

Dispute Resolution
Case Law Update
Rosling King LLP



Background

In a recent decision of the Court of Appeal, Lord Justice Males clarified and strengthened the current law on legal advice privilege in situations where clients have instructed their solicitors to convey their instructions to a third party. This case originates from a dispute over a Sale and Purchase Agreement entered into by the arhgu, Raiffeisen Bank international AG (the “Bank”), and the Defendant, a special purpose vehicle called Asia Coal Energy Ventures Ltd (“ACE”). The Second Defendant, Ashurst LLP, provided a Solicitor’s Confirmation to the Bank whilst acting for the Defendant’s financiers, an Indonesian company named PT Sinar Mas Multiartha TBK (“SMM”).

The Bank controlled a 23.8% shareholding in Asia Resource Minerals Plc (“ARM”) which was to be purchased by ACE. SMM was to provide the financing for this transaction paying for the shares, loans and other collateral at a price of US \$120 million. Part of the consideration included Ashurst setting up an Escrow Account and providing an official Solicitor’s Confirmation confirming that they hold the funds of US \$85 million and have “irrevocable instructions” to transfer those funds upon the signing of the Escrow Agreement. In the event that an Agreement was not signed within 30 days, Ashurst were to continue to hold the funds pending an alternative arrangement being agreed between the parties.

It transpired that the Escrow Agreement was never signed, and no alternative arrangement was entered into. The Bank transferred the ARM shares to ACE for \$50 million, however, ACE refused to pay the outstanding US \$70 million claiming there were various “deliverables” still due from the Bank. By the time the dispute had arisen, a series of payments had already been made out of the Escrow Account at Ashurst which reduced the balance to zero.

The primary claim is brought by the Bank against ACE for the payment of the outstanding purchase price. The Bank also brought an additional claim against Ashurst under the Solicitor’s Confirmation on the basis that it should have continued to hold the US \$85 million security available for enforcement of any judgment against ACE. It is this second claim against Ashurst that is the subject of the recent Court of Appeal decision.

The Decision at First Instance

Moulder J considered the Bank’s claim at first instance. The question to be decided was whether, by providing the Solicitor’s Confirmation, Ashurst had undertaken to the Bank not to comply with any further instructions to transfer funds out of their client account which would bring the balance below the US \$85 million threshold. As part of the claim, the Bank made a Request for Further Information from Ashurst for, inter alia, any document containing the “irrevocable instructions” and any document that changed the “irrevocable instructions”.

In determining whether Ashurst should be ordered to comply with the Bank’s request, the issue turned on whether the instructions had the benefit of legal advice privilege and, if so, whether this privilege had been waived. In order to attract legal advice privilege, the communication between Ashurst and SMM must have been confidential and for the purpose of obtaining legal advice. The communications do not need contain specific legal advice, provided that they are directly related to the performance by the solicitor of his professional duty as legal adviser of

his client. If this is the case, they form part of the “continuum” of communications.

The Bank’s main argument in support of their contention that that instructions were not privileged was based on the long standing case of *Conlon v Conlons Ltd [1952] 2 All ER 462* and the proposition that “legal professional privilege did not extend to a communication which the client instructed the solicitor to repeat”. It was the Bank’s view that SMM’s instructions to Ashurst authorising the Solicitor’s Confirmation would not have the benefit of privilege based on the Conlon proposition. It was the view of Moulder J that *Conlon* should be distinguished because the circumstances in question were different to those in *Conlon*. Ashurst was not acting as agent of SMM and SMM had not “waived privilege” by putting in issue the authority of Ashurst to convey their instructions. Therefore, the underlying instructions had not ceased to be confidential and, with the communications forming part of the completion arrangements, they were inextricably bound up with the legal advice Ashurst would have given to SMM. Accordingly, Moulder J held that documents containing or evidencing the instructions were privileged.

It is on this issue of privilege that the appeal was brought. In its submissions, the Bank placed particular reliance on the *Conlon* decision.

The Decision on Appeal

Males LJ gave the leading judgment in the Court of Appeal in a unanimous decision to dismiss the Bank’s appeal.

Males LJ settled the *Conlon* issue with the aid of some Australian decisions, *Benecke v National Australia Bank* (1993) 35 NSWLR 110 and *Moreay Nominees Pty Ltd v McCarthy* (1994) 10 WAR 293. The Australian courts in *Benecke* and *Moreay* faced similar issues raised by *Conlon*. The Australian courts distinguished *Conlon* in that it only applied in cases where the client questioned their solicitor’s authority to act on their instructions. This led to the conclusion that whilst the initial instructions given by the client to their solicitors were confidential and therefore covered by privilege, by putting in issue the content of those instructions the clients were held to have waived that privilege.

Males LJ applied this reasoning in the English legal context to distinguish *Conlon* and reject the Bank’s submissions. Males LJ made it clear that the decision in *Conlon* does not support the proposition that legal advice privilege does not extend to a communication containing information which the client instructs the solicitor to repeat. As a result of this decision *Conlon* has now been confined to situations where the client has put in issue the instructions that were given to their solicitor and, this not being the case between SMM and Ashurst, the Bank could not rely on *Conlon* in the case at hand.

Males LJ also considered the second limb of the privilege test requiring the communications to be for the purpose of obtaining legal advice. It was the view of the Court that Ashurst’s role must have included advising SMM as to the meaning and effect of the Solicitor’s Confirmation, the significance of the “irrevocable” statement, and the circumstances in which SMM would need to release the funds. The context that Ashurst received the instructions from SMM was

February
Página 4

therefore, by its nature, a legal context directly related to the performance by Ashurst of its professional duties. It was also the judgement of the Court that none of the communications could be isolated specifically to constitute “the instructions”, they all formed part of a “continuum of communications” and were therefore all privileged.

Males LJ concluded, with the agreement of the rest of the Court, that he agreed with Moulder J that the documents sought by the Bank were indeed privileged and he dismissed the appeal.

Commentary

The Courts continue to strengthen and support the sanctity of client solicitor confidentiality which has existed since the sixteenth century. For practitioners and clients alike, it will be most also a most welcome development that the Court of Appeal has considerably closed off a potential avenue to allow disclosure of privileged communications.

For further information, please contact [Georgina Squire](#) or the Partner with whom you usually deal.