[2015] JMSC Civ 179

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013HCV00647

BETWEEN	VIRGINIA MCGOWAN SIMMONDS	CLAIMANT
AND	JAMAICA CO-OPERATIVE CREDIT UNION LEAGUE LIMITED	DEFENDANT

IN CHAMBERS

Jason Jones instructed by Nigel Jones and Company for the claimant

Kalima Bobb Semple instructed by Campbell and Campbell for the defendant

August 13 and September 8, 2015

CIVIL PROCEDURE – DISCLOSURE – WHETHER DISCLOSURE OF REPORT SHOULD BE ORDERED – LEGAL PROFESSIONAL PRIVILEGE – DOMINANT PURPOSE TEST

SYKES J

[1] Mrs Virginia McGowan Simmonds fell from a chair and suffered personal injury. She has brought a claim for damages. During the process of disclosure the Jamaica Cooperative Credit Union League Limited ('JCCU') filed a list of documents which revealed that an in August 2012 an investigator's report, connected to the fall, was prepared for the defendant by Vision Adjusters Limited. Mrs McGowan Simmonds has filed an application asking for specific disclosure of this report. JCCU says that the document is privileged. This court has to decide whether the report is privileged and therefore immune from disclosure.

The modern law

[2] Legal professional privilege is a doctrine developed by the courts in order to facilitate free and open communication between lawyer and client. The underlying idea is that the client should be able to benefit from what this court calls the three f principle, that is, he should be able to speak freely, fully and without fear of disclosure. The client may tell the attorney the embarrassing, the disreputable and, in some instances, the absolutely revolting about his case. It is only when full information is given that the lawyer is able to give clear, accurate and sound advice. Any holding back may lead to disaster.

[3] One of the consequences of legal professional privilege is that it ensures that not all information is before the court and not all relevant information is revealed to the opponent or the court thus placing the court at an information deficit which actually increases the risk of incorrect decisions being made. However, the law has decided that this is risk worth taking in order to enable persons to receive sound legal advice. The response to this risk has been to keep legal professional privilege within proper boundaries and not to extend it unnecessarily. Legal professional privilege lives side by side with another important principle which is that all relevant information should be available to the court. The joint judgment of Stephen, Mason and Murphy JJ of the High Court of Australia in **Grant v Downs** 135 CLR 674, 686 expresses it in this way:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available. As a head of privilege legal professional privilege is so firmly entrenched in the law that it is not to be exorcised by judicial decision. None the less there are powerful considerations which suggest that the privilege should be confined within strict limits.

[4] This last sentence perhaps explains why the court in **Grant** adopted the sole purpose test which was later abandoned. Nonetheless the passage reflects the concern that the primary anxiety of the courts is to have access to all relevant information bearing upon the subject matter of the litigation and therefore legal professional privilege, as important as it is, should not be expanded beyond what is necessary for it to meet its purpose.

[5] When it comes to reports prepared by third parties for any of the litigants the law rests has a firm principle in favour of disclosure. The test that has been developed in order to determine whether a report should be disclosed or withheld emphasises that the sole or dominant purpose for which a report is prepared

should be for the purposes of litigation, actual or apprehended. If there are multiple purposes and none is dominant then the report has to be disclosed. Why? Because it would mean that there is no good reason to refuse disclosure provided that it is relevant to the case. All this was discussed in the House of Lords decision in **Waugh v British Railways Board** [1980] AC 521 which has been adopted in Jamaica as the leading case in the area under consideration. In that case a collision occurred and a report was done. The claimant, the deceased's widow, sought disclosure of a joint internal report which incorporated witness statements. This report was done as a matter of practice. When the widow sought disclosure of the report, the defendant replied that it was privileged. The affidavit in support of the claim to legal professional privilege revealed that the report was done for two purposes: (a) to find out the causes of the collision and (b) for submission to the board's lawyers so that the board can be advised on any pending litigation.

[6] In resolving the question of whether the report should be disclosed Lord Wilberforce noted at pages 531 – 532:

> It is clear that the due administration of justice strongly requires disclosure and production of this report: it was contemporary; it contained statements by witnesses on the spot; it would be not merely relevant evidence, but almost certainly the best evidence as to the cause of the accident. If one accepts that this important public interest can be overridden in order that the defendant may properly prepare his case, how close must the connection be between the preparation of the document and the anticipation of litigation? **On principle I would think that the purpose of preparing for litigation ought to be either the sole purpose or at least the dominant purpose of it: to carry the protection further into cases where that purpose**

> **was secondary or equal with another purpose would seem to be excessive, and unnecessary in the interest of encouraging truthful revelation.** At the lowest such desirability of protection as exist in such cases is not strong enough to outweigh the need for all relevant documents to be made available. (emphasis added)

And at page 533, Lord Wilberforce was very clear that disclosure should be made unless there was some reason not to do so:

> It appears to me that unless the purpose of submission to the legal adviser in view of litigation is at least the dominant purpose for which the relevant document was prepared, the reasons which require privilege to be extended to it cannot apply. On the other hand to hold that the purpose, as above, must be the sole purpose would, apart from difficulties of proof, in my opinion, be too strict a requirement, and would confine the privilege too narrowly

[7] Lord Simon referred to two important principles at page 535:

> The first principle is that ... all relevant evidence should be adduced to the court. The report in question in this appeal undoubtedly contains information relevant to the matters in issue in the litigation here. The first principle thus indicates that it should be disclosed, so that the appellant may make use of it if she wishes.
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> The second general principle arises out of the adversary (in contradiction to the inquisitorial) system of administration of

> justice. Society provides an objective code of law and courts where civil contentions can be decided. But it contents itself with so providing a forum and a code (and nowadays some finance for those who could not otherwise get justice). Having done so much, society considers that it can safely leave each party to bring forward the evidence and argument to establish his/her case, detaching the judge from the hurly-burly of contestation and so enabling him to view the rival contentions dispassionately. It is true that this does not in itself give rise to legal professional privilege.

His Lordship noted at page 536:

> Historically, the second principle - that a litigant must bring forward his own evidence to support his case, and cannot call on his adversary to make or aid it - was fundamental to the outlook of the courts of common law. The first principle - that the opponent might be compelled to disclose relevant evidence in his possession - was the doctrine of the Chancery, a court whose conscience would be affronted by forensic success contrary to justice obtained merely through the silent non-cooperation of the defendant (see Y.B. 9 Ed. IV, Trin. 9), and which therefore had some inclination to limited inquisitorial procedures. The conflict between the Chancery and the courts of common law was, here as elsewhere, ultimately resolved by compromise and accommodation.

[8] Lord Simon was seeking some intermediate ground which would allow both principles to operate within their proper sphere of influence and so his Lordship held that the dominant purpose of the report should be for legal advice where the report served multiple purposes.

[9] Lord Edmund-Davies supplemented the above dicta with reference to the person who has the burden of proof at page 541 - 542:

> **It is for the party refusing disclosure to establish his right to refuse.** It may well be that in some cases where that right has in the past been upheld the courts have failed to keep clear the distinction between (a) communications between client and legal adviser, and (b) communications between the client and third parties, made (as the Law Reform Committee put it)
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> ...
>
> **But in cases falling within (b) the position is quite otherwise. Litigation, apprehended or actual, is its hallmark.**
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> ...
>
> Preparation with a view to litigation - pending or anticipated - being thus the essential purpose which protects a communication from disclosure in such cases as the present, what in the last resort is the touchstone of the privilege? (emphasis added)

And at pages 543 – 544:

> ... **I would certainly deny a claim to privilege when litigation was merely one of several purposes of equal or similar importance intended to be served by the material sought to be withheld from disclosure, and a fortiori where it was merely a minor purpose.**

...

> *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, 135 C.L.R. 674 , 677:
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> '... 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.' (emphasis added)

[10] The joint judgment of Stephen, Mason and Murphy JJ In **Grant**, on the question of burden of proof, held at page 690:

> It is for the party claiming privilege to show that the documents for which the claim is made are privileged. He may succeed in achieving this objective by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence.

[11] No one has said that in the present case, the report was contemporaneous but it undoubtedly may have information relevant to the case and can assist the court is arriving a more accurate position regarding the claim. The court makes this point in order to forestall the observation that the **Waugh** case turned on the contemporaneous nature of the report. The fact of contemporaneity emphasised the relevance of the report but was neither a sufficient nor necessary condition for disclosure. What was crucial was the relevance which was enhanced because it contained contemporaneous accounts of what happened.

[12] From what has been said this court takes the view that legal professional privilege is an exception to the rule requiring full disclosure of relevant

information. The tenor of the judgments in **Waugh** strongly suggests (and this court decides) that disclosure should be made unless there is some reason not to do so such as the information being irrelevant or subject to legal professional privilege. This court takes the view that where the evidence on whether legal professional privilege is established is ambiguous then that ambiguity should be resolved in favour of disclosure because (a) it would mean that the person resisting disclosure has not made out a good case for non-disclosure and (b) the principle of disclosure is the default position by reason of the fact that there is no presumption in favour of legal professional privilege and also the law favours disclosure and not non-disclosure.

The present case

[13] The affidavit in support of JCCU's stout resistance to the production of the report states as follows:

> 3 The defendant's list of documents filed on April 17, 2014 lists the investigator's report ... dated August 28, 2012 as a confidential document prepared during the course of litigation.
>
> 4. The investigator's report is a privileged document and therefore the defendants have a right to withhold the disclosure and inspection (sic) the said document.
>
> 5. This document was prepared for the purpose, though not necessarily for the sole or primary purpose, of assisting the defendant and their (sic) attorney at law in anticipated legal proceedings.
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> 6. That prior to obtaining the investigator's report, the claimant's attorneys at law had already communicated their

intention of pursuing a claim on behalf of the claimant for damage and losses ...

7. That based on the reasons stated above, the grounds which the defendants asserts that the document is privileged are not insufficient and/or incorrect as stated in the claimant's application.

8. That is it (sic) also denied that the investigation was conducted with a view to preventing any future reoccurrence at the defendant's institution as stated in the claimant's application.

9. Disclosure of the investigator's report is not necessary in order to determine the issue of liability or dispose fairly of the claim.

10. The investigator is not an expert and therefore the report generated by ... is merely an opinion of the investigating officer who is not in a position to make any final determination as it relates to liability for the accident.

11. If the defendant is required to produce the investigator's report to the court for the court to make a determination as whether the defendant is entitled to claim privilege, this could prejudice the defendant's case before the matter is tried.

[14] The court is aware that the prevailing legal view is that Lord Hoffman's views in **Investors Compensation Scheme Ltd v West Bromwich Building Society** [1998] 1 All ER 98 is now applied to all documents except possibly constitutions. There his Lordship indicated that the meaning of a document is not necessarily a matter of grammar and dictionaries since the meaning of a document is not

necessarily the same as the meaning of its words. His Lordship arrived at this position because it is entirely possible that a person may use words in an unusual way but the meaning may still be clear. In addition to this principle, there is also another principle which is that when one is looking at carefully prepared documents the interpreter does not readily conclude that the maker of the document wantonly departed from the accepted norms of the grammar and syntax of the language in question. The court may depart from the meaning initially proffered by the grammar and syntax if there is something in the context which demands another conclusion. Context here means the rest of the document and other background information that informed the preparation of the document.

[15] The most important paragraphs are 4, 5 and 6. Paragraph 4 is a conclusion and does not provide any reasons for that conclusion. The reasons are set forth in paragraphs 5 and 6.

[16] The court will now address paragraph 5. Paragraph 5 is a simple sentence meaning it has one finite verb and we know that a finite verb is one with subject and so the verb is limited (hence the expression finite) to that subject. It has one independent clause, that is, a clause which makes complete sense on its own. The independent clause is 'this document was prepared.' The finite verb is 'was'; some may say it is the compound verb 'was prepared.' Either way, the subject is document. However, that independent clause is now part of a simple sentence in which other clauses and phrases add meaning to independent clause and to the words used in clauses and phrases. The phrase 'for the purpose' was beginning to add meaning to 'was prepared' or 'prepared' but was incomplete and needed additional phrases to complete the meaning. It was beginning to say why the document was prepared. Excluding for the moment the phrase 'though not necessarily for the sole or primary purpose,' the rest of the sentence 'of assisting the defendant and their attorney at law in anticipated legal proceedings' is a phrase adding meaning by telling us fuller reasons about the purpose for which

the document was prepared. Therefore without the phrase 'though not necessarily for the sole or primary purpose' the sentence, as a matter of grammar and syntax means that when the document was prepared its purpose purpose was to assist the defendant and their attorney at law in anticipated legal proceedings. However, then the phrase 'though not necessarily for the sole or primary purpose' is taken into account it becomes clear that the assistance to JCCU and its lawyers was not the sole or dominant purpose for which the document was prepared, to use the language from **Waugh**. The fact that the report was made after notification of suit does not, without more, mean that the dominant purpose was for litigation. The time at which the report was prepared is not conclusive but a factor to be considered.

[17] Miss Bobb-Semple during oral submissions sought to say that since the report was done in 2012 and therefore, unlike the **Waugh** case, was not a contemporaneous report and not a report seeking to identify the causes of the incident that led to the claim being made then it could only have been for advice and litigation and thus necessarily privileged. The flaw in this submission is that of the fallacy of the false dilemma; it assumes that the purpose of the report must either be one or the other and if it is not for one then it must necessarily be for the other. There are other purposes which the report may have served. This is in fact what paragraph 5 says. However, the court need not speculate what these may be. Where the evidence is that the report served more than one purpose then the burden is on the person resisting the application for disclosure to establish the claim to legal professional privilege by showing that the dominant purpose was for litigation.

[18] Part of the relevant background is that this affidavit was sworn to by an attorney at law of some years. It was intended to be submitted to the court. This means that some care must have been taken in its preparation and for this reason the court would not, unless driven hard to that conclusion, readily accept that the lawyer had made a mistaken in the way paragraph 5 was constructed. Taken at

face value, paragraph 5 is intelligible and its meaning makes sense. Having looked at the entire affidavit and taking into account relevant background information such as the type of application, the reasons that led to the preparation of the affidavit and that it was a document setting out the purpose for which the report was prepared the court concludes that there is no reason for departing from the ordinary grammatical meaning of the sentence.

[19] In addition, the affidavit does not provide a full and complete narrative of how the report came to be prepared. **Grant's** case makes it clear that the court can examine the full circumstances surrounding the preparation of the document in order to determine whether privilege attaches. In other words, the court is not confined to a bare assertion of privilege but can also look at all the facts and circumstances that led to the preparation of the document. This affidavit is not as fulsome as would be expected in circumstances where the burden is on the withholder to make the case for non-disclosure. It may be that the affidavit was governed by a popular but certainly incorrect view that once an attorney or a litigant claims privilege then that claim is virtually conclusive but there is case law that says that that is not the case.

[20] If the interpretation given to paragraph 5 is not what JCCU intended then this court believes that JCCU would have to concede that it is a possible interpretation. This would mean that the wording of this important paragraph is at least ambiguous since it does not clearly make the assertion that the sole or dominant purpose for the preparation of the report was that it was for litigation purposes. If the phraseology of the affidavit evidence is ambiguous then that ambiguity must be resolved against JCCU because the default position is in favour of disclosure and the burden of proof is on JCCU to make the case for non-disclosure and not for Mrs McGowan Simmonds to make a case for disclosure. If the evidence is ambiguous then it has failed to establish that the document is subject to legal professional privilege.

[21] Paragraph 6 and the other paragraphs do not advance JCCU's case and no analysis of them is necessary.

[22] Lest it be thought that all that needed to have happened here was a clear and unambiguous statement purpose, this court hastens to remind that that is not conclusive but merely a factor to be considered. Clear statement of purpose does not preclude the court from conducting an enquiry in order to determine whether legal professional privilege applies. It should also be noted that where necessary the court has the power to examine the document itself and make the determination. These latter points have to be made for those who may think that it is a matter of verbal formation of the affidavit. If authority for these propositions are needed these are they.

[23] Regarding verbal formulation Lord Edmund-Davies, in **Waugh**, held at page 539:

> The fact that the report states on its face that it has *finally* to be sent to the solicitor for the purpose of enabling him to advise the board cannot however, be determinative of the outcome of this appeal, for, as the Lord President (Lord Strathclyde) said in Whitehill v. Glasgow Corporation, 1915 S.C. 1015 , 1017 - quoted with approval by Lord Kilbrandon in Alfred Crompton Amusement Machines Ltd. v. Customs and Excise Commissioners (No. 2) [1974] A.C. 405 , 435-436:
>
> 'These words cannot alter the character of the report which is made by the employee for the purpose of informing his employers of the accident, and made at the time.

[24] On the issue of the judge's power to examine the documents Barwick CJ in **Grant**, at page 678, that a judge may examine the document to see if legal professional privilege attaches to it.

> Whether or not a document does so qualify is a question ultimately to be decided, if need be, upon an inspection by the judge of the document itself, and by the application of the stated principle. I say "if need be" because where the judge who hears the application for inspection may possibly be the trial judge, sitting without a jury, it may be better to decide the matter upon the evidence as to the purpose of the production of the document rather than upon an inspection of it, thus avoiding any complication which might arise from the document having been seen by the judge and privilege from inspection accorded to it.

[25] In the same case the joint judgment of Stephen, Mason and Murphy JJ addressed both the verbal formulation and the judge's power to examine the document at page 690:

> But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual. The court has power to examine the documents for itself, a power which has perhaps been exercised too sparingly in the past, springing possibly from a misplaced reluctance to go behind the formal claim of privilege. It should not be forgotten that in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence.

[26] Jacobs J, the fifth member of the court, also agreed, at page 693, with the view that the judge may examine the document in question:

> I think that the question which the court should pose to itself is this—does the purpose of supplying the material to the legal adviser account for the existence of the material? I use the word purpose here in the sense of intention—the intended use. The question is one of fact. In some cases a mere general description of documents in an affidavit of discovery may indicate an affirmative answer without any need further to examine the documents or the circumstances in which they came into existence: *Westminster Airways Ltd. v. Kuwait Oil Co. Ltd.* **In other cases both an examination of the documents and of the surrounding circumstances may be necessary.** In my view it is necessary in the present case. (emphasis added)

[27] The fact that **Grant** had decided that in Australia the sole purpose test was the proper test (reversed by the later decision of **Esso Australia Resources v FCT** 201 CLR 49) does not undermine the passages cited from that case because those passage relate other aspects of the law in this area which are still valid today.

[28] The claimant has properly sought to get the report. This is permissible since there is no presumption in favour of legal professional privilege because the applicable principle is that all information should be made available to the court unless that principle is curtailed by legal professional privilege or some other applicable legal rule. The burden of proof is on the person claiming privilege. Thus once Mrs McGowan Simmons makes the demand for disclosure thereafter the burden of resisting disclosure is on JCCU.

[29] Two other points are addressed briefly. The objection that the report is not an expert report is not a sufficient one to bar disclosure. There is no rule that says only expert reports need to be disclosed. The other point was that disclosure of the report was not necessary for the fair and just disposal of the case. This objection is not accepted. Once the report is relevant then it should be disclosed unless there is good reason not to. The court cannot predict what use Mrs McGowan Simmonds may make of the report for the simple reason that the court does not know the full instructions given to counsel. The report may spark what turns out to be fruitful line of enquiry. It may provide material for cross examination. It may even demonstrate to the claimant that her claim is hopeless.

Disposition

[30] Order for specific disclosure of report granted. Costs of application to the claimant to be agreed or taxed.