1995 B No.1163

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BRISTOL CROWN COURT

The Law Courts,
Small Street,
Bristol BS1 1DA

Monday, 11th March 1996

Before:

MR JUSTICE LONGMORE

Between:

ALAN DENNIS BURDGE	First Plaintiff
and	
GRAHAM CHARLES BURDGE	Second Plaintiff
and	
JOHN HODGE & CO. (A Firm)	Defendants

MR P. DARLOW (instructed by Messrs Eversheds, 11/12 Queen Square, Bristol BS1 4NT) appeared for the Plaintiffs

MR W. FLENLEY (instructed by Messrs Wansbroughs Willey Hargrave, 103 Temple Street, Bristol BS99 7UD) appeared for the Defendants

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REVISED JUDGMENT

Computer-Assisted Transcript of the Stenotype Notes of
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Monday, 11th March 1996

J U D G M E N T

MR JUSTICE LONGMORE: I am concerned in this case with a discovery application in an action for professional negligence brought against a firm of solicitors. The Plaintiffs allege that John Hodge and Co. negligently drafted a pre-emption agreement for certain land made at the same time as an agreement to sell neighbouring land. They say that they made clear to the solicitors that they wanted the price for the land, subject to the pre-emption agreement, to be assessed on the same basis as the price agreed for the neighbouring land, and they allege that the solicitors did not carry their instructions into effect but only provided for the price to be the development market value which the land might reasonably be expected to fetch on the open market at the date of the exercise of the option to purchase contained in the pre-emption agreement, the amount to be settled by arbitration if not agreed.

When the purchasers came to exercise their option, an arbitration took place which resulted in the fixing of the price of £750. The Plaintiff vendors were so dissatisfied that they terminated their retainer and instructed other solicitors, now

known as Eversheds, who persuaded Mr Justice Millett to grant leave to appeal from the arbitrator's award. That had the effect of inducing the purchasers not to resist the appeal but to agree to a fresh submission to the arbitrator. Expert reports were exchanged by the parties in pursuance of that fresh submission, but the Plaintiffs came to realise that they would be unable to secure more than £5,000. They therefore settled for that sum in December 1993 but (presumably since that sum had been on the table since September 1991) they had to agree to bear the purchaser's costs since that date.

The damages claimed in the action against the first solicitors are the Plaintiffs' costs of pursuing the largely abortive arbitration proceedings, together with the purchaser's costs which the Plaintiffs had to agree to pay. This claim is made on the basis that if the pre-emption agreement had been drawn up in accordance with the Plaintiffs' wishes and they had understood it correctly, no arbitration would have been begun.

It is a significant fact that the Plaintiffs' expert contended for a figure in the region of £100,000 as the proper purchase price up to and including his report of November 1993, but the Plaintiffs settled for £5,000 in December 1993. The first solicitors say that this is very curious.

Either -- and I emphasise the word either -- the expert was right, in which case the renewed submission to arbitration should have been pressed to a successful conclusion and the Plaintiffs would not only have recovered their own costs but could not have been liable for the purchaser's costs or -- and I emphasise the word or -- he was wrong, in which case the considerable expenditure after leave to appeal had been granted should never have been incurred, and perhaps proceedings for leave to appeal should never even have been instituted.

The first solicitors have now sought discovery of all documents relating to the conduct by the second solicitors, counsel and surveyors in relation to the arbitration appeal and the subsequent progression and settlement of the arbitration proceedings. The Plaintiffs claim privilege for all such documentation.

On the facts as I have outlined them, it seems to me that the documents are relevant within the **Peruvian Guano** test, and the issue is whether privilege can legitimately be claimed for them. Mr Flenley, for the Defendants, submits that when a party sues his former solicitor for negligence he impliedly waves legal professional privilege in relation to documents relevant to the action in the sense of documents relating to the plaintiff's ability to establish his cause of action, or to the

defendant's proper defence to that cause of action. For this purpose, he relies on **Lillicrap v Nalder** [1993] 1 WLR 94, where the defendant's solicitor was held entitled to rely at trial on documents he held in relation to transactions he had conducted on the plaintiff's behalf other than the transactions actually sued on. The passages on which Mr Flenley chiefly relied are three. Firstly, the judgment at first instance of Mr Justice May, at page 99:

"A client who sues his solicitor invites the court to adjudicate the dispute and thereby in my judgment waives privilege and confidence to the extent that is necessary to enable the court to do so fully and fairly in accordance with the law, including the law of evidence. I suspect that at the fringes each case will depend on its own facts. Normally the waiver will extend to facts and documents material to the cause of action upon which the plaintiff sues and to the defendant's proper defence to that cause of action. The bringing of a claim for negligence in relation to a particular retainer will normally be a waiver of privilege and confidence for facts and documents relating to that retainer but not without more for those relating to other discrete retainers".

The second passage on which Mr Flenley relies is the passage immediately after that quotation from the judgment of Mr Justice May at page 99 from the judgment of Lord Justice Dillon, who says:

"I agree with that. The waiver can only extend to matters which are relevant to an issue in the proceedings and, privilege apart, admissible in evidence. There is no waiver for a roving search into anything else in which the solicitor or any other solicitor may have happened to have acted for the clients, but the waiver must go far enough not merely to entitle the plaintiff to establish his cause of action, but to enable the defendant to establish a defence to the cause of action if he has one. Thus it would extend to matters under earlier retainers, as in the hypothetical example I have given, which established that the experience of the

client was, to the knowledge of the solicitor, such that the solicitor was not in breach of duty as alleged".

The third passage on which Mr Flenley relies is contained in the judgment of Lord Justice Russell at page 101, where he says:

"In my judgment, by bringing civil proceedings against his solicitor a client impliedly waives privilege in respect of all matters which are relevant to the suit he pursues, and most particularly where the disclosure of privileged matters is required to enable justice to be done. This is another way of expressing the view that May J. expressed in his judgment in the passage to which Dillon L.J. has referred".

If one reads those passages literally, there is much to be said for Mr Flenley's argument. They must, however, be read in their context, viz the context of the relevant documents being held by the actual solicitor sued. Lord Justice Dillon, however, contemplated expressly that documents subject to the implied waiver might be held by other solicitors (see the passage I have quoted at page 99, at letter D).

That indication was followed by Mrs Justice Ebsworth in the case of Kershaw v Whelan, reported in The Times on 20th December 1995, but of which I have been provided a transcript. She held in that case, following Lillicrap v Nalder, that documents held by previous solicitors were also to be included in the implied waiver. It was not essential to her decision, as I read it, that the documents had come

into the possession of the solicitor who had actually been sued.

But does the waiver extend to documents in the hands of other solicitors instructed subsequently to the alleged act of negligence? Mr Flenley invites me to make that not inconsiderable extension to the doctrine of implied waiver. In **Nederlandse Reassurantie Group Holdings BV v Bacon and Woodrow and Others** [1995] 1 AER 976, Mr Justice Colman had occasion to consider the rationale of the doctrine of implied waiver. He said at page 986:

"The true analysis of what the courts are doing in such cases of so-called implied waiver of privilege is, in my judgment, to prevent the unfairness which would arise if the plaintiff were entitled to exclude from the court's consideration evidence relevant to a defence by relying upon the privilege arising from the solicitor's duty of confidence. The client is thus precluded from both asserting that the solicitor has acted in breach of duty and thereby caused the client loss, and to make good that claim opening up the confidential relationship between them, and at the same time seeking to enforce against the same solicitor a duty of confidence arising from their professional relationship in circumstances where such enforcement would deprive the solicitor of the means of defending the claim. It is fundamental to this principle that the confidence which privilege would otherwise protect arises by reason of the same professional relationship between the parties to the litigation. The underlying unfairness which the principle aims to avoid arises because the claim is asserted and the professional relationship opened for investigation against the very party whose duty of confidence is the basis of the privilege. It is against the unfairness of both opening the relationship by asserting the claim and seeking to enforce the duty of confidence owed by the defendant that the principle is directed".

This shows the limitations of the doctrine, and I conclude that the doctrine of implied waiver of

privilege cannot usually apply to require disclosure of documents privileged in the hands of a solicitor instructed subsequently to the act of negligence. The waiver, if it existed, would be a comprehensive waiver in respect of documents that do not or may not even exist at the time the waiver is made.

Mr Flenley submits that the decision of Mr Justice Colman is materially in conflict with that of Mrs Justice Ebsworth and that I should prefer the decision of Mrs Justice Ebsworth. However, I do not read the decisions as being in conflict in any way, and it seems to me that neither of those decisions bears directly on the extension to the doctrine of implied waiver of privilege which Mr Flenley invites me to make.

He has referred also to the way in which the matter is dealt with in the Annual Practice where the learned editors say under the heading of "Waiver or Loss of Privilege":

> "The institution of civil proceedings against a solicitor by his client constituted an implied waiver of professional privilege in relation to all relevant documents concerned with the suit to the extent necessary to enable the court to adjudicate the dispute fully and fairly".

Once again, if one reads that in its literal width, that would appear to support what Mr Flenley says. Nevertheless, I cannot think that the editors had in mind the situation with which I am confronted, namely that the doctrine of the implied

waiver of privilege is being sought to be applied in the case of a solicitor who is instructed subsequently to the act of negligence. It is fair to say that of course the editors must have written that note before both the judgment of Mr Justice Colman and the judgment of Mrs Justice Ebsworth.

In the event, I cannot regard this case as being substantially different from a case where a plaintiff seeks to recover damages or an indemnity from a defendant in respect of liabilities or costs previously incurred. (See, for example, the well-known cases of Hammond v Bussey [1888] 20 QBD 79 and Biggin v Permanite [1951] 2 KB 314. In such cases a plaintiff has to prove he has acted reasonably. If he declines to produce the advice on which he has acted, he may well fail to discharge the onus of proof upon him, but a court will not usually require him to disclose such advice.

It seems to me that the same position should apply in this case. The Plaintiff must prove that his loss was caused by the Defendants' negligence. If all he can show is that he incurred considerable costs in obtaining in December 1993 what he could have had at much less cost in September 1991, a court might well feel that those costs were not caused by the negligence unless they were reasonably incurred pursuant to reasonable advice. But the mere fact that the plaintiff is suing his former

solicitor cannot, in my judgment, amount to an implied waiver of the advice given by solicitors, counsel and surveyor subsequent to the termination of the retainer given to his former solicitors. I therefore propose to dismiss the Defendants' discovery summons.

There is also before the Court an application for leave to amend, made partly to meet an argument of the Plaintiffs that there was no relevant issue pleaded to which the discovery could go. That argument of the Plaintiffs fails because I have already held that the documents sought are relevant to the issues pleaded, since the Plaintiffs have to prove that their loss was caused by the Defendants' negligence. That allegation is denied and the documents sought are relevant to the pleaded issues without the need for any amendment. However, I cannot see that the draft amendments prejudice the Plaintiffs in any way, and if the Defendants wish to press their application for leave to amend I will grant it.

There was also before me an application to strike out paragraph 10 of the Defendants' pleading, which pleaded contributory negligence and which has been in some ways an attempt by the Defendants to particularise their denial that the Plaintiffs' loss was caused by any negligence on their part. I indicated at an early stage to Mr Darlow, who

appears for the Plaintiffs, that I did not think it was appropriate to strike out before there had been an application for further and better particulars for him to establish if he feels it necessary what it really is that is the case he has to meet.

I think that disposes of all summonses that were before me.

MR DARLOW: My Lord, indeed it does. Your Lordship described the application for discovery as the Plaintiffs' summons. I think that was a slip of the tongue. It was the Defendants' summons.

MR JUSTICE LONGMORE: Thank you. Yes.

MR DARLOW: My Lord, we are left therefore with the question of costs as to the various summonses that have in fact been issued. Your Lordship knows what has taken up the lion's share of the Court's time is clearly the application for discovery, that was what the substantive argument has been about. I ask that the Plaintiffs be given their costs of that summons.

MR JUSTICE LONGMORE: Mr Darlow, I believe you are going to have to disclose if you are going to prove your case. I may be quite wrong about that, and that is a matter, of course, for the trial judge. But obviously you should have the costs if you never disclose them and nevertheless win, but if you feel at the end of the day you have to, or if you lose, I do not think you should have the costs of this summons at all.

MR DARLOW: My Lord, thank you for that indication.

MR JUSTICE LONGMORE: What I would propose, therefore, is costs reserved to the trial judge.

MR DARLOW: My Lord, I cannot object to that course.

MR FLENLEY: My Lord, does that relate to the costs of the specific discovery summons, as opposed to the summons to strike out? As to the latter summons, I would ask for the costs since that summons has failed.

MR JUSTICE LONGMORE: Yes.

MR FLENLEY: My Lord, in that context there is a form of order, a Lockley order -- as a matter of fact I have

the case with me, which I have shown to my learned friend, Mr Darlow. Perhaps I could refer to that? It takes account of the fact that the plaintiff is legally aided and essentially orders that the costs should be the defendant's in any event, not to be enforced without leave of the court or by way of set-off out of any damages that the plaintiff might recover. I can happily read the precise form of words that the Court of Appeal approved in that case to your Lordship. That, I submit, would be the proper order in relation to the striking out summons. I would not oppose the order for costs reserved in relation to the specific discovery summons.

My Lord, the only other matter is the question of amendment. I in fact would seek, my Lord, leave to amend in the terms that I have now drafted, which I have handed to Mr Darlow literally only at 10:30am. I have a copy here for your Lordship to consider. (**Handed**) My Lord, what I have done is to take up my learned friend Mr Darlow's invitation to go through the discovery provided by the Plaintiffs with a fine-tooth comb with a view to particularising every single allegation that can be made from the documents that have now been disclosed and therefore, although I accept that in theory I should have given my learned friend two days' notice of this application, what I say is he cannot be taken by surprise by matters that are derived entirely, so far as they rely on facts, from his own discovery.

MR JUSTICE LONGMORE: Are you content that I deal with it now?

MR DARLOW: My Lord, I am afraid I am not. Not because I am taken by surprise -- yes, I am taken by surprise; but if your Lordship can glance at them you will see that they make now specific allegations against me and against Eversheds, which I have always said should be the case. I cannot continue to act for this Plaintiff in the light of those amendments, and what I would ask your Lordship to do, please, by all means give my learned friend leave to amend his summons, and if he does so, I ask for the costs thrown away by that amendment, and then whoever advises Mr Burdge in the future can say whether he or she does not agree with those amendments as they now stand. But Eversheds and I must duck out of the picture as a result of specific allegations made. We cannot continue to act for this Plaintiff. My Lord, that is what I say about that amended summons.

So far as the dismissal of my application to strike is concerned, may I respectfully submit that should go the same way as the main summons in this action because if it proves to be the case that on such documents as I choose to disclose or as are disclosed there never was a glimmer of a hope of an allegation against these particular Plaintiffs and all they ever did was to rely on the advice that they were told, again your Lordship may in your Lordship's discretion, or whoever has conduct of the trial, have certain views as to whether that allegation pleaded on a flyer ever stood any prospect of success. I ask that costs be reserved to the trial judge in respect of that as well. May I assist you further?

MR JUSTICE LONGMORE: No. I will deal first with the application to strike out. I shall say: "Application dismissed". I am against you on costs; I think that you should pay the costs of that in any event. Do you want to dictate to me a form of order, or you will draw up an order yourself, because I will do what you submitted that I should?

MR FLENLEY: I am grateful. Whichever is more convenient to your Lordship.

MR JUSTICE LONGMORE: How long is it? You can just dictate it to me and I will put it on here.

MR FLENLEY: It is two and a half lines long. The order the Court of Appeal approved was: "The costs of and incidental to this application be the Defendants', not to be enforced without leave of the Court --- "

MR JUSTICE LONGMORE: The Defendants' -- "in any event"?

MR FLENLEY: That was not stated, but that certainly could be added, my Lord.

MR JUSTICE LONGMORE: "In any event". Yes.

MR FLENLEY: "Such order not to be enforced without the leave of the Court save as to set-off as against damages and/or costs".

MR DARLOW: My Lord, I am concerned about the inclusion of the words "in any event". There is something in the back of my mind which says that theoretically that makes that order enforceable here and now as an order for costs, whereas if it does not include those words it simply goes into the melting pot ---

MR JUSTICE LONGMORE: No, it is only enforceable now if I said it is to be paid and taxed forthwith.

MR DARLOW: My Lord, thank you.

MR JUSTICE LONGMORE: Mr Flenley, this is your third attempted amendment. I am certainly not proposing to deal with that now in the light of what Mr Darlow says, and I cannot even adjourn the first paragraph of your summons, can I, because that refers to a different document? So I think I have to adopt Mr Darlow's formulation there and say: "The Defendants have leave to amend paragraph 1 of their summons. Costs of and occasioned by such amendment to be paid by the Defendants", and I will say there "Liberty to apply" so that you can then come before the Court to make that application at any convenient stage. I shall say: "Otherwise summons dismissed. Costs reserved to trial judge".

MR FLENLEY: My Lord, just to make sure that I have correctly understood it, is the amendment to paragraph 1 of the summons an amendment to seek leave to amend in the terms that I have now produced today?

MR JUSTICE LONGMORE: It had better be. "As drafted" just gives you leave in the air, does it not? "Defendants have leave to amend paragraph 1 of their summons to seek leave in accordance with third draft of 11th March 1996", and I will initial what you put in front of me so it is clear what has been put in front of me, but of course I have not expressed any view upon it.

MR FLENLEY: Would your Lordship, in the light of the nature of this matter, grant leave to appeal?

MR JUSTICE LONGMORE: I indicated I would. I have decided it effectively on a matter of law, and I think you should have leave to appeal therefore.

MR DARLOW: May I have, I ask so with deference and respect, leave to appeal against your Lordship's dismissal of my application to strike out that part of the pleading as against the Plaintiffs?

MR JUSTICE LONGMORE: No, Mr Darlow. I think it is not going to be very long before you spend more costs in this case than you are claiming in your statement of claim.

MR DARLOW: Your Lordship's observations as to costs have been taken on board by both parties. There are of course matters, which I cannot discuss with your Lordship, behind the scenes.

MR JUSTICE LONGMORE: Yes. Thank you both very much.
