

insurance bulletin

Yesterday the Court of Appeal handed down its judgment in the eagerly awaited appeal of Quinn Direct from the decision of Peter Smith J.

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Background

Quinn is the qualifying insurer of a firm that has been intervened. As a result of the intervention, the Law Society has possession of the firm's files. The Law Society disclosed the files in respect of which claims have been made (the claims amounting to an implied waiver of privilege - *Lillicrap v Nalder*).

Quinn also sought disclosure of files in respect of which no claim had been made, but which it maintains are relevant to establishing whether Quinn is obliged to indemnify a former partner of the firm. The Law Society refused to disclose these files on the basis that they were privileged.

Peter Smith J agreed with the Law Society, refusing to order that the Law Society grant Quinn access to the files in question. He held that obligations of confidence and privilege attached to the firm, and hence the Law Society, which could only be waived by the client.

This judgment attracted criticism on the bases that it had insufficient regard to the operation of claims made policies and failed to acknowledge that Quinn, as a qualifying insurer, fell within the "circle of confidence" and was entitled to disclosure.

As a consequence of the decision, professional indemnity insurers have been faced with their insureds notifying circumstances from which a claim might arise without disclosing the identity of the client or confidential or privileged information. Some insurers have argued that this practice constitutes non-compliance with notification obligations.



Their insureds have referred to the judgment of Peter Smith J stating that they are bound to maintain obligations of confidence and privilege.

The Court of Appeal's judgment

Any lingering uncertainty, arising from the criticism which the judgment of Peter Smith J attracted, has been swept away by the Court of Appeal.

The judgment is set out in the speech of the Chancellor of the High Court (Sir Andrew Morritt CVO), with which the other two judges (Rimer and Jackson LJ) agreed. Key findings are:

- An insured solicitor is not entitled or bound to disclose to his insurer, on inception, renewal or notification, confidential and privileged documents or information of the client without the client's consent.
- In considering the solicitor's competing obligations of good faith to the insurer and confidence and privilege to the client:
 - privilege cannot be broken or waived without the client's consent;
 - the absence of waiver by the client will create a conflict of interest;
 - this conflict could vitiate the insurance or render the notification inadequate, "but that is the problem of the solicitor not the client"; and
 - the solicitor's duty of disclosure cannot override the entitlement of the client.
- The "circle of confidence" does not include the insurer.
- To the extent that the insurer is "meshed in" to the regulatory system, its request for disclosure is not made for the purpose of advancing any such public or regulatory purpose, rather its purpose is completely at odds with the regulatory role and the insurer's part in it.

In short, an unequivocal affirmation of the approach of Peter Smith J.

Implications for insurers

The Court of Appeal's judgment addresses the situation where the client is asked whether it waives confidence and privilege for the purpose of notifying circumstances to the insurer.

This contrasts with the usual situation. In circumstances where the insured is able to continue acting for the client, the insurer would not normally wish the insured to raise the prospect of a claim by requesting such a waiver. The effect is however the same: the insured is unable in the absence of a claim or waiver to disclose to the insurer any confidential or privileged information or documentation.

The position of solicitors instructed by insurers on the basis of a joint retainer to investigate notified circumstances is in our view different. They fall within a "circle of confidence" arising from their relationship with the insured. They will be subject to the same obligations of confidence and privilege as the insured, but their involvement will afford the insurer with the opportunity take informed advice from a trusted advisor.

Insurers clearly should not encourage their insureds to breach their obligations of confidence and privilege. Insurers may wish to consider:

- Notifying insureds, when investigating circumstances (where a claim has yet to be made), that they should not disclose any privileged or confidential documents or information.
- Developing systems that will enable their insureds to notify circumstances in an anonymous manner that avoids breach of confidence or privilege, but which provides insurers with information that will enable them to make informed decisions, for example in relation to mitigation steps.

The judgment is available [here](#).

Our briefing on the decision of Peter Smith J is available [here](#).

Should you want any further information about this judgment, its implications or the practical steps that insurers may take, please approach your usual contact at Mills & Reeve.

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