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ROYAL COURT

14th November, 1989

Before: Commissioner F.C. Hamon and
Jurats Blampied and Vibert

Between: H Plaintiff

And: T Defendant

Application by plaintiff for discovery of a document made during hearing of substantive issue.

Advocate R.J. Michel for the plaintiff
Advocate G.R. Boxall for the defendant.

JUDGMENT

COMMISSIONER HAMON: This case was called on the 13th November. It was set to last two days. The plaintiff called three witnesses; the defendant called one witness. The plaintiff's advocate opened and called the plaintiff who was examined and cross-examined. She was in the witness box for several hours. When her evidence was completed her counsel, Advocate Michel, made an application for a document to be disclosed.

It must be recorded that the Judicial Greffier had made an order by virtue of Rule 6/16 and 6/21(6) of the Royal Court Rules 1982, as amended, that the parties do, within twenty eight days of the order furnish each other

with a list of documents in the usual form verified by affidavit.

That order was made on the 27th April, 1989. Both parties disregarded the order to a lesser and to a greater degree. Advocate Michel filed his list on the 19th September, some five months after the order was made. Advocate Boxall, however, delivered his list to Advocate Michel (he does not appear to have filed it) at midday on Friday 10th November, some seven months after the order was made and only the weekend before the trial.

A more blatant disregard of a Court order and a more cavalier approach to duty as an officer of the Court it would be difficult to imagine. Naturally, the Court had no opportunity to read the papers before the trial.

When we questioned Advocate Michel as to why he had allowed matters to reach this stage, he told us that he had written letters on the 8th and 19th September but had not progressed the matter further; that he had expected the document to be disclosed but that when it was not it was too late to action the matter. It was only after the evidence of his client had been heard in full that he could assess the importance or otherwise of the document. He now considered it essential to his case. He had mentioned in opening that he might, at a later stage, make the application for discovery.

The dispute between the parties concerned repairs carried out to the roof of the property in St. Peter, which was owned as to two-fifths by the plaintiff and three-fifths by the defendant. The plaintiff and her children lived at the property; the defendant, her former husband, lived elsewhere.

On the 6th October, 1987, the defendant's lawyer wrote to ask if his client and a surveyor could visit the property. Although on the 15th February, 1988, he wrote to say that he had not yet received the surveyor's report, on the 25th January, 1988, Advocate Boxall had written this letter to the plaintiff:

"In relation to your request for a copy of the Surveyor's Report, as

you will know such Reports are in these circumstances obtained for the private use of one party or the other, in this case my client T . I will therefore have to obtain his permission to release a copy to you, at least at this stage. Please let me know if you would like me to ask him to let you have a copy. It may of course assist if, at the time I conveyed your request to him, I were able to say whether or not you were willing to contribute to, say, one half of the cost of obtaining the Report.

I look forward to hearing from you".

There can be no doubt that the survey is in existence.

In his affidavit sworn on the 9th November, the defendant made the usual declaration:

1. THAT I am the Defendant herein and I make this Affidavit on my own behalf.
2. THAT there is now produced to me and marked "PJT 1" a true copy of the List of Documents which are or have been within the possession custody or power of myself, my legal advisers or third parties acting on my behalf relating to the matters in question in this action.
3. THAT I hereby verify the said List as being true to the best of my knowledge, information and belief.
4. THAT the contents of this my Affidavit are true to the best of my knowledge, information and belief".

Schedule 1 Part II of the list of documents is headed as follows:

"Confidential communications, letters, notes, statements and reports which have come into existence since the commencement of this action or in contemplation of it and which have been prepared by or on behalf of the Defendant and his lawyers and other advisers, or between such persons and Third Parties in order to obtain or furnish information or advice to be used in evidence on behalf of the Defendant in this action or for purposes in connection

therewith or preparatory thereto".

Advocate Michel's initial argument was entirely based on a passage from Halsbury's Laws of England Volume 13 (Disclosure of Documents) at paragraph 45. It reads as follows:-

> "**Duty of solicitor.** A client cannot be expected to realise the whole scope of his obligation regarding discovery without the aid and advice of his solicitor and the latter has a peculiar duty, as an officer of the court, carefully to investigate the position and, as far as possible, to see that full and proper disclosure of all relevant documents is made. The solicitor cannot simply allow the client to make whatever list of documents the client thinks fit, nor can the solicitor escape the responsibility of careful investigation or supervision. It is his duty to take positive steps to ensure that the client appreciates the duty of discovery and the importance of not destroying documents which might have to be disclosed, and in the case of a corporate client to ensure that knowledge of this burden is passed on to anyone who may be affected by it. Indeed, the solicitor owes a duty to the court carefully to go through the documents disclosed by his client to make sure, as far as possible, that no relevant document has been withheld from disclosure. If the client will not give him the information he is entitled to require, or if the client insists on making a list of documents or swearing an affidavit verifying the list which the solicitor knows to be imperfect, it is the solicitor's duty to withdraw from the case. If the solicitor is guilty of misconduct in this respect, he may be ordered personally to pay or to contribute to the costs of the action. In this matter a solicitor must search his conscience".

He cited the case of Woods -v- Martins Bank Ltd (1959) 1QB 55 in support of his contention that Advocate Boxall had failed in his duty to the Court. This attack was met by a defence of privilege; Advocate Boxall said that he regarded the document as privileged as it had been obtained for the purpose of obtaining legal advice in existing or anticipated proceedings.

We called for an adjournment and asked the parties to consult the Supreme Court Practice (The White Book) in order to assist us to make a decision.

Advocate Michel drew our attention to Order 24/5/9 which deals with the form of the list and affidavit. He read to us the passage on page 419 which appears on page 34 of the fifth cumulative supplement. We were prepared to hear argument in this way as the Royal Court Rules and the Rules of the Supreme Court are similar in the matter of discovery. Rule 6/16(3) of the Royal Court Rules reads:

> "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".

It can hardly be said that the defendant's list makes a "sufficient" statement - the survey is not even mentioned. Be that as it may from the passage we noted that "the general principle is that documents embodying communications with (including reports to or from) a non-professional servant, agent or third party are privileged if, and only if, coming into existence for the purpose of obtaining legal advice in existing or anticipated proceedings".

Advocate Michel relied heavily on this passage:

> "In Alfred Crompton Amusement Machines Ltd -v- Commissioners of Customs and Excise (No. 2) [1974] A.C. 405" [which was a decision of the House of Lords] "the dominant purpose of the commissioners in procuring certain documents from the third parties was, at the time the documents were brought into being, the valuation of the appellant's goods for purchase tax. In neither case were the documents held to be privileged, notwithstanding that in both cases litigation was reasonably in prospect at the time the documents were brought into being and that in both cases the documents were subsequently used to obtain legal advice and to conduct the litigation".

In our judgment, the obtaining of the surveyor's report late in 1987 could not possibly have been obtained for the purposes of anticipated proceedings despite the fact that this was not the parties' first dispute in this Court.

Advocate Boxall put the matter in another way. The survey was obtained primarily for the purposes of existing proceedings. He explained it thus. On the 4th June, 1985, the Greffier made an order which said, at paragraph 6 thereof:

> "That the respondent do pay the interest and principal due on the mortgages charged against the said property together with the rates, insurances, essential repairs and reasonable re-decoration thereof, both internal and external".

The survey therefore was obtained solely to see whether the proposed repairs were "essential repairs" within the meaning of the Act of Court the effect of which is continuing and therefore falls within the ambit of existing litigation.

We cannot see that the Act of the Court of the 4th June is anything other than an executory order and although its effect is continuing the issues that led to it are at an end and the litigation which caused it to be issued is completed.

Had either counsel cited to us the case of Shirley -v- Channel Islands Knitwear Company Limited and Sangan (1985-86) J.J. 404 we might have examined the surveyor's report before making our decision. It was not and we did not.

Because an appeal was immediately lodged against our decision and because Advocate Michel was not prepared to proceed without the document in question (a course which he was entitled to take) we have adjourned the trial.

We award the costs of today's hearing against the defendant.

Authorities cited:

Halsbury's Laws of England Vol. 13 para. 45.

Woods -v- Martins Bank Limited (1959) 1 Q.B. 55.

Supreme Court Practice (fifth cumulative supplement) O.24/5/9 p.34.

Alfred Crompton Amusement Machines Ltd -v- Commissioners of Customs and Excise (No. 2) [1974] A.C. 405.

Shirley -v- Channel Islands Knitwear Company Limited and Sangan (1985-86) J.L.R. 404.