<u>Privileged Circumstances: *"Quinn Direct Insurance Ltd v The Law Society* [2009] EWHC 2588 (Ch)</u>

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The recent decision of Peter Smith J in *Quinn Direct Insurance Ltd v The Law Society* [2009] EWHC 2588 (Ch) raises matters of both specific and general interest to Qualifying Insurers of solicitors and their advisers. As to the specific, it provides authority for the applicability of *Dooley v The Law Society* (The Times 16 January 2002) to cases where an insurer seeks access to documents that have been taken by the Law Society upon an intervention. As to the general, the case appears to offer a warning about the need to be alert to issues of confidentiality and privilege when dealing with matters that have not yet been made the subject of a claim but represent what the Minimum Terms and Conditions define as a circumstance, namely *"an incident, occurrence, fact, matter, act or omission which <u>may</u> give rise to a claim in respect of civil liability"* (emphasis added).

The Facts of *Quinn v The Law Society*

The case arose out of a scenario that is increasingly common in the wake of excessive lending in the early 2000's, with Qualifying Insurers facing vast numbers of claims brought by lenders alleging negligence or fraud on the part of solicitors retained to perform conveyancing tasks.

South Bank was a two partner firm of solicitors consisting of Mr Onobrakpeya (specialising in conveyancing) and Mr Ikoku (specialising in immigration). In October 2007 the Law Society intervened in South Bank, taking possession of all the files and documents it could locate. Following intervention, a large number of claims were made against South Bank in connection with conveyancing transactions in which Mr Onobrakpeya had acted. Quinn was South Bank's primary layer insurer for the relevant period.

Quinn began to discover that despite being a small firm, South Bank and particularly its Mr Onobrakpeya had apparently been the focus of a large scale fraud. In essence, it was alleged that lenders had paid funds into South Bank's client account to complete transactions in which Mr Onobrakpeya had acted but that the funds had been dishonestly paid away. The largest single sum paid away in this manner was in excess of £2.7m, but Quinn faced numerous other claims and believed that there were many more potential claims of the same character yet to be made.

Quinn declined to provide Mr Onobrakpeya with an indemnity on the grounds of dishonesty. However, as is so often the case, the position of Mr Ikoku became of great importance: unless it was able to demonstrate that Mr Ikoku was implicated in the dishonest conduct, Quinn faced having to satisfy the claims against South Bank, bar some where it had also declined Mr Ikoku an indemnity as well. Quinn acknowledged that in earlier solicitors disciplinary proceedings Mr Ikoku, in contrast to Mr Onobrakpeya, had not been found to have acted dishonestly and, at the time of its application against the Law Society, no dishonesty was alleged against him by Quinn or the lender claimants. However, it did highlight the fact that Mr Ikoku had been reminded of his personal responsibility for the proper operation of the firm's client account by an investigation by the Law Society in 2006/7 and in the light of this, Quinn took the view (expressed in its skeleton argument) that: *"...it would be extraordinary that, when a small firm has been the subject to such investigation, one of the two partners should have succeeded in plundering millions of pounds from the lender through abuse of the client account without the other partner, freshly reminded of his professional duties, having been aware of (and therefore condoning) what was going on."*

In order to investigate the position further and obtain as much information as possible before making a final decision on coverage, Quinn issued a Part 8 claim against the Law Society, seeking an order requiring the Law Society to give it access to all documents it had taken upon intervention. Although it would have relied on any documents provided that implicated Mr Ikoku in dishonesty to refuse him an indemnity, Quinn also argued that as part of its duty to act in good faith (conferred by the Qualifying Insurers Agreement), it was obliged to take all reasonable steps to search for material that might exonerate him.

The Law Society opposed the application. It had already provided Quinn with files in cases where claims had already been made against South Bank and in cases where Mr Ikoku had signed authorities and access to documents would not prejudice the interests of South Bank's former clients. It had also made it clear that it was willing to provide Quinn with documents in similar circumstances in the future. However, the Law Society objected to the wide ranging order sought by Quinn by which it wanted to inspect **all** the documents it held relating to South Bank, including those that where confidential or privileged and whether or not the documents were relevant to any existing claims that had been made against South Bank by lenders.

Quinn's Submissions

In its written submissions Quinn reasoned that:

1) Clause 6.2 of the policy by which it insured South Bank provided that:

"6.2 Notice and Claims Procedure

In the event of any occurrence which may give rise to liability under this Policy, and regardless of the likelihood or probability of a claim being brought under this policy

a) the Insured shall-

(1) Notify the [insurer] immediately you become aware of any incident or as soon as practicably possible (or in accordance with any agreement made with the [insurer]) and as soon as possible thereafter, provide any other documentation that the [insurer] may require with regard to the occurrence.

(2) ...

(3) ...

(4) Give all such information and assistance as [the insurer] may require."

2) Absent intervention, this clause would have entitled Quinn to call upon South Bank to provide it with the documents it sought from the Law Society had they remained in South Bank's possession;
3) Although the Law Society was now custodian of the documents, there was no logical reason why this should alter Quinn's right to inspect the documents, especially because (i) intervention was always likely to be accompanied by claims making investigation by insurers all the more necessary, and (ii) both intervention and compulsory insurance (with all that entailed) formed part of the same statutory regime provided by the Solicitors Act 1974 to protect the public; and
4) Confidentiality and privilege did not prevent inspection by Quinn because:
    a. This was a case where the fraud exception was engaged either because the transactions did not feature actual clients, or there was a credible case to the effect that South Bank had itself been engaged in a fraud; and
    b. 'Claims made insurance' depended on the provisions enabling (and in practice requiring) the insured to notify circumstances capable of giving rise to claims and the later attachment of claims to the year of notification of circumstances (*Rothschild v Collyear*) and that the notification ought to be as early as possible to allow the insurer to investigate (if it chose) without awaiting the arrival of a claim (which might never been made). It was an inherent part of this that insurers were entitled to see documents in the insured's possession, despite the fact that these were (i) otherwise privileged and (ii) not yet the subject of a claim. The effect of this was that the insurer was brought within the 'circle of confidentiality' entitling it to see the documents of the client of the insured but not to pass them onto the world at large. The inclusion of the insurer in this circle of confidence was because of the insurance scheme being part of the statutory scheme for

public protection established by the Solicitors Act 1974, which in effect created an exception to the general position on confidentiality or privilege where insurers reasonably required access to documents for the purpose of the proper operation of the insurance policy.

The Judgment

Peter Smith J rejected Quinn's application in strong terms. He took the view that the application was simply a fishing expedition to go through all South Bank's documents in the hope they could find something implicating Mr Ikoku and that Quinn's belief that it would be extraordinary if Mr Ikoku had not known what was going on could not justify such an exercise. He apparently did not accept that Quinn was simply taking reasonable steps to obtain all information possible as part of its duty of good faith.

The judge characterised Quinn's case as follows:

"22...Mr [Nicholas] Davidson QC's primary case [on behalf of Quinn] is that the insurance obligation is part and parcel of the statutory regime and that the primary insurer as it is part of the statutory regime is entitled to access to the documents in the same way as the Law Society is when it intervenes...

24. The second basis [on] which Quinn asserts [its] rights to see all documents is under the terms of the policy (clause 6.2a)(4))."

In relation to what he considered to be Quinn's primary case, the Judge concluded:

"40. Given the importance of the obligation to be insured as part of the public aspects of the practice of solicitors and its regulation by the Law Society Mr Nicholas Davidson QC submits that as insurance is a key part any insurer is elevated to the same position as the Law Society. That elevation he submits enables the Claimant to seek possession of all documents like the Law Society would on an intervention.

41. I cannot accept that. First, if that was intended to be the arrangement the statutory regulation could have clearly said so. Second whilst there is a public interest in maintaining an insurance policy the purpose of the regulatory procedure is to enable the Law Society to regulate solicitors. There are many potential reasons for intervention or investigation which do not affect insurance...The whole purpose of the present application is not to exercise any kind of supervisory role in the conduct of the firm; it is merely an attempt to gather evidence

for use to enable the Claimant to refuse an indemnity. Its purpose is therefore completely at odds with the regulatory role and in particular the insurers's alleged role in it...The public at large would be worse off if the exercise is carried out as the Claimant believes it will be as there will be no indemnity...

45. Merely because a solicitor is insured under the provision of the Solicitors Act 1974 as a matter of obligation does not in my view carry with it the implicit suggestion that clients will expect such insurers to be able to go through any of the confidential or privileged documents when they are not involved in any claim or dishonesty unless they agree.

46. I cannot believe the clients would expect that the insurer had a right at any time to inspect their privileged and confidential files when they are not involved in any aspect of a claim or dishonesty."

If Quinn's case had been as the Judge characterised it, his response to it would have been entirely justifiable. However, Quinn's written submissions did not suggest that its role in the statutory framework as a Qualifying Insurer *of itself* justified inspection (as the Judge's summary of its case suggested), but rather that: (i) its rights under the policy to require provision of documents by its insured were engaged and (ii) that its status as a Qualifying Insurer meant it was not to be prevented from seeing documents by reason of privilege or confidentiality. Certainly a review of the submissions of the Law Society shows that it understood this more subtle variation to be Quinn's case prior to the hearing. It may of course be that the matter was put differently in court.

Nevertheless, the manner in which the Peter Smith J addressed the assertion that Quinn was entitled to inspection of the documents by reason of clause 6.2a)(4) of its policy shows that even if the Judge did not properly characterise Quinn's case, this made little difference to his decision to refuse Quinn's application. In relation to clause 6.2a)(4), he concluded that:

1) The policy was between Quinn and South Bank and did not bind the Law Society;
2) South Bank's ownership of its document was removed when it was intervened in by reason of paragraph 12 of Schedule 2 of the Solicitors Act 1974[1];
3) Whether or not the Law Society ought to allow inspection depended on its statutory duties in connection with the documents and not the terms of the policy;

[1] *"12 The powers in relation to sums of money, documents and other property conferred by this part of this Schedule shall be exercisable notwithstanding any lien on them or right to their possession."*

4) The decision of Lightman J in *Dooley*, although it concerned a solicitor wanting to access his working papers and not an insurer, set out the general legal position with regard to when the Law Society ought to allow access to documents it held following intervention;
5) It was clear from *Dooley* that while the Law Society would allow access to papers in appropriate cases, it had a duty to balance the interests of the solicitor (or in this case his insurer) against those of the former client and to preserve client confidentiality;
6) Taking account of the relevant factors there was no grounds for requiring the Law Society to provide inspection:
    a. The Law Society could only consider obliging a specific request for documents, not one put as generally as Quinn's, even if confidential and privileged material were excluded;
    b. There was no allegation of fraud in relation to Mr Ikoku such as to justify it disclosing documents on the basis that the fraud exception to privilege applied, Quinn merely held suspicions that may or may not be justified;
    c. In any event, there was no allegation that South Bank's clients had been involved in dishonesty and privilege in respect of the documents belonged to the clients;
    d. It had been made clear in *Nationwide Building Society v Various Solicitors* [1999] PNLR 52 that absent any exceptions (and there were none in this case) the privilege of the client remains paramount; and
    e. While the investigatory role of the Law Society enabled it to consider documents which ordinarily ought to have been subject to legal professional privilege, this exception did not operate in favour of the Claimant for the reasons the judge gave in rejecting what he termed Quinn's primary submission.

Although appearing to regard it as unnecessary to dispose of the application, the Judge also rejected the submission that Quinn could have relied on clause 6.2(a)(4) even had there been no intervention and no bars to inspection created by privilege and confidentiality:

"60. ...[this clause] is not a freestanding obligation to provide information assistance whenever the insurer requires it. It is clear that when one looks at the clause as a whole the provision is dealing with an occurrence which might give rise to the likelihood of a claim...Here there is no claim; the documents are sought where there has not yet been any claim. I am reinforced in that...view by reference to the Court of Appeal in <u>Gan Insurance Ltd v Tai Ping</u>...It is of course necessary to be cautious in having regard to a decision on the construction of a different document. What the Court of Appeal made clear however...is that the insured is only required to provide information to assist in a claim that is already made.

An insured is not required to provide information solely for investigating whether or not a breach of the insured obligations can be established.

61. It seems to me that the Claimant's request is an attempt to obtain material as against its insured so as to enable it if possible to refuse an indemnity. As the Law Society set out in its skeleton argument (paragraph 62) a conflict will therefore arise and the contractual obligations to cooperate and disclose as set out in the policy cannot be relied upon by the Claimant to enable it to obtain whatever information it wants from the insured. That is the position as set out in the Gan case above and the earlier case of Groom v Crocker..."

Finally, the judge rejected an argument that Quinn could obtain the documents it sought by way of an application under CPR r.31.17, because, among other things, there would have to be an existing, clearly formulated claim by Quinn against Mr Ikoku and in any event CPR 31.17 did not allow a party to override confidentiality or privilege.

Discussion

From a review of the judgment in *Quinn v The Law Society* Peter Smith J's decision is understandable on the facts of the case, especially as Quinn sought an order in the broadest possible terms covering copies of all the documents that the Law Society held. However, the reasoning behind the decision raises issues of specific and general interest justifying the close attention of Qualifying Insurers and their advisers.

As mentioned above, the scenario in *Quinn v South Bank* is an increasingly familiar one and doubtless insurers will be considering how to access documents held by the Law Society both now and in the future in similar circumstances to those that faced Quinn. The Judge was clear that to obtain access insurers cannot simply rely upon their policy rights as against the intervened firm, but will need to satisfy the Law Society that providing access is consistent with the following approach approved by Lightman J in *Dooley*:

"The Society is a public body subject to public law duties. These govern its decision whether to allow access to the documents and if so on what terms. The Society is legal custodian of the documents with responsibility to deliver them to the solicitor's former clients or to their order and in the meanwhile to preserve client confidentiality and the integrity of the files. Its primary concern must be to protect the interest of the solicitor's former clients..."

As illustrated in *Quinn v The Law Society*, in cases where a claim has been made against the insured solicitor, this will not cause any difficulty for the insurer and they will be able to obtain the documents in the same way they would if the firm had not been the subject of intervention. Similarly, the impression from *Quinn v The Law Society* is that where an insurer

can establish a genuine policy right to documents motivated by a desire to investigate a claim (as opposed to building a case for an indemnity) and access does not threaten confidentiality or privilege, then the insurer's access to documents will not be prejudiced simply because of intervention. Accordingly, it appears that while in principle the starting point of an application for access to the Law Society is going to be *Dooley*, in practice if insurers can demonstrate they would have been entitled to the documents under their policy rights they will not be in any worse position simply because of intervention.

However, the terms of Peter Smith J's judgment in *Quinn v Law Society* appears to suggest that the rights of an insurer to inspect relevant documents, even where there has been no intervention, may be severely constrained if the documents are subject to privilege and confidentiality (as many will be) and no actual claim has been brought.

As set out above, from its skeleton argument it seems that Quinn did not argue that their right to see the documents held by the Law Society arose merely because of their status as a Qualifying Insurer, but rather that while it still needed to establish a policy right to the documentation sought, that right was not constrained by confidentiality and privilege because of its status as a Qualifying Insurer. It was by this argument that they sought to overcome the Law Society's contention that provision of the documents would be contrary to its obligation to protect the interests of former clients. In support of its position, Quinn cited the reliance 'claims made' insurance places upon insureds notifying circumstances and providing documents to allow investigation and argued that in furtherance of such investigations insurers of solicitors are entitled to call for documents held by their insureds despite the fact they are (i) otherwise privileged and (ii) not yet the subject of a claim. It argued this was in effect an exception to the general position on confidentiality and privilege and that the exception showed that Qualifying Insurers, like the Law Society on intervention, were admitted to the circle of confidentiality permitting consideration of a client's documents, even though it could not communicate their contents to the world at large. The Law Society, by their counsel Marcus Smith, contested these submissions in the strongest terms stating that the suggestion insurers were entitled to view privileged and confidential documents in relation to matters not subject to a claim was obviously wrong and contrary to principle: Qualifying Insurers were only entitled to inspect privileged and confidential documents when a claim had actually been brought by a client, thus waiving their rights to privilege and confidentiality.

Peter Smith J did not specifically address this strand of Quinn's argument in his judgment. However, the terms of his judgment suggest he rejected it, particularly paragraphs 46, 58 and 59:

"46. I cannot believe the clients would expect that the insurer had a right at any time to inspect their privileged and confidential files when they are not involved in any aspect of a claim or dishonesty...

58. ...The investigatory role of the Law Society enables it to consider documents which ordinarily ought to have been the subject matter of legal professional privilege....I do not think that exception operates in favour of the Claimant.

59. ...privilege of the client remains paramount..."

At the very least, the terms of the judgment and the position adopted by the Law Society in response to Quinn's submissions, mean that the law on the rights of Qualifying Insurers wishing to investigate a circumstance is uncertain.

Prior to now it has been a commonly held view that where an insured notifies a circumstance its Qualifying Insurers are entitled to review privileged and confidential material in order to investigate the circumstance for reserving and tactical purposes on the basis that they are within the 'circle of confidentiality'. Similarly, in South Bank-type cases where insurers face a number of claims of a particular type leading them to suspect they are only dealing with the tip of the iceberg, many have thought that Qualifying Insurers are entitled to sample files relating to matters that are not yet the subject of a claim, again to fully understand the extent of their insured's potential exposure for reserving and tactical purposes, but also feeding information gleaned from that exercise into coverage decisions.

However, it seems that the law may well be that prior to a claim actually being made by a former client investigations cannot extend to consideration of privileged or confidential material, despite the fact that Qualifying Insurers know a claim is very likely to eventuate, either by reason of a notification or because they are in possession of evidence which suggests their insured may face a number of claims of the same type as one already made arising out of the same set of circumstances. If this is the law, then insurers are severely constrained in their ability both to judge the extent of their potential exposure for reserving purposes, and to make informed decisions on matters of strategy, prevention of future claims of the same or similar type and so on. Faced with the common, South Bank-style scenario, Qualifying Insurers may well be forced to guess at the extent of their exposure to potential claims other than those already brought, even though all the indicators are that their insured has been the focus of a large scale fraud and they plainly have an understandable and legitimate interest in discovering the extent of that fraud so that they can prepare to meet it financially and tactically and understand the background properly to allow a judgment to be made on matters of aggregation and dishonesty. Such a strict

position in relation to legal professional privilege and confidentiality obviously has the potential to cause great practical difficulties for Qualifying Insurers.

As privilege and confidentiality do not simply apply to documents, such a strict position would mean that if a solicitor notifies a circumstance that can only be explained properly by reference to privileged and confidential matters, insurers may be left very ignorant of what they are facing, being deprived not only of relevant documents, but also of any meaningful explanation of the matter from the insured solicitor, who must keep to himself everything he knows or controls that is privileged and confidential, regardless of whether it is in documentary form or not.

What of the South Bank-style case, where a Qualifying Insurer is especially interested in accounting information to assess whether a potentially innocent partner must have known or appreciated that his partner was being dishonest? Can the Qualifying Insurer call for and review client account ledgers, period reconciliations and so on, or are the contents of those documents protected as privileged and confidential despite the fact they could not in themselves give any meaningful understanding of, or materially intrude into, the clients' affairs? If the client account information can be called for, can the insurer also view documents necessary to understand them? After all, without this complimentary right there would probably be little value in reviewing the account information which might amount to little more than a selection of figures out of context.

Of course, an insurer can still undertake some investigation where there has only been notification of a circumstance. There does not appear to be any reason why it cannot call for non-privileged and non-confidential documents from the files relating to the circumstance, for example the *inter partes* correspondence and pleadings in a lost litigation case, without first obtaining the client and potential claimant's consent. A review of these 'open' documents will allow some understanding of the matter, but of course it may well be that the potential claim concerns a negligent omission to give advice, which can only be assessed properly by probing into the confidential and privileged communications.

Concern among Qualifying Insurers as to these practical difficulties will be increased by the fact that a rejection of Quinn's argument that they enjoyed an exception to the general rule of privilege and confidentiality (if indeed it was rejected by Peter Smith J) may well have been consistent with the pre-existing law. In *Quinn v The Law Society*, The Law Society rightly pointed out that while Quinn asserted that the law recognised *"an exception to the generally established confidentiality or privilege"* when insurers investigated a circumstance, it produced no direct authority to support this proposition. The Law Society also emphasised that legal professional privilege is *"a fundamental human right long established in the*

common law", *per* Lord Hoffmann, R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax [2003] 1 AC 563, para 7.

Furthermore, the foundation of the doctrine of implied waiver of privilege, upon which insurers generally rely to access *prima facie* privileged documents, does not assist where there is a mere circumstance and no actual claim. In this regard, the detail of Colman J's explanation of the leading case on implied waiver, *Lillicrap v Nalder* [1993] 1 WLR 94, needs to be remembered:

"The true analysis of what the Courts are doing in such cases of so-called implied waiver of privilege is, in my judgment, to prevent the unfairness which would arise if the plaintiff were entitled to exclude from the court's consideration evidence relevant to a defence by relying upon the privilege arising from the solicitor's duty of confidence. The client is thus precluded from both asserting that the solicitor has acted in breach of duty and thereby caused the client loss and, to make good that claim, opening up the confidential relationship between them and at the same time seeking to enforce against that same solicitor a duty of confidence arising from their professional relationship in circumstances where such enforcement would deprive their solicitor of the means of defending the client...The underlying unfairness which the principle aims to avoid arises because the claim is asserted and the professional relationship opened for investigation against the very party whose duty of confidence is the basis of the privilege. It is against the unfairness of both opening the relationship by asserting the claim and seeking to enforce the duty of confidence owed by the defendant that the principle is directed." [2]

As long as no claim has been brought by a former client against a solicitor, the unfairness at which the principle of implied waiver is directed does not arise. The client is not seeking to open up a relationship while at the same time insisting on confidentiality; rather the relationship remains wholly unopened, even if the solicitor and its insurer anticipate it being opened in the future by reason of a circumstance having been notified. Therefore, any suggestion that insurers are entitled to inspect privileged and confidential material at a circumstance stage does not gain support from the authorities upon which insurers generally rely to access document. It is notable that Charles Hollander QC in *Documentary Evidence* (10th Ed., **19-40**) stresses that:

"...Implied waiver of privilege arises in litigation between solicitor and client. The client cannot claim privilege for communications between himself and the solicitor who is being sued relevant to the issues between them in the litigation. It is put on the basis that by

[2] See *NRG v Bacon & Woodrow* [1995] 1 ALL ER 976, 986

putting the relationship in issue, there is an implied waiver...Lillicrap decides no more than this. There is no basis for any inroad into the claim for privilege beyond this."

It might be said that the view that insurers have absolutely no right to examine privileged and confidential documentation where no actual claim has been made is an extreme and purist one, but it is worth remembering the constraints placed on lawyers facing wasted costs applications, in which cases the authorities have been at pains to stress that the privilege attaching to documents and their confidentiality belongs to the client and is inviolable.

Conclusion

It is unfortunate that Peter Smith J did not deal more explicitly with Quinn's claim that they could review confidential and privileged document before a claim was made because of their membership of the 'circle of confidentiality'. However, *Quinn v The Law Society* suggests that Qualifying Insurers ought not to assume that they can rely on such membership and would be wise to reflect very carefully on the difficulties of privilege and confidentiality with their advisers. These considerations will also require careful thought by lawyers both when they are acting under a joint retainer for insurer and insured after a circumstance has been notified, and when they are instructed by the insurers to examine and advise upon coverage, especially in a South Bank-style case. It appears that Qualifying Insurers will need to keep in mind that despite their pivotal role in the statutory scheme designed to protect the public, they may not have special rights to access information.

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