

JERSEY / JUDGMENT

Cafe de Lecq -v- Rossborough

[2011] JRC 067 (29 March 2011)

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judgment

the bailiff: 1. This is an application by the defendant for an injunction requiring the return of a document ("document 135") which it says is privileged and was disclosed by mistake during the discovery process. It raises issues as to whether the document is privileged and, if so, the circumstances in which an injunction may be granted ordering the return of a privileged document disclosed inadvertently. The factual

background

2. The Court has received affidavits from Mr Kevin Bailey, Mr David Murray, Mr John McCormick and Mr Steve Wrigglesworth on behalf of the defendant and Mr James Turnbull and Miss Rebecca McNulty on behalf of the plaintiff. We would summarise the relevant factual background as follows. 3. The plaintiff owned and operated a café business at Café de Lecq, St Mary which it purchased in March 2007. It insured the café through the defendant, which is an insurance broker. The insurance policy was issued by AXA Insurance UK PLC ("AXA") and took effect from the date of purchase. The policy contained a 'Deep Fat Frying warranty', the relevant part of which provided that all deep fat frying equipment at the café had to be fitted with a thermostat arranged to prevent the temperature of cooking oils or fats rising above 230° centigrade and an automatic cut-out arranged to cut off the heat source power and extraction system in the event of failure of the thermostat. 4. On 8th May, 2007, the café burned down. The cause of the fire appears to have been cooking oil in a fat fryer that overheated. The café did not in fact contain an automatic cut-out as required by the Deep Fat Fryer warranty. As a result, AXA declined to cover the accident. 5. The plaintiff subsequently instituted proceedings against the defendant alleging that the existence and terms of the Deep Fat Fryer warranty were never brought to the plaintiff's attention and that the defendant is therefore in breach of contract and its common law duty of care by failing to exercise reasonable skill and care in the performance of its duties as insurance broker. The defendant denies the claim on the basis that the wording of the Deep Fat Fryer warranty was sent to Mr Ruellan, who placed the insurance on behalf of the defendant, at least twice, first on 2nd March, 2007, and then again on 15th March, 2007, and that the wording of the warranty was in plain non-technical English. 6. During the course of the litigation the time

came for discovery. Mr McCormick of Carey Olsen had day to day conduct of the litigation on behalf of the defendant and Miss McNulty of Bedell Cristin had day to day conduct on behalf of the plaintiff. It was agreed between them that copies of all disclosable documents should be provided at the same time as the affidavits of discovery were exchanged. Document 135 was listed as a disclosable document by the defendant under the heading "e-mail from Steve Wrigglesworth to Kevin J Bailey (undated)". Copies of all the disclosable documents (including document 135) were sent by Carey Olsen to Bedell Cristin on 7th September, 2010. 7. Following receipt of the documents Miss McNulty asked her assistant Mr Turnbull to review the documents disclosed by the defendant. He considered the content of document 135 to be potentially significant and helpful to the plaintiff and drew this to the attention of Miss McNulty. Miss McNulty subsequently read the document and agreed. Neither of them thought it was a privileged document. She met Mr McCormick on 22nd September to discuss the litigation generally and she referred to the contents of document 135 in the context of an effort to persuade the defendant to give proper consideration to an earlier proposal by the plaintiff that the parties should mediate. Mr McCormick replied that he could not be sure which document she was referring to but he would review the defendant's documents when he returned to the office. Subsequently on 28th September, having identified document 135, Carey Olsen wrote on behalf of the defendant asserting privilege in the document and demanding its return. 8. The parties remain divided over whether document 135 is privileged and accordingly we must describe how it came into being. 9. The defendant carries its own professional indemnity insurance. This was undertaken through Howden Insurance Brokers Limited ("Howden"), a firm of London insurance brokers who placed the insurance with various underwriters at Lloyds ("the insurers"). Mr Bailey is the associate director of Howden with responsibility for the defendant's professional indemnity policy and Mr Murray is the representative of the insurers. The defendant's insurance policy has an excess and also contains a requirement (standard in many professional indemnity policies) to the effect that the insured must notify insurers as soon as reasonably practicable of any circumstances of which it is aware which may subsequently give rise to a claim. 10. In accordance with that requirement, the defendant notified Howden of the potential claim by the plaintiff on 2nd July, 2007. Mr Murray subsequently met with Mr Bailey on 23rd July and asked him to obtain copies of the relevant correspondence and to ask certain questions of the defendant in relation to the notification. This was duly passed on to Mr Wrigglesworth, the Chairman of the defendant, by Mr Bailey and in due course a copy of the defendant's file arrived. Mr Murray passed this to an English solicitor who was on secondment with his firm and asked him to look through the file, identifying the relevant issues and any further information that might be needed from the defendant. 11. The file supplied by the defendant included three file notes made by Mr Lee-Briard of the defendant on 10th May, 17th May, and 10th July, 2007. The file note of 10th May records a telephone conversation between Mr Lee-Briard and the loss adjuster instructed by AXA. It recalls the loss adjuster saying that he had met Mr Barry Reynolds (one of the principals of the plaintiff) on site and that Mr Reynolds had asserted that he was only given the policy documents at the scene on the day of the fire. Mr Lee-Briard's file note

confirmed that a set of the policy documents were handed to the client at the site after the incident, but asserted that the original policy documents had been sent on 15th March. The loss adjuster said that he had explained to Mr Reynolds that he (the loss adjuster) had to check that the terms of the Deep Fat Frying warranty had been complied with. 12. The file note of 17th May recalls a further telephone conversation between Mr Lee-Briard and the loss adjuster in which the loss adjuster said that in a further meeting Mr Reynolds had again asserted that the plaintiff was only presented with the policy documents at the scene immediately after the fire. The loss adjuster confirmed to Mr Lee-Briard that the seat of the fire was in the vicinity of the deep fat fryer equipment. 13. The third file note dated 10th July records a visit by Mr Reynolds to see Mr Lee-Briard at the defendant's office. By then it was known that AXA proposed to decline cover. Mr Reynolds told Mr Lee-Briard that he had spoken to his lawyer and had told his lawyer that the plaintiff had only received the policy documents on the day of (and after) the fire and this was the first that they knew of the Deep Fat Fryer warranty. He said this would be one reason in his lawyer's opinion to have the decision by AXA overturned. Mr Reynolds also said that he had been talking to the proprietor of the amusement arcade affected by the La Cala fire and that Mr Reynolds proposed to contact the same retired loss adjuster from Ireland who had apparently helped the proprietor in the La Cala fire to reach an arrangement with insurers. 14. Mr Murray said that he regarded the file notes as significant. If no reference to the Deep Fat Fryer warranty had been given to the plaintiff before the fire (this appeared from the file notes to be the plaintiff's case), this would be significant in terms of potential for exposure on the part of the defendant (and therefore its insurers). The file also indicated that there were potential issues over whether the representation and the statement of fact given to AXA that the café was of "standard construction" was accurate. Furthermore, the reference to instructing the same loss adjuster as in the La Cala fire was seen by Mr Wigglesworth and Mr Murray as being significant, because the La Cala matter had involved a claim not only against the insurer but also against the defendant as broker. They both felt that this increased the likelihood of a claim against the defendant as AXA had declined to cover the fire because of a breach of the Deep Fat Fryer warranty. 15. According to Mr Murray, on 6th August the in-house lawyer on secondment produced a memorandum in relation to further information which was needed from the defendant. Mr Murray approved this and it was passed on to Mr Bailey, who in turn sent it by e-mail to Mr Wigglesworth on 9th August. It posed a number of questions. 16. On 10th August Mr Wigglesworth responded by e-mail to Mr Bailey giving the answers to the questions raised by the insurers. That e-mail has not been disclosed on the basis that it is privileged. Document 135 is a draft of that e-mail. The evidence of all those involved is that it is in all material respects identical to the e-mail which was actually sent. It is clear that, as well as answering the specific questions posed by the insurers, the e-mail is also asking for confirmation as to the terms of the covering letter which the defendant intended to send to the plaintiff when sending a copy of the plaintiff's insurance file to the plaintiff, as had been requested by the plaintiff. The e-mail is addressed to "Kevin J Bailey" but contains no details of his address or for whom he works. 17. The next occurrence was on 5th November, 2007, when Mr Buckley, the retired loss adjuster referred to earlier

who had been involved in the La Cala matter and was now advising the plaintiff, e-mailed Mr Lee-Briard of the defendant stating he wanted to meet with Mr Lee-Briard to discuss amongst other things "... the possible liability of Rossboroughs". Allegations by Mr Buckley in relation to the possible liability of the defendant were also repeated in a letter of 12th November, 2007, to Mr Lee-Briard. Mr Murray asserted in his affidavit that, following receipt of the e-mail of 5th November, he made the decision to instruct solicitors to advise insurers on the merits of the claim by the plaintiff and to conduct the defendant's defence to the claim made. The Order of Justice was finally issued on 25th February, 2010. 18. In summary, document 135 is a draft of an e-mail in identical form to that which was subsequently sent. The e-mail contained answers on the part of Mr Wigglesworth in response to questions raised by the insurers arising out of the notification by the defendant pursuant to its obligation under its professional indemnity insurance policy to give notice of circumstances of which it was aware which may subsequently give rise to a claim. 19. Mr Murray explained that, upon receipt of a notification, there are three main things that need to be considered by underwriters and investigated at the preliminary stage:- (i) whether the claim subject to the notification falls within the policy and whether underwriters are likely to be on risk; (ii) whether the insured is likely to be liable and what actions are necessary to establish this and to protect the insured's and underwriter's position and how the claim is to be defended if at all, including the instruction of lawyers to advise if necessary; and (iii) if there is a likely liability, the likely extent of the liability, so that the necessary reserves can be set in respect of any prospective liability. 20. He said that often the initial notification does not provide sufficient detail and it is frequently necessary therefore to ask for further information so that these preliminary assessments can be made. The notification requirement in most insurance policies, like that in the defendant's policy, is quite widely drafted and there is a degree of subjectivity as to when a claim should be notified, so further questions are often necessary to establish whether the insured (and therefore the underwriters) are actually "on-risk". 21. He also emphasised that it was not unknown for insured persons to be less than forthcoming on their role in the circumstances which had been notified, so some testing of the facts and background is necessary for the underwriters to come to an informed view of what should be done in relation to the notification and how any claim against the insured should be managed and defended. Furthermore, and most importantly, the asking of questions so as to obtain further information from the insured at an early stage serves the dual purpose of capturing and preserving evidence from the insured that may be used in the defence of the case at the litigation stage whilst that evidence is contemporaneous and fresh in the minds of the appropriate people. 22. He added that not all notifications require the underwriters to instruct lawyers. Sometimes the amounts are small or liability may be obvious. The overarching objective is to try and manage the defence in a cost effective way. In some cases lawyers will be consulted immediately but in others, a wait and see approach is more appropriate even if lawyers ultimately need to be instructed. Issues for the Court 23. It seems to us that we must consider three questions:- (i) Is document 135 privileged? (ii) If so, has privilege been waived by mistake? (iii) If so, should the Court grant an injunction ordering the return of document 135 and all copies and restraining the use by the plaintiff of

information derived from the document. We shall consider these issues in turn.

(i) Is document 135 privileged?

(a) The law 24. This Court has previously applied English principles in relation to questions of privilege e.g. *Bene Limited-v-VAR Hanson and Partners*

[1997] JLR N 10A; *Taylor-v-Taylor*

[1990] JLR 124 ; *Re Continental Trust Company Limited*

[1991] JLR 83 and *Matthews-v-Voisin and Company*

[2001] JLR 595 . In our judgment that is entirely appropriate as the general principles underlying civil litigation and the position of lawyers in that process are similar in England and Jersey. 25. There are two principal forms of legal professional privilege, namely legal advice privilege and litigation privilege. Litigation privilege provides protection for a wider range of documents but only applies where litigation is in reasonable prospect. Legal advice privilege applies even if litigation is not in reasonable prospect but the range of documents to which it applies is narrower. We are concerned in this case with litigation privilege and we consider that the general nature of that privilege is accurately summarised in *Phipson on Evidence* (17th edition) at para 23- 89:- "The second category of legal professional privilege is wider than the first, but arises only when litigation is in prospect or pending. From that moment on, any communications between the client and his solicitor or agent, or between one of them and a third party, will be privileged if they come into existence for the sole or dominant purpose of either giving or getting legal advice with regard to the litigation or collecting evidence for use in the litigation. This is the basis for claiming privilege for correspondence with witnesses of fact or experts, and proofs, reports or documents generated by them. The principle is that a party or potential party should be free to seek evidence without being obliged to disclose the result of his researches to the other side. In *Anderson-v-Bank of British Colombia* James LJ said:- '... as you may have no right to see your adversary's brief, you have no right to see that which comes into existence merely as materials for the brief.' In order for litigation privilege to apply, there must be a confidential communication between client and lawyer or lawyer and agent, or between one of these and a third party made for the dominant purpose of use in litigation; that is, to seek or provide information or evidence to be used in, or in connection with, litigation in which the client is or may become a party, and when litigation is either in process or reasonably in prospect." 26. An authoritative description of litigation privilege, approved by the House of Lords in *Waugh-v-British Railways Board*

[1980] AC 521 , is to be found in the statement of Barwick CJ in the Australian case of *Grant-v-Downs*

(1976) 135 CLR 674 at 677:- "Having considered the decisions, the writings and the various aspects of the public interest which claim attention, I have come to the conclusion that the court should state the relevant principle as follows: a document which was produced or brought

into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection." That summary of litigation privilege is equally applicable under the law of Jersey.

- (i) Litigation reasonably in prospect 27. This requires the Court to consider a number of aspects. First, was litigation reasonably in prospect at the time the document was created? Some guidance on this can be obtained from two cases. In *Plummers Limited-v-Debenhams plc*

[1986] BCLC 447, Millett J made it clear that there did not need to be notification of a possible claim but there must be a real prospect of litigation which must be in the active contemplation of the party seeking advice. At 453, he said this:- "If, as is clear from that case, the privilege covers documents obtained for the purpose of enabling solicitors to advise a party whether to make a claim, and that it extends to documents obtained or brought into existence before the decision to make the claim is made, then it must necessarily extend to documents obtained or brought into existence before that decision is notified to the other side. I see no good reason in logic or principle for requiring a party to warn the other side that he is contemplating making a claim, or rejecting his demand, or for restricting the privilege to documents obtained or brought into existence only after such warning has been given. There is no trace in any of the authorities of any such requirement, and I decline to introduce it. It was said that this would widen the category of legal professional privilege to an unacceptable degree, and even destroy the dividing line between the two categories of privilege described by Lord Edmund-Davies in *Waugh's* case, for legal advice when given will usually bear not only on the client's rights but on other parties' rights as well. I disagree. There must be a real prospect of litigation. Where it is neither pending nor threatened, it must be in the active contemplation of the party seeking advice. This is a real requirement, and it is sufficient to dispose of the more fanciful cases suggested in the course of argument." 28. In *United States of America-v-Philip Morris Inc and others*

[2004] EWCA Civ 330 the Court of Appeal approved the expression that the privilege applies if litigation is "reasonably in prospect" and went on to approve as another way of saying this that, as a general rule at least, there must be a real prospect of litigation as distinct from a mere possibility, but it does not have to be more likely than not. (ii) Dominant purpose 29. Secondly, the document must come into being for the dominant (but not sole) purpose of obtaining legal advice or to conduct or aid in the conduct of the anticipated litigation. The purpose may be that of the person creating the document or the person at whose direction it has been created. 30. Thus in *Guinness Peat Properties Limited-v-The Fitzroy Robinson Partnership*

[1987] 1 WLR 1027, the defendants, FRP were a firm of architects. Following receipt of a letter from Guinness Peat to the effect that they proposed to hold FRP liable for certain defective works, FRP sent a letter ("the McLeish letter") to their insurers notifying them of a potential claim by Guinness Peat as required by the terms of their professional indemnity policy. The letter commented on the merits of the potential claim. The Court of Appeal held that it was privileged and that the relevant intention was that of the insurers. Slade LJ said the following at 1036:- "Mr Slater invited us to look at the realities of the situation. As the definition of 'loss' contained in the policy shows, the cover provided by it is directed to damages and legal costs and expenses awarded against the insured in legal proceedings. The defence of any claim made against the insured which is covered by the policy will be conducted by the lawyers of the insurers, not the insured. If the insured receives a claim or notice of intention to make a claim, the insurers will need to receive immediate notification of it so that they can set about obtaining legal advice, as they will in most cases wish to do and in due course use it to assist them in any ensuing litigation. True it is that FRP actually brought the McLeish letter into existence. However, they did so on the requirement of the insurers who have the real interest in seeing that the claim is defended. In these circumstances and on the evidence, Mr Slater submitted, the letter owed its genesis to the dominant purpose that it should be used for the purpose of obtaining legal advice and in any ensuing litigation. I for my part accept these

submissions.

In my judgment the proposition that the dominant purpose of the document does not necessarily fall to be ascertained by reference to the intention of its actual composer is borne out by a number of recent authorities. Barwick CJ's formulation of the test itself in *Grant-v-Downs* ... refers to the dominant purpose of its author 'or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence.' These words are not to be read as if they had statutory force. Nevertheless, I think that in the present case the insurers are to be regarded as the persons under whose direction the McLeish letter was brought into existence, within the sense and spirit of this formulation. ... Similarly, in *Re Highgrade Traders Limited*

[1984] BCLC 151, this court, in upholding a claim for privilege in respect of certain reports procured by an insurance company from specialists in fire investigations and others in a case where arson was suspected, plainly regarded as crucially relevant the purpose of the insurers instigating the reports ... not the intentions of the writers of the reports themselves. In the light of these authorities, I accept that the dominant purpose of the McLeish letter must be viewed objectively on the evidence, particularly by reference to the intention of the insurers who procured its genesis. Subject to what is said below, I accept that, so viewed, the dominant purpose was to produce a letter of notification which would be used in order to obtain legal advice or to conduct or aid in the conduct of litigation which was at the time of its production in reasonable prospect." 31. In deciding whether the dominant purpose is to obtain legal advice or aid in the conduct of litigation

reasonably in prospect, it is not necessary that a decision to instruct lawyers has been taken at the time the document comes into being. Thus, in *Re Highgrade Traders Limited* (supra) the property of a company burned down. Having been informed of this fact the insurers arranged for a number of reports to be prepared and these suggested that there were suspicious circumstances surrounding the fire. Following receipt of the reports, the insurers then consulted solicitors. Subsequently the claim by the company was repudiated on the basis that the fire had been deliberately started. The liquidator of the company sought access to the reports. The Court of Appeal held that they were privileged notwithstanding that solicitors had not been instructed at the time of their preparation. Oliver LJ referred to a note in the 1982 edition of the *Supreme Court Practice* which said:- "It would seem inconsistent with the decision of the House of Lords, to extend legal privilege to documents coming into existence before a decision to instruct a solicitor to make or resist a claim has been taken by the person upon whom the decision falls..." He went on to say:- "Now, with respect to the learned editors of the *Supreme Court Practice*, that may very well be the case in the sort of accident case which they have in contemplation, but I am, for my part, unable to agree either that this note accurately summarises the effect of the *Crompton* case or that to extend privilege to documents coming into existence before the decision to instruct the solicitor actually to make or resist the claim is in any way inconsistent with it. Such a proposition appears to me to be at variance with the decision of the House of Lords in *Waugh's* case, from which it is, I think, clear that, if litigation is reasonably in prospect, documents brought into being for the purpose of enabling the solicitors to advise whether a claim shall be made or resisted are protected by privilege, subject only to the caveat that that is the dominant purpose for their having been brought into being." 32. That principle was of course followed in *Guinness Peat* where the *McLeish* letter was the originating document from the insured to the insurers and was written before any question of instructing solicitors had arisen. 33. We should add that we have considered the case of *re Barings*

[1998] 1 All ER 675 where Scott VC questioned whether *Guinness Peat* and *Highgrade Traders* were correct. However that decision is criticised in *Phipson* at para 23-106 and we respectfully agree with that criticism. In our judgment the rationale in support of litigation privilege applies just as much to documents prepared before the involvement of a lawyer but in anticipation that they will be put before a lawyer or used in some way in the litigation as it does to documents prepared at a slightly later stage once the lawyer is involved. Indeed, to take the facts of the present case and those in *Guinness Peat*, it is in our judgment important that insured persons should be able to make full and frank disclosure to their insurers in circumstances where litigation is reasonably in prospect without fear that what they have said will have to be disclosed to the other side. 34. In deciding what is the dominant purpose, the Court must not take an unduly narrow or restrictive view. Returning to the facts of *Highgrade Traders* Oliver LJ had this to say at 174:- "What, then, was the purpose of the reports? The learned judge found a duality of purpose because, he said, the insurers wanted not only to obtain the advice of their

solicitors, but also wanted to ascertain the cause of the fire. Now, for my part, I find these two quite inseparable. The insurers were not seeking the cause of the fire as a matter of academic interest in spontaneous combustion. Their purpose in instigating the enquiries can only be determined by asking why they needed to find out the cause of the fire. And the only reason that can be ascribed to them is that of ascertaining whether, as they suspected, it had been fraudulently started by the insured. It was entirely clear that, if the claim was persisted in and if it was resisted, litigation would inevitably follow. The claim has been made and there was no indication that it was not going to be pressed, particularly after Mr M R's acquittal. It is, as it seems to me, entirely unrealistic to attribute to the insurers an intention to make up their minds, independently of the advice which they receive from their solicitors that the claim should or should not be resisted. Whether they paid or not depended on the legal advice which they received, and the reports were prepared in order to enable that advice to be given. The advice given would necessarily determine their decision and would also necessarily determine whether the anticipated litigation would or would not take place." 35. For the sake of completion, we should add that it matters not if the document came into being at the direction of the insurers but privilege is now claimed by the defendant. As was made clear in *Guinness Peat* the relationship between insured and insurers is a classic example of one which gives rise to common interest privilege, which was held to be part of the law of Jersey in *UCC-v-Binder*

[2005] JLR 401 and which was conveniently summarised by Brightman LJ in *Buttes Gas and Oil Co-v-Hammer* (No. 3)

[1981] 1 QB 223 at 267:- "... if two parties with a common interest and a common solicitor exchange information for the dominant purpose of informing each other of the facts, or the issues, or advice received, or of obtaining legal advice in respect of contemplated or pending litigation, the documents or copies containing that information are privileged from production in the hands of each." Application to the

facts

36. We turn therefore to consider whether document 135 is privileged. We begin by recording that the fact the document 135 is a draft of the e-mail which was actually sent out is not material. If the e-mail as sent is privileged, so is the draft which is in identical form and was prepared for the same purpose at the same time. 37. The first question is whether, at the time the document was created on 10th August, 2007, litigation was in reasonable prospect. 38. Advocate Robinson submits that it was not. He points out that there was no mention of any possible claim against the defendant until the e-mail from Mr Buckley on 5th November, 2007. In August, there was merely a concern on the part of the defendant about its standard of care. Litigation might have been a vague possibility but it was not reasonably in prospect. He distinguished the facts from those in *Guinness Peat* where FRP had received a letter formulating a claim before they notified their insurers by means of the McLeish letter. 39. The question of whether litigation is in prospect is to be ascertained objectively although, in

reaching its conclusion on that aspect, the Court may of course have regard to the belief of the parties at the time. 40. In our judgment, litigation was in reasonable prospect at the time of the creation of document 135. We would summarise our reasons as follows:- (i) We accept that, unlike in *Guinness Peat*, there had been no letter of claim at this stage. But as Millett J made clear in *Plummer Ltd* in the passage cited in para 27 above, there is no requirement for a claim to have been notified for it to be in reasonable prospect. (ii) At the time document 135 was created AXA had already declined cover on the basis of a breach of the Deep Fat Fryer warranty and also for possible non-disclosure in relation to the construction of the café, which had been stated in the statement of fact as "standard construction". The decision to decline cover was known to the plaintiff, the defendant and the defendant's insurers prior to the creation of document 135. As Mr Wrigglesworth said in his affidavit, having been an insurance broker for 38 years, it is his experience as a broker that, when a large claim is declined by an insurance company for a breach of the policy conditions and/or warranty under the policy, the attention of the policy holder who has been denied cover almost invariably turns to the role of the broker in arranging cover. (iii) Prior to the creation of document 135, Mr Reynolds, on behalf of the plaintiff, had on three separate occasions (as summarised in the file notes) stated that the first time the AXA insurance policy documents had been provided to the plaintiff was by Mr Lee-Briard at the scene immediately after the fire (see paragraphs 11 - 14 above). On the basis that this was the plaintiff's case, it was highly likely that the plaintiff would argue in due course (as it has) that the reason it did not comply with the Deep Fat Fryer warranty was that the defendant had not brought the existence of the warranty to the attention of the plaintiff. (iv) The file note of 10th July showed that the plaintiff had already consulted lawyers in connection with the repudiation of cover by AXA. It was obvious on reading that file note that any lawyer consulted by the plaintiff would be likely to advise that the defendant would be liable to the plaintiff if it had not communicated the existence of the Deep Fat Fryer warranty to the plaintiff before the fire and non-compliance with the warranty was the reason for AXA refusing cover. (v) The same file note records that Mr Reynolds told the defendant that he was planning to consult the retired loss adjuster who had advised in the *La Cala* claim. That claim involved a claim against the defendant as well as against the insurance company concerned and Mr Wrigglesworth was aware that the involvement of the loss adjuster (Mr Buckley) was likely to lead to a claim also being made against the defendant, especially given what had been said by Mr Reynolds about the non-receipt of the policy documents prior to the fire. (vi) Mr Wrigglesworth and Mr Murray, on behalf of the insurers, were aware of the file notes before the creation of document 135. (vii) It is true of course that the defendant was asserting that a copy of the policy document had been sent on 15th March, but that was apparently not being accepted by the plaintiff. Furthermore proceedings have been instituted in exactly the form anticipated, based upon a failure to draw the existence of the Deep Fat Fryer warranty to the attention of the plaintiff. 41. The second question is whether the dominant purpose of the insurers and/or the defendant in creating the document was to obtain legal advice or aid in the conduct of the anticipated proceedings. 42. Advocate Robinson argued that the dominant purpose of the communication was to obtain approval

for the terms of a letter to the plaintiff enclosing the plaintiff's insurance file held with the defendant. Furthermore, he points out that there was no intention to instruct lawyers at the time. It was impossible for the Court to ascertain what was the dominant purpose as none of the questions asked by the insurers of the defendant which gave rise to document 135 had been disclosed. 43. In our judgment, Mr Wrigglesworth's primary purpose in sending the e-mail, of which document 135 was a draft, was to respond to questions posed by the insurers, although he also sought consent to the terms of the letter he proposed to send to the plaintiff enclosing the insurance file. The dominant purpose of the insurers was to obtain further information by way of answers to questions which they posed so as to use the information received in order to take legal advice and to aid in the conduct of the anticipated litigation. Our grounds for so concluding are as follows:- (i) It is clear from the evidence of Mr Murray that these are the purposes behind the seeking of information from insured persons following notification of a possible claim. An underwriter seeks to obtain information from the insured so as to assess whether the anticipated claim is defensible and in doing so it is highly likely that the underwriter will at the appropriate stage put all the material obtained before lawyers so as to obtain advice on the merits of the claim. The exception will be where the liability of the insured is so obvious that legal advice is not necessary. The information is also sought for use in the anticipated litigation because at that stage the information is comparatively fresh in the minds of the insured. It will therefore form the basis of a proof of evidence in due course. There is nothing in the facts of this case to suggest that these were not the two purposes behind the request of the insurers which gave rise to document 135. Both purposes attract litigation privilege. (ii) As described in paragraphs 31-33 of this judgment, it does not matter that lawyers had not been instructed at the time the document came into being. One of the purposes behind creating the document was so that the information contained in it would be available to lawyers should the decision be taken subsequently to obtain legal advice; and this, of course, is what occurred. The original e-mail (of which document 135 was a draft) was one of the documents supplied to the lawyers in November 2007 for them to advise the insurers. (iii) The facts of this case are not materially distinguishable from those in *Guinness Peat and Hightrade*. In the former the privileged material comprised the original notification by the insured to the insurer and naturally at that stage it was not known for certain whether the insurers would instruct lawyers or not. Similarly, in *Highgrade Traders* the lawyers were only instructed to advise after the reports had been received indicating that there were suspicious circumstances which might mean that the insured company had started the fire itself. 44. For these reasons we conclude that document 135 was the subject of litigation privilege. (ii) Has privilege been waived by mistake? 45. The Court is quite satisfied from the evidence of Mr McCormick that document 135 was disclosed by mistake as part of the discovery process. It appears that, whereas all the correspondence which the defendant had with its insurers and solicitors (including the actual e-mail of which document 135 was a draft) was kept in a separate file for which privilege has subsequently been claimed, the draft e-mail, which constitutes document 135, was inadvertently placed by the defendant in one of their files dealing with the plaintiff's insurance business. Although Mr McCormick went through all the files to

check for privileged material when preparing the list for discovery, he appears to have failed to note document 135 even though the e-mail actually sent by Mr Wigglesworth to the insurers was listed as a privileged document. All in all, the Court is quite satisfied that the defendant, acting through its advocates, did not intend to waive privilege in relation to document 135 and that it was disclosed inadvertently as part of the discovery process. (iii) Is the defendant entitled to an injunction? 46. The general rule is that, once a document included in the list for discovery is inspected by the other side, privilege is lost. A party is entitled to rely on the discovery process and is entitled therefore to assume that any privilege which might otherwise have been claimed for a document has been waived. The position was authoritatively described by Slade LJ in *Guinness Peat* at 1043-1044:- "Mr Burnton, in the present case, did not seek to suggest that FRP had waived or otherwise lost their privilege simply by including the McLeish letter in Part 1 of Schedule 1 to the first supplementary list of documents. He accepted that they would have been entitled to serve an amended list claiming privilege for it at any time before inspection took place. However, in his submission, privilege is essentially privilege from compulsory disclosure. By analogy with the *Great Atlantic Insurance Co* case, he submitted, once a privileged document has not only been disclosed but also inspected in the course of discovery, it is too late to put the clock back; the privilege is lost. The essential distinction between the present case and the *Goddard* and *Herbert Smith* cases, Mr Burnton contended, is that neither of those two cases dealt with a loss of privilege occurring as a result of a step taken in the litigation by the party entitled to the privilege. In all cases where inspection has been given in the course of discovery, he submitted, the court should follow the *Briamore* decision [1986] 1 WLR 1429. This provides a simple practical rule. It places the onus on the party giving discovery, who should ensure that only documents in respect of which no claim of privilege is made should be disclosed. It avoids the practical problems involved in attempting to restore the previous status quo by prohibiting a party and his experts from using information obtained in the normal course of discovery. With one important reservation, I would entirely accept the submissions summarised in the immediately preceding paragraph. Care must be taken by parties to litigation in the preparation of their lists of documents and no less great care must be taken in offering inspection of the documents disclosed. Ordinarily, in my judgment, a party to litigation who sees a particular document referred to in the other side's list, without privilege being claimed, and is subsequently permitted inspection of that document, is fully entitled to assume that any privilege which might otherwise have been claimed for it has been waived. Let there be no doubt about that." 47. The Court went on in *Guinness Peat* (at

¹⁰⁴⁵⁾ to describe the reservation referred to in the extract just quoted, namely that if the party to whom discovery has been made or a solicitor either

- (a) has procured inspection of the relevant document by fraud or (b) on inspection, realises that he has been permitted to see the document only by reason of an obvious mistake, the court should normally intervene by injunction ordering the return of the document and restraining its use. 48. The test established in *Guinness Peat* was elaborated in *Pizzey-v-Ford Motor Company*

[1994] PIQR 15 where again a privileged document had been inadvertently disclosed as part of the discovery process. The Court of Appeal held that an injunction ordering its return should be granted not only where the receiving solicitor realised that an obvious mistake had been made but also where a reasonable solicitor would have realised that this was the case. The relevant passage from the judgment of Mann LJ at 21 reads as follows:- "Slade LJ's use of the phrase "obvious mistake" does not seem to me founded on any authority, but the use was repeated by Dillon LJ in *Derby and Co Limited* in the passage which I have quoted. I respectfully agree with the usage. It is of the utmost importance in the context of litigation that a party should be able to rely on the discovery of his adversary. Exceptions to that ability must not extend beyond fraud and mistake. Cases of mistake are stringently confined to those which are obvious, that is to say those which are evident. This excites the question: evident to whom? The answer must be to the recipient of the discovery. If the mistake was evident to that person then the exception applies, but what of the case where it was not evident but would have been evident to a reasonable person with the qualities of the recipient? In this context the law ought not to give an advantage to obtusity, and if the recipient ought to have realised that a mistake was evident then the exception applies ...". The Court of Appeal went on to say that the onus is on the party who has mistakenly disclosed the document to satisfy the court that a solicitor receiving the document ought to have realised that there had been a mistake. 49. The most recent summary of the applicable principles is to be found in the case of *Al Fayed-v-Commissioner of Police of the Metropolis*

[2002] EWCA Civ 780 which concerned an application in which counsel's opinion was inadvertently disclosed on discovery. The case post dated the introduction of the new Civil Procedure Rules but the court made clear that the principles remain those derived from the pre-Civil Procedure Rules case law. Clarke LJ summarised the relevant principles at paragraph 16 of his judgment as follows:- "In our judgment the following principles can be derived from those cases:- (i) A party giving inspection of documents must decide before doing so what privileged documents he wishes to allow the other party to see and what he does not. (ii) Although the privilege is that of the client and not the solicitor, a party clothes his solicitor with ostensible authority (if not implied or express authority) to waive privilege in respect of relevant documents. (iii) A solicitor considering documents made available by the other party to litigation owes no duty of care to that party and is in general entitled to assume that any privilege which might have otherwise have been claimed for such documents has been waived. (iv) In these circumstances, where a party has given inspection of documents, including privileged documents which he has allowed the other party to inspect by mistake, it will in general be too late for him to claim privilege in order

to attempt to correct the mistake by obtaining injunctive relief. (v) However, the court has jurisdiction to intervene to prevent the use of documents made available for inspection by mistake where justice requires, as for example in the case of inspection procured by fraud. (vi) In the absence of fraud, all will depend upon the circumstances, but the court may grant an injunction if the documents have been made available for inspection as a result of an obvious mistake. (vii) A mistake is likely to be held to be obvious and an injunction granted where the documents are received by a solicitor and; (a) the solicitor appreciates that a mistake has been made before making some use of the documents; or (b) it would be obvious to a reasonable solicitor in his position that a mistake has been made; and, in either case, there are no circumstances which would make it unjust or inequitable to grant relief. (viii) Where a solicitor gives detailed consideration to the question whether the documents had been made available for inspection by mistake and honestly concludes that they have not, that fact will be a relevant (and in many cases an important) pointer to the conclusion that it would not be obvious to the reasonable solicitor that a mistake has been made, but it is not conclusive; the decision remains a matter for the court. (ix) In both the cases identified in (vii)(a) and (b) above there are many circumstances in which it may nevertheless be held to be inequitable or unjust to grant relief, but all will depend upon the particular circumstances. (x) Since the court is exercising an equitable jurisdiction, there are no rigid rules." The Court of Appeal went on in that case to hold that, while the solicitor might have concluded that a mistake had been made, it was by no means obvious. In those circumstances an injunction was refused. 50. The principles to be derived from the above three cases are equally applicable in Jersey. Thus, in the context of a privileged document which is inadvertently disclosed as part of the discovery process, the Court may intervene by injunction to prevent the use of such a document where inspection has been procured by fraud or where the document has been made available for inspection as a result of an obvious mistake. We should add that Advocate Journeaux sought to argue that sub-paragraph (vii)(a) of the formulation by Clarke LJ set out above means that, provided the application for the return of the document is made before the other side has made some use of it, an injunction should be granted because the solicitor will by definition have appreciated that a mistake has been made once the application for the return of the document (with supporting evidence) has been produced. We do not read the sub-paragraph in that way. To do so would be quite contrary to what is said in *Guinness Peat and Pizzey* and would also be contrary to the earlier sub-paragraphs of the observations of Clarke LJ himself. In our judgment, the sub-paragraph is intended to deal with the situation where a lawyer who has realised that the document has been disclosed by mistake nevertheless goes on to make use of it. In those circumstances, despite the use, Clarke LJ is saying that an injunction may be granted because it would clearly be unconscionable to allow the solicitor to take advantage of his decision made in the knowledge that the document has been disclosed by mistake. Application to the facts 51. We accept the evidence of Miss McNulty and Mr Turnbull in their affidavits to the effect that they did not in fact realise that document 135 was privileged. The issue then is whether it would have been obvious to a reasonable lawyer in

their position that it was privileged and had been disclosed by mistake. 52. Advocate Journeaux argued that it must have been obvious. We would summarise his reasons for so arguing as follows:- (i) The e-mail ends by saying "I look forward to hearing from you with underwriter's approval of my proposed letter" . This should have alerted Bedell Cristin to the fact that this was a communication with representatives of the defendant's professional indemnity insurers. (ii) Strength is added to this submission by the fact that, in her affidavit, Miss McNulty, having asserted that at the time she thought that this was an internal e-mail, goes on to say:- "There was nothing in document 135 to suggest it was anything other than an internal document although I can now see on closer inspection that it could be a communication to the defendant's professional indemnity insurance brokers." (iii) Although the draft e-mail did not itself give Mr Bailey's (as the recipient) address or identify him in any way, the fact that he was a representative of Howden should have been obvious because of various draft bills of costs which have been presented by the defendant at a hearing for security for costs before the Master on 2nd September, 2010. These draft bills of cost from the English firm of Kennedys were addressed to Mr Bailey and his address was shown as being at Howden. Miss McNulty had been present at the hearing before the Master. (iv) No other documents containing exchanges between the defendant and its insurers or brokers had been disclosed. This should have alerted Bedell Cristin to the fact that this particular document had been disclosed by mistake. (v) The content of the document, comprising as it did what was clearly a response to some questions posed and a potentially damaging observation in that response, should have alerted Bedell Cristin to the fact that this was a privileged document. The document was on its face clearly related to litigation in reasonable prospect. (vi) Even if the document was an internal document as Bedell Cristin thought, it was still written with the dominant purpose of conducting the defendant's defence to a potential claim by the plaintiff and such a document would be passed on to the defendant's lawyers whenever and however they were instructed. It would still have been privileged and should have been realised as such by Bedell Cristin. 53. Advocate Robinson, on the other hand, submitted that it was not obvious that the document had been disclosed by mistake. We would summarise his arguments as follows:- (i) The fact that it did not occur to Mr Turnbull or Miss McNulty that the document was privileged was supportive of the fact that it was not obvious. (ii) There was nothing in the document itself to identify who Mr Bailey was. He could easily have been a member of the staff of the defendant and there was nothing to gainsay the impression derived by Mr Turnbull and Miss McNulty that this was an internal document. (iii) It was asking far too much to expect a busy lawyer to remember that, in a separate matter dealing with an application for security of costs, a draft bill of costs produced for that hearing had contained the name of Mr Bailey and indicated that he worked at Howden. (iv) On his evidence, Mr McCormick, the legal assistant employed by Carey Olsen with responsibility for dealing with discovery, had reviewed the documents intended to be disclosed (including document 135) at least twice in order to check for privileged documents. In the course of doing so, he had removed a couple of documents that were privileged. He was therefore approaching his task with care. Despite this he had

not removed document 135. If it was so obvious that document 135 was privileged, it was very surprising that Mr McCormick had not picked it up. (v) Whilst on close analysis it could be seen that there is a reference to underwriter's approval of the proposed letter, this was not sufficient of itself to make it obvious that this was a privileged communication. (vi) It was perfectly understandable for the lawyers at Bedell Cristin to have assumed that this was an internal document and the mere fact that it contained a potentially damaging remark was not something to alert them; it was quite common for internal e-mails to reveal damaging material but the whole point of the discovery process was that disadvantageous documents had to be disclosed as well as those which were of assistance. (vii) In summary, there was nothing to make it obvious to Miss McNulty and Mr Turnbull that this had not been deliberately disclosed by the defendant. It was specifically listed in the list of documents and the plaintiff was entitled to assume that it had been duly considered by the advocates for the defendant and a decision had been taken to disclose it. 54. We have carefully considered the competing

submissions.

We have concluded that it would not have been obvious to a reasonable lawyer that document 135 was privileged and had been disclosed by a mistake. We so find essentially for the reasons put forward by Advocate Robinson. In particular, this was not something such as counsel's opinion which is obviously privileged. It was a draft of an e-mail to an unknown person (we accept that it was not reasonable to expect Mr Turnbull and Miss McNulty to remember the identity and business of Mr Bailey from the draft bills of costs referred to in the security for costs hearing). Although there is reference to seeking underwriter's approval, we do not consider that it is obvious that it was a privileged document. In this connection we note that the solicitor employed by the defendant's advocates reviewed the documents to be disclosed twice and in the course of doing so, removed a couple which he considered to be privileged. Yet he did not remove document 135. Unlike the plaintiff's advocates, he was reviewing the documents with a specific mission to check them for privilege. The fact that he did not remove document 135 is supportive of the fact that it was not obvious that the document was privileged. 55. For the reasons given we conclude that this was not a mistake which should have been obvious to the lawyers at Bedell Cristin who reviewed the documents which were provided on discovery and accordingly it is not a case where it would be appropriate to grant an injunction. The application is therefore dismissed. *Authorities Bene Limited-v-VAR Hanson and Partners*

[1997] JLR N 10A. *Taylor-v-Taylor*

[1990] JLR 124 . *Re Continental Trust Company Limited*

[1991] JLR 83 . *Matthews-v-Voisin and Company*

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