United Capital Corporation v Bender and Ors

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	14 October 2005
Neutral Citation:	[2005] JRC 144
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Court:	Royal Court
Date:	14 October 2005

Text

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ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, **Esq., Deputy** Bailiff, **sitting alone**.

Between
United Capital Corporation
Plaintiff
and
(1) John Felix Bender
(2) John Koonmen
(3) SGI Trust Jersey Limited
(4) Johan Hendrik Laurentius Bartolomeus Wijsmuller
(5) Bluebird Limited (a company incorporated in Anguilla)
(6) Dovetail Limited (a company incorporated in Anguilla)

Defendants

Advocate S. Young **for the Plaintiff**.

Advocate J. Speck **for the first and second Defendants**.

Authorities

Koonmen v Bender.

Buttes Gas and Oil v Hammer (No.3) 1981 QB 223.

Shirley v Channel Islands Knitwear Limited 1985–86 JLR 404.

Great Atlantic Insurance Co v Home Insurance Co (1981) 2 All ER 485.

GE Capital Corporate Finance v Bankers Trust Company (1995) 1 WLR 172.

The Sagheera (1997) 1 Lloyds Rep 160.

Hollander: Documentary Evidence (2003 Edition) at paras 12.49–12.50.

Goldstone v Williams Deacon (1899) 1 Ch 47.

Appeal by First and Second Defendants against a decision of the Master ordering them to give discovery of documents to the Plaintiff which those Defendants claim are privileged.

Court finds

(i)that documents capable of being subject to "common interest" privilege;

(ii) that documents came into existence with the dominant purpose of being used in connection with anticipated litigation;

(iii) that documents are subject to "common interest" privilege;

(iv) that documents had not come into the public domain and such privilege not lost simply because documents had been exhibited in an affidavit deployed in other proceedings in open court before the Royal Court and the Court of Appeal;

(v) that such privilege would be lost if the documents had been read out publically in those other proceedings so as to form part of the official court record, had been retained as part of the court file available to the public or had been quoted by any judge in open court or in any judgment of the court.

Bailiff DEPUTY

1 This is an appeal by the first and second defendants against a decision of the Master on 28th September 2005 ordering them to give discovery of certain documents which they contended were privileged. The appeal raises some interesting issues as to privilege and the loss thereof.

The background

2 Mr Bender and Mr Koonmen were responsible for the management of some investment funds known as the Amber funds. These funds were exceptionally successful and gave rise to very substantial management fees which were placed in one or more trusts of which Sinel Trust Anguilla Limited (STAL) was the trustee. Subsequently a dispute arose between Mr Koonmen and Mr Bender as to the allocation of these profits and Mr Koonmen instituted proceedings in Jersey against Mr Bender, STAL and others claiming 50% of the management profits ("the *Koonmen v Bender* action").

3 Mr Bender contended that Anguilla, not Jersey, was the appropriate forum for that action and issued a summons to that effect. In due course the Court of Appeal ruled in favour of Mr Bender and held that Anguilla was the appropriate forum. Subsequently the dispute between Mr Koonmen and Mr Bender was settled.

4 Mr Silverman alleges that, prior to Mr Bender's involvement with Mr Koonmen, he reached an agreement in New York with Mr Bender whereby he, Mr Silverman, was entitled to 25% of the management and performance profits. In 2001 he instituted proceedings against Mr Bender in New York but these were discontinued because Mr Bender had no assets in the United States. He has assigned his claim to United Capital Corporation ("UCC") which has brought the present proceedings in Jersey against Mr Bender, Mr Koonmen and others. It is not necessary to explain in any detail the nature of the claims but suffice it to say that the claim against Mr Bender is based upon the alleged agreement and the claim against the other defendants is related to the allegation that they have received or dealt with some or all of the profits to which Mr Silverman says he is entitled.

5 In support of the application in the *Koonmen v Bender* action as to the appropriate forum Mr Koonmen filed an affidavit sworn by a Mr Jonathan Wheeler a partner in the firm of English solicitors Withers LLP. The affidavit exhibited various correspondence as Exhibit JEW8.

6 In the present proceedings the Master ordered in July 2005 that Mr Koonmen should disclose the affidavits and submissions sworn or put in relation to the *Koonmen v Bender* action. Accordingly Mr Koonmen has disclosed Mr Wheeler's affidavit and all of the exhibits thereto with the exception of eight letters forming part of Exhibit JEW8. Both defendants

claim that these letters are privileged and therefore should not be disclosed to the plaintiff. There is some urgency in the matter because the Court is due to sit next Monday in order to hear an application on behalf of the defendants that, *inter alia*, leave to serve out of the jurisdiction should be set aside and that Anguilla is the appropriate forum rather than Jersey, and Mr Young submits that the documents are relevant to that application.

7 The appeal raises the following issues:–

(i) Are the letters privileged?

(ii) If so, has privilege been waived or otherwise lost

(a) because of the disclosure in these proceedings of Mr Wheeler's affidavit and the remaining exhibits; or

(b) because the letters were deployed in the *Koonmen v Bender* action?

(i) Are the letters privileged?

8 Before the Master, the defendants produced no affidavit listing exactly what were the documents in respect of which they claim privilege and setting out the grounds for the claim of privilege. Nor was any such affidavit originally filed before me. It is quite clear that, if a person wishes to claim privilege, he must do so by affidavit. In the ordinary case, the affidavit of discovery will list the nature of those items in respect of which privilege is claimed (e.g. instructions to counsel, proofs of witnesses etc). Where, as in this case, the basis of the claim for privilege is not immediately obvious, the affidavit must explain enough to make clear the basis of the claim of privilege. I directed that such an affidavit be sworn and it has now been received.

9 The documents in respect of which privilege is claimed are listed as follows:–

(i) A letter from a Mr Lipkind, a lawyer acting for Mr Koonmen, to Mr Wijsmuller (a defendant to these proceedings) at Sinel Trust Limited (the then name of the third Defendant to these proceedings) dated 16 March 2001, which deals predominantly with the Silverman claim;

(ii) A letter from STAL (until recently a defendant to these proceedings) to Mr Lipkind dated 22 March 2001 replying to (i) which deals predominantly with the Silverman claim;

(iii) An email from Mr Lipkind to Advocate Philip Sinel, who was a principal of the Third Defendant, dated 8 April 2001 dealing exclusively with the Silverman claim;

(iv) An email from Advocate Sinel to Mr Lipkind dated 9 April 2001 dealing exclusively with the Silverman claim;

(v) A fax from Mr Lipkind to Advocate Sinel dated 16 April 2001 dealing exclusively with the Silverman claim;

(vi) A letter from Mr Lipkind to another lawyer, Mr James Walker, who acted for the companies called AIA (BVI) and AIA (Cayman), which were defendants both to the Silverman proceedings in 2001 and, until recently, to these proceedings, enclosing a copy of (v);

(vii) A letter from Mr Lipkind to Advocate Sinel dated 30 April 2001 chasing for a response to (v); and

(viii) A fax from Advocate Sinel to Mr Lipkind dated 1 May 2001 with a brief response to (v).

10 As can be seen the documents comprise correspondence by letter and e-mail between March and May 2001. Legal proceedings had been commenced in New York in February 2001 by Mr Silverman against Mr Bender and other defendants as described above. The documents comprise correspondence between Mr Lipkind, a New York lawyer acting for Mr Koonmen and STAL, Advocate Sinel (who acted for STAL) and Mr Walker, a lawyer acting for two of the other defendants to the Silverman proceedings in New York. They are all said to deal predominantly or exclusively with the Silverman claim.

11 Mr Koonmen was not a defendant to the Silverman proceedings. Nevertheless privilege is claimed on the basis of common interest privilege. That sort of privilege is explained in *Buttes Gas and Oil v Hammer (No.3)* 1981 QB 223 where Lord Denning, M R said at 243:–

> ***"There is a privilege which may be called a "common interest" privilege.*** That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him — who have the self-same interest as he — and who have consulted lawyers on the self-same points as he — but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation — because it affects each as much as it does the others. Instances come readily to mind. Owners of adjoining houses complain of a nuisance which affects them both equally. Both take legal advice. Both exchange relevant documents. But only one is a plaintiff. An author writes a book and gets it published. It is said to contain a libel or to be an infringement of copyright. Both author and publisher take legal advice. Both exchange documents. But only one is made a defendant.
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> ***In all such cases I think the courts should — for the purposes of discovery — treat all the persons interested as if they were partners in a single firm or departments in a single company.*** Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All

> are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other the copies. All are privileged."

12 It seems to me that Mr Koonmen undoubtedly had a common interest with Mr Bender in connection with the Silverman claim. They both knew that the management fees in respect of which Mr Silverman was claiming were being shared between Mr Koonmen and Mr Bender or other entities on their behalf. Litigation against both of them and those various entities was clearly 'a reasonable prospect' if Mr Silverman were to discover what had happened to the assets.

13 The next question is whether the correspondence came into existence with the dominant purpose of being used in connection with the anticipated litigation. It is only if that was the dominant purpose that litigation privilege applies. The plaintiff submits that this was not so. It refers to an affidavit of a Mr Philips, an adviser to Mr Koonmen, who swore an affidavit in the *Koonmen v Bender* action stating that Mr Lipkind was originally instructed to make all the necessary arrangements to put into effect a tax efficient structure to receive Mr Koonmen's share of a planned settlement between him and Mr Bender. In fact that particular settlement never came to fruition and accordingly the structure was not put into place. The plaintiff alleges that any correspondence about the Silverman claim was very much ancillary to the main task of Mr Lipkind which was in relation to this tax structure.

14 I accept that that was the initial purpose of the instructions to Mr Lipkind. However that is not determinative of the matter. If I, as a lawyer, am originally instructed on matter A but, during the course of that, I come to learn of proposed litigation against my client and write to him advising him on the contemplated litigation, the dominant purpose of my writing to him would be in connection with that litigation. There would be no logic in holding that my advice to him in connection with that litigation was for some reason not privileged merely because I had originally been instructed in connection with another matter.

15 The Court has a discretion as whether to inspect for itself material which is the subject of a claim for privilege (see *Shirley v Channel Islands Knitwear Limited* 1985–86 JLR 404) but I have not considered it necessary to do so in this case. On the basis of the description of the correspondence contained in the affidavit which is sworn by an advocate I am content to find that, regardless of the original purpose of instructing Mr Lipkind, the dominant purpose of the particular items of correspondence which are an issue related to the Silverman proceedings and the contemplated possible claim in this respect against Mr Koonmen. I therefore find that the correspondence is privileged.

(ii) Has the privilege been lost?

(a) Disclosure of part of the document

16 There is a general rule that where a party chooses to waive privilege in respect of part of a document by deploying it in the case, the opposite party and the court must have an opportunity of seeing the whole of the document in order to check that what has been released fairly represents the whole of the material relevant to the issue in question. See *Great Atlantic Insurance Co v Home Insurance Co* (1981) 2 All ER 485. Mr Young submits that this is the position here.

17 For the reasons given by Mr Speck I do not agree:–

(i) The rule described above only applies where a party chooses to deploy part of the privileged document in support of his case i.e. he wishes to rely upon the released part of the document as supporting him. In such cases it is clearly only fair and reasonable that the Court and the other party should be able to check that the relevant part (which is being relied upon) is fairly representative of the privileged material as a whole and does not give an unfair or distorted impression by being taken out of context. However the defendants in this case are not deploying Mr Wheeler's affidavit in the present proceedings. They are disclosing it simply because they have been ordered to do so. It is an affidavit sworn in a completely different set of proceedings between different parties. They say it is irrelevant to the present case. Mr Young may wish to comment on the document but that is a matter for him. Thus there is no question of the defendant seeking to deploy or rely upon the affidavit in any way in the current proceedings. In those circumstances the principle described above simply has no application. It is of course theoretically possible that things might change and that the defendants might seek to deploy the affidavit in the present proceedings (although I am not sure how they could, given that it is simply an affidavit in different proceedings). Should they elect to do that, the question of whether they should be allowed to do so without disclosing the exhibits could of course be revisited.

(ii) The principle in *Great Atlantic* has been the subject of consideration in the case of *GE Capital Corporate Finance v Bankers Trust Company* (1995) 1 WLR 172 and *The Sagheera* (1997) 1 Lloyds Rep 160. A useful discussion of the position is also to be found in Hollander: Documentary Evidence (2003 Edition) at paras 12.49–12.50. *Great Atlantic* was concerned with a case where a party chose to waive privilege in what was undoubtedly a privileged document by using it in the proceedings and the question then was whether privilege was deemed to be waived in the rest of the document. It was not concerned with issues of discovery in relation to a document which is partly privileged and partly not. This is the situation here. Mr Wheeler's affidavit and all the exhibits, bar the eight letters in question are not the subject of any claim to privilege. They must therefore be disclosed. It is only the eight letters forming part of Exhibit JW8 which are privileged. The disclosure of the non-privileged part of the document cannot result in the loss of privilege in the privileged part. The situation is completely different from that which existed in *Great Atlantic*. To the extent that the Master held that, if part of a document such as an affidavit is disclosed, the whole of it must invariably also be disclosed, I respectfully disagree for the reasons explained above.

18 I rule therefore that, on the facts of this case, disclosure of the non-privileged part of the affidavit has not waived privilege in the privileged exhibits and that the defendants have not sought to deploy the affidavit in a manner which would render it unfair to allow them to do so without allowing the Court and other parties to see the whole of the document.

(b) Disclosure of the privileged material in the Koonmen v Bender action

19 Mr Young submits alternatively that privilege has been lost in the documents because they were exhibited to an affidavit which was deployed in open court in the *Koonmen v Bender* action both before the Royal Court and the Court of Appeal.

20 Mr Speck, on the other hand, submits that privilege has not been lost because the documents were not read out publicly in those proceedings and do not form part of the Court file so as to be available to the public. The confidentiality in the documents has not been lost and therefore privilege has not been lost either.

21 It seems to me that the following principles are applicable:–

(i) Privilege can be waived in respect of a specific person. Thus, if A discloses a privileged document to B, he cannot of course maintain any claim for privilege against B, but he may still claim privilege against others, particularly if B has received the document subject to an express or implied obligation of confidentiality.

(ii) If, however, documents have lost their confidential nature by coming into the public domain then, even if they would otherwise be privileged, privilege cannot be maintained. Thus in *Goldstone v Williams Deacon* (1899) 1 Ch 47 depositions (which would otherwise have been privileged) in previous proceedings were held to have lost their privilege in subsequent proceedings because they were on the court file of the previous proceedings and could be inspected by any member of the public.

(iii) Documents disclosed in previous proceedings will not be taken to have lost their confidential nature (and therefore their privilege) if they have not come into the public domain. So, for example, if the previous proceedings were held in camera, any material used in those proceedings would not have come into the public domain. In *Goldstone* itself, an exhibit to the deposition was put to the witness in the previous proceedings but was not read out in public and did not form part of the court file. The court held that that document had not come into the public domain and that privilege had accordingly not been lost.

22 The difficulty lies in applying these principles to the present case. Mr Young submits that the affidavit and the exhibits were filed in public proceedings. The court might easily have asked that they be read out (in which case they would have lost their confidential nature because they would have been heard by any member of the public in court or anyone who

read the transcript); alternatively the Royal Court or the Court of Appeal might have decided to quote the material in full in the judgment, in which event the material would have come in to the public domain. Mr Speck, on the other hand, submits that the Court simply has to proceed on the basis of what actually occurred. Was confidentiality lost? In this particular case the material was not read out in court nor does it remain on the court file. It is therefore not available to any member of the public and has therefore not come into the public domain so as to lose its confidential nature.

23 I have found this the most difficult aspect of the case. *Goldstone* was decided as long ago as 1899 and there has been much greater emphasis in recent times on the public interest in ensuring that the public has access to what goes on in the courts and to the material which is placed before the courts. Furthermore the greater emphasis (in the interests of the efficient use of time) on the use of written material, which is read by the judge in private and in advance rather than read out loud during the course of the proceedings, means that documents which, at the time of *Goldstone*, may have found their way into the court record will no longer do so. Furthermore it would seem to be entirely fortuitous as to whether a particular document is read into the official court record or is quoted verbatim in the judgment so as to bring it into the public domain. This might be said not to be an entirely satisfactory basis for determining whether privilege has been lost. It is slightly surprising that neither counsel has been able to refer me to any authority which has considered this position and whether *Goldstone* remains good law.

24 However I have been persuaded by Mr Speck that ultimately, whether privilege has been lost in circumstances such as these must depend upon whether confidentiality has in fact been lost and that I should follow *Goldstone*. On the facts of the present case it would appear that confidentiality has not been lost. The material in question has not been retained as part of the court file and is not publicly available. It was not read out during the hearings so as to form part of the official court record, nor was it quoted by any of the judges. Accordingly it has not come into the public domain and is not available to the public. The only persons to whom this material has been disclosed are the other parties in the *Koonmen v Bender* action and they all share the common interest of Mr Koonmen and Mr Bender in this material as being potential parties to the claim brought on behalf of Mr Silverman.

25 I therefore rule that privilege in these documents has not been lost by reason of their being exhibited to Mr Wheeler's affidavit in the *Koonmen v Bender* action.

26 Accordingly I allow the appeal and I will hear the parties in relation to costs.