# England and Wales High Court (Technology and Construction Court) Decisions



**Neutral Citation Number: [2017] EWHC 29 (TCC)**
Case No: HT-2015-000345

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice
Rolls Building,
Fetter Lane, London, EC4A 1NL
13 January 2017

B e f o r e :

**THE HON MR JUSTICE COULSON**

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**Between:**

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| **Lalana Hans Place Limited** | **Claimant** |
| **- and -** | |
| **Michael Barclay Partnership LLP** | **Defendant** |

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**James Leabeater (instructed by MacFarlanes) for the Claimants**
**Tim Chelmick (instructed by DAC Beachcroft LLP) for the Defendants**
**Hearing date: 13 January 2017**

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**HTML VERSION OF JUDGMENT**

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**The Hon. Mr Justice Coulson :**

1. This is an application by the defendant, dated 6 January 2017, that the claimant be required to answer a request for further information, going to the advice given by the claimant's expert at the time the

decision was taken to undertake remedial work. There is some urgency because the trial in this matter starts on Monday week and, as I have indicated to the parties, I am likely to be the trial judge. I propose to deal with the application by first setting out the background, and then going on to deal with the issues of lateness, relevance and privilege. I am very grateful to both counsel for the clarity of their submissions, and the fact that they were able to keep those submissions within the time estimate, notwithstanding the relatively complex issues to which this application gave rise.

2. This is a claim against the defendant engineers arising out of their alleged failure adequately to design basement walls for a luxury development near Harrods in Knightsbridge. Questions were raised about their design as the works were being undertaken in late 2014.

3. A separate firm of engineers ("WSP") were brought in to act as checking engineers because of the concerns which had been expressed about the defendant's calculations. It is the claimant's case that, on the basis of WSP's advice, remedial works were carried out to the walls at basement level 4. At the same time, that is to say late 2014, the claimant instructed Mr Kishan de Silva, of William J Marshall Consulting Engineers, as an expert engineer in respect of the litigation that was, at that stage, already contemplated. In general terms, the advice produced by Mr de Silva, a highly experienced expert, is covered by litigation privilege. That is a point to which I shall return in a moment.

4. Perhaps unusually, I am told that there will be no direct evidence from WSP at the trial, notwithstanding the reliance that the claimant places on the advice that WSP are said to have given at the time. Disclosure has, however, been made of all their contemporaneous written advice.

5. It is clear from my limited knowledge of the case that discerning precisely what WSP were advising at any given time is not an entirely straightforward exercise. That is because it appears that the last formal report that WSP produced was dated 28 November 2014, but the contemporaneous documents which I have been shown by both counsel indicate that detailed discussions and decisions about the adequacy of the defendant's design, and the appropriate remedial works, were going on throughout December 2014 and into January 2015.

6. These documents show that Mr de Silva was involved in at least one discussion with WSP, and certain documents emanating from him were provided to WSP. It is those events which have led to this Part 18 request. I set out that request as follows:

> "1. Did Mr de Silva provide calculations, give advice and/or discuss the decision to instruct remedial works at levels B3 or B4 with Finchatton [the claimant's project managers]? If so, please set out full details of these discussions.
>
> 2. Did Mr de Silva comment on the work being carried out by WSP in relation to the decision to instruct remedial works? If so, please provide full details of his involvement with checking WSP's work and any discussions he had with either WSP or Finchatton.
>
> 3. Did Mr de Silva have any direct contact with WSP and/or Finchatton when the decision to instruct remedial works was being taken? If so, please set out full details of these discussions.
>
> 4. Were any calculations or other documents produced by Mr de Silva sent to, shown or otherwise discussed with WSP? If so, please (1) provide copies of any such documents; and (2) set out full details of these discussions.
>
> 5. Please provide full details of any other involvement Mr de Silva had in respect of the decision to instruct remedial works."

7. The first point taken by the claimant is that the application is made too late (just a working week before trial). It is said that it will disrupt the preparations for trial if attention now has to be given to this request, and that it should have been made weeks, if not months, ago. I quite accept that the application is made late and should have been made at the Pre-Trial Review last month, if not earlier. In some circumstances, that conclusion would be sufficient on its own for the court to refuse the defendant's application.

8. However, in my view that would not be an appropriate response here, for two reasons. First, if I concluded that the application went to an issue that was relevant to the fair disposition of the trial, I should not necessarily refuse it simply on grounds of delay. Secondly, in those circumstances, the delay would fall to be considered by reference to questions of potential prejudice: if the application, and any work to be done as a consequence of the application, put the trial date in jeopardy, or comprise an unfair burden on the claimant so close to trial, then that would again be a complete reason for refusing the application. If, on the other hand, I thought the application went to an important issue and could be comfortably dealt with by the claimant before the trial, then I should allow it.

9. I am in no doubt that, if I granted the application, the claimant could deal with the request, and deal with it comfortably, as part of its ongoing preparations for trial. It is slightly ironic, but not uncommon in applications of this kind, that a good deal of the work to be done in answering the request, if that is what I order, has already been done in the detailed witness statement of Mr Wass (the claimant's solicitor) and in Mr Leabeater's helpful skeleton argument.

10. In my view, the first critical question is the question of relevance: does the request for further information go to a relevant issue in this case?

11. It is the claimant's pleaded case that the decision to carry out the remedial works, the cost of which forms the basis of their claim for damages against the defendant, was based on WSP's advice. I have already explained why that is not an entirely straightforward matter on the facts, and that a certain amount of detective work may be necessary to establish just what that advice was, and on what it was based. That then leads to this question: Were Mr de Silva's views relied on or taken into account by WSP at the time that they were giving the advice on which the claimant now relies? If Mr de Silva's views were a part of the advice (directly or indirectly) that was given by WSP then, subject to questions of privilege, they would be potentially relevant.

12. If advice is given on a particular 'transaction' by X, even if that advice is based upon or relies on other advice which may be privileged, then the usual position is that the interests of fairness require that advice, including the privileged element, to be disclosed in full: see ***Fulham Leisure Holdings v Nicholson Graham Jones*** [2006] EWHC 158 (Ch). That is common sense: if that did not happen, then there would be a risk that the court could not meaningfully address the issues between the parties as to what the advice was at the time, and whether it was reasonable, because the court would not have before it all the elements of the advice or the reasons for it.

13. Of course, I cannot today reach any sort of concluded view as to whether, as a matter of fact, Mr de Silva's advice was relied on or taken into account by WSP. I have however been shown documents, again by both counsel, which lead me to conclude that it is at least arguable that some of Mr de Silva's opinions were taken into account by WSP. Of course, it may well be that those opinions simply reinforced views that WSP had already come to. But in my view, the contemporaneous documents plainly show that WSP were keen to ensure that their views aligned with those of Mr de Silva.

14. Although it is unnecessary to set them all out, I consider that Mr de Silva's role can be seen in a number of the documents I was shown. By way of example, I deal with one very short span, between 15 and 22 December 2014:

    a) In an email dated 15 December 2014, WSP were asking the project managers whether there was any material from the expert witness before a conference call. The response was that there was nothing from the expert witness for that call, but since he was taking part in the call, queries could be raised with him at the time. Mr Leabeater says that the claimant's solicitor participated in the call, and so privilege is now claimed in relation to it.

    b) That means that there is a potential difficulty with a subsequent email from WSP dated 17 December 2014, which has been disclosed without redaction. That email refers expressly to the conference call, to the content of that call, and to the fact that there was an "alignment", on the potentially important matter of pore water pressures, between the views of WSP and the view of Mr de Silva. I come back to questions of waiver of privilege in a moment.

c) The email of 17 December 2014 is also important because, in the action plan that WSP set out, they said expressly that "pore water pressure loads, safety factors, and which design standards should be used", were matters "to be agreed" between WSP and Mr de Silva. That again appears to demonstrate that it is at least arguable that Mr de Silva's views were being canvassed and relied on at the time by WSP.

d) Finally, in this very brief canter through the contemporaneous documents, there are two further documents from WSP which again suggest that they were keen to elicit Mr de Silva's assistance, whether directly or indirectly. The first is an email of 18 December 2014, in which they set out three items on which they required clarification from Mr de Silva before completing their calculations check. The second is an email of 22 December 2014 which reviewed what is described as "the email below" with Mr de Silva's comments, and sets out a variety of steps to be taken. The email below is redacted and I am told by Mr Leabeater that it was sent by the claimant's solicitors.

15. As I have indicated, I can reach no concluded view as to whether WSP relied on, or took into account the views, of Mr de Silva at the time, but I hope that it is plain from my analysis of the documents that it is at least arguable that they did. That seems to me to be sufficient for the purposes of this application. Moreover, I do not consider that to be surprising. If the claimant had gone to the trouble and expense of engaging an expert with the experience of Mr de Silva at that early stage, it might be thought to be rather odd if his views had not been canvassed on what were the critical questions as to adequacy of the design and an appropriate remedial scheme.

16. That then brings me to the question of privilege. The claimant asserts that the application should be refused because Mr de Silva's advice was privileged (because he was the litigation expert) and that the application is an illegitimate attempt to seek privileged material.

17. The first point to make in response is to note a potential confusion between the request for further information, on the one hand, and questions of waiver and privilege, on the other. I reiterate that this application concerns a request for further information. If I consider (as I do) that the claimant should answer that request then, if the claimant maintains that some of the material that would otherwise be provided by way of answer is privileged, it can set out such a case in its answer to the request. The question of privilege can then be dealt with separately, by reference to a clearly-stated case. So too can any response asserting waiver. Neither questions of privilege nor questions of waiver would prevent the claimant from answering the request.

18. At the outset of the hearing, I indicated that I did not think that I could determine today whether or not the particular advice that might be caught by the request was privileged. I remain of that view. For one thing, I do not have the un-redacted documents. Moreover, the question of privilege is only tangential to this application, and so was not a matter that was fully explored during the relatively limited hearing this morning.

19. There is of course the possibility that the relevant elements of Mr de Silva's advice were not privileged. That is because it is not uncommon for a litigation expert, who is involved early in the relevant decision-making process, to give advice as to what should be done or not done. That advice may then be a matter of fact relevant to, for example, a decision to demolish or, as in this case, a decision to carry out costly remedial works. Notwithstanding his instructions as a litigation expert, in those circumstances (and subject of course to the facts) that is a matter that may properly be the subject of cross-examination of the expert: see ***McGlinn v Waltham Contractors Limited*** [2007] EWHC 698 (TCC).

20. As I pointed out in argument, that situation often arises in fire cases. There, forensic experts are engaged as litigation experts, sometimes on the day of, or the day after, the fire itself. Their expressions of opinion and advice are generally covered by CPR Part 35 litigation privilege. But such experts can sometimes carry out their own investigations at the scene. They can interview eye witnesses. Privilege does not usually attach to those aspects of their work and the material produced, such as their notes of the interviews, are disclosed to all parties.

21. Accordingly, although I make plain that I cannot decide the question of privilege today, I can see arguments that might suggest that any advice from Mr de Silva about the need for a remedial scheme, to the extent that it formed a part of WSP's advice, might not be privileged. Beyond that, I cannot go.

22. I reiterate that, because I am not dealing with privilege, I cannot deal with concomitant questions of waiver. Thus the waiver points taken by the defendant would also have to be dealt with at the same time as any separate argument about privilege.

23. Finally on this point, I should address Mr Leabeater's argument that, in one sense, all of this is irrelevant, because the question of the adequacy or otherwise of the defendant's design/calculations will be decided by way of expert evidence. I agree with him that expert evidence will be a critical, perhaps the critical, element of any such assessment. But experience shows that such an assessment cannot usually be done in a vacuum, and a careful ascertainment of the factual background as to how the relevant decision (in this case to carry out remedial works) came to be made, is usually a necessary element of the resolution of this kind of dispute.

24. For those reasons, I have concluded that the claimant should answer the request. The approach that the claimant takes when doing so is obviously a matter for the claimant. I do not want this aspect of the case to grow out of all proportion to its significance, and I should reassure Mr Leabeater that the court is acutely aware of the risk of a defendant obtaining information and then saying that there should be yet further disclosure because of a yet further alleged waiver.

25. I ought also to stress that I accept entirely that it is for a claimant to decide whether or not it wants to waive privilege, and no criticism of any kind can be levelled at a claimant who concludes that it wishes to retain any privilege that it seeks to assert over the relevant documents. As to that, Mr Leabeater reminded me that in ***Edwards-Tubb v J D Wetherspoon PLC*** [2011] 1 WLR 1373, the Court of Appeal clearly stated that no party can be criticised for claiming privilege and declining to waive it, nor can any adverse inference be drawn against that party from his claim for privilege. If privilege is asserted in respect of Mr de Silva's documents and the assertion is made out, then that is the end of the matter.

26. For these reasons, I conclude that the claimant should answer the request and the claimant can decide whether it wishes to continue to assert privilege or not. Any subsequent debate on that topic can be dealt with at the start of the trial.

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