Parry Deborah J & Whelan Michael T v News Group Newspapers Ltd [1990] ADR.L.R. 11/16

CA on QBD (Mr. Justice Michael Davies) before Dillon LJ; Stocker LJ; Bingham LJ. 16th November 1990

J U D G M E N T LORD JUSTICE DILLON:

1. This is an appeal, by leave of the judge, by the defendant in the action, News Group Newspapers Ltd., against a ruling of Mr. Justice Michael Davies of 12th July 1990 whereby he rejected an application by the defendants for further discovery. The action happens to be a defamation action brought by a Miss Parry and a Mr. Whelan against the defendant, but the particular issue with which we are concerned, and which is of some general importance, could just as well have arisen in any other litigation context.

2. The plaintiffs bring their action claiming that they were defamed in an article published by the defendants in the News of the World in October 1988. There was a letter before action written by the plaintiffs' solicitors to the Editor of the News of the World in September 1989. After that letter, and before the writ was issued, there was on the lath October 1989 a telephone conversion between the plaintiffs' solicitor, Mr. Barton-Taylor, and the legal manager of the defendants, Mr. Thomas Crone. He was the in-house lawyer of the defendants who was handling the matter at that time.

3. There is an issue (which has been directed to be tried as a preliminary issue by a judge alone) whether a concluded agreement was reached between the parties during that telephone conversion that the plaintiffs would accept an apology in satisfaction of all their claims. It is indeed common ground that there was some agreement. The defendants say that there was an agreement which was satisfied by an apology that they subsequently published, but the plaintiffs say that the agreement required that the apology should be given as much prominence as the original libel. They say that the apology actually published did not do that and in effect repudiated any agreement made on the 18th October and aggravated the libel.

4. Mr. Crone prepared a file note of his telephone conversation with Mr. Barton-Taylor of the 18th October and disclosed it in November 1989 as an enclosure to a letter he wrote to Mr. Barton Taylor's firm an that occasion. Mr. Barton-Taylor disclosed his file note on the plaintiffs' behalf in the discovery in the action. It is a brief file note headed *"Matter - Whelan (that is the second plaintiff], attending News Group. T. C. Crone [telephone conversation Crone] confirmed clients requirements per letter of claim. He agreed."*

5. The defendants say that that attendance note was a privileged document and that the privilege was waived by its disclosure; consequently the plaintiffs are bound to disclose all further, otherwise privileged, documents relating to the telephone conversation between Mr. Barton-Taylor and Mr. Crone. They ask for all letters to the plaintiffs from their solicitors reporting on the conversation and all attendance notes or memoranda recording telephone conversations between the plaintiffs' solicitors and the plaintiffs or their representatives reporting on the telephone conversation. That was what Mr. Justice Michael Davies refused.

6. The claim for further documents is put on the authority of a decision of this court in **Great Atlantic Insurance Co. v Home Insurance Co.** [1981] 1 WLR 529 where Lord Justice Templeman ruled that you cannot waive part only of a privileged document, and he cited with approval a passage that - *"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"*.

7. But the crux of that is whether the attendance note in question was indeed a privileged document. We have had in the parties' skeleton arguments careful exposition of the authorities on this point and Mr. Browne has developed that in argument in this court.

8. One aspect of the matter which to my mind is of fundamental importance is to be found in the decision of Mr. Justice Stirling in **Ainsworth v Wilding** [1900] 2 Ch. 315. The first two paragraphs of the headnote summarise the relevant, for present purposes, effects of the decision. *"Mere records of what takes place in chambers in the course of a hostile litigation in the presence of parties an both sides are not privileged from production.*

There is no distinction, for this purpose, between proceedings in chambers and proceedings in open court. Correspondence which is protected on the ground of professional privilege is not rendered liable to discovery

merely because it contains statements of fact as to what has taken place in chambers in the course of hostile litigation and in the presence of parties on both sides".

9. The first paragraph in that headnote depends on the passage in Mr. Justice Stirling's judgment at page 320 where he said: *"The application is based on the proposition that a mere record of what takes place in chambers in the course of a hostile action in the presence of parties on both sides is not privileged. It has been held that a shorthand writer's notes of what takes place in open court are not privileged. ... The same thing has been held as to the shorthand writer's notes of proceedings before an arbitrator: ... in* ***Re Worswick*** *where North J. says: '****A mere verbatim report of the evidence, whether by the solicitor's clerk, the solicitor, or counsel, would not in my opinion be privileged****'. With that I agree. I am unable to see that for this purpose any valid distinction can be drawn between proceedings in open court and proceedings in chambers."*

10. Thus a solicitor's attendance note recording what happened in court in the presence of both parties to the litigation is not privileged.

11. Mr. Browne has submitted that that applies merely if the solicitor makes the attendance note as a mechanical recording of what has been happening and not if he makes it with a view to advising his client. I do not read any such distinction in Mr. Justice Stirling's judgment. A solicitor will take a note of judgment that is delivered in court as a note of the judgment, but also having in mind that it may be necessary for him to advise his client on what should be done if it should turn out that the judgment is against his client.

12. The second paragraph in the headnote in **Ainsworth v. Wilding** depends on the passage at page 322 in Mr. Justice Stirling's judgment where he said: *",.. the letters of which production is sought are sworn to be professional communications of a confidential character, having been made solely for the purpose of enabling [the solicitors to conduct the litigation on behalf of the parties claiming privilege]".*

He went on: *"It is said that a letter or a statement in a letter as to what had been done in chambers is not privileged on the ground already mentioned. I am unable to see why it is not. It may well have been, and I shall infer from the affidavit, that the communication was made for the purpose of obtaining information or instructions from the client necessary for the conduct of the action. If I were to hold that such letters or statements were not privileged, it seems to me that I should be imposing on the free communication with his solicitor to which the client is entitled a fatter hitherto unrecognised in any authority."*

13. Mr. Justice Stirling had been invited in that case to proceed from the proposition that a record of what takes place in court is not privileged, to the proposition that communication by the solicitor to his client as to what had taken place in court was also not privileged. But the judge was not willing to take that further step. His decision in **Ainsworth v Wildin** has since been approved by this court.

14. Mr. Browne latches on to a further sentence at page 323 where Mr. Justice Stirling said in relation to a passage in the judgment of Lord Brougham L.C. in **Greenough h v. Gaskell** (1833) 1 My. & A. 1020. *"The important point for the present purpose is that notes or memoranda made by the solicitor are placed on the same footing as communications between the solicitor and the client."*

15. What Mr. Justice Stirling was referring to in that particular sentence, having regard to the passage in Lord Brougham's judgment, is notes or memoranda made by the solicitor of communications between solicitor and client. He is not referring to notes or memoranda (such as he had been dealing with earlier) by the solicitor of matters which had taken place in chambers in the course of the action. The conclusion so construed is obviously correct. It matters not for the purposes of privilege whether, for instance, the client writes a letter to the solicitor which is privileged, or the client telephones the solicitor and the solicitor makes a note or memorandum of the telephone call.

16. I can see for my part no distinction in principle between attendance notes made by the solicitor recording what took place in court or in chambers in the presence of the parties on both sides, and attendance notes recording meetings between the legal advisers of the parties on both sides with or without their clients in attendance, or attendance notes recording telephone conversions between the parties.

17. In all those cases the solicitor's attendance note is recording what happened as a matter of record, setting out what passed publicly between the two parties or their advisers. It matters not whether the meeting or the telephone conversion was at the time without prejudice. The 'without prejudice' label may prevent something being given in evidence, but that is not on the ground of legal professional privilege with which we are alone concerned here. In the present case it is said that if the discussion between Mr. Barton-Taylor and Mr. Crone was originally without prejudice, it led to agreement and accordingly ceased to be without prejudice. That is a separate point. Documents which are merely without prejudice and not governed by legal professional privilege are disclosable, although it may be that they cannot be put in evidence until certain other matters have happened to remove the 'without prejudice' bar. That being so, it seems to me that the position is the same as in **Ainsworth v Wilding**. The attendance note is not a privileged document, but any communication by Mr. Barton-Taylor to his clients informing them about his discussion with Mr. Crone and advising them or seeking their comments or further instructions, or anything of that nature, is a privileged document.

18. Mr. Browne refers also in his submissions to the decision of this court in **Balabel v Air India** (1988] 2 WLR 1036 in which the leading judgment was given by Lord Justice Taylor. In that case the judge at first instance had applied a distinction drawn by Mr. Justice Scott in an earlier unreported decision between communications which seek or convey advice, even though parts may contain narratives of facts or other statements which in themselves would not be protected and, on the other hand, documents which simply record information or transactions with or without instructions to carry them into execution, or which record meetings at which the plaintiffs were present. That formulation was held by this court to be too wide. The matter is dealt with by Lord Justice Taylor from page 1045 to the end of his judgment after a review of the authorities. As I read his judgment, however, he is concerned solely with communications passing between the solicitor and his client and attendance notes, which were attendance notes of attendances by the solicitor on his client or vice versa. He is not concerned at all with the mere attendance note recording what had happened in court in the presence of both parties or at a meeting in the presence of both parties. The decision in **Ainsworth v Wilding** was not cited to the Court in **Balabel v Air India**, presumably because the issue was concerned only with a different class of document.

19. I do not feel constrained in any way by **Balabel v. Air India** to extend the privilege to cover the sort of documents which Mr.Justice Stirling ruled in **Ainsworth v Wilding** not to be privileged. It follows, since in my judgment Mr. Barton Taylor's attendance note was not a privileged document, that there is no basis for requiring any privileged communication between Mr. Barton-Taylor and the plaintiffs to be disclosed. Accordingly I would dismiss this appeal.

LORD JUSTICE STOCKER :

20. I agree and there is nothing I wish to add on my own behalf.

LORD JUSTICE BINGHAM:

21. I agree that the appeal should be dismissed for the reasons which my Lord has given. Had the exchange between Mr. Barton-Taylor for the plaintiffs and Mr. Crone for the defendants been by letter, it is accepted that that exchange would not be protected by legal professional privilege, although it might have been excluded from use in evidence because made without prejudice. It is also accepted that the oral exchange itself was not subject to legal professional privilege, although again evidence of it might be excluded from use in court because the exchange was made without prejudice.

22. The defendants, however, contend that the solicitor's factual record of the effect of the oral exchange is subject to legal professional privilege. Had that record formed part of a communication to the client, or had it contained Mr. Barton-Taylor's analysis of, or views upon, his clients' case, the defendants' contention might have some substance. But the defendants accept, and the basis of their application rests on the fact, that the memorandum was no more than what it appears to be - a factual record by Mr. Barton-Taylor, whether accurate or not, of what he believed to have passed on the telephone.

23. In the course of the argument the question was raised as to what the position would be if the oral exchange on the telephone had been taped and the plaintiffs' solicitor had had the tape of this inter partes conversation transcribed: would the transcript be privileged? As I understood him, Mr. Browne

for the defendant answered that it would not, but he drew a distinction between this hypothetical transcript, assumed to be a full and faithful record of what was said, and a memorandum such as that which Mr. Barton-Taylor made, which inevitably amounts to a precis of what was said and therefore involves a process of distillation or selection. So far as it goes, that distinction is no doubt correct, but it seems to me irrelevant to any issue arising on this appeal. I cannot accept that the intervention of a machine has any bearing on whether a documentary record of an oral exchange between hostile parties in litigation is or is not protected by legal professional privilege. A bare record of what passed is in my view entitled to no legal professional privilege, whether it is a solicitor's memorandum, a transcript, or an exchange of letters. It follows that there can have been no possible waiver of privilege and I would accordingly dismiss the appeal.

Appeal dismissed with costs.

MR. A. CALDECOTT (instructed by Messrs Russell Jones & Walker) appeared on behalf of the Respondents (Plaintiffs).

MR. D. BROWNE, Q.C. (instructed by Messrs Farrer & Co.) appeared on behalf of the Appellants (Defendants).