

## LANDMARK CHAMBERS CASE STUDY

### Stephen Bickford-Smith

*In March 2009, a landlord instructs its surveyor to advise in relation to a rent review of office premises that is due as at 24 June 2009.*

*The surveyor prepares a Report for the landlord in April 2009 in which he sets out his valuation of the likely market rent on the review. He advises that the rent is likely to be increased and that the review should therefore be initiated. He comments on the likelihood of the tenant disputing the review and taking the matter to Arbitration under the Lease and advises on the best strategy to be followed to secure a rent increase without too much delay or cost.*

*Following instructions to proceed, the surveyor initiates the review in June 2009 by serving the rent review notice and he then applies in July 2009 for the appointment of an Arbitrator to determine the review.*

*Foolishly, the surveyor lets slip to his counterpart that he had prepared a detailed Report for the landlord in April 2009. The tenant's surveyor seeks disclosure of the Report on the basis it was not prepared in anticipation of litigation or for that dominant purpose.*

*The tenant's surveyor argues the Report should be disclosed in full or, failing this, with only the parts relating to strategy deleted. Because of the lack of involvement of any solicitors, he claims the surveyor cannot claim litigation privilege and, because it was produced 2 months in advance of the review date, it was not prepared in anticipation of litigation anyway.*

*The landlord claims the Report is privileged as it was prepared in anticipation of a disputed rent review that would go to Arbitration.*

*Is the Report disclosable?*

The first issue raised by this question is whether the Landlord, as party to an arbitration, can withhold production of the April 2009 Report on grounds of privilege.

It is possible that the arbitration is being conducted under institutional rules which limit or exclude the normal process of disclosure of documents. Subject to this, the powers of the arbitrator will be governed by Section 34 (2) (d) of the Arbitration Act 1996. The arbitrator has wide power to decide what documents should be disclosed and produced. However, he/she must give effect to claims of privilege. If he/she orders disclosure, and the Landlord is dissatisfied, his remedy will be to attempt to have the ultimate award set aside under Arbitration Act 1996 Section 68 for serious irregularity. He would have to argue that the arbitrator had acted unfairly and that this had caused substantial injustice. This is unlikely to be an easy task.

Assuming the arbitrator has yet to make any decision, the landlord could not argue for refusing production on the ground of legal professional privilege, because the report has not been produced by a lawyer. The landlord can however invoke litigation privilege provided he can show (a) that litigation was, at the date of the Report, in “reasonable prospect” (See Waugh v British Railways Board [1980] AC 521) or pending, and (b) that the sole or dominant purpose of the Report was for obtaining legal advice or collecting evidence for use in the litigation. For these purposes litigation includes arbitration.

The tenant’s surveyor’s argument that the privilege cannot apply as no lawyer is involved is incorrect. For example in Lee v SW Thames RHA [1985] 1 WLR 845 privilege was upheld in respect of a report by an ambulance crew. In Three Rivers DC v Bank of England [2005] AC 610 the House of Lords did not suggest that litigation privilege was limited to communications with lawyers.

As to whether litigation was in reasonable prospect as at April 2009, it would seem likely that the landlord can show that this is the case. The rent review date in the lease is less than 2 months after the Report. Notice of review is given in June and the arbitration commences in July, though strictly these facts might be inadmissible on the question whether litigation was in prospect at the time of the Report.

The more difficult issue is establishing the dominant purpose of the Report. It contains 4 elements:

- Valuation opinion
- Advice that rent is likely to be increased
- Assessment of whether the tenant will dispute the review and seek arbitration
- Strategy to secure an increase without too much delay or cost

Some of these elements are clearly within the scope of the privilege but others are arguably not, and are more in the nature of general advice. The landlord could counter this difficulty in 2 ways. Firstly, he could argue that the Report has a number of inseparable purposes and that there is in fact a single privileged purpose, namely to determine whether to initiate the rent review process or not and how to conduct the review in the event of dispute – compare Re Highgrade Traders [1984] BCLC 151

Secondly, applying a ‘dominant purpose’ test, he could argue that the dominant purpose of the report was to enable the landlord to decide whether, and how, to conduct proceedings in arbitration. The other purposes were subsidiary. One has to look at the real purpose – see London Fire and Emergency Planning Authority v Halcrow Gilbert [2005] BLR 18

The tenant’s surveyor’s suggestion that parts of the Report could be blanked out is not legally correct. The test is to be applied to the document as a whole.

On balance the landlord ought to succeed in refusing production of the Report.

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