15 pages.

COURT OF APPEAL

93

5th July, 1990

Before: Sir Godfray Le Quesne, Q.C., (President),
Sir Patrick Neill, Q.C., and
Sydney Kentridge, Esq., Q.C.

BETWEEN: T APPELLANT

AND: H RESPONDENT

Appeal against an Order of the Royal Court (Samedi Division) of the 14th November, 1989, whereby it was ordered that the Appellant (the defendant below) make discovery to the Respondent (the plaintiff below) of a certain surveyor's report.

Advocate G.R. Boxall for the Appellant,
Advocate R.J. Michel for the Respondent.

JUDGMENT

NEILL, J.A: This is an appeal from an interlocutory Order made by Mr. Commissioner Hamon sitting with Jurats Blampied and Vibert on the 14th November, 1989. The Order was made in the course of the trial of the action. The material part of the Order under appeal reads:

"The Court ..... ordered that the Defendant should produce for the inspection of the Plaintiff the surveyor's report on the said property...." (and that is the house in St. Peter) "..... commissioned by the Defendant and referred to in a letter dated 25th January, 1988, from the Defendant's Advocate to the Plaintiff and permit her to take copies thereof".

I may comment in passing that it is fairly plain from the terms of that Order that the Court was under the impression that the surveyor's report in question was a document which was in existence on 25th January, 1988. This Court was told that the surveyor did not actually produce his report until 17th May, 1988. The Order of the Court went on to give the Defendant leave to appeal and adjourned the hearing of the action until another day. Now, nearly eight months later, the appeal comes before us with the trial still standing adjourned. I must, therefore, go back in time to explain how the issue arose.

The Plaintiff in the action, H , is the former wife of the Defendant, T . She was the Petitioner in the divorce proceedings. The divorce took place in 1982. Ancillary matters were dealt with in an Order of 22nd February, 1982. By an Order dated 4th June, 1985, varying that earlier Order, the Greffier Substitut ordered as follows:

"That the Respondent do pay the interest and principal due on the mortgage charged against the said property"
"together with the rates, insurances, essential repairs and reasonable redecoration thereof, both internal and external".

Thus, this Order imposed on T a liability, inter alia, to pay for essential external repairs to the property.

By early 1987 the roof of the house was in need of repair. The Plaintiff obtained estimates for repairs from two contractors in February and March of 1987. She sent these to the Defendant by letter dated 28th September, 1987, asking him to let her know as quickly as possible whether she could instruct the contractors to go ahead. This elicited a response not from T himself but from his lawyer.

The letter was written to H's lawyer. It was dated 6th October, 1987. The material sentence in the letter, and it is highly material, read as follows:-

> "I will be grateful if you will, as a matter of great urgency, let me have a time and a day when it will be convenient for my client and his surveyor and me too, if necessary, to attend at the property to examine the condition of it and for my client to satisfy himself that the requirements of the Court Order are met".

On the night of 15th/16th October, 1987, a storm struck Jersey and further damage was done to the roof. On the 1st November, a firm called A. Cameron & Sons (Jersey) Ltd., submitted an estimate for £1,568 for "reslating due to storm damage". Loss Adjusters agreed with H to pay £1,070. They gave two reasons for their refusal to pay the full amount of Camerons' invoice. They said, first, that the Cameron estimate included some wear and tear work for which the insurers were not liable; secondly, they said that the house was under-insured. I pause to refer to the Cameron estimate in order to make it clear that it did not cover all the repair work to the roof which H and her advisers claim was essential. In the result the Cameron firm, despite repeated reminders from H, failed to appear to do the work and on 28th March, 1988, H told them that their services were no longer required.

Meanwhile, if we go back to the months of September to December, 1987, T and his advocate appear to have taken no steps to appoint a surveyor. Mr. Clyde-Smith wrote on 10th December on H's behalf to Advocate Boxall, saying: "You did indicate that you would attend at the property with your surveyor, but nothing appears to have happened". H herself followed this up with a letter of 15th December stating: "I would like to draw your attention to the matter of the request from your client of a surveyor to confirm the estimate I sent to him back in September for the repairs to the roof of the property. She referred to the storm damage and to a letter from the loss adjusters referring to damage by wear and tear. "Therefore, I feel", she wrote, "it will not be necessary for a surveyor also to ascertain this fact".

This Court has not been told the date on which T's surveyor actually visited the site, but so far as we can deduce it from the correspondence and the pleadings in this case, the visit appears to have taken place some time around 20th January, 1988. H wrote on that date to Advocate Boxall stating: "In regard to the surveyor's report, please may I have a copy for my own information? Thank you".

Mr. Boxall replied on 25th January in the following terms:

"In relation to your request for a copy of the surveyor's report as you will know such reports are in these circumstances clearly for the private use of one party or the other. In this case my client, T. I will therefore have to obtain his permission to release a copy to you, at least at this stage. Please let me know if you would like me to ask him to let you have a copy. It may of course assist if at the time I convey your request to him I were able to say whether or not you will be prepared to pay one half of the costs of obtaining the report. I look forward to hearing from you".

We postpone comment on this letter until later.

H wrote back to Mr. Boxall on 1st February, 1988, as follows:

"With reference to my request for a copy of the surveyor's report, the reason for my request is to establish any additional work the surveyor may have disclosed which can be rectified while the builder is working on the roof, thus saving cost and inconvenience in the future". I leave out two sentences and continue:
"I would certainly not agree to paying half the cost towards the report. May I remind you initially the surveyor's report was at T's request".

On 7th February she pressed for an answer to the letter which I have just read. Mr. Boxall wrote back on 15th February stating: "I have not yet received the surveyor's report".

In March H obtained estimates from three other firms of contractors. She wrote to Advocate Boxall on 31st March, sending copies of all these documents. All the estimates that she sent were passed on by Mr. Boxall to his client. Her letter of the 31st March opened with these words: "Since my last correspondence to you and telephone conversation with your secretary, (re surveyor's report)....." It therefore appears that H had by this date made four requests to be supplied with a copy of the surveyor's report - by letters of 20th January, 1st and 7th February and in a telephone conversation.

No word having been heard from T or Mr. Boxall, H accepted the estimate of one of the firms, Hacquoil and Cook Limited, and instructed them to get on and repair the roof. This they did and submitted their bill on 11th May, for a total of £5,768. T has paid £1,568 towards this - the £1,568 being, of course, the sum quoted by Camerons for reslating due to storm damage. In order to discharge the balance of £4,200 due to Hacquoil and Cook, H borrowed that sum from the bank, paying an interest charge of 19.7 per cent per annum and coming under an obligation to repay the capital plus interest plus insurance by sixty payments of £119, making a total repayment of £7,141.

On 14th December, 1988, H commenced proceedings against T , claiming the above mentioned short-fall of £4,200 with interest thereon. She also claimed certain other sums alleged to be due from T . By his Answer in the proceedings T denied liability. The following pleading should be noted: "Immediately after receiving the estimates the defendant took steps to contact the plaintiff to arrange for himself and/or his surveyor to attend at the property to inspect the roof of the property and to satisfy himself that the proposed work fell within the wording of the Court's Order as being repairs of an essential nature". This is no doubt a reference to the surveyor's inspection to which I have already alluded.

On 27th April, 1989, an Order for discovery of documents was made. The Order which required a list verified by affidavit referred to the Royal Court Rules of 1982, and I will quote here the relevant Rule which is 6/16 paragraphs 1 and 3.

> "1. The court may order any party to a cause or matter to furnish any other party with a list of the documents which are or have been in his possession, custody, or power relating to any matter in question in the cause or matter and to verify such list by affidavit". And
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> "3. If it is desired to claim that any documents are privileged from production the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege".

This Rule, recently introduced into the law of Jersey, is plainly derived from the English Rules for discovery, now contained in Order 24 of the Rules of the Supreme Court. Indeed, the language of paragraph 3, which I have just read, is identical to the wording of Order 24 Rule 5(2). An obvious difference between Jersey law and Order 24 is that under Order 24 discovery is in most cases automatic after close of pleadings, whereas in Jersey the intervention of a Court Order is required (just as it used to be in England). It is convenient here to refer to the Jersey case of Shirley -v- C.I. Knitwear (1985-86) J.L.R. 404, at page 410, in which case Commissioner Le Cras said that in view of the similarity of the rules with those of the English Supreme Court he proposed to turn to the latter for guidance. I believe that that is an entirely correct approach and that indeed the Jersey Rules can be elucidated usefully in the light of the very extensive case law in England.

As I said, the Order for discovery in the action required each party to furnish a list of documents and an affidavit within 28 days of 27th April. T's list reached the advocate for the Plaintiff on Friday, 10th November, 1989, with the trial due to start on Monday, 13th November. The relevant part of the list reads as follows: Paragraph 2 "The Defendant objects to producing the documents enumerated in part II of schedule 1 on the ground that they are privileged". Schedule 1 part II is in these terms: "Confidential

communications, letters, notes, statements and reports which have come into existence since the commencement of this action or in contemplation of it which have been prepared by or on behalf of the defendant and his lawyers or other advisers or between such persons and Third Parties in order to obtain or furnish information or advice to be used in evidence on behalf of the defendant in this action or for purposes in connection therewith or preparatory thereto".

There is manifestly no express reference here to the report by the unknown surveyor which we now know was dated 17th May, 1988, and which was, therefore, prepared and finalised some four months after his inspection of the roof took place. In view of the repeated requests which had been made by H in the early part of 1988 for a copy of that surveyor's report, it is a remarkable fact that no express reference was made to it in the list if it was desired to claim privilege for it.

No additional affidavit was filed in the Court below or for the purposes of this appeal making any express claim for privilege of the surveyor's report, or putting before us any additional evidence. It is a common practice in England where the original list and affidavit is laconic and uninformative for an affidavit giving more information to the Court to be filed. Our attention has been drawn to an example of that in the English House of Lords decision in Waugh -v- British Railways Board [1980] AC 521 at 530.

The contention of the appellant here is as follows (and I am reading from the appellant's case): "The appellant contends that the document is a privileged document commissioned from a third party for the purpose of taking and obtaining legal advice for the appellant in existing or contemplated proceedings and as such legal professional privilege attaches to it". The case has been argued in two ways, first, under the heading "Existing proceedings". It is argued that the 1985 Order, to which I referred at the beginning of this judgment, which made the appellant liable for essential external repairs to the house, constituted existing proceedings for the purposes of the privilege rule. But those proceedings were finished apart from the continuing executory Order. No case has been cited to this Court to

show that the privilege rule continues to operate in such circumstances. Cases cited of existing proceedings are all of instances where the issues had still to be decided by the Court and where no trial had yet taken place. We asked what reason there might be for extending the rule and Mr. Boxall was unable to give any positive reason why the existing proceedings rule should be extended to such a case as the one at present before us.

In our opinion the Court below were entirely correct in their treatment of this point when they stated (reading from page 6 of the judgment): "We cannot see that the Act of the Court of 4th June, 1985, is anything other than an executory order and although its effect is continuing the issues which led to it are at an end and the litigation which caused it to be issued is completed".

So we turn to the alternative argument that the report came into existence for the purpose of contemplated proceedings. The law, as laid down in the House of Lords case of Waugh -v- British Railways Board, to which I have just made reference, is that in order to get the benefit of privilege, the dominant purpose for the production of the document in question must have been that it was to be used in connection with contemplated proceedings. I would quote the material passage, which the appellant himself sets out in his written case citing from the speech of Lord Edmund-Davies in the Waugh case. He in his turn was making a citation from the Australian case of Grant -v- Downs (1976) 135 C.L.R. 674 where at 677 there is the following passage by Barwick C.J., in the High Court of Australia. He said:

> "Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its

production in reasonable prospect, should be privileged and excluded from inspection".

Lord Edmund-Davies goes on to say, and these are his words: "Dominant purpose, then, in my judgment, should now be declared by this House to be the touchstone. It is less stringent a test than 'sole' purpose, for, as Barwick C.J. added, 'the fact that the person ..... had in mind other uses of the document will not preclude that document being accorded privilege, if it were produced with the requisite dominant purpose'." I would just add by way of a gloss to the Australian case that the majority view of the High Court in Australia had been that the sole purpose for production of the document had to be the contemplated legal proceedings.

A rather more relaxed or lighter test of dominant purpose was adopted by Barwick C.J., and the House of Lords unanimously took that view in Waugh.

While citing from Lord Edmund-Davies in Waugh I would like to quote a further passage on p.543 where he is looking at the question of principle in relation to privilege claims and has this to say:

"And in my judgment we should start from the basis that the public interest is, on balance, best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld. Justice is better served by candour than by suppression".

What then was the dominant purpose here? Mr. Boxall in his argument says that we cannot go behind the appellant's affidavit. But, as I have already said, the list and the affidavit make no express reference to the surveyor's report. It is not a question of going behind a full and specific claim for privilege. Nor is the document one of such an obviously privileged character that a short phrase will suffice to cover it, for example "solicitor and client correspondence". I have already read the Rule which applies, Rule 6/16 paragraph 3: ".... the claim must be made in the list of documents with a sufficient

statement of the grounds of the privilege". The affidavit and the list in this case are wanting in that respect.

Mr. Boxall also referred us to a nineteenth century English case Gardner & Anor -v- Irvin & Anor (1878) 4 Ex. D. 49. I will cite the words of Cotton L.J., on p.53:

> "An affidavit in answer to an application for discovery must be construed strictly, because the other side cannot adduce evidence to contradict it. The person seeking discovery is bound by the affidavit made by his opponent, and therefore it ought to be full".

Brett L.J., said in the same case (p.52): "The defendants ought to verify on oath the facts on which they claim the privilege".

My comment is that the affidavit and list in our case markedly failed to do what was required by that authority.

However, we do have some primary evidence as to why the report was required. I have already referred to the letter of 6th October, 1987, from T's advocate. Referring to the proposed visit by the three people (the surveyor, the client and the lawyer) it was said that they wanted to attend at the property: "to examine the condition of it and for my client to satisfy himself that the requirements of the Court Order are met". That passage was echoed in the Answer and some further light was thrown on the document by the later letter dated 25th January, 1988, where the suggestion was made that the chances of getting a copy would be increased by an offer to pay half the costs of the surveyor.

Mr. Boxall said that the report was not to ascertain the quantum but to verify a legal liability. In fact, in my judgment, that was clearly the dominant if not the sole purpose and that is quite inadequate to support a privilege claim.

It has been suggested, especially in the appellant's written case, that there had been a whole series of disputes between the parties

about maintenance, school fees and the like and that therefore it was highly probable that the matter of the roof repairs would end up in litigation - hence proceedings were contemplated. I am unable to accept that this general atmosphere of contention if established (and here again Mr. Boxall failed to adduce the requisite evidence) would necessarily apply to a matter such as roof repairs. The surveyor as a professional man could be expected to take a dispassionate view of the evidence. He might well have agreed that the work described in the various estimates was indeed essential. But even if T's vague fears of the possibility of the matter ending up in Court meant that the proceedings were contemplated, a claim for privilege must still necessarily fail because the dominant purpose for which the report was prepared was to verify an existing legal liability rather than to make preparation for contemplated litigation or to get advice in connection with that litigation.

The Court below was again quite right on this point and I quote: "In our judgment the obtaining of a surveyor's report ..." (they say late in 1987, but I have been into the matter of dates) ".....could not possibly have been obtained for the purpose of anticipated proceedings despite the fact that this was not the parties' first dispute within this Court".

In my judgment it is not necessary for the purpose of deciding this appeal to go into the niceties of language, and to discuss the words 'contemplated proceedings'; 'anticipated proceedings'; 'proceedings in reasonable prospect' and other language used in cases to which our attention was directed, such as Jarman -v- Lambert and Cooke (Contractors) Ltd [1951] 2KB 937; and the Australian case of Grant -v- Downs, which I have already mentioned.

That is sufficient to dispose of the legal issues which arose on this appeal. I desire, however, to add a comment about what took place here. As I said, the Defendant's list of documents reached the Plaintiff's advocate on the Friday before a trial starting on Monday. Clearly, this gave no proper opportunity for considering its adequacy, or to decide whether or not to mount a challenge. The Plaintiff's counsel did not come to appreciate the possible importance of the

surveyor's report until after the conclusion of H's evidence. She had been in the witness box for several hours. The application for production was then made and granted by the Court. Leave to appeal was given and the case adjourned. Some eight months then elapsed. We will affirm the Order of the Court below; the report will no doubt be produced and a new date fixed for the further hearing, possibly not until September or October of this year, nearly twelve months from the original trial.

This interruption in a trial which was investigating liability for relatively small sums of money is lamentable. Although the sums of money at stake are not large, the plaintiff is out of pocket and has been driven to take a bank loan at a high rate of interest. So far as we know that debt still exists and the interest is accruing. This shows the injustice which can be caused by the failure to comply promptly with an Order for discovery. The Court below had this to say: "A more blatant disregard of a Court Order and a more cavalier approach to duty as an officer of the Court it would be difficult to imagine". We agree. It cannot be emphasised too strongly that the discovery of documents is a vital task in the administration of justice and prompt and proper compliance with an Order for discovery imposes a high and continuing obligation on the parties and in particular on their advocates.

I add to my judgment this citation from Halsbury's Laws of England 4th Ed. Vol. 13 title Discovery, paragraph 45:

> "Duty of a solicitor
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> A client cannot be expected to realise the whole scope of his obligation regarding discovery without the aid and advice of his solicitor and the latter has a peculiar duty, as an officer of the court, carefully to investigate the position and, as far as possible, to see that full and proper disclosure of all relevant documents is made. The solicitor cannot simply allow the client to make whatever list of documents the client thinks fit, nor can the solicitor escape the responsibility of careful investigation or supervision. It is his duty to take positive steps to ensure that the client appreciates the duty of discovery and the

importance of not destroying documents which might have to be disclosed, and in the case of a corporate client to ensure that knowledge of this burden is passed on to anyone who may be affected by it. Indeed, the solicitor owes a duty to the court carefully to go through the documents disclosed by his client to make sure, as far as possible, that no relevant document has been withheld from disclosure".

Everything there which is said about the position of a solicitor applies here to advocates in Jersey. For those reasons I would dismiss this appeal.

KENTRIDGE, J.A: I should like, in agreeing with the judgment which has just been delivered, to add a few words on the submission of counsel for the appellant that the Court does not go behind a discovery affidavit. In a sense, of course, that is true. One may not cross-examine on a discovery affidavit nor administer interrogatories, nor file a counter affidavit, but it must never be overlooked, that the party who claims privilege from disclosing a document is bound to establish that privilege to the satisfaction of the Court.

How far he must go in his discovery affidavit must depend upon the nature of the document. As Sir Patrick Neill has pointed out, in the case of some classes of document, such as solicitor and client correspondence, the claim to privilege may be made in the most concise terms; but in this case one is dealing with a document which is not in its nature necessarily privileged and in particular a document which came into existence several months before the commencement of litigation. A party who wishes to claim privilege would be well advised in his affidavit doing so to place sufficient information before the Court if he wishes to persuade and convince the Court that the claim for discovery is properly made. If he chooses not to go into detail he runs the risk, as in this case, that the claim of privilege will fail. I agree that the appeal should be dismissed.

THE PRESIDENT: I agree with both judgments which have been delivered.

JUDGMENT ON COSTS

THE PRESIDENT: Clearly the appellant will have to pay the costs of this appeal. Mr. Michel asks that we order the costs to be paid on a "Solicitor and own client" basis; and he does that on the ground that, he says, there was never any reasonable basis for claiming privilege for this document and the appeal lacked, therefore, any reasonable ground, and, therefore, he says, the order for costs should be on the higher scale.

Mr. Michel has been unable to cite to us any authority for the proposition that the fact that an appeal appears to the appellate court to have been hopeless from the start is a ground upon which costs should be ordered on anything other than the ordinary scale. We do not therefore feel able to order that the costs be on anything other than the ordinary scale on this occasion.

We would, however, add this: when the trial is concluded, and an order for the costs of the trial has to be made, it will be entirely within the discretion of the Court to take into account the conduct of the defence, and to make any order for costs, special or exceptional, as may appear to be right, which reflects any view the Court may form of the way in which the defence has been conducted.

This appeal, however, stands dismissed with costs.

Authorities

Royal Court Rules, 1982, Rule 6/16 and 6/21.

Phipson on Evidence, 13th Ed'n. (1982) p.291.

Home Office -v- Harman [1983] AC 280; [1982] 1 All E.R. 532.

Waugh -v- British Railways Board [1980] AC 521; [1979] 2 All E.R. 1169.

Guinness Peat -v- Fitzroy Robinson [1987] 2 All E.R. 716.

Neilson -v- Laugharne [1981] 1 QB 736; [1981] 1 All E.R. 829.

Alfred Crompton Amusement Machines -v- Commissioners of Customs & Excise No. 2 [1974] AC 405; [1973] 2 All E.R. 1169.

Westminster Airways -v- Kuwait Oil [1951] 1KB 134; [1950] 2 All E.R. 596.

Shirley -v- C.I. Knitwear (1985-86) J.L.R. 404 at p.410.

O'Rourke -v- Darbishire [1920] AC 581; [1920] All E.R. Rep. 1.

R.S.C. (1988 Ed'n.) Order 24.

R.S.C. (1988 Ed'n.) (6th Cumulative Supplement) P.P.41-2: 24/5/9.

Jarman -v- Lambert and Cooke (Contractors) Ltd. [1951] 2KB 937; [1951] 2 All E.R. 255 C.A.

Halsbury's Laws of England (4th Ed.) Vol. 13, paras. 45; 52-55; 68-83.

Gardner -v- Irvin (1878) 4 Ex. 49.

Grant -v- Downs (1976) 135 Commonwealth L.R. 674 at 677.

On Costs

Rahman -v- Chase Bank Trust & Ors. (2nd July, 1990) Jersey Unreported.

Preston -v- Preston [1982] 1 All E.R. 41.

Jones (née Ludlow) -v- Jones (1985-86) J.L.R. 40.