



Neutral Citation Number: [2021] EWHC 176 (Ch)

Case No: BL-2020-000593

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
BUSINESS LIST (ChD)

Rolls Building, Fetter Lane,
London EC4A 1NL
(judgment handed down remotely)

Date: 03/02/2021

Before:

CHIEF MASTER MARSH

Between:

ALAN EDWARDS & CO SOLICITORS
- and -
TWM SOLICITORS LLP

Claimant

Defendant

Hugh Evans (instructed by **DAC Beachcroft LLP**) for the **Claimant**
Benjamin Wood (instructed by **Reynolds Porter Chamberlain LLP**) for the **Defendant**

Hearing date: 19 November 2020

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I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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Approved Judgment**Chief Master Marsh:**

1. This judgment deals with a discrete point concerning legal professional privilege and, more particularly, whether that privilege has been waived. The issue was raised at the Costs and Case Management Conference held on 19 November 2020. I felt unable to determine the issue based upon the information before the court at that date and gave directions for the parties to provide further evidence and submissions. I indicated that I would determine the issue without a further hearing unless I considered that oral submissions were needed. Having read the additional material that has been provided, I am satisfied that a further hearing is unlikely to be of material benefit when weighed against the likely costs involved. Both sides have agreed to the issue being determined without a hearing.
2. On 19 November 2020 I also made an order directing a member of Payne Hicks Beach LLP (“PHB”) to serve:

“a witness statement by a member, partner and/or solicitor as to the circumstances in which the Defendant’s file relating to ELS was provided to Ms Galloway, including whether there were any limitations on that provision. For the avoidance of doubt, this Order does not require PHB to make any statement that would be incompatible with its obligations of confidentiality/privilege to its clients/former clients.”
3. PHB has applied to set aside that order on various grounds and the application is due to be heard on 23 February 2021. It remains to be seen in light of this judgment whether the hearing can be vacated.

Background

4. All the owners of long leases, bar one, in 49 Lennox Gardens, Knightsbridge instructed Enfranchisement & Leasehold Solutions Limited (“ELS”) in 2008 to assist them with the purchase of the freehold of Lennox Gardens pursuant to the Leasehold Reform, Housing and Urban Development Act 1993. The purchase was to be undertaken by a nominee company, 49 Lennox Gardens Limited, owned by the participating leaseholders. ELS instructed the defendant firm of solicitors (“TWM”) to act for it. Ms Amber Galloway was one of the lessees who participated in the enfranchisement exercise. Ms Galloway instructed the claimant firm of solicitors (“Alan Edwards”) to act for her in relation to the enfranchisement and related matters.
5. Ms Galloway brought two claims against Alan Edwards alleging negligence. A claim in the County Court alleged that they had been negligent in relation to the drafting of the section 13 notice concerning her ground floor flat. In the High Court claim she alleged that they had been negligent in relation to a covenant and/or the terms of the new long lease that materially affected her ability to amalgamate the ground floor flat with another flat she owned. Payne Hicks Beach LLP (“PHB”) acted for Ms Galloway. DAC Beachcroft LLP acted for Alan Edwards.
6. The claims were settled by Tomlin orders made in the County Court and the High Court dated respectively 13 and 16 November 2018. Both orders had a materially identical schedule annexed setting out the terms of settlement. Paragraph 9 in each case provided that Ms Galloway was to provide a copy of TWM’s file relating to its

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retainer with ELS to DAC Beachcroft, subject to the proviso that she was entitled to exclude any documents that she reasonably considered to be privileged. A copy of TWM's file¹ was duly handed over to DAC Beachcroft.

7. Having settled the claim brought by Ms Galloway, Alan Edwards has brought this claim in which it seeks a contribution from TWM. The issue concerning privilege between the parties to this claim is whether in the events that have taken place, legal professional privilege in the communications between TWM and ELS has survived or has been waived. The privilege is of course distinct from ownership of the contents of the file.

Has privilege been waived?

8. In order to determine whether ELS' privilege in the TWM file is extant or has been waived it is necessary to consider (1) how a waiver of privilege may be effected and (2) whether on the balance of probabilities the privilege has been waived.
9. It is trite that the privilege belongs to the client, in this case ELS, and only ELS was able to waive it. It has not been suggested that ELS' file was inadvertently disclosed and the privilege was accidentally waived. However, it is possible for privilege to be waived without there being an express statement to that effect. The court is able to infer in an appropriate case from the available evidence that the person or entity who is entitled to assert the privilege has waived that right from their behaviour or from other indirect evidence.
10. TWM was instructed to act for ELS in about April or May 2009. ELS went into administration and subsequently went into liquidation. On 1 June 2017 ELS was dissolved and if the privilege subsisted at that date it would have vested in the Crown as bona vacantia. One of the joint liquidators of ELS, Ms Julie Palmer, has recently confirmed that she is neutral about the privilege and has no objection to Alan Edwards using the documents in the TWM file for the purposes of this claim. However, this confirmation does not assist because ELS has been dissolved and she has no authority to waive ELS' privilege. If waiver has taken place, it must have taken place at an earlier date.
11. It has been suggested in evidence provided by Mr Nicholas Bird of RPC on behalf of TWM that PHB acted initially for the Administrators of ELS and acted for Ms Galloway subsequently. However, I have not seen any documents which directly support Mr Bird's evidence on this point. It seems unlikely that Mr Bird's evidence on this point is given from his own knowledge, albeit that he does not qualify his assertion by providing the source of his knowledge. Mr Evans, who appeared for Alan Edwards, submitted in his skeleton argument dated 7 January 2021 that there is no evidence of PHB acting for ELS.
12. In the absence of assistance from PHB there is no direct evidence from which to draw conclusions on this point. There is, however, secondary evidence that points firmly toward PHB having acted only for Ms Galloway. TWM's file was handed over to PHB by TWM pursuant to requests made to TWM by Andrew Hook, a manager with Begbies Traynor, on 1 and 20 July 2016 followed by a request for the file made in a

¹ I will use file in the singular regardless of whether the papers comprised more than one file.

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letter from PHB to TWM dated 16 August 2016 that enclosed a written authority signed by Julie Palmer on 12 August 2016. The file was provided shortly afterwards. It may have been assumed by RPC that PHB acted for the liquidator because the initial request for the file was made by Mr Hook and Ms Palmer then signed an authority letter. If so, it seems to be that this assumption was misplaced. As Mr Evans points out, the reference used by PHB when requesting the file has the same matter partner initials and file number that was used in the claim brought by Ms Galloway against ELS. Plainly file references that related to matters dealt with by PHB acting for the liquidator would have been different.

13. In 2019, TWM asked PHB to return their original file and that led to a forthright exchange of correspondence between the two law firms. However, I do not regard anything said in those letters to be material.
14. The context in which the request for TWM's file was made is significant. In the claim by Ms Galloway and Alan Edwards the parties had by May 2016 agreed to mediate the dispute and agreed to provide early disclosure. In July 2016 PHB agreed to give disclosure for the purposes of the mediation of the valuation file. It appears likely that PHB went rather further than seeking to obtain only the valuation file because in a letter dated 4 November 2016 they referred to having made enquiries of "relevant parties". It is likely this is a reference to, or at least includes, TWM.
15. RPC have agreed to the court determining the issue of waiver on the basis of the evidence and submissions before it. If there were evidence of PHB acting for ELS, it would have been open to RPC to provide it.
16. I conclude on the balance of probabilities that PHB only acted for Ms Galloway.
17. By July 2016 ELS was in liquidation. Two members of Begbies Traynor were the joint liquidators one of whom was Julie Palmer. At that time the right to assert privilege belonged to ELS and the only persons who could waive the right were the liquidators themselves or staff at Begbies Traynor who were authorised to bind the liquidators. Ms Palmer has been asked to explain the basis upon which she signed the authority letter but, unsurprisingly, she is unable to recall.
18. It is relevant to note that the initial request for the file was made by Mr Hook of Begbies Traynor. Had the request been complied with, the physical file would have been located with the liquidators who were the persons with the ability to waive privilege. If the liquidators had supplied the file to PHB, without an express reservation of some sort, it is clear waiver would have taken place. Instead, the file was handed over to PHB pursuant to the request in their letter dated 16 August 2016 and Ms Palmer's authority letter which does not contain any reservation. It is merely a request to hand the file over to PHB. No illumination can be obtained from PHB's letter itself.
19. I conclude on the balance of probabilities that PHB, acting on behalf of Ms Galloway, requested ELS' liquidators to obtain TWM's file for the purposes of Ms Galloway's claim against Alan Edwards, that Ms Palmer intended to authorise the file being handed over for the purposes of that claim, that she signed the authority letter without any intention to retain ELS' privilege and that by handing over the file pursuant to the authority letter privilege was waived. Waiver therefore took place in August 2016.

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20. It follows that the copy file handed over pursuant to the Tomlin orders was not subject to ELS' privilege.
21. It is right to note that paragraph 9 of the schedule to the Tomlin Orders entitled Ms Galloway to withhold any parts of the file that she reasonably considered to be privileged. The privilege that is being considered in this judgment can only be ELS' privilege. The reservation in the schedule has the appearance of a standard provision that was not directed to particular documents as it would have been apparent that the only persons who could assert ELS' privilege in the file would have been the liquidators. It is not clear why it was included but the absence of an explanation for it does not affect the conclusion I have reached.