C0/2025/2003

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IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2
Friday, 13 February 2004

B E F O R E:
LORD JUSTICE ROSE
(Vice President of the Court of Appeal, Criminal Division)
MR JUSTICE DAVID CLARKE

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THE QUEEN ON THE APPLICATION OF HOWE

(CLAIMANT)

-v-

SOUTH DURHAM MAGISTRATES' COURT

(DEFENDANT)

THE CROWN PROSECUTION SERVICE
THE LAW SOCIETY

(INTERESTED PARTIES)

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MR CP MITFORD (instructed by Messrs Hewitts Solicitors, 21 Dalton Way, Newton Aycliffe OL5 4DJ) appeared on behalf of the CLAIMANT
THE DEFENDANT DID NOT APPEAR AND WAS NOT REPRESENTED
MR S DODDS (instructed by CPS Durham) appeared on behalf of the INTERESTED PARTY (CPS)
MISS J COLLIER (instructed by the Law Society) appeared on behalf of the INTERESTED PARTY (The Law Society)

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J U D G M E N T
(As Approved by the Court)

1.MR JUSTICE DAVID CLARKE: This is an application for judicial review of the decision of the South Durham Magistrates sitting at Darlington on 30th January 2003, by which they granted two witness summonses in connection with the forthcoming summary trial of the claimant, Christopher Howe, for offences of driving whilst disqualified and without insurance.

2.The witness summonses were issued on the application of the Crown Prosecution Service. They were issued pursuant to section 97 of the Magistrates' Courts Act 1980, which so far as material reads as follows:

> "Where a justice of the peace for any commission area is satisfied that any person in England or Wales is likely to be able to give material evidence, or produce any document or thing likely to be material evidence at the summary trial of an information or hearing of a complaint by a magistrates' court for that commission area and that that person will not voluntarily attend as a witness or will not voluntarily produce the document or thing, the justice shall issue a summons directed to that person requiring him to attend before the court at that time and place appointed in the summons to give evidence or to produce the document or thing."

3.The background to the Crown Prosecution Service's application for these summonses was as follows. Evidence in their possession was that on the day in question two police officers were on duty on the B1278 road near Sedgefield when they saw a vehicle which they said was driven by this claimant, Christopher Howe. They lost sight of it, but their inquiries led them to a particular address where they found that the vehicle was parked.

4.The claimant was later interviewed about the driving on that occasion, but he made no reply. He declined to comment on the question whether he was a disqualified driver; the evidence being that a Christopher Howe was disqualified from driving for three years on 7th February 2000. No admission to that effect was forthcoming from this claimant either in that interview or in any other way, or at any later stage. He never admitted that he was the Christopher Howe who had been disqualified. That produced a gap in the potential prosecution case against him arising out of this driving. This gap has been referred to in the skeleton argument and elsewhere as the "Heaviside issue", a reference to the decision of this court in R v Derwentside Justices ex parte Heaviside (1995) RTR, 384. It is necessary for the prosecution to prove when prosecuting for driving whilst disqualified that the defendant before the court was the person disqualified from driving on the earlier occasion.

5.In the judgment of McKinnon J in Heaviside three methods of plugging that gap were suggested, one of those being to call a person who has been present in court on the earlier occasion who is able to say that the defendant before the court is the same person who was disqualified on that earlier occasion. Subsequent decisions of this court demonstrate that the three methods suggested in Heaviside are not the only methods, but the Crown say in the present case that no other method is available to them. We have an affidavit from the Crown Prosecutor to this effect, setting out the inquiries which have been made to find any other method of plugging the gap in the case.

6.The witness summonses directed by the magistrate were directed to Mr Wager, a solicitor who was not only the solicitor acting in 2000 for the Christopher Howe who was disqualified from driving on that occasion but is also presently acting for the claimant Christopher Howe in the present proceedings, and to his firm for the production of their attendance note of the earlier hearing.

7.The application to the justices for the issue of the summonsees was opposed and was fully argued. The submission was made that to compel Mr Wager to give evidence for the prosecution, and indeed to compel the firm of Hewitts to produce its attendance note of the hearing of 2000, would inevitably involve a breach of the legal professional privilege, covering communications between the then client and his solicitor and between the present client, the claimant, and his solicitor. Furthermore, it would be in breach of Articles 6 and 8 of the European Convention on Human Rights, and it would be a cause of professional embarrassment to Mr Wager and to the firm of Hewitts, of which he is now a consultant.

8.The justices provided full written reasons for their decision to grant the summonses. They reminded themselves of the terms of section 97 and of the fact that it gave them no discretion to refuse the summonses if the statutory criteria were met. They directed themselves that the expressions "likely to be able to give material evidence", and "a document or thing likely to be material evidence", were to be taken to exclude any evidence or document which would be covered by legal professional privilege.

9.They held that the admissible evidence, which it was hoped that the solicitor would give, was limited to evidence of what took place in the public courtroom, which would not be covered by legal professional privilege, so that he would not be asked to disclose anything which passed privately between him and his then client for the purpose of seeking or receiving legal advice. They reached similar conclusions in relation to the attendance note, saying: "privilege does not apply because the file note was not made detailing legal advice given or received in relation to the proceedings. It is simply a log which assists internal and external audits and is of a type that would be made by any professional engaged in providing services."

10.It appears to me that the justices reached this conclusion about the contents of the attendance note, which of course they had not seen, because of what they were told in the hearing about the requirements imposed by the Legal Services Commission on solicitors acting in criminal cases.

11.The claimant seeks judicial review of the decision to issue the witness summonses. He contends that for the prosecution to call Mr Wager as a witness against him, and for them to require the production of the attendance note, involves breaches of the legal professional privilege which belongs to him and which has not been waived. It is then contended that the intended procedure conflicts with his rights under Article 6 of the Convention in two respects: first, that it deprives him of his right to be represented by a lawyer of his choice and, second, that it conflicts with his right not to incriminate himself.

12.Granting permission on 31st July 2003, this court directed that the Law Society should be served with these proceedings as an interested party, and the Law Society have made valuable written and oral submissions through Miss Collier.

13.I turn first to the question of legal professional privilege. It is established by the House of Lords' decision in R v Derby Magistrates ex parte B [1996] AC 487 that where the document to be produced under a witness summons is covered by legal professional privilege that takes it out of the scope of section 97 on the ground that it cannot be material evidence at the trial. The same applies to the oral evidence of a witness: if the only evidence that can be expected to be given by the witness is evidence which would be covered by legal professional privilege, then section 97 cannot be brought into operation to issue such a summons against that witness.

14.The question here, it seems to me, is whether the evidence, which it is hoped that Mr Wager can gave, and indeed the document which his firm is required to produce, are necessarily covered by legal professional privilege, and whether the calling of Mr Wager, and the production of the document, necessarily involve an infringement of that privilege.

15.The claimant, of course, is not to be taken to be admitting that he was the client represented by Mr Wager in 2000, but he is undoubtedly the client being represented by that solicitor in January 2003, and indeed now. The argument on legal professional privilege, therefore, seems to me to have two limbs: one is that any communications between Mr Wager and his 2000 client, for the purpose of that client obtaining legal advice, as well as any legal advice given, were covered and remain covered by that client's legal professional privilege; the other is that any communications between Mr Wager and the present claimant, for the purpose of him seeking legal advice in relation to his 2003 prosecution, which must include any conversation about whether he had or had not been disqualified in 2000, are covered by the legal professional privilege belonging to the claimant and which only he can waive.

16.I take, as my starting point for legal professional privilege as a principle, the reaffirmation of it by the House of Lords in Derby Magistrates' Court ex parte B:

> "Legal professional privilege was not just an ordinary rule of evidence but a fundamental condition on which the administration of justice as a whole rested, since it was based on the principle that a client should be able to consult his lawyer in confidence and without fear that his communications would be revealed without his consent, because otherwise he might hold back half the truth."

17.In this court in R v Manchester Crown Court ex parte Rogers [1991] 1 WLR 832, Lord Bingham, CJ, put the matter in this way at 839C:

> "It is in my judgment important to remind oneself of the well established purpose of legal professional privilege, which is to enable a client to make full disclosure to his legal adviser for the purposes of seeking legal advice without apprehension that anything said by him in seeking advice or to him in giving it may thereafter be subject to disclosure against his will."

18.The principle of legal professional privilege is not in issue before us in this case. The Crown Prosecution Service have made it clear that they do not seek to lift the veil in any way, either in calling Mr Wager to give evidence or in making use of the solicitor's attendance note. They seek only to call him as a witness who was present in court on the earlier occasion in an attempt to plug the gap which presently exists in their case.

19.It is argued by Mr Mitford, for the claimant, that Mr Wager will not be able to answer the relevant questions without breach of legal professional privilege. He will need to draw on his knowledge of the claimant based on his discussions with him about his present case, which must involve such discussions as there have been concerning the claimant's involvement or non-involvement in the events which led to him or his namesake being disqualified from driving in February 2000. Thus, any evidence that he, Mr Wager, can give must be covered by privilege.

20.I would reject that submission. The permissible questions do not in my judgment infringe legal professional privilege. They are questions solely as to the identity of the person disqualified from driving in 2000 and as to the identification of this claimant as being the same person. It is expressly recognised by the prosecution that they cannot go further into territory covered by legal professional privilege. They cannot enquire into what the claimant has told Mr Wager, including anything he has told him about his own identity or address, let alone, of course, anything he has told him about his involvement or otherwise in the earlier incident. The admissible question will be whether, when Mr Wager first saw the claimant in connection with this prosecution, he knew him, he remembered him. I do not of course know from the material before the court now whether he first met him at court on the day, or at some earlier meeting, whether at his office or anywhere else. But what Mr Wager cannot be asked and (to borrow a phrase from other legislation) "if asked cannot be required to answer", is anything about what he was told by his client.

21.So I turn to the question whether the issue of the summons involves an infringement of the claimant's rights under Article 6. The Article reads, as far as material, as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights:...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require."

22. An important element of the right to a fair trial is the privilege against self-incrimination. Though this is not an absolute right, as held recently by the Privy Council in the Scottish case of Brown v Stott [2003] 1 AC, 681, in the context of section 172 of the Road Traffic Act 1988, and recently followed by this court in Hayes v Director of Public Prosecutions (decided on 4th February 2004), it is nevertheless a principle of the highest importance. It is submitted both by the claimant and the Law Society that to call a solicitor to give evidence against his own client is equivalent to calling a defendant to incriminate himself. Miss Collier argues that whilst acting for the client, he is his client's voice and to call him as a prosecution witness of itself infringes the client's privilege against self-incrimination.

23. No authority is cited in direct support of this proposition and I would reject it. I fully accept and pay full attention to the prime importance of the privilege against self-incrimination, set out in particular in the European Court of Human Rights' decision in Saunders. But the passage there and in the other authorities do not seem to me to touch on the present point. The witness is not being called in his capacity as the claimant's solicitor, but as a person who was present in court at the relevant time. The evidence he will be asked to give, and the questions which will be put to him, will not enter the territory of solicitor and client communication. I readily recognise that the situation is inevitably one of personal and professional embarrassment, and no doubt this procedure will only be adopted in the future in cases where the prosecution have no reasonable alternative. But I do not consider it wrong in law.

24. The other limb of the argument under Article 6 is that the claimant will necessarily be deprived, in consequence of this situation, of the solicitor of his choice. The right to a lawyer of one's choice in the Article is an important one, and it is emphasised before us by the Law Society. But it is recognised on all sides that it is not an absolute right. A reason why a lawyer may be unable to act is that contained in the guide to the Professional Conduct of Solicitors, to which we have been referred, namely that he is or is likely to be, or becomes a witness in the case. A solicitor should withdraw from a case if it becomes apparent that he is likely to become a witness in the case.

25. The right to a solicitor of choice is not an absolute one. There can obviously be no right to the lawyer of one's first choice because a lawyer's availability is dependent upon his commitments. But that aside, there is no absolute right, as is shown by a number of authorities cited to us: Croissant v and Germany, decided in the European Court of Human Rights (1992) and we are also referred to the case of X v United Kingdom. The right to a solicitor of one's choice may be overridden where that is necessary in the interest of justice.

26. In the present case, which is factually a simple one, it seems to me that there is no risk of injustice to this claimant if he is required to make a fresh choice of solicitor and advocate.

27. Maurice Kay J (as he then was) when granting permission to apply in this case for judicial review on 30th July 2003 said:

"There are curiosities about the case. If the claimant is the man who was convicted on 7th March 2000, it seems to us that Mr Wager ought not to be representing him to the extent that he is seeking to advance the case denying that reality. If on the other hand he is not the man who was convicted on 7th March 2000, in some ways one would have thought that the claimant and Mr Wager might have some enthusiasm for providing evidence in a formal document under the Criminal Justice Act signed by Mr Wager to that effect; it no doubt would be seriously considered by the Crown Prosecution Service in relation to the future of the prosecution.

In one sense, therefore, we are a little mystified by the turn of events."

28. For myself, I share that feeling of mystification: if the claimant is not the same man there is no reason for professional embarrassment in that sense, and (it seems to me) no difficulty in Mr Wager being able to say so. If the evidence remains challenged he would no doubt have to withdraw from his role as defence solicitor since he is to be called as a witness. But, in reality, he would become a valuable witness for the defence. If his evidence exonerates the claimant in that way, that could well bring an end to the prosecution. If on the other hand the claimant is the same man, but continues to put identity in issue, despite Mr Wager's knowledge to the contrary, it seems to me that the professional embarrassment arises not from the issue of the witness summons, which is part of the process to enable the court to ascertain the truth, but from Mr Wager continuing to act for him at all.

29. It may be, of course, that as the claimant submits is the likely situation, Mr Wager will not be able to say whether he is the same man for whom he was acting in 2000, in what was perhaps a routine and unmemorable incident in the life of a

busy solicitor with a large turnover of work. But if he no more than believes him to be the same man, his professional embarrassment would be similar.

30.It seems to me that the justices' approach to this unusual application was an entirely proper one, and that they correctly issued the witness summons directed to Mr Wager to give oral evidence.

31.I turn more briefly to the second summons, addressed to the firm of solicitors in which Mr Wager is now a consultant. No separate submissions have been addressed to us orally on this and, in reality, it may be that the two stand or fall together.

32.It was made clear by counsel for the Crown Prosecution Service, Mr Dodds, before us, as it was made clear before the justices that the prosecution do not seek to introduce into evidence anything in the attendance note which would infringe legal professional privilege. The justices made certain findings as to what the document would contain. The claimant rightly points out that neither the justices nor, indeed, this court, know what is contained in any attendance note of the hearing of February 2000. It may well contain not only a record, detailed or perfunctory, of the proceedings in court on that day, but also a record of information provided by the then defendant, whoever he was, and advice given to him. If so, then part of the document is clearly privileged.

33.I return to the case of Rogers to which I referred earlier. In that case this court was hearing proceedings for judicial review of a decision of a Crown Court judge under section 9 of the Police and Criminal Evidence Act 1984 ordering production of special procedure material. The material in question was a solicitor's record or log showing the time at which their client had attended their offices on the day of the murder of which he was suspected. The judge's order in the Crown Court was later widened in its scope to include attendance notes, but that part of the order was set aside in this court on the ground that the widened ambit of the order had not been separately and adequately considered by the judge who made it.

34.However, having dealt with that subsidiary issue, Lord Bingham, LCJ, went on to deal with legal professional privilege in the passage that I have cited, but specifically in relation to documents, such as solicitors' time sheets, diary notes and attendance notes, where he said:

> "In this case we must consider the function and nature of the documents with which we are concerned. The record of time on an attendance note, on a time sheet or fee record is not in my judgment in any sense a communication. It records nothing which passes between the solicitor and the client and it has nothing to do with obtaining legal advice. It is the same sort of record as might arise if a call were made on a dentist or a bank manager. A record of an appointment made does involve a communication between the client and the solicitor's office but is not in my judgment, without more, to be regarded as made in connection with legal advice. So to hold would extend the scope of legal privilege far beyond its proper sphere, in my view. It is submitted on behalf of the applicant that the doctrine is to be applied on an all or nothing basis, that either a document is wholly entitled to legal professional privilege or none of it. That in my judgment is not so. The proposition is not in my view made good by *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529. That case concerned a continuous memorandum. It was held that a party could not waive privilege in relation to one part of it without waiving privilege in relation to the whole. The good sense of that ruling is, I think, obvious since to permit such a course would raise an obvious risk of misleading the reader. It therefore was held, and properly held in my view, that a party cannot pick and choose. But that is not the position here. Production is sought of nothing relevant to legal advice of the subject matter of legal advice. Any such reference in, for example, an attendance note can be covered up, blacked out or obliterated. The Crown have made it as clear as can be from the outset that they have no wish to go behind the veil which protects the exchanges between the applicant and his professional adviser with regard to his personal affairs. That is something to which the Crown are not entitled and it is something which they do not seek. In my judgment, subject to any necessary obliteration, blacking out or covering up, there is nothing in the documents to which the Crown seek access to which legal professional privilege can apply."

35.Thus it is clear, it seems to me, that any privilege material in that relevant attendance note can be covered up, blacked out or otherwise obliterated. So long as this is done, I see no ground on which any distinction can be made between the oral evidence of Mr Wager and any attendance note of that hearing which the firm of solicitors have retained.

36.My conclusions on the issue of self-incrimination and infringement of Article 6 of the Convention are the same conclusions as expressed earlier in this judgment and which I do not need to repeat.

37.For completeness, I should perhaps add that section 97 of the Magistrates' Court Act 1980 refers to documents which are "likely to be material evidence." It was established in this court in R v Reading Justices ex parte Berkshire County Council (1996) 1 Cr App R, 239 that these words must be strictly applied. The documents must themselves be likely to be admissible in evidence. It has not been argued before us that an attendance note would not be admissible as such, but because of reference in the earlier proceedings to an aide-memoire, it might have been suggested that this document would only be a memory refreshing document akin to a police officer's notebook. But it seems to me that the point was rightly not taken before us. The attendance note in question, assuming it exists, is likely to be a document admissible in evidence as part of a record kept in the course of a solicitor's business and thus admissible under section 24 of the Criminal Justice Act 1988.

38.I would, therefore, uphold the justices' decision to issue the witness summonses.

39.LORD JUSTICE ROSE: I agree. We have been told that although driving while disqualified is a regrettably common offence, the Law Society know of only two or three applications for the issue of a summons against a solicitor with a view to proving the identity of a defendant for whom he or she has previously acted. Each related to an offence of alleged driving while disqualified.

40.That such applications are very rare, is welcome. This court's decision affords no licence for any increase in frequency. In R v Derby Magistrates' Court ex parte B (1996) 1 AC 487, at page 507C, Lord Taylor of Gosforth, Chief Justice, giving the principal speech in the House of Lords, said:

> "The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests."

41.More widely, outside the scope of legal professional privilege, the maintenance of confidence between lawyer and client is of central importance in our administration of justice. It is, therefore, important for prosecuting authorities and justices to note that applications for a summons to serve on a lawyer, with a view to proving the identity of a defendant for whom he or she has previously acted, should not become a matter of routine in relation to offences of driving while disqualified, or indeed any other offence.

42.On the contrary, such a course should, in my judgment, be the route of last resort to be followed only when no other reasonably practicable means of proving identity exists. I would expect it to be demonstrated to justices that that is the position when such an application is made to them.

43.But for the reasons given by my Lord, David Clarke J, with all of which I agree, the justices in the present case were right to issue these two summonses. Accordingly, this application is refused.

44.MR DODDS: My Lord, might I raise the issue of costs incurred by the Crown Prosecution Service and whether it be appropriate that they be paid by the claimant?

45.MR MITFORD: My Lord, the claimant is legally aided, so I would ask that any such order not to be enforced without leave.

46.LORD JUSTICE ROSE: Well, is there any point, Mr Dodds?

47.MR DODDS: My Lord, I make the application.

48.LORD JUSTICE ROSE: We shall make no order as to costs.

49.MR MITFORD: May I, in any event, have legal taxation, my Lord?

50.LORD JUSTICE ROSE: You may, whatever the current formula is: community legal services funding assessment in accordance with the representation order, which I assume you have lodged with the court?

51.MR MITFORD: Yes. I am grateful for that.