

ROYAL COURT
(Samedi Division)

155.

3rd September, 1996.

P.R. Le Cras, Esq., Lieutenant Bailiff,
Single Judge.

In the matter of the Representation of Ian David Moore, a Director of
Pacific Investments, Ltd

Between:	Pacific Investments Limited	Plaintiff
And:	Robert Christensen	First Defendant
And:	Alison Mary Holland	Second Defendant
And:	Michael Allardice	Third Defendant
And:	Graeme Elliott	Fourth Defendant
And:	Firmandale Investments Limited	Fifth Defendant
And:	James Hardie Industries Limited	Sixth Defendant
And:	James Hardie Finance Limited	Seventh Defendant
And:	Govett American Endeavour Fund Limited	Eighth Defendant

Advocate N.F. Journeaux for the Plaintiff.
Advocate W.J. Bailhache for the First, Second,
Third and Fourth Defendants.

Application by the Representor for an Order setting aside that part of the First, Second, Third and Fourth Defendants' *subpoena duces tecum* issued against Ian David Moore, requiring him to produce documents which are privileged.

JUDGMENT

THE LIEUTENANT BAILIFF: This is a Representation brought by the Representor as a result of an unusual or rather, perhaps, a novel procedure where the First to the Fourth Defendants obtained an order for a subpoena duces tecum on Mr. I. Moore in his capacity as a Director of the Plaintiff, Officer of Centurion Trust or in any other capacity. As the points of law raised may not be entirely familiar to the profession, the Court, although the hearing was in Chambers, proposes to publish the legal submissions.

The summons having been served and the Order made, Mr. Moore duly (by two affidavits, some further papers having been subsequently found) gave production of certain papers and claimed, in respect of some of them, privilege in whole or in part.

Following this, he brought a Representation requesting that the Royal Court should order:

"(a) that part of the subpoena which requires Mr. Moore to produce documents which are subject to privilege be set aside".

In passing, it is proper to say that the other two grounds of relief sought concerned costs, which by agreement between counsel, are left over to the application to strike out the proceedings.

Both counsel helpfully addressed the Court at some length on the principles to be applied.

Mr. Journeaux submitted that the general rule relating to legal advice was that set out in Matthews & Malek: Litigation Library: "Discovery" p.161:

"Communications between a lawyer in his professional capacity and his client are privileged from production if they are confidential and for the purposes of seeking or giving legal advice for the client".

In the present instance, a number of legal firms have given advice.

The second basis was litigation privilege. The basic rule was described by Messrs. Matthew & Malek at p.168:

"Confidential communications made, after litigation is commenced or even contemplated, between (a) a lawyer and his client, (b) a lawyer and his non-professional agent, or (c) a lawyer and a third party, for the sole or dominant purpose of such litigation (whether for seeking or giving advice in relation to it, or for obtaining evidence to be used in it, or for obtaining information leading to such obtaining) are privileged from production".

It was put in this way in R. -v- Derby Magistrates' Court ex parte B [1995] 4 All ER 526 HL at 540j:

"The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold

back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests".

In his submission it was a case of competing interests, where that of conducting litigation with cards upwards on the table is overridden by the fundamental necessity of confidentiality in certain instances.

The principle is less clear where a document has been supplied to a third party, and the question arises as to whether it was supplied in such circumstances that privilege was abandoned. In his submission the Court should be slow in coming to such a conclusion and require a clear demonstration that the effect was such that privilege should be waived. Put another way, in assessing the relative merits and weight of the competing interests, it came down to a question of fairness.

In support of this contention, he cited a further passage from Messrs. Matthew and Malek at p.223:

"A waiver can be express or implied. An express consent to the opposing party's inspecting material known to be privileged is a waiver, though it can be withdrawn at any time before the inspection takes place. A deliberate supply of a privileged document to the opposing party in litigation or his agent or representative would normally amount to an express waiver. At the very least that confidentiality which is an essential element of privilege has gone. Similarly, where evidence is given (whether at trial or in interlocutory proceedings) by a party or his lawyer of privileged material, the privilege goes, even if the evidence was being adduced to try to maintain privilege. The position is less clear where there is a deliberate supply of a privileged document to a third party. One aspect of the question is the intention with which it was supplied. Was it supplied in confidence, without prejudice to the privilege? Or was it supplied with the intention of abandoning it? But this is not conclusive, because beyond a certain point it is a question of fairness whether a person who discloses material may be permitted to continue to assert that it is privileged from production".

In his view, once the privilege is established, waiver only takes place if the party intended to waive privilege.

Certain documents had been released in part.

As to deletions of parts of documents, he relied on GE Capital Corporate Finance Group Ltd -v- Bankers Trust Co & Ors. [1995] 2 All ER 993 CA. He cited first the headnote:

"The plaintiff company brought proceedings against various parties following a disastrous management buy-out of a company by a syndicate of lenders of which the plaintiff was a member. The plaintiff alleged misrepresentation and negligence against

the fourth defendants, a firm of accountants who had prepared two reports on which the plaintiff claimed to have relied. The plaintiff served its list of documents on the fourth defendants' solicitors, drawing attention to the fact that in some cases it had blanked out irrelevant passages which contained the names, amounts or other details of other financing transactions undertaken by the plaintiff which did not relate to any matter in question between the parties in the action. The fourth defendants applied for an order permitting them to inspect the complete documents, claiming that the missing words would assist in their defence by enabling them to assemble a general picture of the plaintiff's investment strategy and the attention the plaintiff paid in general to accountants' reports. The fourth defendants contended that the test for whether part of a document could be withheld as irrelevant was whether it dealt with separate subject matter from the relevant parts of the document. The judge granted the order, holding that where the whole document was said to be irrelevant the oath of the party giving discovery was *prima facie* conclusive, but where the 'documents themselves' were agreed to be relevant, because they contained relevant passages, the other party was *prima facie* entitled to see the whole, and therefore the fourth defendants were *prima facie* entitled to see the documents in their entirety and, furthermore, it appeared that the omitted passages were at least potentially relevant. The plaintiff appealed.

Held - It was well established that a party was entitled to seal up or cover up parts of a disclosed document on the ground of irrelevance just as it could withhold an entire document on that ground, provided that the irrelevant part could be covered without destroying the sense of the rest or making it misleading. The judge had accordingly erred in distinguishing between documents which were claimed to be wholly irrelevant and those where it was claimed that only part was irrelevant. Moreover, there was no additional requirement that the parts claimed to be irrelevant had to deal with an entirely different subject matter from the rest of the document. The test to be applied in deciding whether material was relevant was not whether it was at least potentially relevant but whether it was not unreasonable to suppose that the passages contained information which might either directly or indirectly enable the defendant either to advance his own case or to damage the plaintiff's case. The court would not ordinarily disregard the oath of the party that the parts concealed were irrelevant unless it appeared from the documents produced that that was not the case. On the facts, the blanked-out passages apparently referred to other transactions in which the plaintiff was involved and there was no reason to suppose that such details could support the defence as it was inconceivable that the trial judge would be willing to admit evidence of collateral transactions by way of similar facts to lead to an inference that the plaintiff was negligent in the transaction in issue. The appeal would therefore be allowed and the order for production discharged".

He further cited a passage at 997c:

"On its facts, the Great Atlantic case was not about discovery at all. It concerned a privileged document of which counsel read out part in the course of his opening. It was held that although he was unaware that the document was privileged, he thereby waived privilege in the whole. Templeman LJ said ([1981] 2 All ER 485 at 490, [1981] 1 WLR 529 at 536):

'... severance would be possible if the memorandum dealt with entirely different subject matters or different incidents and could in effect be divided into two separate memoranda each dealing with a separate subject matter ... once it is decided that the memorandum deals with only one subject matter, it seems to me that it might be or appear dangerous or misleading to allow the plaintiffs to disclose part of the memorandum and to assert privilege over the remainder.

If this test is confined to the context in which it was applied, namely the case of a party who puts in evidence part of a privileged document, I would not in any way differ. But if (as certain dicta in the case suggest) it is extended to the discovery of parts of documents, I do not think that it can be reconciled with well-established principle. In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is privileged. There is no additional requirement that the part must deal with an entirely different subject matter from the rest.

The Peruvian Guano test must be applied to the information contained in the covered-up part of the document, regardless of its physical or grammatical relationship to the rest. Relevant and irrelevant information may, as in this case, be contained in the same sentence. Provided that the irrelevant part can be covered without destroying the sense of the rest or making it misleading, a party is permitted to do so. In *Jones -v- Andrews* (1888) 58 LT 601 an application to require a party to uncover parts of sentences of which the rest had been disclosed was, on the facts, unsuccessful (cf *Carew -v- White* (1842) 5 Beav 172, 49 ER 542).

The fact that the blanked-out part deals with the same subject matter as the part admitted to be relevant may mean that the former is also likely to be relevant. On the other hand it may not. The link between the two pieces of information which makes it appropriate to say that the subject matter is the same may be irrelevant to any issue in the action".

Thus, in certain of the documents, deletion of certain legal costs have been made, as the Plaintiff does not agree that the Defendants should pry into the structure of the legal advice. He accepted that, given the admitted financial support, it was not surprising that questions should be asked, but nonetheless provision of the amounts covered up was not requisite in the circumstances. The information was not relevant and it would be oppressive to provide it.

In his view there were three distinct areas of challenge to the information requested by the Defendants.

5 First, any information not within the scope of the subpoenas is not disclosable. Any document not within the scope is not produced thereunder. Some documents within the scope of the subpoena also contain information which is not within the scope thereof. He gave an
10 example of what he considered to be such an instance and submitted that where the information is not relevant, it should not be disclosed, even where it is contained in the same document.

15 Second, if a document passes through the first filter, and is *prima facie* disclosable, is it privileged?

20 Third, even if it is not privileged and is relevant then if it is oppressive - and this is a coercive order - it should not be ordered to be disclosed.

Mr. Bailhache, before dealing in particular with his complaints, made, in his turn, several general observations. In general he did not dissent from the submissions of Mr. Journeaux although he made a series of observations and sought to draw some distinctions.

25 First, he submitted that if a document is privileged, and a party waives privilege in respect of part of the document, then he waives it in respect of the whole.

30 In support he cited Great Atlantic Insurance Co -v- Home Insurance Co & Ors. [1981] 2 All ER 485 CA, the headnote of which reads:

35 "The plaintiffs, who were insurers, entered into reinsurance agreements with the defendants who later repudiated the agreements. The plaintiffs brought an action against the defendants claiming a declaration that the defendants were bound by the agreements. When preparing their case the plaintiffs received a memorandum from their American attorneys relating to the action. The first two paragraphs of the memorandum consisted of an account of a discussion between the
40 attorneys and a third party and in the course of discovery before trial the plaintiffs' solicitors disclosed only those two paragraphs of the memorandum. The solicitors intended to claim privilege for the remainder but omitted to do so. At the trial the plaintiffs' counsel read out in open court the first two paragraphs of the memorandum under the impression that it was complete as it stood. When counsel on both sides became aware some days later that the memorandum as read out was incomplete, the defendants' counsel asked for disclosure of the additional matter on the ground that even if the whole document
45 was privileged the disclosure of part of it to the court amounted to a waiver of privilege. The judge upheld that claim and the plaintiffs appealed.

55 Held - (1) Even though the first two paragraphs of the memorandum contained information obtained by the American attorneys from a third party the whole of the memorandum was privileged since the memorandum itself was a communication

between solicitor and client. Furthermore, the memorandum dealt throughout with the same subject matter and it was therefore not possible for the plaintiffs to sever the document by claiming privilege for part and waiving privilege for the remainder.

(2) However, the introduction by the plaintiffs of part of the memorandum into the trial record waived privilege in regard to the whole document, since a party was not entitled to disclose only those parts of a document that were to his advantage, and both the court and the opposing party were entitled to know whether the material released from privilege represented the whole of the material relevant to the issue in question. The fact that the waiver had been made by the plaintiffs' counsel without the plaintiffs agreeing to it was irrelevant, since counsel had ostensible authority to bind the plaintiffs in any matter arising in, or incidental to, the litigation, and when counsel introduced into the record part of the document he thereby effectively waived any privilege attaching to the document that could be asserted by the plaintiffs. The whole of the memorandum was therefore required to be disclosed, and the plaintiffs' appeal would be dismissed".

He further cited the passage at p.490h:

"Counsel for the plaintiffs argued that severance is permissible where the part disclosed is only an account of a discussion which itself is not privileged. But, once it is decided that the memorandum deals with only one subject matter, it seems to me that it might be or appear dangerous or misleading to allow the plaintiffs to disclose part of the memorandum and to assert privilege over the remainder. In the present case the suspicions of Heath which have not unnaturally been aroused by the disclosure of only part of the memorandum can only be justified or allayed by disclosing the whole. It would be undesirable for severance to be allowed in these circumstances. In my judgment, the simplest, safest and most straightforward rule is that if a document is privileged then privilege must be asserted, if at all, to the whole document unless the document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete".

He accepted that in certain cases the document can contain privileged and non-privileged material and that in those circumstances the non-privileged material is not disclosable.

The conclusion, however, which he drew, was that once one part of a privileged document is disclosed, the whole of the document must be disclosed including that part which is not privileged.

Disclosure is not limited only to the remainder of the document which is privileged. The whole document must be available for construction.

Next, he accepted that it was always open to a party to disclose part only of a document and to cover up the remainder on the grounds of

relevance (v. e.g. GE Capital Corporate Finance Group Ltd -v- Bankers Trust Co & Ors [1995] 2 All ER at p.993h CA, supra).

In the present case the Court should be astute to distinguish between legal advice privilege and litigation privilege.

Here litigation privilege for the Plaintiff could not, in his submission, arise prior to the date of its incorporation viz. 17th May, 1995, although legal advice privilege might well arise for Centurion prior to that date.

In addition, he queried why a witness should be able to claim litigation privilege, even though he might be able to claim it for legal advice.

Furthermore, given that one ground for the strike out application will be for abuse of process, that is that the action was brought by the Plaintiff for the collateral purposes of another, the question of whether and in what terms advice was sought may be material.

In the present application privilege in respect of certain of the documents does on the face of the affidavit arise but he reserved the right to request the trial Judge to re-examine the contents on this point when the evidence is heard.

Under RSC O.24/5/6 the communication had to be to or from the solicitor; it did not attach to communications by the client unless written to the solicitor.

He referred further to RSC O.24/5/9:

"Client and non-professional agent or third party - The general principle is that documents embodying communications with (including reports to or from) a non-professional servant, agent or third party are privileged if, and only if, coming into existence for the purpose of obtaining legal advice in existing or anticipated proceedings (see the cases summarised in the judgment of Havers J in Seabrook v. British Transport Commission [1959] 1 WLR 509, [1959] 2 All ER 15).

The application of this test is easy enough in straightforward cases; privilege will clearly extend to communications for such purposes made to a solicitor through an agent, and to information obtained from a third party at the request of a solicitor to enable him to enforce or resist a claim by legal proceedings. Difficulties arise, however, (a) in determining the status of documents coming into existence for more than one purpose, and (b) in deciding at what stage it can fairly be said any such purpose is obtaining advice in anticipated litigation, as contrasted with obtaining information as to an occurrence which may lead to litigation.

As to (a) a document which is produced or brought into existence where the dominant purpose of its author, or of the person or authority under whose direction (whether particular or general) it is produced or brought into existence, is the use of the document or its contents in order to obtain legal

advice, or to conduct or aid in the conduct of litigation in reasonable prospect at the time of its production, is privileged and excluded from inspection (Waugh v. British Railways Board [1980] AC 521, [1979] 2 All ER 1169 HL)".

5

Subject to these remarks, he agreed in general with the approach of Mr. Journeaux.

10

As will be seen, counsel were to a great extent agreed on the law, which, on account of these proceedings being as yet unusual, the Court has set out at length.

15

There were points upon which Mr. Journeaux in his reply took issue, and upon which he made cogent submissions.

First, the Court should take care to note the remarks in GE Capital Corporate Finance Group Ltd -v- Bankers Trust Co & Ors where Hoffmann LJ deals with the parameters of the finding in Great Atlantic.

20

25

What, he submitted, was crucial here was the distinction between a party volunteering evidence and that where a party is answering a question in response to a coercive order, the difficulty here being how much properly to put in. So far as the Great Atlantic case was concerned, in fact, here, the point did not need to be considered because in the instant case there was no document where privilege was abandoned in part, requiring the whole document to go in.

30

So far as the director of a company is concerned, a company can only speak through a director and therefore what is privileged for a company must be privileged for its director who is not, in that sense, merely a witness. The court thinks that that submission must be right.

35

Last, it is right to note that several reservations were made by Mr. Bailhache. These were noted but without concession by the Plaintiff.

40

Turning now to the points raised by Mr. Bailhache and the specific information for which he asked, the Court is required to make a series of rulings.

As the hearing was in Chambers, the Court sees no requirement that what follows requires to be published.

Authorities.

Matthews & Malek: Litigation Library: "Discovery": pp.161, 168, 223.

R. -v- Derby Magistrates' Court ex parte B [1995] 4 All ER 526 HL at 540j.

GE Capital Corporate Finance Group Ltd -v- Bankers Trust Co & Ors [1995] 2 All ER 993 CA.

Great Atlantic Insurance Co -v- Home Insurance Co & Ors [1981] 2 All ER 495.

R.S.C. O.24/5/6; O.24/5/9.