



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2011 No: 179

BETWEEN:

KEITHLY DANIEL

Plaintiff

-v-

EXXON SERVICES (BERMUDA) LTD.

Defendant

RULING

(In Chambers)

Date of Hearing: August 25, 2011

Date of Ruling: August 31, 2011

Mr. Glenn Harvey-McKean, Mello Jones & Martin, for the Plaintiff

Mr. Adam Collieson, Appleby, for the Defendant

Introductory

1. The Plaintiff applied by Summons dated July 22, 2011 for Specific Discovery of certain documents. At a directions hearing on August 4, 2011, the Plaintiff was ordered to serve a Revised Schedule to his Summons and the Defendant was ordered to file an Amended

List of Documents and any evidence in opposition by August 18, 2011. The application was adjourned to August 25, 2011 for effective hearing.

2. On the date of the hearing of the Plaintiff's Specific Discovery Summons, it emerged that the only outstanding controversy was whether or not certain documents requested were protected by privilege. The relevant requests related to two pleas made in the Defence. These pleas were made in response to the Plaintiff's claim that the benefits he received upon termination of his employment were, *inter alia*: (a) in breach of his lawful entitlement under the Employment Act 2000 to a redundancy payment, in that the latter statutory entitlement was deducted from his pension benefit; and (b) in breach of the Plaintiff's contractual rights, in that the 1.5% multiplier used for computing his lump sum retirement benefit was never contractually agreed.

The relevant pleas in the Defence

3. In paragraph 11 of the Defence, the Defendant recites clause VIII of the Pension Plan as follows:

"Lump Sum Settlement. You may also elect a lump-sum settlement of your annuity if you retire with annuitant status. Instead of a monthly annuity, you receive a one-time payment equal to the actuarially computed present value of the Norma Annuity and any temporary annuity (National Insurance offset) to which you may be entitled. In computing the amount of the lump sum the company uses mortality rates and an interest rate set from time to time by the Trustees."

4. In paragraph 16 of the Defence, the Defendant recites clause 16 of the Pension Plan as follows:

"Integration of Legally or Contractually Required Payments. The Company has the right to reduce any benefits paid to the beneficiaries of this Plan from any benefits, compensation, severance payments or any other payments that the Company will be obliged to pay to the beneficiaries at the termination of their employment with the Company due to legislation or regulations in the country or to contractual obligations which make mandatory to the Company as an employer to make such payments."

The relevant requests for specific discovery

5. The first controversial request is set out in paragraph 8(h) of the revised Schedule A to the Plaintiffs' Summons:

“To provide particulars and/or documents evidencing whether the Company and/or Trustees sought any legal advice or opinion in relation to whether the integration of legally or contractually required payments was consistent and/or valid with the Laws of Bermuda, or any legislation or governmental decree, order or regulation thereof.”

6. The Defendant's response to this request was as follows: *“Such advice as may have been obtained is privileged by virtue of the attorney-client relationship.”* At first blush, the only issue at trial relating to clause 16 of the Pension Plan seems likely to be whether, on its fair construction, the Defendant was entitled to make the deduction complained of. As Mr. Collieson submitted, whether and what advice the Defendant obtained prior to the date when litigation was contemplated appears wholly irrelevant to the Plaintiff's claim.

7. The second controversial request, set out in paragraph 20(b) of the Revised Schedule, states as follows:

“Provide particulars of whether the Trustees (or Company) took the necessary legal measures to establish the legality of deducting or otherwise reducing severance allowance or redundancy payments from the pension entitlement (including any legal advice or opinions obtained).”

8. The Defendant's response to this request was as follows: *“The issue of whether or not the Company obtained legal advice is immaterial. Nevertheless, such advice as may have been obtained is privileged by virtue of the attorney-client relationship”*. This response equally appeared to be valid.

9. The only issue which prompted me to reserve judgment was an apparently difficult issue of privilege, which arose from the following controversial request (paragraph 24):

“With reference to the email from Lissa Alvarez dated August 17th, 2009, please provide the particulars and/or specific document wherein the Trustees endorsed the deduction of redundancy benefits (severance allowance) from pension benefits and/or the interest rate or multiplier used in calculating lump sum benefits. If so, was any legal advice or opinion relied upon-provide supporting documentation.”

10. So far as is relevant for present purposes, the Defendant's response to the legal advice information request was as follows: "*The issue of whether or not the Company obtained legal advice is immaterial. Nevertheless, such advice as may have been obtained is privileged by virtue of the attorney-client relationship*". Having regard to the authority placed before the Court by Mr. Collieson, it was not immediately clear that any advice received by the Trustee in deciding what multiplier to use in calculating the Plaintiff's lump sum benefit was privileged; and the request seemed to me to fairly encompass any advice received not just by the Company in its own right, but also any advice which the Trustee received which was in the Company's possession.

Legal findings: the scope of legal professional privilege

11. Mr. Collieson relied upon the principles set out in the commentary following Order 24 rule 5 in the 1999 White Book. Mr. Harvey-McKean did not dissent from the applicability of the approach set out therein. I accept that, even where no litigation was contemplated or pending, "[l]etters 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": paragraph 24/4/9.
12. However, the following passage in the 1999 White Book, which I put to the Defendant's counsel, was also potentially relevant:

"Privilege cannot be claimed by a trustee against his cestuis que trust (Re Mason (1883) 22 Ch.D. 609; Wynne v. Humberston (1858) 27 Beav. 421; Devaynes v. Robinson (1855) 20 Beav.421; Devaynes v. Robinson (1855) 20 Beav. 42; Re Postlethwaite, Re Rickman, Postlethwaite v. Rickman (1887) 35 Ch.D. 722); nor against persons in an analogous position (Gouraud v. Edison Co. (1888) 57 L.J. Ch. 498; cf. Bristol Corp. v. Cox (1884) 26 Ch.D. 678 at 683. See also Re Whitworth (solicitor trustee))."

13. However, Mr. Collieson also referred the Court to the following *dictum* of Lord Taylor in *R-v-Derby Magistrates' Court, ex p. B* [1996] A.C. 487:

"58.The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an

ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests.”

14. The principles enunciated by the House of Lords in the latter case were approved by the Court of Appeal for Bermuda in *Thyssen Bornemisza et al-v- Thyssen Bornemisza et al* [1998] Bda LR 11, a case which concerned the circumstances in which an implied waiver of privilege takes place. The Court of Appeal for Bermuda approved the following statement by Colman J in *Nederlandse Reassuruntie Groep Holding NV v Bacon & Woodrow* :

“...’where a party himself puts the confidential relationship between himself and his lawyer in issue he will waive privilege in respect of documents passing between them which are relevant to the issues in the proceeding. He may put that relationship in issue either by bringing proceedings directly against his lawyer, or by raising an issue to which his conduct within that relationship is so directly relevant that it would be unfair to allow him to maintain privilege in documents created under it.”

15. Finally, it is necessary to remember that *“legal professional privilege is a common law concept which forms part of the cluster of rights which together make up the concept of a fair trial according to the common law notion of that expression. As such I consider that it is part of, and ancillary to, the right to a fair hearing guaranteed by section 6(1)”*: *Fubler et al-v-Attorney-General and Commissioner Police* [1994] Bda LR 64 per Ground J (as he then was) at page 11.
16. The above principles suggest that the Court should be slow to find that legal advice is not privileged or that, where it is privileged, implied waiver has occurred.

Findings: is the Plaintiff entitled to specific discovery of advice received by the Company and/or the Trustee?

17. I find that the Plaintiff’s requests for specific discovery in relation to legal advice received by the Company in relation to the compliance of the Pension Plan with local law issue must be refused on the grounds of irrelevance. Further and/or alternatively, such advice is *prima facie* privileged and no question of waiver arises on the facts of the present case.
18. As far as any advice received by the Defendant in relation to the multiplier to be used for computing the Plaintiff’s lump sum entitlement, I find that such advice was *prima facie*

privileged and that no question of implied waiver arises from the Defendant's pleading. Nor was the Court referred to any evidence from which it might be inferred that the Defendant had brought any such advice into play on the facts. Although the position of any advice received by the Trustee might theoretically be different, the Trustee is not before the Court; accordingly, I decline to decide this aspect of the request under paragraph 24.

Conclusion

19. For the above reasons, the privilege issue is resolved in the Defendant's favour.
20. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, I would award the costs attributable to this aspect of the Plaintiff's specific discovery application to the Defendant in any event.

Dated this 31st day of August, 2011 _____
KAWALEY J