In The Supreme Court of Bermuda

(COMMERCIAL COURT)

CIVIL JURISDICTION

2012: No. 165

BETWEEN:

STIFTUNG SALLE MODULABLE

RÜTLI-STIFTUNG

Plaintiff

-v-

BUTTERFIELD TRUST (BERMUDA) LIMITED

Defendant

RULING

(In Chambers)

Date of Hearing: October 25, December 5, 2012

Date of Ruling: December 12, 2012

Mr. Jan Woloniecki, Attride-Stirling & Woloniecki, for the Applicant/Defendant
Mr David Kessaram and Ms Sarah-Jane Hurrion, Cox Hallett Wilkinson, for the Respondents/ Plaintiffs

Introductory

1. Under paragraph 2 of the Applicant's Summons for Directions issued on October 18, 2012, an Order was sought that: "*The Plaintiff shall give specific discovery of the Harbour Funding Agreement referred to at paragraph 53 of its Amended Statement of*

Claim." This aspect of the Summons was listed by way of special fixture for October 25, 2012. I heard the Applicant's submissions, expressed the provisional view that disclosure was seemingly required and adjourned the application part-heard as the Respondents were not in a position to present its response.

2. Before the resumed hearing took place, the Respondent disclosed a redacted version of the Harbour Funding agreement together with a redacted copy of a related November 8, 2012 letter (together, "the Funding Agreement"). The issue before the Court at the continued hearing was whether or not the redaction approach adopted by the Respondent was legally permissible.

3. The discovery dispute involved an analysis of both the law of privilege and the discretion to exclude prejudicial evidence in relation to a partially redacted document which was relied upon in support of damages claim, on the one hand, and which was said to be illegal on the other.

The relevance of the Funding Agreement on the pleadings

4. The Salle Modulable project entails the construction of an opera house in Lucerne, Switzerland. The Plaintiffs claim that the Defendant is legally obliged to fund the project. This liability is denied. The losses alleged to be attributable to the Defendant's refusal to fund the project include not just the amount said to have been promised "*but also SMF and Rütli's further costs of pursuing its rights in this matter, including sums due to Harbour under the funding arrangements*" (Re-Amended Statement of Claim, paragraph 53).

5. Liability for these losses is also denied on the grounds of causation and remoteness. The funding agreements are further said to be "champertous and unlawful" (Amended Defence and Counterclaim, paragraphs 79-79A).

The contentious 'Financing Redactions'

6. The following redactions described in the Plaintiff's Skeleton Argument as the 'Financing Redactions' were contentious:

   (1) the sum of money defined as the "Aggregate HF2 Commitment", said to be privileged;

   (2) the "Agreed Budget and Timeline", said to be privileged and irrelevant;

   (3) the Claimant's "Declared List of Creditors", said to be irrelevant.

7. The "Aggregate HF2 Commitment" is the total amount pledged under the Funding Agreement as it now stands. The Agreed Budget and Timeline (Schedule 4) sets out the Plaintiff's plan as to how these monies will be expended in the execution of the Plaintiff's litigation strategy. It was obvious, as Mr. Kessaram submitted, that disclosing this material would be highly prejudicial to the Plaintiff's fair trial rights, and also that the relevant information would ordinarily be assumed to be privileged material.

8. Far less obvious was whether any such privilege had been lost because of the pleaded reliance on the entire document and/or because the document had been disclosed to Harbour, a third party to the litigation. It was also unclear precisely what test of relevance should apply in a jurisdiction such as Bermuda, where funding arrangements, are not formally regulated and in a case in which the relevant agreements are alleged to be unlawful on public policy grounds.

9. It did seem obvious, as Mr Woloniecki submitted, that the "Declared List of Creditors" (Schedule 5) was relevant to the issue of causation of loss since the Plaintiff alleges that the Defendant is responsible for the Plaintiff having to obtain litigation funding from Harbour. This redacted portion of the Funding Agreement must be disclosed as it is relevant to the issue of causation of loss and no claim to privilege has been (nor properly could be) raised in respect of the contents of Schedule 5 to the Agreement.

Findings on privilege

<u>What type of privilege can potentially be claimed?</u>

10. The Plaintiffs relied upon legal advice privilege, litigation privilege and/or common interest privilege.

11. Legal advice privilege has been found to attach to documents obtained by a solicitor "*because the very fact of the solicitors having got copies…might shew what his view was as to the case of his client*": *Lyell-v-Kennedy (No 3)* (1884) 27 ChD 1 at 26 per Cotton LJ. The Defendant's counsel responded that Funding Agreement evidenced dealings between the Plaintiffs and a third party and that "*it has never been possible to claim legal advice privilege for communications between client and third parties, even though the purpose of the communication is to enable the lawyer to be instructed*": '*Phipson on Evidence*", 17th edition (Sweet & Maxwell/Thomson Reuters: London, 2009), paragraph 23-79. I find that legal advice privilege does not apply.

12. Alternatively, Mr Kessaram contended that the Funding Agreement was clearly covered by litigation privilege, which extends to "*communications between a client*

and or his lawyer and third parties for the purposes of litigation": Thanki, '*The Law of Privilege*', 2nd edition (Oxford University Press: Oxford, 2011). I agree, subject to a consideration of the issue of waiver below. Also addressed below, in the context of considering the relevance of the redacted material at this stage, is the argument advanced by the Plaintiffs' counsel to the effect that the Funding Agreement is analogous to an After the Event ("ATE") insurance policy.

13. I am not satisfied that common interest privilege would attach to the Funding Agreement, but see no need to decide this issue as litigation privilege is the head of privilege which would most clearly apply.

Has privilege been waived by positive reliance upon the Funding Agreement as part of the Plaintiffs' pleaded case?

14. The precise legal parameters of the law governing the waiving of privilege are somewhat fuzzy. Based on a nuanced reading of the judicial and text authorities placed before the Court, I make the following legal findings:

    (a) where a party positively relies on a document in support of his pleaded case, any privilege which would otherwise attach to the document is waived: *Buttes Oil-v-Hammer (No.3)* [1981] 1 Q.B. 223 at 268;

    (b) such waiver is either express (Hollander, '*Documentary Evidence*', 10th edition (Sweet & Maxwell: London, 2009) at paragraph 19.06) or implied (Matthews and Malek, '*Discovery*', 4th edition (Sweet & Maxwell/Thomson Reuters: London:) paragraph 16.17;

    (c) the voluntary reliance upon any part of a privileged document ordinarily waives privilege in the entire document : Hollander, at paragraph 19.06 et seq;

    (d) where privilege in the entirety of a document has been waived, the question of whether disclosure may be withheld on the grounds of irrelevance ought properly to be regarded as entirely distinct to the question of whether privilege has been waived. As Hoffman LJ opined in *GE Capital Group Ltd-v-Bankers Trust Co.* [1995] 1 WLR 172 at 175 in a passage to which Mr Kessaram referred:

> "*In my view, the test for whether on discovery part of a document can be withheld on grounds of irrelevance is simply whether that part is irrelevant. The test for whether part can be withheld on grounds of privilege is simply whether that part is privileged.*"

15. The Plaintiffs in the present case have in my judgment waived privilege in the Funding Agreement by positively relying upon the document without qualification in support of part of their damages claim. But this does not preclude on an application for disclosure their right to invite the Court to exercise its discretion to permit them to redact portions of the document on the grounds of irrelevance and/or prejudice.

The Court's discretion to permit non-disclosure of the "Aggregate HF2 Commitment" amount

16. The Plaintiffs' counsel aptly relied upon Order 24 rule 13 of this Court's Rules, which provides as follows:

> "***24/13 Production to be ordered only if necessary, etc.***
> *13 (1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.*
>
> *(2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.*"

17. Mr Kessaram also referred the Court to the commentary on the English equivalent of this rule set out at paragraph 24/13/2 of the 1999 White Book:

> "*Under this rule, in contrast to r.8, it is for the party applying for the order for production to satisfy the court that the order for production and inspection is necessary either for fairly disposing of the cause or matter, or for saving costs…It is not enough for the applicant to show that the documents are relevant; he must also show that their production and inspection is necessary for one or more of the purposes mentioned in the rule*…"

18. It was clear that the total amount claimed in relation to the Funding Agreement would only fall to be calculated at the end of the trial in the event that the Plaintiffs succeeded. It was also clear that the Defendant's counsel had been able to extrapolate

from the disclosed portions of the document a rough estimate of the possible quantum of the claim. Mr Woloniecki submitted that disclosure of the redacted references to the total amount of the third party funder's commitment (and the schedule setting out how the funds were to be disbursed) was not only necessary to allow the Court to properly adjudicate the champerty argument; it was required as a matter of principle having regard to the nature of the Defendant's illegality defence. I did not find these arguments convincing.

19. The Plaintiffs relied upon the decision of the Senior Master in *Arroyo et al-v-BP Exploration Company (Colombia) Ltd* (unreported), Judgment dated March 17, 2010, inviting me to treat the Funding Agreement as analogous to the ATE policy under consideration in that case. There, it was held disclosure about the plaintiffs' funding arrangement details ought not to take place until the taxation of costs phase, in part, to avoid giving the defendant a tactical advantage. However, the Senior Master (at paragraphs 2, 4) of his Judgment explained the jurisdictional context in which his decision was made:

> "*2. The statutory regime on which the current version of conditional fee agreements, together with after the event insurance policies, is based is in section 27 and 29 of the Access to Justice Act 1999…*
>
> *4…given effect to in the court rules from April 2000….*"

20. While none of this statutory support exists for third party funding arrangements under Bermuda law, this Court has previously recognised that the fair hearing rights under section 6(8) of the Constitution implicitly include the right of access to the Court: see e.g. *Re First Virginia Reinsurance Co Ltd* [2003] Bda LR 43, at page 9. Order 1A of the Rules of the Supreme Court requires the Court to, *inter alia*, exercise any powers under the Rules with a view to ensuring that the parties are on a level footing.

21. The disclosure the Defendant seeks is not required to ensure fairness to the Defendant; the material sought is of minimal if any relevance at this stage. The legality of the Funding Agreement can, in my judgment, fairly be determined with the disclosure already given. On the other hand, it would prejudice the Plaintiffs to an unacceptable extent to require them to disclose further details of their funding arrangements directly relevant to their litigation strategy.

22. The Defendant has not in these circumstances satisfied me that justice requires the requested discovery in accordance with the principles underpinning Order 24 rule 13 as read with Order 1A of the Rules.

23. I appreciate that this finding may be said to involve an assumption that the impugned Agreement is, to some extent at least, *prima facie* valid. This seems to me to be an appropriate approach to take in all the circumstances of the present case. This finding involves no judgment whatsoever about what is arguably the more important issue of whether the costs of such funding arrangements to the Plaintiffs, assuming the arrangements to be valid on their face, are recoverable under Bermudian common law.

Conclusion

24. The main focus of the October 25 initial hearing was the Funding Agreement as a whole. The Plaintiffs essentially capitulated after the Defendant opened its application and gave substantial disclosure of the relevant documents. The main focus of the resumed hearing was the Defendant's complaint that references to the Aggregate HF2 Commitment were wrongly redacted and that disclosure was necessary to enable the Defendant to assess its damages exposure (see e.g. Woloniecki/Hurrion email dated November 29, 2012). As regards the issues in controversy at the December 5, 2012, hearing, the Defendant's application is refused in part and allowed in part.

25. It is refused as regards the challenge to the Plaintiffs' redactions of (a) all references to the aggregate funding commitment which has presently been made, and (b) Schedule 4 which sets out the manner in which the promised funding support is proposed to be spent as part of the Plaintiffs' litigation strategy. Although the unqualified pleaded reliance upon the Funding Agreement waived the litigation privilege which would otherwise have attached to the documents evidencing the funding arrangements, the redacted material was neither relevant nor necessary for the fair trial of the action and the Defendant failed to make out a case for disclosure in accordance with Order 24 rule 13 of this Court's Rules.

26. The Defendant's disclosure application succeeds as regards Schedule 5, which contains a list of the Plaintiffs' creditors. The Plaintiffs' case is that the Defendant's breaches of duty caused them to enter into the Funding Agreement pursuant to which they have to remit a portion of any damages recovered to their third-party funder. The Defendant is clearly entitled to full disclosure of the Plaintiffs' financial position to enable it to refute, if possible, the alleged causative link between the Defendants' actions and the Plaintiffs' alleged inability to fund the claim from its own resources. This aspect of the Financial Redactions was a comparatively minor issue which appeared to me to only clearly emerge as a distinct issue in the course of oral argument.

27. Unless either party applies by letter to the Registrar within 28 days to be heard as to costs, I would make the following costs order:

(1) The Defendant is awarded its costs of the discovery application up to and including November 22, 2012 when the Plaintiffs disclosed a redacted version of the Funding Agreement;

(2) The Plaintiffs are awarded their costs of preparing their response to the application after November, 22, 2012;

(3) The Plaintiffs are awarded 90% of their costs of the December 5, 2012 hearing, the 10% deduction being in recognition of the limited success the Defendant achieved in relation to the outstanding issues in controversy.

Dated this 12th day of December 2012 _____

IAN RC KAWALEY CJ