



ARTICLE

A Brief Review of Pickett v Balkind

Injunctions, Privilege and the Conduct of Experts and Instructing Solicitors

This article addresses the recent decision in *Gary Pickett v David Balkind* [2022] EWHC 2226 (TCC) in which the High Court refused an injunction to prevent an opposing party using a document allegedly disclosed by mistake.

Before delving into the case, it is also worth referencing another judgement earlier this year in *Patricia Andrews & Ors Kronospan Limited* [2022] EWHC 479 (QB) in which an expert was found to be engaging in discussions with the instructing solicitors in respect of the expert's report for more than mere amendments for typographical and formatting issues. This led to the Defendant submitting an application to revoke permission to rely on the Claimant's expert evidence and was heard before Senior Master Fontaine. The Defendant's application submitted that the conduct of the Claimant's expert was not independent and instead the expert had acted as an advocate for the Claimant. The Claimant's solicitors accepted that at least 16 comments were provided to the Claimant's expert which related to "advice and suggestions as to content" and conceded that there had been "serious transgressions." On this point the Senior Master said:

"It is important that the integrity of the expert discussion process is preserved so that the court, and the public, can have confidence that the court's decisions are made on the basis of objective expert evidence."

This leads us to *Pickett v Balkind* where, once again, an expert is found to have been actively involving counsel by inviting feedback on a Joint Statement.

The Background

The case of *Pickett v Balkind* relates to a tree subsidence claim valued at approximately £356,000. The parties had permission to engage expert evidence from an arboriculturist and a structural engineer. In respect of structural engineering matters, Mr. Gerry Cutting was retained by the Claimant and Mr. Timothy Pither for the Defendant. The Joint Statement of the expert structural engineers is dated 18 May 2022.

On 3 May 2022 the Claimant's expert issued a letter to his instructing solicitors advising, amongst other things, that he would be unable to attend a hearing in July due to the need for an operation. On 9 May 2022 the Claimant's solicitors advised the Defendant's solicitors of this event and was asked to consent to an adjournment.

For the Defendant's consideration, the Claimant's solicitors were asked to issue a draft application. The Claimant, in so doing, also exhibited an unredacted copy of a 3 May 2022 letter to the witness statement of

the Claimant's solicitor. The letter in part related to the Claimant's expert being unable to attend court as he was due to have eye surgery. However, the same letter also provided evidence that the expert had been seeking feedback and assistance from the Claimant's solicitors in the drafting of the Joint Statement.

Upon review, the Defendant's solicitors reminded the Claimant's solicitors of the 'Technology Construction Court Guide',¹ specifically paragraph 13.6.3 thereof which states:

"Whilst the parties' legal advisors may assist in identifying issues which the statement should address, those legal advisors must not be involved in either negotiating or drafting the experts' joint statement. Legal advisors should only invite the experts to consider amending any draft joint statement in exceptional circumstances where there are serious concerns that the court may misunderstand or be misled by the terms of that joint statement. Any such concerns should be raised with all experts involved in the joint statement."

On 8 June 2022 the Claimant's solicitors asserted, in an email to the Defendant's solicitors, that the letter of 3 May 2022 "is privileged and has been disclosed inadvertently by obvious mistake" and further noting that the comments were merely an "aide memoire."

The Defendant then submitted a cross-application seeking production of the aide memoire and for permission to cross examine Mr. Cutting at trial regarding the preparation of the Joint Statement.

Decision

HHJ Paul Matthews, sitting as a High Court Judge ('the Judge'):

- Rejected the application for an injunction to prevent the Defendant from using the letter; and
- Refused to order the production of the 'aide memoire' but gave permission to cross examine;

The Injunction

Despite arguments by the Claimant's solicitors that the communication was privileged and was mistakenly disclosed, the Judge concluded:

"77. In my judgment, if there is a deliberate disclosure of information by a party to its opponent, even for an interlocutory purpose, it ceases to be confidential as against that party, and hence loses its privilege."

He further added to the justification for not separating out those statements within the letter by stating:

"78. Moreover, I see no justification for separating out, and treating differently, the different parts of the letter in this case. As I pointed out earlier, the first four paragraphs appear to reveal a breach of the expert independence principle. To my mind those paragraphs are less worthy of protection than the remainder, but the remainder is the part which most justifies the reference to the letter in the witness statement of the solicitor. Accordingly, I conclude that privilege has been waived in the whole of the letter of 3 May 2022, and (as I have already said) no injunction should be granted to restrain use of the information contained in it."

It was the opinion of the Judge that the Defendant's solicitors had relied upon the unredacted letter "in order to pursue a concern, which I consider to have been entirely legitimate and proper, that a breach of the TCC Guide had taken place."

The Aide Memoire

The Defendant's cross application contained a request for the production of the aide memoire and permission to cross examine Mr. Cutting. The Judge was not satisfied that the aide memoire formed part of the experts' instructions and the court had no power to order disclosure under CPR 35.10, noting:

"95. ...I refuse to order disclosure of the aide memoire, or of any "comments", "suggestions" and "requests" in relation to the experts' joint statement or Mr. Cutting's report."

¹ HM Courts & Tribunals Service - Second Edition Issued 3rd October 2005, fifth revision

The Judge did consider however that there was a basis for allowing the cross-examination of the expert on the aide memoire as it went to the independence of expert, saying:

“95. On the other hand, but subject to any contrary direction of the trial judge, the defendant may cross-examine Mr. Cutting (but not Mr. Pryce) in relation to any such aide memoire, “comments”, “suggestions” or “requests”.”

The Judge did not feel it appropriate to question the independence of Mr. Pryce, as concluded above and further noted:

“94. The fact that there is a proper basis for cross-examining one expert on his independence does not be itself raise any presumption of such basis in relation to another expert, and there is not material before me in relation to Mr. Pryce to raise any suggestion of compromised independence.”

This judgement illustrates a number of points. In consideration of the injunction, whilst an injunction may be warranted where there is an obvious mistake, the court is entitled to refuse the granting of an injunction where such privileged information shows a wrongdoing of the party disclosing the information.

This case, and the earlier case of Patricia Andrews & Ors Kronospan Limited, is a reminder that experts must retain their independence from their instructing solicitors. Legal advice to experts, when preparing a Joint Statement, should be limited to “assisting in identifying issues which the statement should address.” That said, legal advice may be extended to both experts in exceptional circumstances where there are “serious concerns that the court may misunderstand or be misled by the terms of the joint statement.”

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