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1. Mornington 2000 LLP (t/a Sterilab Services) & Anor v SoS for Health and Social Care [2025] EWHC 540, 2. John Sisk and Son Ltd v Capital & Centric (Rose) Ltd [2025] EWHC 594

1. *Mornington 2000 LLP (t/a Sterilab Services) & Anor v Secretary of State for Health and Social Care* [2025] EWHC 540 (TCC)

Date: 11 March 2025

Key Words:

Without Prejudice Privilege, Agreement, Public Policy, Third-Party Report, Objective Test, Disclosure, Negotiations, Intertek Audit Report, Implied Understanding, Sole Purpose

Summary

The Claimants, Mornington 2000 LLP (t/a Sterilab Services) and Sante Global LLP, sought a declaration that an audit report commissioned by the Defendant, the Secretary of State for Health and Social Care, was not protected by Without Prejudice (WP) privilege [1]. The report, prepared by Intertek during WP negotiations regarding a contract dispute over lateral flow testing devices, was ordered disclosed by Mrs Justice Joanna Smith [75]. The court ruled that there was no express or implied agreement extending WP privilege to the Intertek Audit Report, nor did it fall within the public policy justification for the rule [47, 64-66, 70-73].

Key Themes:

1. ***Scope of the WP Rule:*** *The judgment explores its legal basis, public policy justification, and possible extension by agreement [47-58].*
2. ***Distinction Between WP Negotiations & Documents:*** *The court examined whether documents created during WP discussions are automatically privileged or require a separate agreement [66, 73d].*
3. ***Role of Agreement:*** *Consideration of whether the parties expressly or impliedly agreed to extend WP privilege to the Intertek Audit Report [47d-e, 61, 62, 70-73].*
4. ***Objective Test:*** *The determination of WP privilege is an objective question for the court, independent of parties' subjective beliefs [38, 43, 47h].*
5. ***Burden of Proof:*** *Discussion of which party must establish the existence of WP privilege, though this was not decisive in the case [56-58].*

Background

The Claimants and the Defendant entered into a contract in May 2021 for the supply of lateral flow testing devices [2]. After ordering 68.4 million tests, the Defendant commissioned a BSCI audit by QIMA, which resulted in a "failure" rating [5, 6]. Open discussions followed, including a potential further audit [7]. The Claimants commissioned a V-Trust audit showing progress [9, 10], but the Defendant rejected the tests [9, 10]. WP negotiations began around January 2022 regarding alternative solutions [12, 15, 16, 19, 20]. During these discussions, the Defendant commissioned an audit by Intertek [22]. The Defendant later refused to disclose the audit report, claiming WP privilege [25, 26, 28]. Despite initially providing the report on a WP basis, the Defendant withheld it in formal disclosure, leading to the Claimants' application for a ruling that the report was not privileged [30-34].

Legal Issues and Analysis

1. **Key Issue:** Whether the Intertek Audit Report was protected by WP privilege [47b, 59, 60].
2. **Claimants' Argument:** The report did not fall under WP privilege's public policy justification, nor was there an agreement to extend WP protection to it [47b-c].
3. **Defendant's Position:** Initially argued there was mutual agreement that the report was WP. Later, it claimed an implied agreement arose as the Claimants permitted the audit to proceed [61, 62b-d, 64-66].
4. **Court's Rejection of Public Policy Justification:** The court found the report was an independent third-party document, not a statement or record of negotiations, and did not facilitate free discussion for settlement [66-69].
5. **No Express Agreement:** The court found no explicit agreement that the report would be WP [62b-d, 70].
6. **No Implied Agreement:** No objective evidence supported an implied agreement. Allowing the audit did not imply WP privilege, and no proposal to that effect was made and accepted [72-73]. The open commissioning of other audits further undermined this argument [73h].
7. **Reference to *Rabin v Mendoza & Co [1954] 1 WLR 271*:** The court distinguished this case, noting that while WP privilege can be extended by agreement, the Intertek Audit Report was not solely created for WP negotiations [50-53]. While sole purpose is not essential, it strengthens an argument for WP privilege [55-56].
8. **Burden of Proof:** The court acknowledged this issue but found it unnecessary to resolve since the decision was clear based on objective evidence [45, 46, 47a, 57, 58].

Conclusion

Mrs Justice Joanna Smith ruled that the Intertek Audit Report and associated documents (excluding documents provided by Boson to Intertek before WP discussions) were not protected by WP privilege and must be disclosed [75].

Key Takeaway:

Independent third-party reports created during WP negotiations are not automatically privileged. WP privilege requires an express or clearly implied agreement between parties. Ongoing WP negotiations alone do not confer privilege on independently generated documents [70, 73c-d]. The court objectively assesses the existence of such an agreement, considering factual context rather than subjective intent [47h-i, 71-72].

Parting Thoughts

In the realm of dispute resolution, while the without prejudice rule serves as a valuable shield for open and honest negotiation, it is crucial to recognise that this protection does not automatically extend to all documents created during such discussions. As the judgment in Mornington 2000 LLP v Secretary of State for Health and Social Care EWHC 540 (TCC) highlights, the public policy underpinning the rule primarily safeguards the frank exchange of views, offers, and admissions made directly between the negotiating parties [47a-b]. Therefore, when commissioning or sharing reports or other third-party documents within a without prejudice context, parties should be explicit and mutually agree if these materials are also intended to be covered by the privilege, as the absence of such a clear understanding may leave those documents vulnerable to disclosure in subsequent proceedings [47d, 70].

#WithoutPrejudicePrivilege #LegalPrivilege #CommercialLaw #Litigation #DisputeResolution #SettlementNegotiations #ThirdPartyReports #Agreement #PublicPolicy #Disclosure #HighCourt #TCC #AuditReport #ObjectivityInLaw #Mornington #Sterilab

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2. *John Sisk and Son Ltd v Capital & Centric (Rose) Ltd* [2025] EWHC 594 (TCC)

Date: 14 March 2025

Key Words:

Contract Interpretation, Risk Allocation, Existing Structures Risk, Contract Clarifications, Tender Submission Clarifications, Cl.2.42, Employer Risk, Admissibility of Pre-Contractual Negotiations, JCT Design and Build Contract 2016, Bespoke Amendments, Declaratory Relief, Proper Construction, Contract Documents, Entire Agreement Clause, Factual Matrix, Arup Warranty

Summary

The case concerns a Part 8 claim brought by the contractor, John Sisk and Son Limited ("Sisk"), against the developer, Capital & Centric (Rose) Limited ("C&C"), seeking a declaratory relief on the proper interpretation of a clarification clause within their design and build contract [1-2]. The dispute centres on who bears the contractual risk associated with the existing structures at the Weir Mill site in Stockport, including their ability to support the proposed works [1-3, 6]. The contract was based on the JCT Design and Build Contract 2016 with extensive bespoke amendments [2]. The judge found that, based on the proper interpretation of the contract, particularly Cl.2.42 and item two of the contract clarifications, the risk of unsuitability of the existing structures lies solely with C&C [6-8].

Key Themes:

1. ***Contract Interpretation:*** *The central theme is the proper interpretation of specific clauses within a construction contract, applying established legal principles [63].*
2. ***Risk Allocation:*** *The judgment focuses on how the contract allocates the risk between the employer (C&C) and the contractor (Sisk) concerning the condition and suitability of existing structures [1, 6].*
3. ***Clarification Clauses:*** *The role and interpretation of bespoke clarification clauses within a standard form contract are crucial [6, 8, 9-16].*

4. ***Admissibility of Pre-Contractual Negotiations:*** *The court considered whether evidence of pre-contractual negotiations was admissible as an aid to interpreting the contract, ultimately concluding it was not [38, 65-71].*
5. ***Contract Documents:*** *The scope and hierarchy of different contract documents, including electronic and hard copy versions, and their relevance to interpretation were examined [12-14, 22, 77, 78].*

Background

Sisk and C&C entered a design and build contract on 20 May 2022 for works at Weir Mill [1-2]. The dispute arose over responsibility for existing structures' suitability for proposed works [3]. After an unsuccessful adjudication in favour of C&C, Sisk sought relief in the Technology and Construction Court [6]. The contract comprised multiple volumes, including clarifications within the Employer's Requirements [16-24]. A key dispute was whether "tender submission clarifications" formed part of the contractually defined "Clarifications" [12-16].

Legal Issues and Analysis

The primary legal issue was the proper construction of Cl.2.42 of the amended JCT Design and Build Contract 2016, particularly in light of item two of the contract clarifications [6-8]. Cl.2.42 generally placed all risks related to the existing site, including the condition of existing structures and the accuracy of information provided by C&C, on Sisk [6, 9-12, 75, 82, 83]. However, Cl.2.42.4 stated that this clause was "subject to item 2 of the Clarifications" [13, 83-84].

The court had to determine what constituted "the Clarifications" as defined in the contract [11, 14-15, 76-82]. HHJ Davies concluded that the contract definition clearly referred to "the clarifications headed 'Contract Clarifications'" contained within the Employer's Requirements, and thus only encompassed the specific "contract clarifications" worksheet, not the broader excel workbook that also contained the "tender submission clarifications" [80, 88-90]. This interpretation was reinforced by Cl.2.42.4's reference to "item 2 of the Clarifications," which plainly corresponded to item two of the "contract clarifications" worksheet [13, 81, 89-90]

The court then analysed item two of the "contract clarifications," which stated: "Existing Structures Risk including ability to support / facilitate proposed works" with the "Comments / Risk Owner" being "The Employer is to insure the Existing buildings/ works. Employer also to obtain warranty from Arup with regard to the suitability of the proposed works. Employer Risk" [29-30, 33-34, 83-84, 92]. The judge interpreted "Employer Risk" in this context to mean that C&C held the contractual risk as to the suitability of the existing structures [29-30, 46, 84, 99-104, 109, 118]. While acknowledging that C&C was to insure the existing buildings (consistent with Insurance Option C.1) and obtain a warranty from Arup, the court found the most likely meaning of "Employer Risk," when read in conjunction with the Sisk clarification, was that C&C was the "risk owner" for the suitability of the existing structures [83-101, 109].

The court also considered the admissibility of pre-contractual negotiations, including the "tender submission clarifications," to aid in interpreting the contract [69]. Applying established inadmissible for the purpose of drawing inferences about the meaning of the contract [61-65, 69]. While the "tender submission clarifications" was a contract document by virtue of being on the USB stick, the court gave it limited weight as it was not specifically referenced in relation to Cl.2.42.4 or the existing structures risk, and it appeared under the heading "design responsibility," a matter being addressed separately [107-110, 115]. The judge noted that relying on the pre-contractual negotiations would require improperly inferring the parties' intentions and that C&C had not pleaded estoppel or rectification, which are exceptions to the rule against admitting such evidence [68-69, 115].

Even if the pre-contractual negotiations were considered, the judge found that they demonstrated that the issue of existing structures risk was live and subject to ongoing discussions after the "tender submission clarifications" were produced in March 2022, leading to the inclusion of Cl.2.42.4 and the "contract clarifications" [122-143].

Conclusion

HHJ Davies concluded that on a proper interpretation of the design and build contract, and in particular Cl.2.42 and item two of the contract clarifications, the risk of the unsuitability of the existing structures, including their ability to support and/or facilitate the proposed works, lies solely with Capital & Centric (Rose) Limited (C&C) [6-8, 128-129, 135].

Key Takeaway:

The key takeaway from this judgment is the importance of clearly and unambiguously defining risk allocation in construction contracts, particularly when dealing with existing structures. Bespoke clarification clauses, when intended to modify general risk allocation provisions, must be interpreted carefully based on their specific wording and the overall contractual context [83-84, 109, 118]. Furthermore, the case reinforces the general rule against the admissibility of pre-contractual negotiations for the purpose of interpreting the concluded written agreement, except in specific circumstances like estoppel or rectification, which were not pleaded in this case [61, 64-66, 69, 115]. The judgment also highlights the need for precision in defining and referencing contract documents to avoid disputes over their inclusion and relative importance [11, 77-78, 88-89].

Parting Thoughts

This judgment highlights the importance of clarity in construction contracts, particularly in risk allocation for existing structures. Bespoke clauses overriding general risk provisions must be explicit to prevent disputes. The ruling also underscores that final contracts should serve as definitive records, with limited scope for pre-contractual negotiations to influence interpretation. Careful drafting and precise documentation are fundamental to mitigating conflicts and ensuring clear obligations.

#ConstructionLaw #ContractLaw #ContractInterpretation #RiskAllocation #ExistingStructures #ClarificationClauses #JCTContract #BuildingContracts #PreContractualNegotiations #AdmissibilityOfEvidence #DeclaratoryRelief #EmployerRisk #WeirMill #SiskVCapitalAndCentric #ConstructionDispute #TCC

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