to state the substance of all communications with those instructing them that went beyond providing the facts or factual assumptions for the expert's opinion. The court should not order disclosure merely because there were reasonable grounds to consider the statement did not refer to such communications.

In this case, the court could not tell, without having seen the aide-memoire, whether it set out a factual basis for the expert's opinion and formed part of the expert's instructions, or was something else entirely. Accordingly, the court had to proceed on the basis it did not fall within CPR 35.10 and so it had no power to order its disclosure under that rule. However, nothing in CPR 35.10 prevented a party cross-examining the other party's expert on communications that went beyond providing the factual basis. The rules of privilege could prevent that, but the witness statement referring to the aide-memoire had never been privileged, and any privilege in the letter had been waived. Given the unresolved concerns about the expert's independence, there was a proper basis for cross-examining the expert. NLJ

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