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P.W.S. SHIRLEY v. CHANNEL ISLANDS KNITWEAR COMPANY LTD & P.G. SANGAN

Mr. P.W.S. Shirley in person

Advocates J.P. Wheeler & C. Whelan for the Defendants

This arises from an application by Mr. Shirley to examine documents which the Defendants claim are privileged. It is made consequent upon proceedings which first came before the Royal Court as long ago as September 1981.

Mr. Shirley was previously a director and employee of the first Defendant (the company), and it was as a result of his ceasing to hold either of these positions that these proceedings were instituted.

In order to follow the submissions advanced by Mr. Shirley, it is necessary to refer to the pleadings. No evidence has been heard, and I make no findings on the allegations of fact which they contain. From the pleadings, it would appear that Mr. Shirley bases his claim on two grounds.

First he claims that he had an agreement with the company and:-

> "7. THAT in or about September, 1980 the Second Defendant did by various means seek to persuade the First Defendant to break the said Agreement, it being the intention of the Second Defendant, at all material times, that the First Defendant should so break the said Agreement.
> 8. THAT on or about the 6th October, 1980 and by reason of the Second Defendant's inducements as aforementioned, the First Defendant, in breach of contract, dismissed the Plaintiff from its employment, purporting to terminate the said Agreement without notice.
> 9. THAT by reason of the First Defendant's breach of contract, further or alternatively the wrongful acts of the Second Defendant the Plaintiff has suffered loss or damage."

There then follow details of the damage which Mr. Shirley claims to have suffered. These do not include any claim for general damages for conspiracy, but are limited to the loss which he claims results from breaches of a series of agreements which he had reached with the company during his employment.

Second, he claims, at paragraph 10:-

> "10. THAT alternatively, and without prejudice to the foregoing, by an agreement made between the Plaintiff and the First Defendant made partly orally and partly in writing, such writing consisting of letters from the First Defendant to the Plaintiff dated the 26th September, 1980, the Plaintiff to the First Defendant dated the 6th October, 1980 and the First Defendant to the Plaintiff dated the 13th October, 1980 in compromise of the Plaintiff's claim against

the First Defendant as set out in paragraphs 1. to 9. hereof which the Plaintiff now repeats, the First Defendant agreed with the Plaintiff as follows:-"

There then follow the details of the agreement which Mr. Shirley alleged to exist and a claim that the first Defendant, that is, the company has failed to implement the agreement, and sets out the damage which Mr. Shirley alleges to flow therefrom.

The Defendants answer, in brief, is to claim that there was indeed a termination agreement, although the parties would appear to be at odds over the correspondence by which it was reached, as well, it would appear, over the terms.

In his further and better particulars, Mr. Shirley claims:-

"That the offer was made under threat of dismissal and it is the Plaintiff's case that he has constructively dismissed."

Put shortly therefore, the claim of the Plaintiff would appear to be based either on the ground that, one way or another, he was dismissed without notice (for which he claims damages) or that there was a termination agreement (which the Defendants have not honoured).

As part of the proceedings the Defendants have made discovery, in which they have objected to produce, in Part 2 of their Affidavit, letters, drafts, memoranda etc passing between the Defendants and the Defendant's Advocate on the ground that they are covered by privilege as communications passing between a client and his legal advisers. No distinction is made as between the first and second Defendants. There is no claim that they were made for the purpose of giving legal advice.

Among the documents produced was that numbered 35. in the list of documents. As Mr. Shirley made a good deal of reference to this document I propose to reproduce it in full:-

"CHANNEL ISLANDS KNITWEAR COMPANY LIMITED

The steps leading up to the resignation/removal of Directors of the Company.

1. Letter to P.W.S. Shirley inviting resignation as employee and Director.
2. Letter to D.S. Mason offering new position as Sales Director of Pierre Sangan Limited and Consultant to C.I.K.

-3. Acceptance-

3. Acceptance by D.S. Mason of appointment and resignation as employee and Director of C.I.K.
4. After 3. above received issue revised notice of meeting of Directors for 6th October and revised Agenda.
5. By close of business on 3rd October establish whether P.W.S. Shirley will resign his positions.
6. If no resignation by P.W.S. Shirley under 5. above, P.G.S. to give formal notice of termination of employment of P.W.S. Shirley with effect from 6th October. This notice to be given to P.W.S. Shirley before Board Meeting at 2.30 p.m. on 6th October.
7. D.S. Mason to be requested (subject to his resignation being received under 3. above) not to attend Board Meeting.
8. First three items on Agenda to be dealt with and in particular Board to vote on acceptance of D.S. Mason's resignation as a Director.
9. If P.W.S. Shirley's resignation received after his retirement from the meeting - Board to consider financial terms of compensation and then remaining items on Agenda to be dealt with.
10. If P.W.S. Shirley's resignation not received Board to vote on Resolution to confirm P.G.S's action in terminating P.W.S. Shirley's employment
After this Resolution in favour being passed P.G.S. to propose that the removal of P.W.S. Shirley as a Director should be referred to a meeting of the Shareholders to be called in accordance with Article 51 and date to be fixed 14 clear days later (say 23rd October).
P.G.S. then to propose that the meeting be adjourned and that the remaining items on the Agenda be considered at a further meeting to follow immediately after the Shareholder's meeting on the 23rd October."

Subsequent to the production of the affidavit, the Plaintiff issued a summons requesting an order permitting him "to inspect those documents in the possession of the Defendants described in part 2. of Schedule 1. of the list of documents disclosed on discovery". In his submissions to me, Mr. Shirley modified his summons by making an alternative request to the effect that the Court might inspect the documents.

In view of the lack of authority on this subject, I propose to make some preliminary remarks regarding the rules of Court dealing with privilege on discovery, and the Courts power to inspect or order inspection of documents.

Discovery in its present sense was unknown to this Court before the comparatively recent introduction of the Royal Court Rules. Those of 1982 provide as follows:-

"6/16.-(1) The Court may order any party to a cause or matter to furnish any other party with a list of the documents which are or have been in his possession, custody or power relating to any

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matter in question in the cause or matter, and to verify such list by affidavit.
(3) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege.
(5) The Court may order any party to a cause or matter in whose pleadings or affidavits reference is made to any document to produce that document for the inspection of any other party and to permit him to take copies thereof."

No description or definition is given as to what documents are or are not privileged. However, in view of the similarity, in this instance, of the Royal Court Rules to those of the Supreme Court, I propose to turn to the latter for guidance on this point.

Order 24 rule 5(2) reads as follows:-

"24/5(2) If it is desired to claim that any documents are privileged from production, the claim must be made in the list of documents with a sufficient statement of the grounds of the privilege"

The general rule as to correspondence passing between a client and his legal adviser is propounded under the heading of 024/5/6 -

"Communications privileged although no litigation was contemplated or pending - solicitor and client - 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.
The privilege does not extend to documents which are not confidential .....letter written not to obtain advice but to inform the solicitor of a fact at his request....."

It is put thus in Cross on Evidence, 6th Edition at pp. 388

"In civil and criminal cases, confidential communications passing between a client and his legal adviser need not be given in evidence by the client and without the client's consent, may not be given in evidence by the legal adviser in a judicial proceeding if made either:
(1) to enable the client to obtain, or the adviser to give, legal advice; or
(2) with reference to litigation that is actually taking place or was in the contemplation of the client"

It is further discussed @ p. 389

"The first head of legal professional privilege was the last to gain full recognition by the courts for it was not until Greenough v. Gaskell was decided in 1833 that it was clear that the privilege attaches to communications between client and legal adviser, even though no litigation was contemplated by the client. In that case Lord Broughham said:
If the privilege was confined to communications connected with suits begun, or intended or expected or apprehended, no-one could safely adopt such precautions as might eventually render any proceedings successful, or all proceedings superfluous."

This is a sufficient statement of a well known and accepted rule.

Insofar as concerns the Court's power to order inspection of or to inspect the documents, this is covered briefly by rule 6/16(5) supra. It seems clear to me that it is implicit in the wording of the rule that the Court has a discretion as to whether to inspect the documents or not. The question is whether, it must, or in certain circumstances even ought to do so on the application of one of the parties.

The Court was referred to O 24/13/2 of the Rules of the Supreme Court which reads as follows:

> "In what circumstances the Court will inspect the document - "The question whether the Court should inspect the documents is one which is a matter for the discretion of the Court, and primarily for the Judge of first instance. Each case must depend on its own circumstances: but if, looking at the affidavit (and now the list of documents verified by affidavit) the Court finds that the claim to privilege is formally correct, and that the documents in respect of which it is made are sufficiently identified and are such that, prima facie, the claim for privilege would appear to be properly made in respect of them ... the Court should generally speaking, accept the affidavit as sufficiently justifying the claim without going further and inspecting the documents" (per Jenkins L.J., Westminster Airways v. Kuwait Oil Co. (1951) 1 K.B. 134, p. 146, C.A.). For a list of documents, verified by affidavit, is prima facie conclusive as to all matters stated therein in proper form. Nevertheless, parties do from time to time consent or ask for the Court to inspect the documents and decide upon them. The party applying for the order for inspection should give notice to the other party to produce the documents on the hearing of the application for inspection by the Master. The decision to inspect is appealable, but, on general principles, the Court of Appeal will not readily overrule the Judge's exercise of discretion."

Counsel for the Defendants put it on the basis that if the Court were to find that prima facie the claim for privilege is proper then it is not appropriate to go behind the affidavit; or, as he put it subsequently, the Court must have a discretion but must exercise it judicially, that is, in accordance with established principles. He referred the Court first to Hobbs & Hobbs v. Coubens, (1960) P. 112 (1959) 3 AER 827 where the co-Respondent was not permitted to inspect the brief when opposing an application for taxation of costs. The question of whether the Court should inspect it was not really in point: it was going before the taxing registrar, and the question was whether the co-Respondent could see it in order to address him. He referred also to Westminster Airways v. Kuiwait

Oil Co. (1950) 2AER 597. This case again was not quite in point, as it concerned correspondence passing between the defendants and their insurance brokers and insurers. There are however two passages which are of assistance to the Court. The first is @ 599H:-

> "Counsel for the plaintiffs claims that the further documents set out in the schedule to the first affidavit are not privileged, and, furthermore, he submits that the court ought to look at them before deciding that they are privileged. Parker, J., did not think it necessary to do so, nor do I. The court ought to regard the defendants' affidavit as covering the question unless there is some reason to cast doubt on it."

The second is @ 604 H:-

> "I should, perhaps, mention an unreported case from Southern Ireland to which we were referred, the case of Coss v. National Maternity Hospital (10), a decision of Nixon, J. The case is of interest because the learned judge had to deal with the question of privilege in regard to correspondence between an insurance company and the defendants and their solicitors and so had before him the very matter with which we are concerned. In that case the judge held, with regard to the correspondence, that the proper course for him to take was to look at the documents under the general power given by the corresponding rule in Southern Ireland, and he said this:
> "So far as a line of demarcation may apply, I conceive it should not have reference to the date of the making of a claim by the plaintiffs, but to the point of time, if ascertainable, at which the insurance company ceased to be interested or concerned in the matter from the point of view of their own liability to their insured, and acquired instead the character of agents, even prospectively, for the legal advisers of the defendants. Having inspected the documents, I think the line of demarcation should be drawn at the letter of Aug. 23, 1946, from the insurance company to the assistant secretary of the defendants. The plaintiffs are entitled, in my view, to inspection of documents within the description in item 21 up to and including that date."
> The judge in that case thus took the view we were invited by counsel for the plaintiffs to adopt. With respect to the judge, I think that is too narrow a view to form the foundation of any general rule. After all, it must be remembered that the documents are documents with respect to which privilege has been claimed on oath, and, for the reasons I have endeavoured to state, they are documents in respect of which, prima facie, the claim to privilege would appear to be proper. I therefore, cannot see that it would be right to lay down any general rule to the effect that in all such cases it is necessary to peruse the document for the purpose of arriving at a line of demarcation such as the judge in Southern Ireland described. Of the authorities cited to us, it seems to me that the one nearest in point is the Adam S,S. Co., Ltd. v. London Assurance Corpn.(9), in which the Court of Appeal, looking at the affidavit and the nature of the documents, held - so far as appears from the report, without inspecting them - that the claim to privilege made in the affidavit was properly made, and disposed of the matter on that footing. For these reasons I agree that the appeal fails and should be dismissed."

This is my opinion sufficiently states the position which I conceive to

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be the law in Jersey, that is, that the Court has an entire discretion to examine the documents where a claim for privilege is denied (and see e.g. O'Rourke v. Darbishire & others (1920) AE Law Reports reprint 1 @ p. 6), but that it has no obligation to do so, and indeed need not do so should it consider that the claim to privilege made in the affidavit was properly made.

Now the first point I have to deal with is this, that the Defendants have not made their claim for privilege in precisely the form suggested by the Rule. I therefore order that they should amend their affidavit in order that they should make it quite clear that they are claiming their privilege only with regard to those documents which are and are sworn to be confidential and written to or by the Solicitor in his professional capacity for the purpose of getting legal advice or assistance to the client.

Once this is done some documents may or may not be released from the claim to privilege. I am not concerned with them, but only with those in respect of which privilege is claimed. In respect of these, I see no reason why I should not rule on Mr. Shirley's application.

Again, as there is a certain absence of authority, it may be helpful if I deal with this at some length.

Mr. Shirley put his case on three grounds.

First, he says, he has a right to see the correspondence from the company's lawyers to the company up to the date on which he ceased to be a member of the board;

Second, that, "privilege will not protect documents concerned with the seeking or giving of legal advice if the nature of that advice and the circumstances in which it was sought or given are themselves material facts."

Third, that it was clear from "the plan" that the company's advocates were offering advice to the Defendants which was in furtherance of an act which was prima facie unlawful.

I will deal with these three grounds in turn.

Mr. Shirley's first ground was that he had a right to see letters passing

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between the company and its legal advisers up to the 6th October 1980 on which date he ceased, as I understand, to be a director of the company. He put it in this way, that the second defendant (Mr. Sangan) acted under the instructions of the first defendant (the company) and that as the letters went to and from the company through its board, he was entitled to see the letters as of right. He further claimed that evidence that such documents exist was provided by "the plan". His proprietary right, he submitted, was established at that time and he now seeks to exercise it. Having once had this right vested in him he could not lose it.

He further argued that Article 95 of the Articles of Association of the company provided that the business of the company shall be managed by the directors and that the management of the company is impossible without access to the books of account. He also submitted that as a minority he might have been acting in the interest of the company. He sought these papers he said because he wished to know whether the persistence in securing his resignation was a ploy in securing his resignation. He had resigned under pressure and he wished to know if negotiations were taking place prior to the 6th October 1980. These last reasons seem to me rather more related to the grounds advanced in his later contentions to which I will advert later. What I must decide on this first ground is whether he has an indefeasible proprietary right to see all correspondence passing to and from the company up to the 6th October 1980.

No direct authority on this point was cited to me by either party, Mr. Shirley suggested that Article 41 of the Loi (1861) sur les Sociétés à Responsabilité limitée was helpful to his case, but I do not find it to be so.

Clearly, by Article 95 of the Articles of Association (following Article 6 of the law) the business of the company is to be managed by the directors, but this again is of no direct assistance.

Although not precisely in point, Counsel for the defendants referred the Court to the following passage in Gore Brown on Companies, 44th Edition Ch. 26.7:

"A director's Right to inspect company books
A director has the right to inspect the company's books either at a

board meeting or elsewhere. This right extends both to the minutes of directors' meetings, and to the company's accounting records. In Conway v Petronius Clothing Co, Slade J held that this right did not derive from what was then section 147 of the Companies Act 1948 (which imposed a sanction for failure to keep proper books of account). He held that this common law right was not conferred on a director for his own advantage but to enable him to carry out his duties as a director. It follows from this that the right to inspect terminates on his removal from office. Furthermore, a court will not allow a director to abuse his right by disregarding the confidence imposed on him as a director, but in the absence of clear proof it will be assumed that he is exercising his right for the company's benefit. The court has a discretion as to whether or not to order an inspection. In the instant case, where misconduct was alleged against the two plaintiff directors, and where a meeting to consider their removal from the board was held, Slade J held that the balance of convenience was against the making of an immediate order."

He then went on to refer the Court to Conway v. Petronius (1978) 1 AER 185. Once again, the facts are not on all fours with those of the present case, but there is a passage which is of assistance. It commences at p. 201 b where Slade J. found:-

"In contrast the right under discussion in the present case is a right exercisable, if at all, by directors, who do owe fiduciary duties to their company.
With the limited assistance available from reported cases but with valuable help from counsel's arguments, I reach the following conclusions in relation to the nature of the right of a director to inspect the books of account of a company; (1) The right exists but it is a right conferred by the common law and not by statute. Although the legislature in s 147 of the 1948 Act (and its predecessors implicitly recognised the existence of this right at common law, it conferred no new right: the purpose of that section and its predecessors was to impose criminal sanctions in the event of proper books of account not being kept or not being made available for inspection or in the event of a breach of any of the other duties imposed by the section. (2) The right of a director to see his company's books of account, which is exercisable both at and outside meetings, is conferred by the common law in order to enable the director to carry out his duties as a director (see Burn v London and South Wales Coal Co). I leave open the question whether this right conferred on him at common law is to be regarded on the one hand as a right incident to his office and independent of contract or on the other hand as a right dependent on the express or implied terms of his contract of employment with the company, so that it may be excluded by express provision to the contrary; no such express provision to the contrary appears in the present case and counsel for the defendants accepts that the right at common law exists. (3) The right of a director to inspect the company's books of account must determine on removal of the director from office. (4) The right not being a statutory right, the court is left with a residue of discretion whether or not to order inspection. However, in the case whether there is no reason to suppose that the director is about to be removed from office, the discretion to withhold an order for inspection will be very sparingly exercised. Although a director will not in general be called on to furnish his reasons before being allowed to exercise his right of

inspection the court would in my judgment in such a case restrain him in the exercise of the right, if satisfied affirmatively that his intention was to abuse the confidence reposed in him as director and materially to injure the company. In my judgement, however, in the absence of clear proof to the contrary, the court would in such a case assume that he was exercising it for the benefit of his company. It will be seen that the proposition contained in this present paragraph is derived from the passage from Street J's judgment in Edman v Ross which has already been cited. This passage seems to me, if I may say so, consistent with both principle and common sense. If the position were otherwise, a director's rights of inspection could be rendered more or less nugatory, at least for many months, by specious allegations that he was exercising them with intent to injure the company or for other improper motives. (5) Principles rather different from those just stated in my judgment apply in a case, such as the present, where an interlocutory application for inspection is made to the court by a director who is alleged to have been misconducting himself as a director and, at the time when the application comes before the court, a general meeting of his company has been convened for the purpose of removing him from office. In such a case the court would, in my judgment, normally intervene to assist him on an interlocutory application for inspection, before the wishes of the company had been made known at the general meeting; only if it considered such intervention necessary for the protection of the company. The right of inspection is in my judgment one given to him to exercise for the benefit of the company. He can claim the right as a personal right only in the sense that he may invoke it so as to enable him to discharge his personal obligations to the company and his statutory obligations. If the evidence shows that at least some members of the company no longer have confidence in him as a director, because of alleged misconduct, and have indicated that lack of confidence by causing a general meeting to be convened for the purpose of his removal, the balance of convenience will, in my judgment, normally require postponement of the consideration of his interlocutory application for inspection until the meeting has been held (compare Harben v Phillips and Bainbridge v Smith). Each case, however, must depend on its special facts. In particular circumstances the court may consider it essential for the protection of the company or indeed for the personal protection of the director that he be allowed to inspect the company's books even though a resolution for his removal as a director is shortly thereafter to be considered by the company's members."

Counsel for the Defendants suggested that the correct approach on this point was that whilst the Plaintiff was a director of the company he had the right to see the minutes and the letters which were sent out; but that this right is one which has to be exercised for the benefit of the company (which is not the purpose for which Mr. Shirley is seeking it) and in any event ceases on his leaving the company.

I think this approach is correct. On this point therefore I hold that no proprietary right exists in the present circumstances for Mr. Shirley to inspect correspondence passing between the first defendant and

its legal advisers prior to the date he ceased to be a director.

In saying this, I do not wish to preclude in some other case the exercise of a discretion by the Court to inspect such correspondence. I should perhaps add though, that if there is, it is not one which I would consider exercising in the present circumstances.

Mr. Shirley's second ground was founded on some lines taken from Odgers on Pleading, 22nd Edition @ p. 224 which reads:-

> "Secondly, privilege will not protect documents concerned with the seeking or giving of legal advice, if the nature of that advice and the circumstances in which it was sought or given are themselves material facts."

Unfortunately, Mr. Shirley omitted to read the remainder of the paragraph, Which reads:-

> "This may be the case, for example, where a party requests relief under section 33 of the Limitation Acts 1980 (a consolidation of earlier statutes). The Court is such a case is directed by the Statute to have regard to the steps taken by the Plaintiff to obtain legal advice and the nature of any advice received."

This passage is consistent with the language of the Rules of the Supreme Court of O 24/5/6:

> "1. Legal professional privilege - It is necessary to divide into two classes the documents that are protected on this ground, namely (a) those that are privileged whether or not litigation was contemplated or pending, and (b) those that are only privileged if litigation was contemplated or pending when they were made or came into existence. Legal professional privilege does not protect from production documents by which legal advice is sought or given, if the question whether, and in what terms, advice was sought, and the nature of such advice, are themselves material fact, as e.g. upon an application under the Limitation Act 1939, s 2D), as added by the Limitation Act 1975 (see now 1980 Act) (Jones v. C.D. Searle & Co. Ltd. (1978) 3 All E.R. 654, C.A.)."

In both passages, the case of Jones v. G.D. Searle & Co. Ltd. (1978) 3 AER 654 (1979) 1 WLR 101 was suggested as authority for this proposition; and Counsel for the Defendants duly produced it. This was a case where the Plaintiff had pleaded that it would be equitable to permit her action to proceed notwithstanding a defence that it was statute barred on account of delay. The Court held that, notwithstanding that the opinions of Counsel were not liable to discovery or production, the nature of the advice to the Plaintiff i.e. whether it was favourable or unfavourable,

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should be disclosed as being relevant. Roskill L.J. put it in this way @ p. 657 of the All England Report:

> "Plainly the obtaining of the relevant medical, legal and other expert advice will or may in certain cases bear upon the degree of expedition which a plaintiff has shown. Therefore it is right that a plaintiff should, when it is relevant, be required to state quite generally the nature of the advice he or she has received; what is relevant here is whether that advice was favourable or unfavourable to his or her case."

I refer also to the remarks of Eveleigh L.J. @ p. 658:-

> "I agree. I think that the court would be slow to take away a well-established privilege from a plaintiff and certainly would require some positive indication that the legislature so intended. If counsel's argument had rested upon the wording of section 2D (3)(e) in isolation, I think there would be strong reason to reject his submission on the basis that there was no sufficient positive indication that the principle was to be taken away. However, the wording of section 2D (3)(f) refers specifically to the "nature of any such advice he may have received". Thus the provision is that that court is under a duty to consider the nature of advice received by the plaintiff; and if the Court is under a duty to consider the advice, it seems to me that the court must be in a position to demand evidence as to what the nature of the advice was. I agree that this appeal should be allowed."

Mr. Shirley suggested that correspondence passed in which advice as to his departure was sought and given: and that the circumstances in which it was sought and given are themselves material facts.

I have two things to say with regard to this argument. First, I do not agree that the passage in Odgers remotely supports the interpretation which Mr. Shirley seeks to put upon it. Indeed, Jones v. G.D. Searle & Co. Ltd. is strong authority against him, and against any widening of the rule except where it is plainly necessary. Second, I cannot see how the nature and circumstances of the legal advice are themselves material to his claim, in the manner in which he has brought it.

I therefore rule against Mr. Shirley's application on this ground also.

This brings me to Mr. Shirley's third ground, which is that the parties were guilty of planning an unlawful act, that is his dismissal without notice. He claimed that paragraph 6 of "the plan", that is, to give formal notice of termination of his employment from 6th October 1980,

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was an unlawful act. He took the view that the paragraph could have been read as planning his dismissal without notice, contrary either to the Termination of Employment - Minimum Periods of Notice (Jersey) Law 1974, or in breach of the principles enunciated in Greig v. Wackett Evans (1963) JJ 265; and that it was thus unlawful for the company to break his contract.

I do not agree with him that paragraph 6. of the plan bears the construction which he seeks to put on it. In my view it contains nothing to suggest, as he claims that the company shewed any intention of dismissing him without notice.

Even if I am wrong on this the authorities do not, in my opinion, assist Mr. Shirley. In his submissions to me, Mr. Whelan who was dealing with this point, put his case in this way, that the authorities shewed that every precaution should be taken against unnecessary disclosure of privileged documents; that there is no privilege against disclosure where there is iniquity, that is, crime or fraud; and that there must be some evidence that the assertion that there is crime or fraud has some foundation in fact.

He cited first a passage from Cross on Evidence which at p. 398 in the 6th Edition reads as follows:-

> "In the leading case of R v Cox and Railton, the Court for Crown Cases Reserved decided that, if a client applies to a lawyer for advice intended to guide him in the commission of a crime or fraud, the legal adviser being ignorant of the purpose for which his advice is wanted, the communication between the two is not privileged. Accordingly a solicitor was compelled to disclose what passed between the prisoners and himself when they consulted him with reference to drawing up a bill of sale that was alleged to be fraudulent. As Stephen J pointed out when delivering the judgment of the court, if the law were otherwise, a man intending to commit treason or murder might safely take legal advice for the purpose of enabling himself to do so with impunity, and the solicitor to whom the application was made would not be at liberty to give information against his client in order to frustrate his criminal purpose. If the lawyer participates in the criminal purpose he ceases to act as a lawyer. Stephen J concluded that the court must judge whether the evidence is admissible on the special facts of each particular case, and every precaution should be taken against compelling unnecessary disclosures. The doctrine of R v Cox and Railton has been applied to civil cases in which fraud was alleged and it has since been stressed that there should be prima facie evidence that it was the client's intention to obtain advice in furtherance of his criminal or fraudulent purpose before the court will consider whether the situation comes within the exception to the rule relating to

professional privilege. 'Fraud' in this context does not extend to every act or scheme which is unlawful such, for example, as an inducement of breach of contract; and an unsolicited letter from a lawyer to his client advising him that certain conduct could lead to his being prosecuted is outside the principle of R v Cox and Railton."

He then referred to O 24/5/12 of the Rules of the Supreme Court:-

"Fraud or illegality - This professional privilege does not extend to cases where the document came into existence as a step in a criminal or illegal proceeding, as e.g. if a solicitor is consulted on how to do an illegal act (Bullivant v. Att.-Gen. for Victoria (1901) A.C. 196 p. 201 (per Lord Halsbury) p. 206 (per Lord Lindley); see also R. v. Cox (1884) 14 Q.B.D. 153). In an action against ex-employees for conspiracy to injure, breach of the duty of fidelity and breach of confidence, discovery was ordered of documents passing between the defendants and their solicitors relating to the setting up of the companies within which the defendants proposed to operate. But privilege is not lost if the purpose of the document was to ask, or give, advice as to how (lawfully) "to keep out of an Act of Parliament" or to warn against the results of contemplated acts. To bring a case within this exception there must be a definite charge of fraud or illegality and a prima facie case must be made out (Re Whitworth (1919) 1 Ch. 320 pp.336, 349 C.A.; affirmed (1920) A.C. 581; 89 L.J. Ch. 162, sub nom. O'Rourke v. Darbishire, H.L.). Notwithstanding that the word "fraud" has not been used in the statement of claim, privilege can be displaced if the facts alleged enable the court to recognise fraud. It is immaterial whether the solicitor is party to the alleged fraud or not."

Following this he cited O'Rourke v. Darbishire (1920) AER 1 referring in particular to a passage on p. 6 in which Viscount Finlay stated:-

"(c) The appellant also relied on the proposition that no privilege comes into existence with regard to communications made in order to get advice for the purpose of carrying out a fraud. This is clear law, and if such guilty purpose was in the client's mind when he sought the solicitor's advice, professional privilege is out of the question. But it is not enough to allege fraud. If the communications to the solicitor were for the purpose of obtaining professional advice, there must be, in order to get rid of privilege, not merely an allegation that they were made for the purpose of getting advice for the commission of a fraud, but there must be something to give colour to the charge. The statement must be made in clear and definite terms, and there must further be some prima facie evidence that it has some foundation in fact. It is with reference to cases of this kind that it can be correctly said that the court has a discretion as to ordering inspection of documents. It is obvious that it would be absurd to say that the privilege could be got rid of merely by making a charge of fraud. The court will exercise its discretion not merely as to the terms in which the allegation is made, but also as to the surrounding circumstances, for the purposes of seeing whether the charge is made honestly and with sufficient probability of its truth to make it right to disallow the privilege of professional communications. In the present case it seems to me clear that the appellant has not shown such a prima facie case as would make right to treat the claim of professional privilege as unfounded."

-There-

There is a further helpful passage in Lord Sumner's judgement at p. 10 in which he says:-

> "that no mere allegation of fraud ..... will suffice in itself to overcome a claim of professional privilege properly formulated."

Finally he cited Crescent Farm (Sidcup) Sports Ltd. v. Sterling Offices Ltd. & another (1971) 3 AER 1192 where at 1199g Goff J. found:-

> "As to the plaintiffs' alternative claim it is well established that where a communication which would otherwise be within the protection of legal professional privilege is made in preparation for or in furtherance of a crime or fraud privilege does not attach.
> The plaintiffs rely on this principle and they say first that this exception is not limited to crime or fraud but extends to any act or scheme which is unlawful in the sense of giving rise to a civil claim or if that is putting it too high still 'fraud' must be liberally construed and includes what the defendants were doing in this case. They further say that by sending the documents to the second defendants the defendants showed that the opinion was obtained in preparation for or in furtherance of their tortious purposes or made it necessary or proper so to regard it. The principle of the exception is that the communication in such circumstances is not in truth within the scope of professional service at all and the plaintiffs submit that it is no part of a solicitor's duty innocently or otherwise to further any breach of duty or wrongful act.
> In my judgment that is far too wide. Apart possibly from Williams v. Quebrada Railway, Land & Copper Co, the exception has always been stated as confined to cases of crime or fraud; see e.g. O'Rourke v. Darbishire and R v Cox and Railton .....
> I do not consider the principle requires any extension. On the contrary I think the wide submission of the plaintiffs would endanger the whole basis of legal professional privilege. It is clear that parties must be at liberty to take advice as to the ambit of their contractual obligations and liabilities in tort and what liability they will incur whether in contract or tort by a proposed course of action without thereby in every case losing professional privilege.
> I agree that fraud in this connection is not limited to the tort of deceit and includes all forms of fraud and dishonesty such as fraudulent breach of trust, fraudulent conspiracy, trickery and sham contrivances, but I cannot feel that the tort of inducing a breach of contract or the narrow form of conspiracy pleaded in this case come within that ambit."

These authorities, in my view support Mr. Whelan's contentions. Neither the allegations of Mr. Shirley nor his assertions as to the conduct of the Defendants on this third point come anywhere near to displacing the Defendant's privilege and I have no hesitation in ruling against him on that ground also.

In the particular circumstances of this case, and in view of my finding, I see no necessity for me to inspect the documents and do not propose to exercise my discretion to do so.

Subject therefore to compliance by the Defendants with my order, I find no grounds on which the Defendant's claim for privilege should be disallowed, and for the reasons set out above I dismiss Mr. Shirley's summons and refuse his request for inspection.