Walter Lilly & Company Ltd v Mackay
[2012] EWHC 649 (TCC) TCC; Akenhead J

Facts
Walter Lilly and Company Ltd (WLC), was employed by DMW Developments Ltd (DMW), to construct a house in London on behalf of the future property owner and occupier, Mr Giles Mackay. Barrett Lloyd Davis Associates (BLDA) was engaged as the architect on the project.

Work commenced in 2004 and it was anticipated that it would complete within 18 to 20 months. By June 2006 significant delay had occurred and ultimately BLDA granted extensions of time to February 2007. In October 2006, disillusioned with BLDA, Mr Mackay engaged claims consultants Knowles Ltd (Knowles) to provide ‘contractual and adjudication advice’ to him and DMW.

In 2010 WLC issued proceedings against both Mr Mackay and DMW. During the disclosure exercise as part of those proceedings a dispute arose between the parties as to whether the documents created by Knowles and/or its correspondence with Mr Mackay and DMW attracted either legal professional or legal advice privilege. On the first day of the trial WLC made an application for disclosure of all correspondence with and documents generated by Knowles. In response, Mr Mackay argued that these documents should attract legal professional privilege because: (i) all advice received from Knowles was legal in nature; and (ii) the two consultants employed by Knowles providing that advice had held themselves out to be lawyers.

As a firm, Knowles was not qualified to provide legal advice, although the consultants advising Mr Mackay and DMW may have been qualified barristers. Mr Mackay argued that, in any event, this was irrelevant on the basis that a client who in good faith instructs an organisation or person which he mistakenly believes is a qualified solicitor or barrister and then receives legal advice from them should be entitled to rely on privilege. WLC denied that the correspondence with Knowles attracted legal professional or legal advice privilege.

Held
It was held that neither professional or legal advice privilege attached to documents in question and such documents were therefore discloseable.

In reaching this conclusion Akenhead J considered the nature of Knowles' engagement and held that it was retained neither as a solicitor or barrister. Accordingly, whether Mr Mackay had an honest belief that the two consultants employed by Knowles in relation to the project were qualified barristers or solicitors was immaterial. As a matter of policy, legal professional privilege will only be extended outside the legal profession in exceptional circumstances. It would not apply in this case, as Mr Mackay had no good reason to believe that he was employing qualified lawyers given that Knowles did not hold itself out to be providing those services.

The judgment acknowledged that it did not deal with litigation privilege (ie privilege in respect of documents and correspondence which come into existence for the dominant purpose of being used in connection with actual or pending litigation).

Significance
Following this judgment, neither legal professional or legal advice privilege is likely to apply to documents generated by claims consultants and associated correspondence in the provision of contractual advice. Litigation privilege may apply to documents generated and correspondence in relation to an adjudication, because this class of privilege was not covered by the judgment. However, in order to ensure that any such
documents are covered by privilege a practising solicitor or barrister should be retained to provide legal advice on the issues involved and documents generated.

This judgment also highlights the importance of clarifying the terms of engagement between a claims consultant and the client, so that the client is not unintentionally misled by the claims consultant’s title or professional qualifications.

**Baht v Masshouse Developments Ltd**
[2012] All ER (D) 168 (Mar) Ch D; George Bompas QC

**Facts**
Between November 2007 and February 2008, Masshouse Developments Ltd (Masshouse) entered into contracts (the contracts) with a number of individuals (the claimants) for the off-plan sale of long leases of apartments to be built by Masshouse (the apartments).

It was anticipated that the apartments would be ready by April 2009 and that the claimants would take possession of them in spring 2009. Special condition 4.1 of the contracts required Masshouse to arrange the completion of the Apartments with all due diligence in accordance with specified requirements.

In October 2008, the main contractor in relation to the development went into administration and the works came to a standstill. At this stage the building was roofed but the internal fit out had not been commenced. In November 2008 Masshouse considered using the apartments as a hotel and work on the development did not recommence until January 2010.

In February and March 2010 the claimants wrote to Masshouse purporting to accept its repudiatory breach of contract and demanding a return of deposit moneys paid on the basis that: (i) it was an implied term of the contracts that Masshouse would complete the works within a reasonable time; (ii) Masshouse had breached this implied term and special condition 4.1; and (ii) in doing so Masshouse had repudiated the contracts.

Masshouse refused to return the deposit moneys and completed the apartments in spring 2011. In May 2011 Masshouse served notices to complete the purchase of the apartments on the claimants and subsequently sought to exercise a contractual right of recission for failure to complete and forfeited the claimants’ deposits.

The claimants issued proceedings to recover the deposits arguing that the implied term to complete the works within a reasonable time was necessary to give the contracts business efficacy and that Masshouse was in repudiatory breach of the implied term and special condition 4.1. Masshouse denied these allegations and counterclaimed on the basis that the claimants had failed to complete the purchases in accordance with the contract.

**Held**
- There was an implied term requiring Masshouse to complete the development within a reasonable time. Although it was not possible to give an exact date as to when the reasonable time would have expired, it was clear that the additional two years could not be considered reasonable.
- Masshouse was in breach of special condition 4.1 as there was no indication during 2009 that Masshouse had fulfilled its contractual obligation to arrange that the apartments were completed with all due diligence in accordance with the specification and instead it had considered converting them into hotels.
- Normally, to be in a position to accept repudiation of the contracts, the claimants would have to show they were deprived of substantially the whole benefit. Masshouse’s failure to complete within a reasonable time did not in itself satisfy this test. However, the fact that nothing had actually happened on site for a significant period signalled an intention from Masshouse not to be bound by the contracts which entitled the claimants to treat them as being at an end.

**Significance**
This judgment confirms that it is possible for a term to be implied into a development contract requiring the developer to procure completion within a reasonable time and that significant delay in doing so can constitute a repudiatory breach of contract, if it either deprives the other party of the substance of the contract or signals an intention not to be bound by it.

This case should serve as a warning for developers who have entered into contracts with potential purchasers ‘off-plan’ of the need to bear in mind their obligations under those contracts, particularly if the development encounters difficulties. If delays do occur to the works it would be sensible to inform the purchasers that action is being taken to complete within a reasonable time. **CL**