Neutral Citation no [2004] NIQB 12 | *Ref:* **COGC4106**

Judgment: approved by the Court for handing down | *Delivered:* **3/3/04**
(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (COMMERCIAL LIST)

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BETWEEN:

COLIN JOHN BARKLEY

Plaintiff;

-and-

JOHN NELSON BELL WHITESIDE

Defendant.

_____

COGHLIN J

[1] In these proceedings the plaintiff has issued a summons in accordance with the provision of Order 24 Rule 7 of the Rules of the Supreme Court (NI) 1980 seeking specific discovery of three categories of documents and, in particular;

> "1. The documents, records and files of Peden and Reid, Solicitors, relating to the sale of a partnership business to Halifax Building Society, and without prejudice to the generality of the foregoing; all attendance notes with the plaintiff or the defendant and all communications between Peden and Reid and the defendant."

[2] In answer to the said summons the defendant has disclosed a number of documents and, in a supplementary affidavit sworn on the 20 November 2003, the defendant has identified a number of documents in respect of which

he has claimed legal professional privilege. Ultimately, the attention of the parties has come to focus upon two specific documents;

> *(1)* a letter dated the 24 October 1986 from the defendant to Peden and Reid described as recording advices given by Peden and Reid to the defendant regarding the apportionment of the consideration for the Mortons Newtownards business between the defendant and the plaintiff.
>
> *(2)* an attendance note of a telephone discussion on the 29 October 1986 between the defendant and Peden and Reid described as relating to the apportionment of the consideration of the Mortons Newtownards business between the defendant and the plaintiff.

The Background Facts

[3] On the 1 May 1984 the plaintiff entered into an agreement with the defendant whereby they agreed to carry on business together as a partnership with a view to profit as surveyors, auctioneers, estate agents and valuers under the style of Brian Morton and Company, a business which was to be carried out from premises in Newtownards. The plaintiff paid a capital sum of £25,000.00 to the defendant as consideration for his share in the partnership business in return for which the plaintiff received a 1/3 share of the good will. The profits and losses of the business were to be divided as to one third to the plaintiff and two thirds to the defendant. The partnership in which the plaintiff thereby acquired a one third share was a local business and the style "Brian Morton and Company" was used by a number of estate agencies and valuers organised under a principal partnership deed between the defendant and seven other individuals.

[4] In or around 1986 the Halifax Building Society expressed an interest in purchasing the entire Brian Morton business. It appears that the direct negotiations in respect of this transaction were carried on with the Halifax by the eight partners in the main Brian Morton business acting on behalf of themselves and on behalf of partners in the local businesses. Peden and Reid were the firm of solicitors engaged by the Brian Morton business to prepare and draft the documentation necessary to effect the commercial transfer of the Brian Morton business to the Halifax.

[5] At the time of the sale of the Brian Morton business to the Halifax the plaintiff had worked with the defendant in the local partnership for about ten years. The plaintiff states that he agreed that the defendant would undertake the conduct of negotiations on behalf of the local partnership as well as the main business and he has asserted that he had full trust in the defendant expecting him to obtain the best possible deal. The plaintiff says that, as a result of this arrangement, he wrote a letter to Messrs Peden and Reid on the

24 October 1986 confirming that he had read a copy of the revised draft Vending Agreement between the Partners of Brian Morton and Company and the Halifax Building Society and that the terms and conditions set out therein were acceptable to him including, in particular, a consideration of £65,000.00 in respect of the entirety of his interest in the firm. The plaintiff authorised the defendant to sign the Vending Agreement and all other relevant documents on his behalf and he instructed Messrs Peden and Reid to prepare a Power of Attorney in order to effect the transaction. The Power of Attorney was executed by the plaintiff in the offices of Messrs Peden and Reid on the same date, 24 October 1986, appointing the defendant to act on the plaintiff's behalf for the purpose of executing the Vending Agreement. The Power also appointed the defendant to execute a form of service agreement with the Halifax under which the plaintiff was to be employed after the transaction had been concluded at a commencing salary of £20,000.00 per annum.

[6] It is the plaintiff's case that, at all material times, he expected the defendant to negotiate upon his behalf for a share of the consideration proportionate to the plaintiff's one third share in the local business. The plaintiff claims that he understood at the time of signing the letter of the 24 October 1986 that such sum amounted to £65,000.00. However, he also maintains that he never saw any of the actual sale documentation or knew the true value of the partnership business. The partnership was dissolved in February 1987 and the plaintiff seems to have taken no further action until he obtained a copy of the Vending Agreement on the 24 September 2001. The plaintiff alleges that this was the first time that he had appreciated that the total sale price of the partnership had been £733,000.00 and that he should have received one third of that sum in accordance with his one third share in the partnership business. Accordingly, the plaintiff has initiated these proceedings.

[7] On the adjourned hearing of the summons Mr Palmer and Mr Allen of Messrs Peden and Reid, Solicitors, gave evidence. Mr Palmer confirmed that his practice acted in the sale of the local businesses, including the Newtownards partnership, although he emphasised that the firm took instructions solely from the principal partners in Brian Morton and Company, one of whom was the defendant, Mr Whiteside. Mr Palmer accepted that it was his firm which had prepared the Power of Attorney executed by the plaintiff on behalf of the defendant as well as the form of discharge which the plaintiff had signed. Mr Palmer was responsible for producing the attendance note of 29 October 1986. Mr Palmer accepted that, on the 29 October 1986 he was aware that there were two partners in the Newtownards firm, that those partners would share in the capital received for the sale of that firm, that the plaintiff had not received independent legal advice and that his firm had prepared the Power of Attorney which the plaintiff had executed in favour of the defendant. Nevertheless, Mr Palmer maintained that the advice that he gave to the defendant on the 29 October 1986 was

specifically given to him as a principal partner in Brian Morton and Company and was not intended for the benefit of the plaintiff.

[8] Mr Allen stated in evidence that he had prepared the letter of the 24 October 1986, the terms of which had been agreed some weeks previously during the course of a telephone conversation between himself and the defendant. According to Mr Allen the letter recorded personal advice that he had given to the defendant.

[9] Having regard to all the circumstances I acceded to Mr Brangham QC's request that I should inspect the documents.

[10] On behalf of the plaintiff Mr Coll submitted that a sufficient prima facie case of fraud or dishonesty had been established to displace any claim to legal professional privilege on behalf of the defendant. In *Derby & Company Limited v Weldon* [1990] 1 WLR 1156 Vinelott J said, at page 1173;

> "There is a continuous spectrum and it is impossible to, as it were, calibrate or express in any simple formula the strength that the plaintiff must show in each of these categories. An order to disclose documents for which legal professional privilege is claimed lies at the extreme end of the spectrum. Such an order will only be made in very exceptional circumstances but it is, I think, too restrictive to say that the plaintiff's case must always be founded on an admission or supported by affidavit evidence or that the Court must carry out the preliminary exercise of deciding on the material before it whether the plaintiff's case will probably succeed, a task which may well present insurmountable difficulties in a case where fraud is alleged and the Court has no more than affidavit evidence…all that can be said is that all the circumstances must be taken into account and that the Court will be very slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application".

The long line of authority examined by Vinelott J in *Derby and Company Limited v Weldon* was referred to by Sir Christopher Slade in the course of giving judgment in *Royscot Spa Leasing Limited v Lovett & Others* [1995] BCC 502 when he noted that a claim for legal professional privilege could be lost if the evidence before the Court revealed a prima facie case that the documents in question came into existence either for the purpose of advising and assisting a party in preparation for contemplated fraudulent conduct or in the course of such conduct and, at page 506 he went on to say:

> "This line of authority, however, also shows that since legal professional privilege is founded on important considerations of public policy (namely that a citizen should be able to speak frankly to his legal advisor) the Court would be slow to displace this privilege and will require evidence of a prima facie case of fraud before it does so. Where no prima facie case has yet been established, it will not order discovery on the mere suspicion that disclosure of the relevant documents might perhaps enable the party seeking it to prove fraud thereafter; it will not allow him discovery simply to assist him in embarking on a fishing expedition".

Ultimately, each case must be considered in the context of its own particular circumstances and, at the conclusion of the hearing on the first day, I reached the view that Mr Coll had not established a sufficiently strong prima facie case of fraud and/or dishonesty to displace the defendant's claim of legal professional privilege. At that stage I was not persuaded that I should inspect the documents in accordance with *R v Governor of Pentonville Prison* ex parte Osman [1989] 3 AER 701 at 730.

[11] However, I am in no doubt that, at all material times, Peden and Reid ought to have appreciated that they were acting not only for Mr Whiteside but also on behalf of the plaintiff. Peden and Reid had drawn up the Power of Attorney which entitled Mr Whiteside to instruct Peden and Reid on behalf of both the plaintiff and the defendant. In addition, the letter of authority written by the plaintiff and presented to Messrs Peden and Reid by Mr Whiteside confirmed that the plaintiff had authorised Mr Whiteside to sign the Vending Agreement and associated documents and instructed the solicitors to prepare the Power of Attorney in favour of Mr Whiteside in order to complete the transaction. Furthermore, the letter of the 24 October 1986 which was apparently prepared by Mr Allen and signed by Mr Whiteside purported to confirm "our instructions" to Peden and Reid to proceed with finalising the Vending Agreement and other documentation. This letter, discovery of which is sought by the plaintiff, also referred to the plaintiff's letter of authority of the same date. In such circumstances, I am entirely satisfied that the reality of the situation was that Peden and Reid were jointly retained by the plaintiff and the defendant for the purpose of completing this transaction upon their behalf and, in such circumstances, the rule is that clients of a jointly retained firm of solicitors waive their respective claims to legal professional privilege in respect of communications made by each of them to the joint solicitor – see *TSB Bank Plc v Robert Irving and Burns* (a firm) (Colonia Baltica Insurance Limited 3rd Party) [2000] 2 AER 826. Mr Allen stated that the letter of 24 October 1986 contained advice that was personal to

the defendant. I have inspected the document which, in my opinion, suggests at least a potential conflict of interest although no steps appear to have been taken to consider whether the plaintiff should receive independent legal advice. My impression is that the reason that such steps were not taken may have been a mistaken belief that Peden and Reid were not acting for the plaintiff. However, whatever the belief may have been, I am satisfied that, legally, the plaintiff was entitled to repose trust and confidence in his solicitors and expect that his interests would be fully protected consistent with the joint retainer.

[12] The situation in relation to the telephone attendance by Mr Palmer on the defendant on the 28 October 1986 is somewhat similar and, having also read this document, it again seems to me that it is at least arguable that Mr Palmer should have given some consideration to the possibility of a conflict of interest and as to whether the plaintiff ought to have been advised to consider taking independent legal advice. However, that did not occur and the implied waiver of privilege continues until there is an actual as opposed to a potential, conflict of interest (*TSB Bank Plc v Robert Irving and Burns*). In his affidavit sworn on the 20 November 2003 the defendant has referred to both the letter of the 24 October 1986 and the telephone memorandum of the 29 October 1986 as relating to "the apportionment of the consideration for the Mortons Newtownards business between me and the plaintiff". Such apportionment certainly appears to have fallen within the scope of the plaintiff's authority and Power of Attorney and the material contained in both documents seems to clearly relate to the subject of the joint retainer.

[13] As a result of inspecting both the relevant documents I have also formed the prima facie impression, and I emphasise that the impression is no more than prima facie at this time, without hearing all the evidence, that had I inspected earlier in accordance with the Osman decision I might have reached a different view at that stage.

[14] Accordingly, I propose to order discovery of both the letter of the 24 October 1986 and the telephone memorandum of the 29 October 1986 and to permit the plaintiff to inspect and, if necessary, to take copies of the same in accordance with the amended summons.