Three's a Crowd:
Confidentiality Between Insurer, Insured and Lawyer

by Charles Phipps

Introduction

We are all of us familiar with cases in which minute differences in interest between parties in fairly similar positions have resulted in a truly heroic spread of legal representation. For a barrister, there are worse fates than having to rise to one's feet on behalf of the seventeenth defendant on day twenty-five, in order to announce simply that one's client adopts respectfully and whole-heartedly the submissions previously advanced on behalf of defendants one to sixteen. For the client – and indeed for the administration of justice more generally – the position is less satisfactory.

So a balance must be struck that takes proper account of both the importance and unqualified nature of a lawyer's fiduciary duties to his client and the commercial realities of litigation. That is a balance that both the courts and indeed recently, the Law Society have sought to address. It is not always an easy balance to strike.

This article looks at one situation in which the issues are raised with particular starkness: the solicitor who receives information while acting for both insurer and insured. The starkness derives both from the importance that the law attaches to communications that are confidential and privileged and from the huge inconvenience that would result for everyone if solicitors were unable regularly to act simultaneously for both insurer and insured.

Confidentiality/privilege

First, an introductory word about confidentiality and privilege. These are, of course, two different legal concepts and their interrelationship is sometimes both complex and unsatisfactory. Viewed traditionally:

- Duties of confidence, on the one hand, arise contractually or equitably, by operating on the conscience of the person owing a duty of confidence. The equitable jurisdiction of confidentiality is largely a nineteenth century invention and, although its existence is well established, its principles and parameters remain in many respects uncertain. Most duties of confidence are subject to implied limitations operating in the public interest, or indeed in the interest of the confidant himself. (*Tournier v National Provincial and Union Bank* (1924) 1 KB 461, esp. at 473. *Pace* La Forest J *LAC Minerals Ltd v*

International Corona Resources Ltd (1990) FSR 441) and the Federal Court of Australia (*Smith Kline & French Laboratories v Secretary to the Department of Community Services and Health* (1991) 99 ALR 679), one should surely do what one can to avoid using the term “confidee”).

- Legal professional privilege, on the other hand, is a rule of law protecting written or oral communications from production. The traditional view is that legal professional privilege is absolute and cannot be overridden by competing public interest considerations.

Both these traditional characterisations require qualification. First, the territory of equitable confidentiality has been recently invaded by a new human rights jurisprudence of privacy. It would be wrong to say that this will have no impact on issues arising between insurers and insured, but, since the relationship between insurer and insured is primarily a commercial one, considerations of privacy (as opposed to traditional notions of confidentiality) are unlikely often to be determinative of issues arising in the context of that relationship.

Secondly, the number of recent high level decisions in relation to privilege suggest perhaps that this too is an unsettled area of the law. One particular straw in the wind may be worth mentioning. At present, there is at least one aspect of the law of privilege that appears conveniently straightforward and unqualified: the absolute nature of legal professional privilege. There may be all sorts of difficulties in answering the question whether a particular communication is privileged but, if it is, there’s your answer: the other side cannot have it. The lawyer reaches gratefully for his copy of the 1996 Appeal Cases and the House of Lords’ decision in *R v Derby Magistrates’ Court* ((1996) 1 AC 487).

The reader will recall the facts: a man, charged with murder, sought disclosure of the privileged documents of his stepson, who had earlier been tried and acquitted of the same offence (and this was at a time when a plea of autrefois acquit was a complete answer to any criminal charge). It was argued on behalf of the accused that a balancing exercise should be carried out by the court to weigh up the competing public interests in confidentiality and disclosure. Lord Taylor CJ, who gave the leading speech, rejected the notion of a balancing exercise. He added (at 508):

> *“Putting it another way, if a balancing exercise was ever required in the case of legal professional privilege, it was performed once and for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client’s individual merits.”*

Subject to the expression of some reservations by Lord Nicholls, the House of Lords was unanimous on this point, and it did not march alone, because the High Court of Australia had reached the same conclusion some four months before in *Carter v Managing Partner, Northmore, Hale, Davy & Leake* ((1995) 183 CLR 121).

My purpose in raising this case, which can no longer be regarded as news, is to suggest that it may not be that long before Lord Taylor's dictum is re-examined as a result of the introduction of the Human Rights Act 1998. It is to be noted that *R v Derby Magistrates' Court* pre-dated that act and that Lord Taylor expressly stated (at 507) that the House of Lords had not given any consideration to rights under the European Convention on Human Rights.

Is an absolute rule of the kind expressed by the House of Lords in *R v Derby Magistrates' Court* consistent with the rights-based balancing exercise required by the European Court of Human Rights? The issue has been directly addressed only at first instance by Toulson J in *General Mediterranean Holdings SA v Patel* ((2000) 1 WLR 272). His answer was: yes, it was consistent: an individual litigant seeking to invade privilege was not entitled to insist that the court should carry out an individual balancing exercise with regard to the facts of his specific case.

However, in two more recent decisions of the House of Lords, *Medcalf v Mardell* ((2003) 1 AC 120, at (60)), and *R (Morgan Grenfell) v Special Commissioner of Income Tax* (2003) 1 AC 563, at (43)), Lord Hobhouse has suggested that the issue requires re-examination, because it may be that privilege is not always absolute in the context of Articles 6 and 8, and a balancing exercise may sometimes be necessary.

So, to those of us who think that the law of privilege is already unnecessarily complicated, the warning is that it may become yet more complicated in the not-too-distant future. It is another example of the way in which the never very limpid pools of the law of confidentiality have been stirred up and made murkier by the sudden inrush of European human rights jurisprudence.

The problem

However, that is for another day. This article looks at a problem that frequently arises in relation to liability insurance. What is the position when an insured confides something to his solicitor, who also acts for the insurer, that raises or impacts directly on the question whether the insured is entitled to an indemnity from the insurer? Can the solicitor pass the information along to the insurer and, if he does, can the insurer use it against the interest of the insured? There are English decisions

directly addressing the former question and Australian ones directly addressing the latter but they have not always approached the issues in the same way.

Joint retainer

One way of avoiding the problem altogether might be to ensure that the solicitor acts only for one or other of the insured and the insurer, and not for both. Thus, in the U.S., it is apparently common for insurers to pay for an insured's lawyer, without becoming the lawyer's client, (see *FAI General Insurance Company Ltd v CAN 010 087 573 Pty Ltd* (1999) QCA 524, at paragraph 35). It is never a comfortable experience to pay for someone else's lawyer and discomfort can rapidly become painful when there is no control over that lawyer and no reassurance that the lawyer is looking after one's interests. So this approach may not be thought very appealing by insurers – at least in those cases where there is no readily apparent good reason why the insurer and the insured should require to be separately represented.

Alternatively, a solicitor instructed to investigate a claim can make it clear to the insured that he acts *only* for the insurer. The difficulty there comes when the insurer wishes to take some step through its solicitor on the insured's behalf (for example, to enter a defence to the third party's claim). How can the solicitor take a step on the insured's behalf without accepting the existence of a retainer by the insured? Generally speaking, he cannot, as is demonstrated by a thorough review of the position across the common law world by Penlington J in the New Zealand case of *Nicholson v Icepak Coolstores Ltd,* ((1999) 3 NZLR 475, including reference to *Groom v Crocker* (1938) 2 All ER 394).

So one returns to the scenario that is familiar to everyone in the field, where the solicitor acts pursuant to a joint retainer by both the insured and the insurer. Take the case of an insured who gives his solicitor information suggestive of fraud on the part of the insured. In what circumstances can the solicitor pass on to the insurer what he has been told by the insured, in order to assist the insurer in defeating the insured's claim to indemnity?

The solicitor's duty to insurers

As against third parties, unless the insured's communication to his solicitor was itself made in furtherance of a fraudulent design, (*Derby & Co Ltd v Weldon (No.7)* (1990) 1 WLR 1156), it is both privileged and confidential.

However, in the scenario under discussion, there can be no doubt that insurers may have a legitimate interest in being informed of the insured's communication on two different grounds:

1. it may be relevant to the insured's defence to his former client's claim; and
2. it is relevant to the question whether the insured is entitled to an indemnity from the insurers.

Prima facie, the solicitors therefore have not only a right but an obligation to inform the insurers of the communication. They are unlikely to be able to side-step that obligation simply by pointing to a duty to the insured *not* to disclose the communication to the insurers, since a solicitor facing a conflict of duties is unable to escape a finding of liability for breach of one of those duties merely by reference to the existence of the other, (*Moody v Cox and Hatt* (1917) 2 Ch. 71; *Bristol and West Building Society v Mothew* (1998) 1 Ch. 1, *per* Millett LJ at 19).

A more sophisticated attempt to escape liability for failing to provide one of two clients with material information was made in *Hilton v Barker Booth & Eastwood,* ((2005) 1 WLR 567). In that case, the solicitor had two clients. One was the claimant property developer, Mr Hilton. The other was a Mr Bromage. As Lord Walker laconically recorded:

> *"What Mr Hilton did not know, and did not discover until much later, was that Mr Bromage had only a few months before been released from prison on licence. On 30 October 1989 he was sentenced at Preston Crown Court to nine months' imprisonment after pleading guilty to three offences of participating in the management of a company while an undischarged bankrupt, one offence of fraudulent trading, and nine offences of obtaining credit while an undischarged bankrupt. He was released from prison on 16 March 1990."*

The defendant firm *did* know all of these things, because they had acted for Mr Bromage in the criminal proceedings against him. Moreover, it did not help the firm's defence of the case subsequently brought by Mr Hilton that they hosted numerous meetings between Mr Hilton and Mr Bromage at their offices and even lent Mr Bromage money to fund the deposits payable by him to Mr Hilton. Not a word of this was breathed to Mr Hilton. The development transaction between Mr Hilton and Mr Bromage duly turned out to be the disaster that one might expect.

In the Court of Appeal, Sir Andrew Morritt V-C held that the defendant firm should not have continued to act for Mr Hilton, but that they were not under an obligation to inform him of Mr Bromage's past. This was because Mr Hilton's retainer of the defendant firm:

> *"…must be subject to an implied exclusion from any general duty of disclosure of that which they are legally obliged to treat as confidential."*

In other words, this was not a case of two conflicting duties, but of a duty (of disclosure) to one client (Mr Hilton) that never arose because of the existence of a duty (of confidentiality) owed to the other client (Mr Bromage). The House of Lords vigorously rejected the suggestion that such a term should be implied in the defendant solicitors' retainer. They were also unimpressed by an attempted analogy drawn between solicitors and estate agents, whose clients (as the Privy Council held in *Kelly v Cooper* (1993) 1 AC 205), are taken to accept that an estate agent will not pass on to them information that is confidential to another client.

So, in the absence of express contractual provision, it is unclear in the scenario that we are considering whether the jointly instructed solicitors could argue that they were under no obligation to insurers to disclose to them any information in respect of which they owed a duty of confidence to the insured.

The solicitor's duties to the insured

In any event, the question whether the solicitors do owe a duty to the insured not to communicate with the insurer remains an important one:

- to the solicitors, who may be placed in the unenviable position of having two irreconcilable duties;
- to the insured, who may be able to prevent communication to the insurers by appealing to the court to protect his privilege; and
- to the insurers, whose subsequent use of the information, if they get it, may be affected by the circumstances of its receipt.

The first step, as so often, must be to look at the terms of the policy, because one of the few ways in which it is possible to have one's rights of privilege overridden is to assume contractual obligations that override them (see, for example, *Moser v. Cotton,* The Times, 29 August 1990 (CA): solicitor not entitled to privilege as against his fellow partners). The insurance policy may itself contain express terms relating to the provision of information to insurers which govern (or at least affect) any issues of confidentiality between insured and insurer.

This was the case in *Brown v Guardian Royal Exchange Assurance plc* ((1994) 2 Lloyd's Rep 325), in which insurers, who had previously jointly instructed solicitors with their insured, subsequently sought disclosure of the solicitors' file. Under the terms of the policy, the insurers were expressly entitled to require solicitors' reports to be submitted directly to them. As a result, it was held by the Court of Appeal that the insured was to be taken to have known that anything said

by him to the solicitors would be treated as having been said to the insurers. Disclosure was accordingly granted.

What if the policy is silent on the question of privilege and/or confidentiality as between insurer and insured? The general rule was set out in the context of common interest privilege by *Bridge LJ in Barca de Panama SA v George Wimpey & Co Ltd,* ((1980) 1 Lloyd's Rep 598), at 615:

> *"If A and B have a common interest in litigation against C and if at that point there is no dispute between A and B, then if subsequently A and B fall out and litigate between themselves and the litigation against C is relevant to the disputes between A and B, then in the litigation between A and B neither A nor B can claim legal professional privilege for documents which came into existence in relation to earlier litigation against it."*

Other authorities express the same point by reference to an implied waiver of privilege as between A and B. However, one should bear in mind that this principle is not a narrow one, based only on the technical rules of privilege. The reason that A and B are unable to assert privilege against each other is broader: both are within the circle of confidence created by their joint retainer of the solicitors, so that they "retain no confidence as against one another", in the phrase used by Rix J in *The Sagheera* ((1997) 1 Lloyd's Rep 160, at 164). In the normal course, someone who instructs a solicitor jointly does not, or should not, expect what he tells the solicitor to be kept confidential from the other client.

One difficulty in applying this general principle lies in determining when it can and when it cannot be said that, in the phrase used by Bridge LJ, "there is no dispute between" insurer and insured, so that the solicitors can pass on confidential information obtained from one to the other.

This question arose in the case of *TSB Bank plc v Robert Irving & Burns* ((1999) Lloyd's Rep PN 956). The facts were that it occurred to an insurer and its legal advisers that there might be grounds for rejecting the defendant valuer's claim to an indemnity against the professional negligence claim brought by the claimant. The defendant attended a conference, unaware of this possibility, and was effectively cross-examined by counsel, without any warning as to the use that might be made of his answers. The judge at first instance granted an injunction restraining the insurer from using those answers against the defendant and the Court of Appeal upheld his decision.

The Court of Appeal answered the question as to when a "dispute" between insurer and insured can be said to arise in the following way:

> *"…the waiver of privilege implicit in the joint retainer extends to (a) all communications made by the insured to the solicitors down to such time as an actual conflict of interest emerges and (b) to all communications made by the insured to those solicitors after the notification by the solicitors to the insured of such conflict and the lapse of such further time as the insured reasonably requires to decide whether to instruct separate solicitors."*

The Court of Appeal referred to an actual conflict of interest "emerging", as if it were as recognisable as Venus emerging from the waves, but without giving much or any guidance as to what sort of beast an actual conflict of interests is. Is it really any easier to identify an "actual conflict of interests" than it is to identify a "dispute"?

On this front, it seems to me that the new definition in the Solicitors' Code of Conduct is of real value:

> *"3.01(2) There is a conflict of interests if … you owe, or your firm owes, separate duties to act in the best interests of two or more clients in relation to the same or related matters, and those duties conflict, or there is a significant risk that those duties may conflict…"*

The merit of this new definition is that the focus is now clearly on a conflict between the solicitor's *duties,* rather than on a conflict between the clients' *interests*. The latter focus often resulted in nebulous and inconclusive debate as to whether there was an actual or merely a potential conflict between the interests of two clients, an understandably difficult distinction to draw if one remembers Lord Palmerston's dictum that our interests are both eternal and perpetual.

Whenever a solicitor takes on more than one client, their interests must necessarily differ, because they are not identical people; to that extent, their interests must at some point "conflict". However, in most cases, the difference between their interests will not impinge on a solicitor carrying out a limited retainer because the conflict will not arise in relation to what he has to do and therefore does not give rise to any conflict of duty. So a conflict of interest between two clients represents only a potential conflict of duty for a solicitor. What the solicitor must avoid above everything is an *actual conflict of duty.* The hallmark of an actual conflict of duty is that the solicitor cannot fulfill his obligations to one principal without being in breach of his obligations to the other, (see *Bristol and West Building Society v. Mothew* (1996) 4 All ER 698, per Millett LJ at 713).

Wherever the precise boundaries lie, it is fairly clear that a conflict of duties has arisen for the solicitor once there is a realistic likelihood that insurers will avoid cover. At that point, says the Court of Appeal, the insured's deemed waiver of confidentiality in favour of the insurers comes to an end.

The solicitors must first inform the insured of the conflict of interest and make it clear that they will be reporting to insurers on the issue. Thereafter – or after sufficient time to permit the insured to consider seeking independent advice – if the insured's retainer of the solicitors continues, it will again be on the basis that the insured has no right of confidentiality against the insurers in respect of communications made for the purpose of the joint retainer.

On the other hand, by continuing to instruct the solicitors, the insured will also be giving his consent to the solicitors keeping confidential from him any reports to the insurers on the coverage issue. These reports are produced pursuant to a separate retainer by the insurer and are privileged from the insured, see *Goddard v Nationwide Building Society* ((1987) QB 670 (solicitors acting for both mortgagor and mortgagee)).

The solicitors would do well also to issue periodic reminders to the insured of the existence and significance of the conflict of interests, so that there can be no doubt in his/her mind that the issue remains a live one. An initial reservation of rights may not remain effective indefinitely. Insurers themselves should not do anything to lead an insured to suppose that cover has been accepted if cover in fact remains an open question.

I have taken an example where insurers have a strong and immediate interest in the information disclosed by the insured – for example, because it entitles them to avoid cover. However, an insurer will often have other interests in such information – for example, it may assist them in assessing the insured as a risk for future underwriting purposes. Will a solicitor be entitled to pass on privileged information from insured to insurer for those purposes?

In my view, the principle is much the same. Once again, everything will depend on informed consent. But it may well be that a specific warning has to be given. The usual warning that the solicitor is investigating a claim under a reservation of rights might well not be sufficient to put an insured on notice that his solicitor is reserving the right to pass on information for underwriting as well as claims handling purposes.

That is all well and good, but in real life matters do not always progress in the orderly procession envisaged in *TSB v Robert Irving & Burns.* What if there has hitherto been no apparent conflict of interests, but the insured's communication itself creates one? Suppose that the information evidencing the insured's dishonesty is volunteered by the insured out of the blue, when no question of dishonesty has previously arisen.

Or suppose that there is no question of dishonesty at all but that, during a meeting with the solicitors, the insured lets slip information showing that the claim against him by his former client was first made two years before insurers were notified, with the result that the insured is in breach of his duty of prompt notification.

In those circumstances, can solicitors tell the insurers, or do they simply have to cease to act? Does the insured's deemed waiver of confidentiality in favour of insurers effectively end the moment before or the moment after the crucial communication is made?

The courts are generally reluctant to impose upon a solicitor any obligation to keep information from a client in circumstances where the solicitor had no choice whether or not to receive that information. For example, in the context of accidental disclosure by one side to the other of privileged documents during litigation, (e.g., *Guinness Peat Ltd v. Fitzroy Robinson* (1987) 1 WLR 1027; R v G (2004) 1 WLR 2932), the question whether the solicitor receiving disclosure did realise, or should have realised, that the information was privileged before reading it is often decisive in determining whether privilege can be maintained or has effectively been waived.

The Court of Appeal's judgment in *TSB Bank plc v Robert Irving & Burns* appears to follow this general pattern, though any consideration of the issue must have been *obiter:* the crucial question is whether an actual conflict has arisen before the communication, not whether it arises *with* the communication. It is only in the former situation that the insured's implied waiver in favour of insurers fails to operate and the solicitor is unable to pass the relevant information to insurers.

It is not clear that the Australian courts would take the same approach. In *Mercantile Mutual Insurance (NSW Workers' Compensation) Ltd v Murray* ((2004) NSWCA 151), a decision of the New South Wales Court of Appeal, the appellant insurers repudiated the respondent insured's claim to indemnity. The issue was whether insurers were entitled to receive and to use copies of a loss assessor's report that had been produced before any challenge to indemnity had been made. The

Court of Appeal held that the loss assessor's report had been produced in part for the benefit of insurers and that they were therefore entitled to retain and use copies of it.

However, the President, Mr Justice Mason, who gave the only substantive judgment, said, obiter (page 57):

> *"…any information divulged confidentially by the insured to the solicitor would attract client-legal privilege whether or not the insurer was also a client. On top of that, the solicitor would have been under duties of confidentiality and undivided loyalty to the insured client not to divulge that information to the insurer without permission to the extent that the information was adverse to the insured's interests, unless of course the policy conditions clearly override any such obligation…"*

This is entirely consistent with the Court of Appeal's approach in *TSB Bank plc v Robert Irving & Burns,* provided that it is confined to confidential communications made by the insured after an actual conflict of interests has arisen and before the insured has been warned of the actual conflict. However, it is not clear that Mr Justice Mason intended that his observation should be limited in this way.

In my view, where the disclosure of information itself creates a conflict of interests that did not exist before, the solicitors are not inhibited from passing on that information to insurers. However, that is not a proposition established beyond doubt and the safest course, in the absence of consent from the insured, might well be to obtain a declaration from the court in advance of the proposed disclosure.

Subsequent use by insurers of information communicated by the insured

Suppose that the information blurted out by the insured has been properly communicated to insurers, without any breach of any duty owed to the insured. What use can insurers subsequently make of it? I want to consider this briefly under two headings, (use against the insured and disclosure to third parties), before finally considering the position where information has been improperly obtained by insurers.

Use against each other

So far as the right of insurers and insureds to use jointly privileged material *against each other* is concerned, it appears from the authorities at Court of Appeal level (eg *Brown* and *TSB*), that, in England at least, once it is established that insurers (or, as the case may be, the insured) are entitled to production of communications with a

jointly retained solicitor, then they will not be prevented from using those communications in disputes with the insureds (or, as the case may be, insurers).

Again it appears that the Australians may adopt a rather different approach. In *FAI General Insurance Company Ltd v CAN 010 087 573 Pty Ltd,* ((1999) QCA 524), the facts were horrendously complicated but the nub of the issue falling to be determined was whether an insured, which had reached settlement with a third party claimant after the insured's insurer had repudiated cover for the claim, was entitled to obtain, (for the probable purpose of disclosing to the claimant), privileged communications by the solicitors who had been jointly retained by the insurer and the insured prior to the repudiation of cover. In other words, the insured, having fallen out of love with the insurer, now wanted to gang up with the claimant. The Queensland Court of Appeal held that the insured was entitled to access to the privileged communications for "legitimate" purposes, but was not entitled to use them for the purpose of attacking the insurer's refusal of indemnity. Derrington J said (page 24):

> *"…although the insured is otherwise entitled to access to the relevant documents in the hands of the joint solicitor, they are not entitled to use them, or to waive privilege to allow others to use them, for a purpose contrary to the purpose by which they obtained their right of access."*

Byrne J said (page 45):

> *'"Confidential information", as Lord Millett has said, "shares this characteristic with trust property, that the person who is entrusted with it is bound to use it, if he uses it at all, only for the purpose for which he received it" and not "for an ulterior purpose of his own". Use by the insured of the retained material for the prosecution of the indemnity claim has not been authorized, expressly or impliedly, by the insurer; and it would have been an unconscientious exploitation of the information.'*

In November 2000, the High Court of Australia gave leave to appeal the decision of the Queensland Court of Appeal, but it doesn't appear that the appeal was pursued to a conclusion. However, the decision has been referred to without apparent disapproval in subsequent Australian cases, such as the New South Wales Court of Appeal's decision in *Mercantile Mutual Insurance* (*NSW Workers Compensation) Ltd v Murray* that I discussed earlier.

It is doubtful whether Lord Millett's observation, (from *Equity's Place in the Law of Commerce* (1998) 114 LQR 214, 222), cited by the Queensland Court of Appeal in

FAI General Insurance, justifies the decision reached by the court. It is true, as a general principle, that confidential information supplied to a person for a particular purpose should not be used for a different purpose. But where one person puts in issue his relationship with another (as an insurer does, by repudiating an insured's claim), that person cannot prevent the other from doing what is necessary to contest the issue between them by asserting the confidentiality of that relationship, (*Paragon Finance plc v Freshfields* (1999) 1 WLR 1183; see also *per* Aikens J in *Winterthur Swiss Insurance Company Ltd v AG (Manchester) Ltd (in liquidation)* (2006) EWHC 839 Comm, at paragraph 116). If you think about the cases in which lawyers are sued by their former clients, it is clear that that is a proposition which applies to privileged communications, just as much as it applies to more general confidential communications.

So in my view an insurer should not be inhibited in its use of any information legitimately obtained by it from an insured in, for example, defeating the insured's claim to indemnity. Moreover, any attempt to impose such an inhibition would be likely to lead to serious practical difficulty in policing the boundary between the insurer's authorised possession of the relevant information and the insurer's unauthorised use of that information against the interests of the insured.

Disclosure to third parties

However, the general rule that two parties jointly instructing a solicitor cannot assert rights of confidentiality as against each other does not extend to disclosure to third parties: the consent of both clients is necessary for disclosure to other persons, (*Re Konigsberg* (1989) 1 WLR 1266; *The Sagheera* (1997) 1 Lloyd's Rep 160, 165). That raises two rather difficult questions:

1. Where is one to draw the boundary between (i) an insurer's *permissible* use of jointly privileged information in a dispute with the insured and (ii) an insurer's *impermissible* disclosure of jointly privileged information to a third party?
2. What is the nature of the insurer's duty not to disclose jointly privileged information to third parties?

As for the first of these questions, the use of privileged information in an indemnity dispute that progresses to litigation is likely eventually to lead to its disclosure to third parties (although a certain amount can be done, for example, by way of holding court hearings where appropriate in private). Such disclosure to third parties as is inevitably attendant upon pursuing a claim against an insured, or resisting a claim by the insured, is presumably unobjectionable. As Lord Bingham said in

Paragon Finance v Freshfields, ((1999) 1 WLR 1883, at 1188) in discussing the scope of the waiver of privilege in the similar context of a claimant suing his former solicitor:

> *"He thereby waives any right to claim the protection of legal professional privilege in relation to any communication between them* ***so far as necessary for the just determination of his claim;*** *or, putting the same proposition in different terms, he releases the solicitor to that extent from the obligation of confidence by which he was formerly bound.* [Emphasis added]*"*

Where the privileged information, or its proposed disclosure, is less directly relevant to the dispute between insurer and insured, then disclosure may not be permissible. For example, an insurer in dispute with an allegedly fraudulent valuer might find some tactical value in making a full report to the R.I.C.S, but it is unlikely that the existence of the dispute would justify the disclosure to the R.I.C.S. of communications subject to joint legal professional privilege.

As for the nature of the insurer's obligation not to disclose jointly privileged material to third parties, the question is whether the duty of confidence owed by each client to the other vis-à-vis disclosure to third parties should be an absolute one (akin to the duty of confidence owed by a solicitor to his client) or limited in the way that most equitable duties of confidence are. The preponderance of more recent authority suggests that, where equity acts in aid of legal professional privilege, it is generally clothed in the same absolute principles as legal professional privilege and is therefore not subject to the qualifications and balancing of interests that apply more generally to equitable duties of confidentiality. (See Derby v Weldon (No.8) (1991) 1 WLR 73 and the judgment of the Privy Council in *B v Auckland District Law Society* (2003) 2 A.C. 736. On the other side, see the judgment of Lawrence Collins J in *Istil Group Inc v Zahoor* (2003) 2 All E.R. 252, at (88) to (94), commented on by Kellock Ag.J. in *J.P. Morgan Multi-Strategy Fund LP v The Macro Fund Ltd* (2003) C.I.L.R. 250, at (113) (Grand Court of Cayman).

Subsequent use of improperly obtained information

What if the insurer obtains information to which it is *not* entitled – for example, because of a breach of privilege by jointly retained solicitors?

The insurer might argue that, once it has got hold of the relevant information, it is too late for the insured to assert privilege: the cat is out of the bag. The Court of Appeal's decision in *TSB Bank v Robert Irving & Burns,* (in line with the Privy Council's decision in *B v Auckland District Law Society* (2003) 2 AC 736), shows that

that argument will not succeed: the courts will exercise their jurisdiction to enforce the insured's rights of confidentiality by granting appropriate injunctions to prevent the insurers from making use of the material wrongfully obtained by them. Whether this is achieved by reference to the law of privilege (notwithstanding the Court of Appeal's outdated decision in *Calcraft v Guest* ((1898) 1 QB 759), or the court's equitable jurisdiction under *Ashburton v Pape* ((1913) 2 Ch. 469), is fast becoming a debate of little more than academic interest. As in other areas of jurisprudence, equity remedies the law.

Conclusion

In general terms, of course, many difficulties can be avoided simply by ensuring that an insured knows at any point in time exactly where he stands in relation to his insurers and their jointly instructed solicitors. Maintaining open and frank communications with the insured is very important, for that reason alone.

But difficult cases will always arise and I suggest that it is apparent that the common law world as a whole has not yet established a reliable consensus as to the principles by which such cases should be determined.

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