21/82

COURT OF APPEAL (ENGLAND) — CIVIL DIVISION

GREAT ATLANTIC INSURANCE Co v HOME INSURANCE Co & Ors

Templeman and Dunn LJJ — 14, 15, 28 January 1981

[1981] 2 All ER 485; (1981) 1 WLR 529; [1981] 2 Lloyd's Rep 138

PRACTICE – EVIDENCE – DISCOVERY – PRIVILEGE – LEGAL PROFESSIONAL PRIVILEGE.

The plaintiffs were insurers who entered into reinsurance agreements with the defendants who later repudiated the agreements. Plaintiffs brought a declaratory action against the defendants claiming that the agreements bound the defendants. In the preparation of their case the plaintiffs received a memorandum from their American attorneys relating to the action. The first two paragraphs were an account of a discussion between those attorneys and another person, and before trial the solicitors for the plaintiff disclosed only those paragraphs, intending to claim privilege but omitted to do so. Counsel at the trial read out the paragraphs under the impression that they constituted the whole of the memorandum. When both sides became aware some days later that the details read out were incomplete, defendant's counsel asked for the disclosure of the additional material on the ground that though the whole document might be privileged, the disclosure of part amounted to a waiver of privilege.

HELD: When discovery is made of part of a privileged document, it amounts to waiver of privilege in respect of the whole document.

TEMPLEMAN LJ (whose judgment was adopted by DUNN LJ: *[His Lordship firstly pointed out that the whole of the document was privileged even though it contained matters which by themselves were not, by virtue of the relationship of the American Attorneys as legal representatives of the plaintiffs. He referred to the following cases:]*

In *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 @ 658 a distinction was drawn between solicitor and client information and that which is obtained from a third party by the solicitor, which information is not directly concerned with litigation and therefore not privileged. In *Wheeler v Le Marchant* (1881) 17 Ch D 675, Jessel MR affirmed this distinction and said that this third party information was only protected where it had come into existence after litigation was commenced or was in contemplation. The protection afforded to communications between solicitor and client is wider and is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property. It has never gone beyond the obtaining legal advice and assistance, and all things reasonably necessary in the shape of communication to the legal advisers are protected from production or discovery in order that that legal advice may be obtained safely and sufficiently ... a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of litigation provided it be a communication made to the solicitor in that character and for that purpose ... it is a rule established and maintained solely for the purpose of enabling a man to obtain legal advice with safety.

In *Minter v Priest* [1929] 1 KB 655; (1930) AC 558; (1930) All ER 431 the House of Lords affirmed that a communication between a solicitor and his client is privileged provided that the relationship of solicitor and client is established and that the communication is such as 'within a very wide and generous ambit of interpretation, must be fairly referable to the relationship ...' The relevant authority to the present case is *Wilson v Northampton and Banbury Junction Railway Co* (1872) LR 14 Eq 477 'all correspondence between solicitors and clients relating to the subject-matter of a contract which has been entered into and which may lead to litigation – whether it has done so or may do so, whether it is probable or improbable that it will do so – ought certainly to be privileged'. All communications between solicitor and client where the solicitor is acting as a solicitor are privileged subject to exceptions to prevent fraud and crime and to protect the client and that the privilege should only be waived with great caution. This principle applies equally to communications between a client and his foreign lawyers or attorneys.

Secondly, can the plaintiff, though the whole document is privileged, waive privilege in

respect of the first two paragraphs and claim it for the balance? This would only be possible if the documents dealt with were different matters. In the present case the judge held 'They could not be severed.' The rule is that if a document is privileged then privilege must be claimed if at all to the whole of the document unless it refers to more then one subject matter.

The case of *Churton v Frewen* [1865] EngR 281; 62 ER 669 discovery was sought of parts of a privileged document which contained matters available from a public register. Disclosure was refused on the grounds that it would be very dangerous, and trench very much upon the principle which protects the report itself, if that were permitted; for it would be hardly possible to seal up and effectually protect from inspection those parts which constitute the report, and which it is admitted there is no right to see. Such a report would most probably (indeed, from its nature, almost necessarily) be not merely a collection of extracts from, and copies of, ancient records, with a distinct and separate report referring to them; but the extracts and copies would be s interspersed with observations and comments ... as to render it quite impossible to separate the different portions.

Thirdly, it was contended that privilege had not been waived because plaintiffs counsel had by mistake read it in open court. The plaintiffs and the legal advisers had never intended to waive privilege. The deliberate introduction of part of a privileged document by mistake waives privilege in regard to the whole document. In *Burnell v British Transport Commission* (1956) 1 QB 187 at 190 Denning LJ said:

> '...although this statement may well have been privileged from production and discovery in the hands of the defendant at one stage, nevertheless, when it was used by cross-examining counsel in this way, he waived the privilege, certainly for that part which was used; and in a case of this kind, if the privilege is waived as to the part, it must, I think, be waived also as to the whole. It would be most unfair that cross-examining counsel should use part of the document which was to his advantage and not allow anyone, not even the judge or the opposing counsel, a sight of the rest of the document, much of which might have been against him.'

This case was followed in *Nea Karteria Maritime Co Ltd v Atlantic and Great Lakes Steamship Corpn,* unrep, Mustill J, 11 December 1978. Mustill J states:

> 'I believe that the principle underlying the rule of practice exemplified by *Burnell v British Transport Commission* is that, where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. In my view, the same principle can be seen at work in *George Doland Ltd v Blackburn Robson Coates & Co* in a rather different context.'

As to whether the counsel for Plaintiff had right to waive privilege the general principle is that a solicitor is the agent of his client in all matters that may reasonably be expected to arise for decision in the case; per Denning LJ in *Griffiths v Evans* (1953) 2 All ER 1364; [1953] 1 WLR 1424. In *Matthews v Munster* (1887) 20 QBD 141, the defendant's counsel in the absence of the defendant and without his express authority in open court consented to a verdict for the plaintiff for £350 and costs and agreed that all imputations should be withdrawn against the plaintiff. This settlement was held to be a matter within the apparent general authority of the counsel and was binding on the defendant. Lord Esher MR said (20 QBD 141 at 143, (1886-90) All ER 251 at 252):

> 'But when the client has requested counsel to act as his advocate ... he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of court and to act for him in court, and until his authority is withdrawn he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client. 'I apprehend that it is not contended that this power cannot be controlled by the court. It is clear that it can be, for the power is exercised in matters which are before the Court, and carried on under its supervision. If, therefore, counsel were to conduct a cause in such a manner that an unjust advantage would be given to the other side, or to act under a mistake in such a way as to produce some injustice the Court has authority to overrule the action of the advocate.'

Lastly, there is no special discretion in a Court to enable the plaintiffs to assert privilege in respect of the whole of the part of the documents which had not been introduced. Appeal dismissed.
