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Judgment: approved by the Court for handing down | *Delivered:* **24/02/2009**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

DESMOND ORR

Plaintiff;

and

M E CROWE T/A M E CROWE BUILDING CONTRACTORS

Defendant.

GILLEN J

Application

[1] This is an appeal against the Order of Master Bell made on 20 November 2008 in which he refused an application pursuant to Order 24 rule 14 of the Rules of the Supreme Court (NI) 1980 ("RSC") by the defendant for an order compelling the plaintiff to disclose a report of Mr Niall Eames FRCS dated 7 December 2005 ("the Eames report"). This report was referred to in a report of Mr I A Gillespie Consultant in Anaesthetics and Chronic Pain Relief dated 9 November 2006 ("the Gillespie report").

Background

[2] The plaintiff alleges he sustained personal injuries on 14 June 2004 on a building site when he tripped and fell. This 41 year old plaintiff has given a history of significant pain and discomfort within his back to a range of physicians. He has been examined by Mr Mawhinney FRCS on behalf of the defendant who has expressed difficulties accepting the plaintiff's continuing symptoms.

[3] On behalf of the plaintiff, the Gillespie report has been served on the defendant pursuant to Order 25 of the RSC. At the commencement of that report Mr Gillespie records:

> "Reports available: Mr Niall Eames FRCS 7th December 2005" together with the report of Dr Fleming and various notes and records. Thereafter Mr Gillespie makes no reference whatsoever to the report of Mr Eames in the course of his report.

The Relevant Rules

[4] Order 24 rule 14 of the RSC where relevant provides:

> "14. At any stage of the proceedings in any cause or matter the Court may, subject to rule 15(1) order any party to produce to the court any document in his possession, custody or power relating to any matter in question in the cause or matter and the court may deal with the document when produced in such manner as it thinks fit."

[5] Rule 15(1) of the RSC provides:

> "15.-(1) No order for the production of any documents for inspection or to the court or for the supply of a copy of any document shall be made under any of the foregoing rules unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs".

The Issues

[6] Mr Dunlop on behalf of the defendant and the appellant in these proceedings contended that the disclosure of the report of Mr Eames to another expert reporting on the plaintiff's behalf amounts to a waiver of privilege and entitles the defendant to have sight of the Eames report.

[7] Mr Lavery who appeared on behalf of the plaintiff and the respondent in this matter, contended that the contents of the report of Mr Eames remained privileged in circumstances where there is no evidence that Mr Gillespie has referred to it in his document or placed any reliance upon it in his opinion or conclusions.

Relevant Authorities

[8] Mr Dunlop relied upon a judgment of Bracewell J in Clough v Tameside and Glossop Health Authority [1998] 2 All ER 971 ("Clough"). In that case, where the plaintiff who had given birth to a child suffering from

Down's Syndrome had issued proceedings against the defendant health authority, the defendant disclosed a psychiatric medical report which recited the receipt of a communication from a Dr P who was a Senior House Officer actively involved with the treatment of the plaintiff during her anti-natal care. The plaintiff successfully applied for disclosure of Dr P's report.

[9] In the course of her judgment Bracewell J said at page 976:

> "I am persuaded that the privilege is waived and in the instant case, the supply to Dr Hay of a medical report of Dr P could only be in order for Dr Hay to consider it as part of the background information in formulating his opinion. The mere fact that Dr Hay may have found it unhelpful or even irrelevant, if that was the case, does not alter the status of the materials supplied as part of his instructions and background material in coming to his independent opinion. A statement was supplied to Dr Hay to consider, and the resulting report was served on the other side on the basis of such a statement having been considered by Dr Hay. In those circumstances I hold that the privilege was waived and it matters not if the statement of Dr P was considered material by Dr Hay".

[10] Before commencing an analysis of Bracewell J's approach, I draw attention to B & Ors v John Wath & Bros Ltd & Anor [1992] 1 All ER 443 . This was a case where in group litigation for damages for personal injuries medical reports had been served with each plaintiff's statement of claim as required by the English RSC Order 18 rule 12(1A). The defendants in that case contended that when a medical report was served with a statement of claim the reference in a report to another document justified disclosure under Order 24 rule 10 of the English RSC.

[11] Lord Woolf said at page 446:

> "What is needed, in my judgment, is an approach which reconciles the requirements of the defendants to know the medical history relied upon by the plaintiff's doctor and the source of that history so that the defendants are able to make an assessment of its validity and the legitimate interests of the plaintiff to preserve his legal professional privilege. It is also necessary to take into account the fact that in due course the

> defendants' doctors will have the opportunity to examine the plaintiffs, who can take an independent history and explore matters which the plaintiffs' doctors may not have considered".

[12] Lord Donaldson at page 447 said:

> "I …. think it is clear from the judgment of Woolf LJ that on the one issue where there was some disagreement, namely as to whether there has to be disclosure of material put to the plaintiff's doctor which he disregards as being irrelevant, I think it is Woolf LJ's view and certainly my view that he does not have to disclose that. … If we are to go beyond that on which the plaintiff's doctor's opinion is based, which will be that which he thinks is relevant, … then I think we are breaching the rules of professional legal privilege".

I consider that is the approach that I should also adopt in cases of this nature under our legislation.

[13] In Bournes Inc v Raychem Corp & Anor [1999] 3 All ER 154("Bournes' case") the issue of privilege arose in the context of the collateral use of documents obtained in a taxation of proceedings in England in the course of United States proceedings. In that case the court held that there was an implied undertaking that the documents disclosed for the purposes of taxation would only be used for the purposes of those proceedings. Although the facts of that case are far removed from the present instance, the Court of Appeal discussed the judgment of Bracewell J in Clough. Aldous LJ, indicating in the course of his judgment that he was unable to support all the statements as to the law made by Bracewell J, closely analysed the authority of Marubeni Corp v Alafouzos [1986] CA Transcript 996 which had not been referred to by Bracewell J. He summarised his approach to the issue at page 166 when he said:

> "As stated in the Marubeni Corp case mere reference to a document does not waive privilege in that document: there must at least be reference to the contents and reliance. In the present case there was reference and no reliance therefore to waiver."

With respect to Bracewell J I consider that the views expressed by Aldous LJ are preferable and I intend to be guided by them.

[14] In Lucas v Barking, Havering & Redbridge Hospitals NHS Trust [2004] 1 WLR 220 the plaintiff in a personal injuries claim attached to his particulars of claim two expert reports relating to his injuries, both of which listed the documents which the claimant's solicitors had supplied to the experts when instructing them. This case was determined in the context of the English Civil Procedure Rules at rule 31.14(2) and rule 35.10(3) which of course do not apply in Northern Ireland .Nonetheless I consider that the comments made in that case on the issue of privilege and discovery are relevant in the context of the present hearing in Northern Ireland.

[15] Waller LJ, adopting the views of Aldous LJ in Bourns' case as outlined paragraph 13 by me of this judgment, adopted a convenient summary of the principle set out in Matthews and Malek, Disclosure, 2nd Edition (2001), pp305-306, para 10.17. The 3rd Edition of that book makes the same general point. At para 12.19, in the context of references in affidavits or witness statements, the authors state:

> "A mere reference to a privileged document in an affidavit does not of itself amount to a waiver of privilege and this is so even if the document referred to is being relied on for some purpose, for reliance in itself is said not to be the test. Instead, the test is whether the *contents* of the document are being relied on, rather than its *effect*."

[16]At paragraph 12.21 the authors deal with references in the reports of experts and state the following at paragraph 12.22:

> "On principle it seems that the same rules should apply as with written evidence, i.e. that references to privileged material and a witness statement or expert's report will amount to a waiver of that privilege *if* they amount to a `deployment' of such material. It seems there cannot be such a deployment in a witness statement or expert's report without at least reference to the contents of their privileged material and reliance placed upon them. The authority for that proposition is quoted as Bournes' case and Atkinson v T & P Fabrications [2001] TAS SC 38, Sup CT TAS."

Conclusions

[17] I am satisfied that it is still necessary to reconcile the requirements of a defendant to know the medical history relied on by the plaintiff's doctor so

that the defendant can assess its validity with the equally legitimate interests of a plaintiff to preserve his legal professional privilege.

[18] Against the background of that principle, I consider that the test that I should adopt in this case is that adumbrated by Aldous LJ in Bournes' case namely that mere reference to a document does not waive privilege in that document. There must at least be reference to the contents and reliance. Where as in this instance, Mr Gillespie does not quote the contents or summarise them but simply refers to the other document, there is no waiver of privilege. Mere reference to the document at the outset of his report does not waive that privilege without reference to the contents together with reliance thereon.

[19] In due course the defendant's expert can take an independent history and explore matters which the plaintiff's doctors may not have considered. Moreover at the hearing of this case, Mr Gillespie can be questioned as to whether or not he, by implication, has referred to the contents of Mr Eames report and has relied on those contents. If it turns out that he has, then my decision may well be revisited with the possibility of adjournment and costs thrown away being awarded against the plaintiff who is now in a position to know what the answer to that query will be and act accordingly.

[20] However on the basis of the evidence as it currently stands, and having read Mr Gillespie's report, I find no basis for suggesting that the contents of Mr Eames' report have been referred to by him or have been relied on.

[21] In the circumstances I therefore affirm the decision of Master Bell and refuse the appeal. I shall invite the parties to address me on the issue of costs.