Philip Cowan Sinel (trading as Sinels) v Moira Hennessy and Damien James and Adam Clarke and Luc Jean Edouard Argand (as executor of the estate of the late Killian Hennessy) and Marie Emanuelle Michelle Argand (as executor of the estate of the late Killian Hennessy) and Sylvain Michael Bogensberger and Amaury D'Everlange and The Law Society of Jersey

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	27 March 2018
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Text

[2018] JRC 065A

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Bailiff, sitting alone.

Between
Philip Cowan Sinel (trading as Sinels)
Plaintiff
and
(1) Moira Hennessy
Defendants
(2) Damien James
(3) Adam Clarke
(4) Luc Jean Edouard Argand (as executor of the estate of the late Killian Hennessy)
(5) Marie Emanuelle Michelle Argand (as executor of the estate of the late Killian Hennessy)
(6) Sylvain Michael Bogensberger
(7) Amaury D'Everlange
(8) The Law Society of Jersey

Advocate J. S. Dickinson **and** G. C. Staal **for the Plaintiff**.

Advocate M. L. Preston **for the First Defendant**.

Authorities

Sinels v Hennessey and Others [2018] JRC 007 .

Jersey Evening Post v Al Thani [2002] JLR 542 .

In Re Sanne Trust Company Limited [2009] JRC 025B .

In the matter of the C Trust [2012] JRC 098 .

James v Law Society of Jersey and Sinel [2017] JRC047B .

R v Derby Magistrates Court ex parte B [1996] 1 AC 487 .

Trusts (Jersey) Law 1984

Estate — application by the Plaintiff for an order that the judgment of 12 January 2018 should be anonymised.

Bailiff

THE

1 An application was made by the first defendant to have the order for service of the plaintiff's order of justice upon her out of the jurisdiction set aside. The application was successful and judgment was handed down on 12 th January 2018 (*Sinels v Hennessey and Others*

[2018] JRC 007). The application was heard in public. The plaintiff accepts that the judgment should be published but now seeks an order for it to be anonymised. In doing so, he accepts that these were hostile proceedings and that there is a principle of open justice but he asserts that this relationship with his client should not come into the public domain.

2 In support of his application the plaintiff refers to *Jersey Evening Post v Al Thani* [2002] JLR 542, *In Re Sanne Trust Company Limited* [2009] JRC 025B and *In the matter of the C Trust* [2012] JRC 098. These cases emphasise the importance of justice being done in public and the principle of publishing judgments in order that firstly the public can be satisfied that justice is being done, and secondly so that the reasons for Court decisions will be understood and guide subsequent cases in the future. The cases also establish that in applications affecting the administration of trusts, the Court will frequently sit in private although it may subsequently determine to publish its judgment, if it is in the public interest to do so. It is to be noted that this practice does not mean that the Court will always sit in private simply because a trust matter is before it, nor does it mean that the judgment will not be published, or if published will always be redacted, in the case where the subject matter of the application is a trust, or if the proceedings generally concern a trust. Indeed, *In the matter of the C Trust* (*supra*) the Court expressly indicated that it rejected the contention that the principles outlined in *Re Sanne* should be expanded or extended. Indeed the Court indicated that the conduct of trustees and protectors carrying on trust company business in the Island was very much of public interest. Thus it is clear that it is not conclusive for anonymization that the proceedings may have had some connections with a private trust.

3 The Plaintiff also relied upon the decision of this Court in *James v Law Society of Jersey and Sinel* [2017] JRC047B. In connection with this case, it was said by the plaintiff that the decision of the Court to redact the judgment on publication recognised that there was a legitimate interest in preserving the privacy of a confidential relationship between client and lawyer at least equivalent to preserving the privacy of family arrangements in trusts.

4 The plaintiff also went on to submit that legal professional privilege is a fundamental human right. In doing so he referred to *R v Derby Magistrates Court ex parte B* [1996] 1 AC 487. The facts in that case were that the applicant had gone for a walk with a 16 year old girl who was later found murdered. He was arrested and he made a statement to the police admitting being solely responsible for the murder. Shortly before his trial, he retracted that statement and alleged that although he had been at the scene of the crime, his step-father had killed the girl. He was acquitted. In 1992 the step-father was charged with the girl's murder and in the committal proceedings the applicant gave evidence for the prosecution and repeated his allegation that the step-father had murdered the girl. When the applicant refused to answer questions under cross-examination as to the instructions he had initially given to his solicitors when admitting to the murder, the step-father made an application for a witness summons directed to the applicant's solicitor requiring production of the attendance notes and proofs of evidence disclosing the relevant instructions. The stipendiary magistrate issued the summons and the Divisional Court dismissed an application for leave to seek judicial review of those decisions. The House of Lords allowed the appeals and *inter alia* held that a witness summons could not be issued to compel the

production of documents subject to legal professional privilege which had not been waived, since the principle that a client should be free to consult his legal advisers without fear of his communications being revealed was a fundamental condition on which the administration of justice as a whole rested. This was described by the majority of their Lordships as the predominant public interest even where the witness no longer had any recognisable interest in preserving the confidentiality. At page 507, Lord Taylor of Gosworth said this:–

> ***"Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd.8969), as to which we did not hear any argument."***

5 One might think that there was a very strong public interest in ensuring that a person was not convicted of a murder which he did not commit and in that context, the instructions given by the applicant to his solicitors when admitting to the murder might be thought to be very relevant indeed. The case is good authority to support the contention that legal professional privilege is such an important human right that it has priority over other public interest factors.

6 It was contended therefore on behalf of Advocate Sinel that the relationship between him and his client would never have come into the public domain if the first defendant had acted correctly and given the documents back. Instead she circulated them, to Advocate James, and maybe to the executors and to her French lawyers.

7 Advocate Dickinson contended that he sought only a limited extension to the principles as set out in *Sanne*, and in this case that the Court should note that the first defendant had abused its process twice — by giving the documents to the executors and also by filing an unredacted copy of the judgment of 12 th January 2018 in the Swiss proceedings.

8 The first defendant resists any attempt at anonymization on the grounds that:–

(i) The plaintiff was seeking to have the judgment anonymised for the benefit of a non-party.

(ii) The Plaintiff had left it too late to raise the question of privacy or anonymity and should have sought directions at the outset as a preliminary point.

(iii) It was contrary to the principles of open justice to redact a judgment where argument had taken place in open court on the assumption that there would be an unredacted judgment published in due course.

(iv) Contrary to the plaintiff's assertions, the judgment contained no privileged

material.

(v) As to the disclosure in Switzerland, this might have happened, but it was in response to an order of the Lausanne Court, obtained at the request of Gilles Hennessy. Advocate Preston agreed that those proceedings are held in private. He was instructed that the order for disclosure was made prior to the application for confidentiality made in this court, and it was not therefore abusive conduct. These submissions on behalf of the first defendant could not be gainsaid by the plaintiff, and Advocate Dickinson advised me that he would have to take instructions on them. It seems to me therefore that I must proceed today upon the basis that there was no abuse of the process of the Royal Court on the second occasion as Advocate Dickinson had suggested. Furthermore it is not entirely clear which court process is said to have been abused by handing the documents to the executors in the first place. Accordingly I do not take abuse of process into account.

Decision

9 There is no doubt that legal professional privilege is a fundamental right which is given the highest level of protection by the courts for policy reasons which it is unnecessary to set out again here. As we indicated in our judgment of 22 nd March, 2017, in relation to the representation of Advocate James (*James v Law Society of Jersey and Sinel* [2017] JRC 047B), the underlying documents in question appear to belong to Mr Gilles Hennessy or to Advocate Sinel. At the time of issuing proceedings in the present case, Advocate Sinel did not contend in his original order of justice that he had any proprietary interest in the documents in question — instead his claim was that, as a result of the duty of confidence which he owed to his client, he was entitled to take action against third parties to protect that confidence. That contention was rejected for all the reasons set out in our judgment of 12 th January; in short summary, because the privilege belongs to the client and not to the lawyer and Advocate Sinel did not contend that he had any proprietary interest, it followed that he was not entitled to relief and the order for service out of the jurisdiction should be set aside. The plaintiff's contention that the judgment of 12 th January should be anonymised raises a collateral dispute between the parties but ultimately it is a matter for the discretion of the Court as to what should be redacted from a judgment given in public in relation to proceedings heard in public.

10 I also take note of the fact that the judgment of 12 th January in fact contains no significant reference to privileged material at all. The only privileged material which is referred to is the fact that the Plaintiff acted for the late Mr Killian Hennessy and also for Mr Gilles Hennessy — and yet that information is already known to the first defendant and to others. Clearly, to the extent that the late Mr Killian Hennessy had an entitlement to privilege, that entitlement vests in his estate and not in either the plaintiff or Mr Gilles Hennessy, and it seems hard to see why there should be any redaction of the judgment in relation to reference to Mr Killian Hennessy. Furthermore, it is also hard to see why there should be any redaction of the judgment in relation to the name of the first defendant — she does not object to her name being published, and it is not obvious as to why she should not tell the world, even if the

judgment were redacted, that she is the first defendant named in these proceedings. So the proposed redactions that would remove any reference to any member of the Hennessy family seem to me to go too far in any event, relating as they do solely to Mr Gilles Hennessy.

11 I am therefore left with the contention by the plaintiff that the anonymization should take place for the benefit of his client Mr Gilles Hennessy notwithstanding that that client has not participated in these proceedings at all. For my part, I do not see why he should have the cloak of anonymity in relation to proceedings which he has not sought to bring but which apparently have been brought to protect his rights. There is in my judgment no reason to afford anonymity in litigation brought on behalf of a third party, and every reason not to do so.

12 This is not a case involving a minor or person under disability. It is not a case where issuing a public judgment would defeat the very objective of the proceedings so that the Court cannot do justice. It is not an administrative action concerning a trust under Article 51 of the Trusts (Jersey) Law 1984. Neither is it a matter of professional discipline, where the focus of the judgment will be on the conduct of the lawyer — which might or might not mean that the lawyer's name is published — and the client's identity is not only a private matter but also one which is of no real consequence in the proceedings.

13 By contrast, these were hostile proceedings commenced by the plaintiff against the different defendants. By taking the decision to issue those proceedings, the plaintiff must have been aware that the proceedings would be liable to take place in public and a judgment be published. In this case, the argument as to whether the order for service out of the jurisdiction should be set aside did take place in public and no submission was made that it should not do so.

14 There is a public interest in the publication of the judgment for the two policy reasons set out at paragraph 2 above, and it would extend the usual approach to anonymization if the plaintiff's application were to be granted. I do not see any justification for doing this, and indeed consider that the arguments for not doing so are conclusive.

15 The first defendant has sought her costs of and incidental to the application for anonymization. In my judgment costs follow the event and I order the plaintiff to pay the first defendant's costs of and incidental to this application on the standard basis.