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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN GRAND CAYMAN

BEFORE THE HON THE CHIEF JUSTICE

IN CHAMBERS

ON the 9th, 10th, 14th, 15th 16th and 21st October 1992.

CAUSE 107 of 1992

In the Matter of H OF H LIMITED

and

In the Matter of

THE COMPANIES LAW, CAP. 22

Mr. R Alberga Q.C. instructed by
Mr. C. Quin of Bruce Campbell & Co
for the Petitioners/Applicants
Mr. D. Ritch for the Respondent

MALONE C. J.

RULING

This summons by the petitioners raises issues on public policy considerations that relate to the due administration of justice. By it application is made for three orders. The first is for an order to cross-examine the respondent's counsel - Ms. Bridges of the law firm of Ritch & Conolly - on three affidavits sworn by her on the 10th April 1992, the 22nd April 1992, and the 28th May 1992:

> "with particular reference to the reasons why and the circumstances in which her said affidavit sworn herein on 10th April 1992:
>
> (a) came to contain statements which were false and/or misleading, and
>
> (b) came to have exhibited thereto (as part of Exhibit "CJB3") a Memorandum dated 9th April 1992 of one Jeremiah T. Mulligan"

a member of the respondent's New York attorneys, Curtis, Mallet-Prevost, Colt and Mosle. The second and third of the

three orders are similar to each other. They require Ritch and Conolly and the respondent, Beaumont Enterprises Limited to produce all documents which are in their or its possession, custody and power and which are relevant with particular reference to the reasons why and or the circumstances in which the affidavit of Ms. Bridges sworn to on the 10th April 1992 came to contain statements which were false and/or misleading and came to have exhibited to it (as part of Exhibit "CJB3") the Memorandum of J. T. Mulligan dated the 9th April 1992. Such documents, in the case of the order applicable to the respondent, to include documents which are in the possession, custody or power of Messrs Curtis, Mallet - Prevost Colt and Mosle.

Defences submitted on behalf of the respondent to the first of the orders applied for are that:

(1) Ms. Bridges has discharged her duty to the Court to correct the misleading affidavit of the 10th April 1992;

(2) the respondent is protected by legal professional privilege;

(3) there was no fraud;

(4) the first order applied for is misconceived as it is not one that can be raised on an application such as this and consequently the second and third orders applied for must fail;

(5) if even the first order applied for is not misconceived, cross examination of Ms. Bridges should not be allowed because:

(a) in this instance it is for a "fishing expedition" and not for a proper purpose;

(b) the objective of the cross-examination is for a collateral purpose;

Both parties accept that public policy considerations relating to the due administration of justice demand the observance of the following principles derived from the judgments of the House of Lords in Myers v Elman (1940) A.C. 282:

"(1) It is the duty of the Court to be equally anxious to see that (Attorneys) not only perform their duty towards their own clients, but also towards all those against whom they are concerned - Viscount Maugham at page 290.

(2) Where an Attorney discovers that an Affidavit sworn by his client (as defendant) is untrue and that important documents were omitted from it, the duty of the Attorney is as follows:-

(a) His duty to the plaintiff and to the Court is to inform his client (the defendant) that he (the Attorney) must inform the plaintiff's Attorney of the omitted documents;

(b) if his client (the defendant) does not agree to that course, he (the Attorney) must cease to act;

(c) he owes a duty to the court "to put the matter right" "at the earliest date" if he continues to act as the Attorney on the record;

(d) he is not entitled to keep silence and wait until the plaintiff succeeds, if he can, in obtaining an Order for a further and better Affidavit. To do so is "to obstruct the interests of justice." - Viscount Maugham at pages 293 and 294.

See also Lord Atkin at page 302.

(e) the duty of the Attorney engaged in putting before the Court information which may afford evidence at the trial is:

(i) to explain to his client what is the meaning of relevance;

(ii) not necessarily to be satisfied that his client has no document or no more than he chooses to disclose;

(iii) if he has reasonable grounds for supposing that there are others, he must investigate the matter and take reasonable steps to ascertain the truth - Lord Atkin at page 304.

(f) the duty of the Attorney is "specially incumbent" when his client is charged with fraud.

They accept also that Ms. Bridges' affidavit of the 10th April 1992 contains misleading statements. Their difference to quote from the address of Mr. Ritch:

"is not whether the duty is owed since Ms. Bridges by the filing of her 'corrective' affidavits of 22nd April and the 29th May clearly acknowledges such duty, but precisely what ground and material must be covered in the affidavit to discharge that duty .....

The fallacy of the Petitioners' approach to Myers v Elman is that it requires disclosure of 'how the Court came to be mislead.

There, they say it includes:-

(a) correction of misleading statements;

(b) fully and frankly explaining the true position; and

(c) explaining how the Court came to be mislead.

It is in this respect that we say the Petitioners are in error.

If one reads the letter of 19th May 1992 from Bruce Campbell & Co it becomes clear that the Petitioners have included in the above even correspondence passing between the parties as requiring explanation to the Court (see for example (iii) on pages 4 and 5 of that letter). Not surprisingly there is no reference anywhere in Mr. Alberga's outline to any part of the decision in Myers v Elman as being the authority for this proposition.

The respondent submits that the duty is discharged by an affidavit which sets out the true position and apologises for the prior falsity, i.e. by disclosing the fact and nature of the restructuring."

In brief the difference between the two parties may be said to depend on the meaning to be given to the words:

"put the matter right"

in the following passage of Viscount Maugham's judgment in Myer's v Elman (ibid) at p 294:

> "A solicitor who has innocently put on the file an affidavit by his client which he has subsequently discovered to be certainly false owes it to the Court to put the matter right at the earliest date if he continues to act as solicitor upon the record.".

The respondent contends they mean no more than correct and apologise. The petitioners contend they mean that and include how the Court came to be mislead. I venture to think that the key to the meaning of those words is to be found in the nature of the jurisdiction exercised by the Court in cases of this kind. It is as Lord Atkin said at p 303 of Myers v Elman (ibid) a "punitive" jurisdiction in the exercise of which as he further said at that page:

> "The Court is not concerning itself with a breach of duty to the other litigant but with a

breach of duty to itself.".

(Of course the Court is anxious to see that solicitors not only perform their duty towards their own clients but also towards all those against whom they are concerned because a solicitor's duty to parties for whom he is not acting is founded on his duty to the Court.) Because the jurisdiction is punitive the Court must be possessed of the power to punish those to whom its jurisdiction extends. Therefore it must arguably be entitled to know how a wrong came about in order that it may punish appropriately. For example a breach of duty that is the consequence of mere negligence will attract a less severe punishment than a breach that is wilful. There may even be no punishment where as in Vine Products v Green (1966) Ch 484 the fault is so venial and the possible consequences so trifling.

In this case Ms. Bridges by her corrective affidavits of the 22nd April 1992 and 28th May 1992 has corrected the misleading statements. She has apologised and has explained why her first corrective affidavit was not brought earlier to the attention of the Court. That is well, but it does not go far enough. For nothing is said that explains how the misleading statements in the affidavit of the 10th April 1992 came about. Why it was, for example, that the petitioners' understanding of the structuring of the companies was accepted as accurate when that structuring no longer existed. Nor is it explained why the Mulligan memorandum is exhibited to the affidavit of the 10th April 1992 or how it came to be exhibited to that affidavit. It does not, however, follow that the petitioners are entitled to any of the orders they seek as there are other defences of the respondent to be considered. Before doing so there are two minor matters to which I must direct attention.

The first matter is that in the course of his address Mr. Ritch made a point of saying that the Court:

"almost came to be mislead".

It is not clear to me why Mr. Ritch suggested that the Court was not mislead as the affidavit was filed and Mr. Ritch himself acknowledged that:

> ".....Ms. Bridges by the filing of her corrective affidavits of 22nd April and the 29th May clearly acknowledges such duty.".

That is her duty to the Court. Presumably the point Mr. Ritch was making was that Ms. Bridges' breach of her duty was technical and therefore undeserving of the attention given to it by the petitioners. In brief that it exemplified the respondent's intention to make a mountain of a molehill. I do not take that view. It was purely fortuitous that the affidavits of the 10th and 22nd April 1992 came to the attention of the Court at about the same time. In any event the affidavit of the 10th April was on the Court record for some time.

The second matter arises out of Mr. Ritch's statement in reference to the Mulligan memorandum:

> " ..... it is not accepted that it is misleading."

I do not agree that the Memorandum is not misleading. Like Ms. Bridges' affidavit of the 10th April 1992, it creates the impression that there had been no alteration to the structuring of the companies. It is that which makes it misleading. The fact that as Mr. Ritch puts it:

> "Profits by way of dividends still flow 'up the chain'"

and the fact that:

> "Beaumont and Patricio are still the 'ultimate shareholders' of the operating companies"

do not, even if true, prevent the Memorandum from being misleading. Prima facie the gravity of the misleading nature of the Memorandum is more marked than the gravity of the misleading nature of Ms. Bridges' affidavit of the 10th April 1992 as Ms. Bridges may have been mislead by those intending to mislead whereas J. T. Mulligan may have been one of those who intended to mislead.

The public policy issues that in this case relate to the due administration of justice have to be considered in the

context of the contest between the petitioners and the respondent. On the one hand are the important considerations of public policy on which legal professional privilege is founded. Namely the necessity that the citizen should be able to make a clean breast of it to his legal adviser. On the other hand is the duty of the legal adviser to observe the principles laid down by the House of Lords in Myers v Elman (ibid). Those principles also are based on considerations of public policy. A balance has to be struck. Where to strike the balance was explained by Vinelott J in Derby Co. Ltd and others v Weldon and others (1959)1 W.L.R 1136 at p 1173 when he said:

> "The point at which the balance is struck must depend on the extent to which the relief sought may unjustifiably invade the defendants' rights. So if a plaintiff can show that he has a fairly arguable case and if the defendant can be fully protected by a cross undertaking in damages the court in granting or refusing a purely negative injunction will be primarily concerned with a balance of convenience. More is required (in ascending order of importance) if the plaintiff seeks a mandatory injunction or a negative injunction which, in the words of Hoffman J 'may have intrusive effect' or if the plaintiff seeks Mareva relief or an Anton Piller order or the disclosure of confidential banking documents.
>
> There is a continuous spectrum and it is impossible to, as it were, calibrate or express in any simple formula the strength of the case that the plaintiff must show in each of these categories. An order to disclose documents for which legal privilege is claimed lies at the extreme end of the spectrum. Such an order will 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.

Both Lord Parmoor and Lord Wrenbury in O'Rouke v Darbishire (1920) A.C. 581 at pp. 622 and 632, contemplated that allegations in a statement of claim; apart from any other source of information, might in themselves be sufficiently explicit to negative the claim for professional privilege. That might, as I see it, be the case if the statement of claim set out the allegations of misconduct with very great particularity and if the defence was couched in very general terms and was unsupported by affidavit or other admissible evidence. But no clear line can be drawn. 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.".

It is unquestionable in this case that the affidavit of Ms. Bridges of the 10th April 1992 and the Memorandum of J. T. Mulligan of the 9th April 1992 misstate the structuring of the companies as of these dates. It is also arguable that J. T. Mulligan is in contempt for attempting to conceal the restructuring of the companies. Contempt of court, however, has nothing to do with the private interests of litigants. (See A.G. v Times Newspapers Ltd. (1973) 3 W.L.R. 298 per Lord Reid at p 310). Accordingly this is not a case of a public interest which counterbalances the private interests of litigants. It is a case of conflicting public policy considerations. The balance must be

struck between those conflicting public policy considerations. In that context I think to be very pertinent Mr. Alberga's submission that:

> "Public policy considerations and this Court will not allow the Court's process to be abused by a client or an attorney by the filing of a misleading affidavit and at the same time allow that client or attorney to shelter behind the cloak of privilege, thereby preventing the Court from knowing how it came about."

Therefore it seems to me arguable that the privilege was overridden by public policy considerations.

In the course of his address Mr. Ritch laid great emphasis on the issue of fraud. I do not, however, agree with Mr. Alberga that:

> "Mr. Ritch suggested that if there was no fraud there is not basis for the cross-examination of Ms Bridges."

His words were that:

> "If the Court accepts the submissions of the Respondent on the allegation of fraud, then that would be an end of the matter as to the breaking of the privilege on that ground.".
>
> (my emphasis)

By which I understand him to be saying no more than the obvious. Namely that privilege would not be lost on the ground of fraud when there was no fraud. As I have found that arguably the privilege was lost by reason of being overridden by public policy considerations and as I also will find that arguably it was lost by reason of waiver. I see no reason to consider the submission on fraud.

The petitioners further contend that the privilege claimed by the respondent has been lost because of waiver. As I understand the petitioners' argument on waiver of privilege

its pivot is the following passage from Ms. Bridges' affidavit of 28th May 1992 where she deposes that:

> "In making this affidavit I am not authorised to, nor do I, waive my client's privilege beyond the extent set out herein.".

Mr. Alberga submits that the passage constitutes a waiver as it reveals that:

> ".....there was an intention on her part to abandon privilege in respect of some material but not in respect of other material.".

I think it is more accurate to say that Ms. Bridges in that passage is deposing that she is authorised to waive no more of the client's privilege than she is waiving. Her intention is not relevant as the privilege is the privilege of the client and may be waived by the client and not by the legal adviser. Nevertheless it is clear from the passage cited from Ms. Bridges' affidavit that the privilege attaching to some but not all of the client's privileged material was waived. The question at issue is whether there should be implied or imputed by this Court a waiver of the privilege attaching to other privileged material of the client?

Attorney General for the Northern Territory v Maurice & Others (1986) is a case that came before the High Court of Australia. In that case there was no express waiver and there was nothing to suggest that the claimants had any actual intention to waive privilege in the source documents. In declaring the principle applicable in those instances to the doctrine of waiver Deane J said at pp42 to 43.

> "Waiver of legal professional privilege by an imputation or implication of law is based on notions of fairness. It occurs in circumstances where a person has used privileged material in such a way that it

would be unfair to him to assert that legal professional privilege rendered him immune from procedure pursuant to which he would otherwise be compelled to produce or allow access to material which he has elected to use to his own advantage. Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he made of the material by reliance upon legal professional privilege. There are, however, no considerations of fairness which require that compliance by a party with a procedural requirement that he prepare and make available a document setting forth the case which he proposes to make before a court or quasi-judicial tribunal should be treated as a waiver of his right to claim legal professional privilege in respect of all the material on which he has relied in the preparation of that document. If in such a document, a party sets forth part of the contents of a particular identified document or communication or asserts the effect of his reliance upon a particular identified document or communication, it may be, that considerations of fairness might require that he be treated as having waived any legal professional privilege in relation to the whole document or communication: cf Buttes Gas and Oil Co v Hammer (No 3) (1981) 1 Q.B. 223 at pp 251 - 252. Where,

> however, he does no more than make use of privileged material (e.g. legal advice, expert opinion or statements of potential witnesses) for the purpose of formulating the statement in such a document of the details of the case which he proposes to make, it would be an affront to ordinary notions of fairness to hold that the effect of his compliance with that procedural requirement was that he has waived his legal professional privilege in relation to such material.".

In that passage, no mention is made of fraud. The two concepts of fairness as the basis of implied or imputed waiver and fraud are correctly treated by Mr. Alberga as independent of each other. Mr. Ritch on the other hand confuses them as when he said:

> "The Respondent submits that where the allegation of fraud is weak or lacks credibility, such as is the case in this matter, then the issue of fairness ought to be resolved in favour of the Respondent.".

I, therefore, do not accept Mr. Ritch's submissions on the law.

The admitted facts disclose that in her affidavit of the 10th April 1992 Ms. Bridges presented as true, facts which were false. As at all material times, Curtis, Mallet-Prevost, Colt and Mosle were, she says in her affidavit of the 28th May 1992:

> "my firm's professional clients (they) acting on behalf of the Respondent herein."

it is reasonable to conclude that the information in her affidavit of the 10th April 1992 concerning the corporate structure came from them. Presumably, J. T. Mulligan's memorandum was exhibited to the affidavit of the 10th April 1992 to give it credibility. Presumably, too, the information provided by the affidavits of the 22nd April 1992 and the 28th May 1992 correcting the misleading statements in the affidavit of the 10th April 1992 came from

Curtis, Mollet-Prevost, Collet and Mosle or perhaps from J. T. Mulligan himself. In the existing state of the evidence, it is apparent that information from that firm which ordinarily would be privileged has been used to make the best case for the respondent. First it was used to pooh pooh the petitioners' fear of a take-over by Claudio, by maintaining that there had been no restructuring. When that position could not be maintained because there had been a restructuring, it was used to justify the restructuring on the ground that it was needed to counterbalance alleged misdeeds of Patricio. To my mind it is arguable that having used some privileged material in that way, it would be unfair for the respondent to assert that on grounds of privilege it is rendered immune from procedure which would otherwise compel the production of other material relevant to the issue. As Mustill J said in Nea Karteria Maritime (1981) Commercial Law Reports 138 at p 139:

> "To allow an individual item to be plucked
>
> out of context would be to risk injustice
>
> through its real weight or meaning being
>
> misconceived.".

As I have earlier found it to be arguable that the corrective affidavits do not go far enough it seems to me essential that if the cross-examination of Ms. Bridges is allowed, material related to the material already disclosed or relevant to it with particular reference to the matters set out in the application should be disclosed and be a legitimate subject for cross-examination.

The ground covered by the fourth of the respondent's defences to the first of the orders applied for is largely the same as that covered by the first of those defences. The latter is concerned with the extent of Ms. Bridges' duty to the Court. The former is concerned with the extent of the inquiry that the Court should permit into the conduct of Ms. Bridges. Having considered the submissions made as to the extent of Ms. Bridges' duty to the Court I have nothing to say on the fourth defence further to what I

have previously said on the first defence. Before leaving the fourth defence there is, however, a further point to be considered. It is that the application is made in interlocutory proceedings.

There is nothing in the rule pursuant to which this application is brought that forbids cross-examination upon affidavits filed in interlocutory proceedings. But note 38/2/3 of the Supreme Court Practice is that:

> "Cross examination upon affidavits sworn in applications for interlocutory injunctions is very rare.".

And in Derby Co Ltd and others v Weldon and others (ibid) as earlier noted, Vinelott J. said at p 1173:

> "the court will be very slow to deprive a defendant of the important protection of legal professional privilege on an interlocutory application.".

Those comments must be kept in mind in deciding how I should exercise the discretion I have in this matter.

The fifth and last of the respondent's defences to the first of the orders applied for is from the same mould as the first and fourth defences. The fact that the cross-examination, if allowed, may be wide ranging does not make it a "fishing expedition" nor a cloak to conceal a collateral and improper purpose. Namely, the discovery of persons in contempt.

The crux of this application is that Ms. Bridges made misleading statements and it is arguable that she has not put the matter right as it was her duty to do. In seeking to make her fulfil her duty, the application has raised serious questions in regard to the affidavits of the 10th April, 22nd April and 28th May 1992 and, of course, also in regard to the J. T. Mulligan Memorandum of the 9th April 1992. It may be that the cross-examination of Ms. Bridges and the documents to be produced will cast some light on those matters. It may well be also that the light cast will reveal

matters that will have a major part to play in the outcome of the petition. For those reasons it seems to me to follow that the cross examination of Ms. Bridges should be allowed and should take place before the hearing of the petition, and indeed, as soon as practicable.

I have considered, individually, the submissions as to why the first order applied for by the petitioners should not be made and in each instance there seems to me a strong arguable case against those submissions. That finding must, I think, outweigh any consideration arising from the fact that this is an application in interlocutory proceedings. I shall make an order for her cross-examination.

Submissions separate and distinct from the submissions made under the head described by Mr. Alberga as the Myers v Elman. Point were made by him under the head he described as the Relevant Issues Point. Under either head he submitted that the petitioners were entitled to the three orders described in the summons. For greater clarity of presentation, I have dealt solely with the arguments advanced under the first of the two heads in relation to the claim to the first of the three orders. However as I agree with Mr. Alberga that the findings made under that head support the claims for the second and third of the three orders further consideration of this application is unnecessary. I shall make the orders I have described as the second and third orders.

Before I rule I would like to express my appreciation to counsel on both sides for having so ably presented their submissions.

Denis E. J. Malone

Sir Denis Malone

21st October 1992.