IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
(Mr N Baker QC sitting as a Deputy High Court Judge))

QBENI 97/0159/E

Royal Courts of Justice
Strand
London WC2

Thursday 19th June, 1997

B e f o r e:

LORD JUSTICE STAUGHTON
LORD JUSTICE ALDOUS
LORD JUSTICE HUTCHISON

- - - - - -

CITY OF GOTHA

Respondent

- v -

SOTHEBY'S & another

Appellants

- - - - - -

(Computer Aided Transcript of the Palantype Notes of
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MR B THANKI (Instructed by Herbert Smith, London EC2A 2HS) appeared on behalf of the Appellant

MR A LAYTON QC and MS M CARSS FRISK (Instructed by Frere Cholmeley Bischoff, London EC4Y ONH) appeared on behalf of the Respondent

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

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Thursday, 19th June 1997

JUDGMENT

LORD JUSTICE STAUGHTON: This consolidated action is pending in the Queen's Bench division. It is about the ownership of a painting called the Holy Family with Saints John and Elizabeth and Angels by Joachim Wtewael. Presently it is in the custody of Sotheby's who are the first defendants. They hold it on the instructions of Cobert Finance SA, a Panamanian company who claim to be the owners of the painting, having bought it in March 1989 from Mrs Breslav of Berlin. Rival claimants are the Federal Republic of Germany and the City of Gotha, which is in Thuringia in the eastern part of Germany. They are the plaintiffs in the consolidated action.

The present appeal is from an order of Mr Baker QC sitting as a Deputy Judge of the Queen's Bench Division. He dismissed an appeal from an order of Master Trench concerned with discovery. That was an order that Cobert Finance SA should disclose no less than seven categories of documents. It is important to note that no order was made against Sotheby's. There had been another occasion when an order was sought against Sotheby's and was refused on the ground that they had interpleaded.

The order of Master Trench, upheld by the deputy judge, was very wide. It is unfortunately typical of the sort of orders that are sought under Order 24, rule 7, which should always be scrutinised with great care by a master or judge who is asked to make them. The parts that are in dispute are paragraphs 7 and 8 as follows:

> "7. Copies of any letters, opinions or other documents whatsoever provided to the Second Defendant by its legal advisers in which possible legal professional privilege has subsequently been lost because such documents ceased to be confidential by virtue of their being copied to third parties (including the First Defendant) during the period 29th November 1988 to 30th march 1992.

> 8. Minutes or attendance notes of any meetings or telephone conversations held between 29th November 1988 and 30th March 1992 held between (i) the Second Defendant and/or its legal advisers and (ii) third parties (including the First Defendant) whether such minutes or notes were prepared by the Second Defendant, the Second Defendant's legal advisers or the third party in each case."

The Master had ordered discovery in those two categories on affidavit and inspection, as well as other categories which are not now in dispute. His order was upheld by the judge, who refused leave to appeal. However, leave was granted on a written application by Potter LJ, who also stayed the order of the Master and the judge in respect of the two categories.

The ground of the judge's decision was that there had been a waiver of privilege in relation to the documents in categories 7 and 8. The judge reached that conclusion because the documents, or the information in them in the case of category 8, had been disclosed to Sotheby's by Cobert Finance. That, the judge held, was a waiver of privilege in relation to all the world, it would seem.

The facts briefly are that the painting first reached Sotheby's from Mrs Breslav in November 1988. She, at that time, was advised by Herbert Smith Solicitors. When she sold the painting to Cobert Finance in March 1989 Herbert Smith were retained by them. The painting was to be sold at auction by Sotheby's on 1st April 1992. However, on 31st March there was a letter from Frere Cholmeley on behalf of the City of Gotha that resulted in the picture being withdrawn from sale. The contention apparently is that the painting was stolen from the City of Gotha, or its museum, during or at any rate at the end of the second world war. The property is said to lie in the City of Gotha or the Federal Republic of Germany.

The documents with which we are concerned, in general terms and not with complete accuracy, are said to have come into existence between 29th November 1988 and 30th March 1992. At the time of the hearing before the deputy judge there were thought to be only two documents which might be within the description of those two paragraphs. One was a copy of a letter from Herbert Smith to

Cobert Finance; Cobert sent a copy to Sotheby's. It was agreed that this letter contained legal advice and so was privileged when it was first sent by Herbert Smith to Cobert and received by them. But it was argued that there was a waiver of that privilege when the letter was shown to Sotheby's. The date of that letter was 5th December 1990. That raises a question under paragraph 7 of the judge's order. It has since been discovered that there are four other documents which are said to be of a similar nature. Those, we are told, were revealed by Cobert for the first time yesterday. In consequence there is as yet no affidavit relating to them.

The second document which was considered by the judge was a minute of a meeting which took place between Herbert Smith, Cobert Finance and Sotheby's on 14th November 1990. That meeting was for the purpose of Herbert Smith receiving information for the purpose of giving legal advice. The information, it is agreed, would have been privileged if only Herbert Smith and Cobert had been present at the meeting and only they received the minute. But it is said that there was a waiver of privilege because Sotheby's were present when advice was sought and given. That raises a question under paragraph 8 of the judge's order.

Mr Layton, who appears for the plaintiffs today, produced some new evidence in which he identified two further documents which he said the order should apply to. The reason that it was new evidence was because it was in an affidavit of Cobert which the judge ordered, so there could be no possible objection on that ground. But the grounds upon which we are asked to order production of those documents have got nothing to do with waiver, or with what was discussed with the judge or so far as we can see before the Master. They are totally different points that are raised.

I should have said that it is agreed that litigation was not in contemplation until April 1992. It follows that there can be no question here of the kind of privilege which applies when litigation is contemplated. The basis of privilege claimed before us is the other variety of legal professional

privilege described as follows in the Supreme Court Practice at 431:

> "Letters and other communications passing between a party, or his predecessors in title, and his, or their solicitors are privileged from production provided they are, and are sworn to be, confidential, and written to, or by, the solicitor in his professional capacity, and for the purpose of getting legal advice or assistance for the client."

That is enlarged somewhat on page 432:

> "The principle that a client should be entitled to obtain legal advice in confidence requires that, where professional privilege applies to lawyer-client communications, internally circulated documents or parts of documents revealing such communications are also privileged, whatever the purpose, other than fraud, for which such documents are brought into existence."
> [CHECK]

The principle is restated by Taylor LJ in the case of Balabel v Air India [1988] Ch 317 at page 330 where the Lord Justice said:

> "In my judgment, therefore, the test is whether the communication or other document was made confidentially for the purposes of legal advice ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach."

Now of course legal professional privilege can come to an end. It can end by waiver, although some say that a more correct description is loss of confidentiality. To my mind it does not matter, for present purposes, which is the correct rationale for the ending of privilege. That appears in a number of authorities and indeed is not, it would seem, any longer controversial in this case. The first is Attorney General v Guardian Newspapers Ltd and others (No 2) [1988] 3 All ER 545, where Lord Donaldson MR said at 595:

> "(3) As a general proposition, that which has no character of confidentiality because it has already been communicated to the world, ie made generally available to the relevant public, cannot thereafter be subjected to a right of confidentiality: see O Mustad & Son v S Allcock & Co Ltd and Dosen (1928) [1963] 1 WLR 109n.

> However, this will not necessarily be the case if the information has previously only been disclosed to a limited part of that public."

Now, that case was concerned with the breach of a duty of confidence said to have been owed by W to the Crown. It was not concerned with legal professional privilege and the waiver of it, but it may be of some assistance to the present problem.

Next we were referred to Style and Hollander on Documentary Evidence, 6th edition, page 224:

> "If the document is read out on the television news or in open court then confidentiality is lost once and for all. No further question of privilege arises. But it is important to bear in mind that it is possible for a document to cease to be confidential as between some parties and not others. If A shows a privileged document to his six best friends, he will not be able to assert privilege if one of those friends sues him because the document is not confidential as between him and the friend. But the fact six other people have seen it does not prevent him claiming privilege as against the rest of the world."

Next we were referred to Cross and Tapper on Evidence (8th edition) cited by the deputy judge in this case at page 474:

> "Legal professional privilege may always be waived by the client. While making the advice public would certainly amount to waiver, it is arguable that more limited disclosure, seeking to exclude the claimant, may not do so. The fact that a conversation between a client and his solicitor takes place in the presence of a third party does not necessarily amount to a waiver, although it will no doubt usually be held to have this effect. If a presumptively privileged document is offered to an opponent to read, the privilege is waived whether or not he reads it."

I have, I must say, some doubt about the word 'usually' in that passage, but maybe it is a question of degree.

The Australian case of R v Braham [1976] VR 647 was concerned with a conversation which took place between a person in a police station and his solicitor on the telephone, when the telephone call was made in the presence of a police officer. During the telephone call the accused admitted the

offence. Lush J said this at 549:

> "In my opinion, each case should be examined to see whether the communication was one which should be classed as confidential. The fact of the presence of a third party should be examined to see whether that presence indicates that the communication was not intended to be confidential, or whether the presence of the third party was caused by some necessity or some circumstances which did not affect the primary nature of the communication as confidential; and it is with these matters in mind that I look at the situation here.
>
> I do not regard it as decisive that Braham did not ask to be alone when he spoke to his solicitor, but I find in the circumstances described as I have set them out, no real indication that this communication was intended to be confidential, or that it was only made in the presence of Inspector Phelan as a matter of necessity. It appears to me that so far as the situation between Braham and Inspector Phelan at the time was concerned, it is most likely that Braham considered that there was no reason why Inspector Phelan should not hear the conversation because what he was telling his solicitor was in substance what he had been telling Inspector Phelan for the last hour or more."

One can readily understand that decision. If somebody chooses to communicate with his solicitor in public, so to speak, there are grounds for concluding that he does not intend the conversation to be confidential.

The next case, and perhaps that which is closest to the present in many ways, is Crescent Farm (Sidcup) Sports Ltd v Sterling Offices Ltd [1972] 1 Ch 553. In that case A had sold land to B on terms that if B ever wanted to sell it he should give first refusal to A to buy it back. That was in 1959. In 1965 B contracted to sell to C subject to A's rights, if any. A then required B to sell part of the land back to him. B took counsel's opinion. His solicitors then sent that opinion, or a copy of it, to C. Thereafter B did sell the land to C and A sued both B and C. A sought discovery of the opinion; privilege was claimed. Goff J, as I see it, dealt with two points, although the second only very briefly. For the most part he considered whether the documents were privileged in the hands of 'C' because his title was derived from the title of B. At least that is how it seems to me. That point does not arise today. At page 564 Goff J said this:

> "Of course, as Sir Nathaniel Lindley MR said in *Clacraft v Guest [1898] 1 QB 759,*

> *761,* privilege may be waived, but I cannot regard communicating this confidential information to a particular prospective purchaser as a waiver."

That, as it seems to me, must have been part of the grounds of the decision.

Two other authorities of some note are, firstly, British Coal Corporation v Rye [1988] 1 WLR 1113 at 1120. There Neil LJ said this:

> "I turn, therefore, to the second ground relied on by the plaintiff. This ground, which may not have been as fully developed before the judge as it was before us, seems to me, on the facts of the present case, to be of much more importance than the first ground. Legal professional privilege of the kind which is relied on in this case is a rule of evidence which protects a party to civil litigation from being obliged to give discovery of documents which have come into existence for the dominant purpose of being used in and for that litigation. The documents with which we are concerned, witness statements and experts' reports, clearly fall within this category. So much is common ground. The issue is whether this privilege has been waived or is otherwise no longer available to the plaintiff. Thus it is said on behalf of the defendants that the privilege has been lost because these copy documents have come into their hands quite properly and in circumstances in which the plaintiff either gave its approval or acquiescence, or at any rate (in the case of Category A documents) where the plaintiff ought to have foreseen that by making the documents available to the police copies might reach the defendants in accordance with the practice authorised by the Attorney-General's guidelines. It is further argued that if the plaintiff had wished to preserve its privilege it should have declined to make any documents available in the criminal proceedings, except pursuant to an order of the court, and even then only on the basis that it expressly reserved its privilege.
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> In my opinion this part of the case can be dealt with quite shortly. The documents, when they came into existence, were plainly protected by legal professional privilege of the kind to which I have referred. The privilege was a privilege from discovery in the action for which they were prepared, that is, the present action. Has anything happened which has caused that privilege to be waived or otherwise lost?
>
> In my judgment the answer to this question is plainly 'No.' Let it be assumed that all the documents have come into the possession of the defendants with the implied consent of the plaintiff and that it could be established that they would have supplied the Category B documents even without an order of the court. Nevertheless it is clear that the plaintiff made the documents available for a limited purpose only, namely to assist in the conduct first of a criminal investigation and then of a criminal trial. This action of the plaintiff, looked at objectively as it must be, cannot be construed as a waiver of any rights available to them in the present civil action for the purpose of which the privilege exists."

That was referred to in a passage from the judgment of the New South Wales Court of Appeal in the case of Goldberg v Ng [1994] 33 NSWLR 639 which has been shown to us as quoted in Network Ten

Ltd v Capital Television Holdings Ltd [1995] 36 NSWLR 275 at page 284. President Kirby said at 651:

> "The English Court of Appeal has held that, where communications, the subject of legal professional privilege, are disclosed to a third party by the holder of the legal professional privilege for a limited and specific purpose, legal professional privilege is only waived for that limited and specific purpose as against the third party and not as against the privilege holder's opposing litigant: *see British Coal Corporation v Dennis Rye Ltd (No 2) [1988] 1 WLR 1113; [1988] 3 All ER 816* and *Goldman v Hesper [1988] 1 WLR 1238; [1988] 3 All ER 97*. That is, it is possible to have a limited waiver of legal professional privilege in respect of a non-litigant third party, and yet maintain fully that privilege against a litigant party. This is even more the case when the holder of the privilege has disclosed the relevant communication upon the condition that privilege and confidentiality be maintained and that condition has been accepted."

The President then referred in more detail to the two cases cited, and to the Irish case of Downey v Murray [1988] NI 600 at 653 and said that those cases:

> "... establish that ... it is possible for the holder of legal professional privilege to disclose relevant privileged material to a third party for a limited and specific purpose in a specific context, and that limited waiver of the privilege will not prevent the holder of the privilege from maintaining that privilege as against the opposing litigant. It is also clear that the absence of an express reservation of confidentiality and/or privilege is not fatal to the operation of the limited waiver."

Mr Layton, as I have said, at the end of the day is disposed to accept that there may, in certain circumstances, be a waiver as regards one third party or more but not the whole world.

That does not seem to me to have been a view that the judge took. He seems to have attached importance to the case of Derby & Co Ltd and others v Weldon and others (No 7) [1990] 3 All ER 161.

Mr Layton did not rely on that case today, understandably. It seems to be dealing with the rule that privilege will not be regarded as a ground for not disclosing documents in certain circumstances where fraud is involved. That is not this case as far as we know.

At the end of the day it seems to me that the issue is: were the documents and the information disclosed to Sotheby's in confidence? It is fair to say that when they interpleaded they swore an affidavit, as they were required to do by Order 17, rule 3 subrule 4(b), saying that they did not collude with either claimant. Sotheby's are not represented here today. I say nothing about whether the documents we have been shown are consistent with that assertion.

We have the affidavit of Miss Kiesselbach who is the solicitor for Cobert Finance. What she says in relation to the documents is this:

> "Category 7
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> ...
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> 49. The fact that the document referred to in paragraph 32 (g) of Ms Burras' affidavit was copied to the First Defendant does not mean that it ceased to be confidential or came into the public domain so as to lose any claim to privilege.
>
> Category 8
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> ...
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> 51. The meeting referred to in paragraph 32(h) of Ms Burras' affidavit was concerned with and was held for the purpose of the giving of legal advice by Herbert Smith to their client and for receiving information by Herbert Smith to that end. The presence of third party does not, in my respectful submission, vitiate the privilege which arises in respect of such communications."

It is noticeable, as Lord Justice Aldous pointed out in the course of the argument, that neither the disclosure of the document to Sotheby's nor the meeting was expressly said to be confidential. We must therefore infer that there was no express agreement to that effect. There can certainly be an implied agreement. This is the sort of situation where, in the ordinary way, one would expect confidentiality to be assumed by all present rather than expressly agreed upon. Here they were, Cobert Finance disclosing their legal advice to Sotheby's who were going to be the auctioneers to sell

the picture. There is some evidence of an occasion when the parties were agreed that some information should not be made available to the City of Gotha. That is reflected in a letter from Sotheby's to Mr Montgomery of Cobert Finance on 7th December 1990. It appears to me to be a plain inference that the communications were intended to be confidential and understood to be confidential as between Cobert Finance and Sotheby's.

We have heard a great deal about common interest privilege, which is not defined as well as one might hope. Lord Justice Hutchison put the point, in the course of the argument, that common interest may well be a ground for inferring an agreement as to confidentiality. Mr Layton accepted that those are certainly the circumstances here. Whether or not there is sufficient community of interest to justify common interest privilege is not a matter upon which I express any view. What I do say is that both Cobert Finance and Sotheby's were presumably anxious that there should be a sale of this picture with a good title by Sotheby's at their auction house. They have a common interest, not in the technical sense but in plain ordinary language, to that extent. One can see that pursuit of that interest might well require that the legal advice received by Cobert Finance should remain confidential between them.

That, accordingly, means that I do not agree with the conclusion of the deputy judge when he held that privilege had been waived in relation to these two documents. In my judgment the right conclusion is to set aside the whole of paragraphs 7 and 8 of the order made by the master and upheld by the judge, because the ground upon which the judge upheld it goes entirely. It may be that there could be a new order in relation to the documents referred to in the new evidence. That is not before us. If a new order is sought in relation to those documents application must be made to the master. He will no doubt be told that what we have decided is that there can be a limited waiver of privilege such that, in general, it is preserved; and that has happened in this case. Mr Layton helpfully produced a proposed alteration to the order today in these terms. He asked that there be an affidavit of documents relating to the documents of the description in Schedule 1. Schedule 1 contains:

> "1. Copies of any letters, opinions or other documents provided to Cobert by its legal advisers for the purpose of providing legal advice or assistance concerning or in connection to the painting which have been copied to third parties (including Sotheby's) in the period 29 November 1988 to 30th March 1992.
>
> 2. Minutes or attendance notes of any meetings or telephone conversations concerning or in connection with the painting held between 29 November 1988 and 30 of March 1992 between (i) Cobert and/or its legal advisers and (ii) third parties (including Sotheby's) whether such minutes or notes were prepared by Cobert, Cobert's legal advisers or third parties in each case."

Then, in relation to Schedule 2, there was an order for inspection. Schedule 2 contained the two documents which the judge considered and we too have considered. A revised order in that form would have accurately reflected the problem that was before the Master, and it is that argument that we have rejected in relation to those two documents. There should, however, be an affidavit relating to the four documents said to be in the same category, category 7, which were first revealed yesterday. It said that the plaintiffs cannot ascertain whether those documents are properly covered by a claim for privilege. I would, if required, order such an affidavit in relation to those four documents.

Mr Layton sought to put forward today two new grounds of waiver in relation to the letter of 5th November 1990, and the information and minutes of 14th November. Apart from the fact that it is very late in the day to produce new grounds of waiver I can see no sufficient argument of waiver to justify that course.

In the result I would allow this appeal, and quash paragraphs 7 and 8 of the judge's order. If required I would order an affidavit relating to the four documents that were disclosed for the first time yesterday.

LORD JUSTICE ALDOUS: My Lord has dealt in detail with the issues that arose and I agree with everything he has said. I also agree with the order that he proposes. However, I would wish to draw attention to the necessity of litigants carefully complying with the rules relating to discovery. The

second defendants in this case were ordered to provide inspection of classes of documents, at least one of such classes was so widely drawn as to include within it documents that might not be relevant and could be privileged on any basis. That was accepted by Mr Layton who agreed that one class at least had to be notionally limited to documents that were relevant. It is also supported by the draft order that is now sought so as to accurately set out the request that should have been made.

The form of the order that was made was the direct result of the affidavit in support. Discovery of the classes of documents being sought was supported, as required by Order 24, rule 7, by an affidavit. The deponent of that affidavit said:

> "I believe all such documents are relevant to the issue in this action and are or have been in the position or custody or power of the second defendant."

That statement was in my view incorrect. It is important when applications for specific discovery under Order 24, rule 7 are made, that the documents or classes of documents for which discovery is being sought are clearly and carefully defined. A deponent of the required affidavit must consider carefully whether he can say on oath that each document, or all the documents within a class, have been in the possession, custody or power of the other party, and that all the documents the subject of the application relate to the matters in question. The rule specifically requires an affidavit in support. No solicitor should swear an affidavit without being satisfied that the application is not too widely drafted and the opinion he expresses is soundly based.

LORD JUSTICE HUTCHISON: I agree with both judgments and there is nothing I would wish to add.

ORDER: As per judgment with costs.

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