

JERSEY / JUDGMENT

Cater Allen v Viberts [2001]

JRC 159 (25 July 2001)

[2001] JRC 159

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judgment

The bailiff 1. This is a representation brought by Cater Allen Trust Company (Jersey) Limited ("the Representor") seeking, inter alia, that the firm of Viberts ("the respondents") be enjoined from acting for any member of a group of investors in the Delta Scheme. The Delta Scheme was an investment scheme in relation to which the Jersey Financial Services Commission ("the JFSC") has brought proceedings against the Representor amongst others ("the JFSC proceedings"). 2. The history of the matter can be summarized as follows. In October 1991, the firm of K. Hooper Valpy & Co. accepted a general retainer to provide legal advice to the Representor. The retainer was accepted in letters by Advocate Scholefield, then a partner of K. Hooper Valpy & Co., to Mr. Peter Langton, a director of the Representor. Subsequently, the firm of K. Hooper Valpy & Co. was merged into the firm of Vibert & Valpy. Advocate Scholefield and Advocate Le Quesne were at all material times partners in Vibert & Valpy. Vibert and Valpy is the predecessor firm of the respondents, of which Advocate Scholefield and Advocate Le Quesne are both partners. 3. Pursuant to this general retainer, legal advice was sought by and given to the Representor by Advocate Scholefield. The Representor provided Advocate Scholefield with confidential documents and confidential information for the purpose of obtaining such advice. Such advice was sought and/or given at least until May 1996. In particular, advice was sought and obtained by the Representor from Advocate Scholefield in relation to the Delta Scheme and the role in it of a company which with the Representor then had a business relationship, A. P. Black (Jersey) Limited ("Black Jersey"). 4. In 1996, Advocate J. G. P. Wheeler was appointed to conduct an investigation under Article 128 of the Companies (Jersey) Law 1991 in relation to the Delta Scheme. Advocate Wheeler was informed that, when arranging for Black Jersey to be incorporated, the Representor through its director Mr. Langton sought the advice of Advocate Scholefield as to the necessary consents required to be obtained by Black Jersey. The respondents deny that that information provided to Advocate Wheeler is correct, and whether such advice was sought and given is an issue pleaded in the representation which commenced the JFSC proceedings. 5. In June 1993 however, it is accepted that Advocate Scholefield was asked for advice by the Representor in relation to Black Jersey and the Delta Scheme. Advocate Scholefield tendered advice, including advice by letter dated 8 th June 1993. By that stage, Advocate Scholefield had become a partner in the merged firm of Vibert & Valpy. The Representor alleges

that the advice given in June 1993 was tendered at a critical period in the history of matters which lie at the heart of the JFSC proceedings. 6. In May 1996, Advocate Scholefield sent a letter before action to the Representor relating to actions to be brought by various investors in the Delta Scheme. Advocate Lacey of Messrs. Mourant du Feu & Jeune ("Mourants") who were then acting for the Representor immediately objected to a conflict of interest on the part of Advocate Scholefield. Following an exchange of correspondence, Advocate Scholefield proposed that he would withdraw from the litigation and that the conduct of the investor claims would be taken over by Advocate Le Quesne. A Chinese Wall would be erected between Advocate Scholefield and Advocate Le Quesne so that no privileged material would pass between them. On that basis, Mourants confirmed that the Representor was content for the respondents to continue acting in relation to the investor claims. By letter of 31 st May 1996, Advocate Le Quesne confirmed that he knew nothing of the earlier exchanges between Advocate Scholefield and the Representor (save for their existence) and that he would do his best to ensure that he would learn nothing of the contents of such exchanges and that he would inform Mourants if he did learn any such thing. An undertaking in similar terms was given by Advocate Scholefield to Mourants on behalf of the Representor. 7. In November 1996, the actions brought by the various investors were adjourned sine die. Advocate Le Quesne continued to act for the investor group in connection with the investigation being conducted by Advocate Wheeler. On nd March 1999, Advocate Le Quesne wrote to Advocate Wheeler, who had by then prepared his report on the Delta Scheme. Advocate Le Quesne wrote (in relation to the suggestion that Advocate Scholefield had given advice in April 1992) as follows:- "I have discussed this in detail and at length with Advocate Scholefield and we have separately and together examined the file, Advocate Scholefield's notes of advice given to Cater Allen before, at the time of and subsequent to this particular matter, and accounts for Cater Allen before, at the time of and subsequent to this matter". This letter subsequently came to the attention of Mourants who immediately protested that the respondents were in breach of their duties of confidence and privilege. No notice was given to Mourants on behalf of the Representor before the discussions between Advocate Scholefield and Advocate Le Quesne took place and Mourants were not informed of the letter to Advocate Wheeler until they received a copy of it from Advocate Wheeler on 9 th April 1999. Correspondence has subsequently taken place between Mourants and the respondents but the respondents have declined to withdraw from the JFSC litigation and to cease acting for the investors in those proceedings. The Representor accordingly seeks the injunction to which we have referred. 8. Mr. Binnington submits that the relief should be granted on two grounds - (i) The protection of the Representors legal privilege and confidential information; it was wholly wrong that Advocate Le Quesne should be enabled to use that information in litigation in which the Representor was involved by acting for a party with an adverse interest in that litigation; (ii) It was not proper for an advocate to appear in a case in which he or a member of his firm was a potential witness. 9. We deal first with the first ground of objection. Mr. Binnington submitted that the application was straightforward, the law was well settled and the facts were clear. The respondents were seeking to prevent the law of confidence from being applied to them and to ignore the obligations of legal professional privilege which bound them. Counsel submitted that the correct approach was set out by Lord Millett in *Bolkiah v KPMG*

[1999] 2AC 223 at 236 in a passage which was applied by this Court in *Hirschfield v Sinel*

(1999) JLR 55 - "It is in any case difficult to discern any justification in principle for a rule which exposes a former client without his consent to any avoidable risk, however slight, that information which he has imparted in confidence in the course of a fiduciary relationship may come into the possession of a third party and be used to his advantage. Where in addition the information in question is not only confidential but also privileged, the case for a strict approach is unanswerable. Anything less fails to give effect to the policy on which legal professional privilege is based. It is of overriding importance for the proper administration of justice that a client should be able to have complete confidence that what he tells his lawyer will remain secret. This is a matter of perception as well as substance. It is of the highest importance to the administration of justice that a solicitor or other person in possession of confidential and privileged information should not act in any way that might appear to put that information at risk of coming into the hands of someone with an adverse interest". 10. Counsel submitted that it was plain and obvious that confidential information had passed to the respondents and that that information was or might be relevant to the JFSC proceedings. Those proceedings involved allegations as to the conduct of the Representor in relation to the Delta Scheme and raised issues which were at or close to the heart of the legal advice sought and obtained from Advocate Scholefield. The respondents were in possession of confidential information relating to many of those issues. 11. Advocate Le Quesne, who appeared for the respondents, has conceded that confidential information was communicated to Advocate Scholefield in June 1993 and that prima facie that information is or was covered by legal professional privilege. Counsel submits, however, that the privilege has been waived, and that the information no longer remains confidential; furthermore, he asserts that it is not relevant to the JFSC proceedings. 12. In relation to waiver, Advocate Le Quesne relies upon four letters, one from the Representor and three from Mourants, all of which were disclosed to Advocate Wheeler in the context of his enquiry under the Companies (Jersey) Law 1991. The three letters from Mourants disclose that legal advice was sought from Advocate Scholefield in 1992, prior to the formation of Black Jersey (we repeat that this is denied by Advocate Scholefield). The fourth letter discloses that in June 1993, Advocate Scholefield advised that Black Jersey should have sought a licence under the Regulation of Undertakings and Development (Jersey) Law 1973. Advocate Le Quesne submitted that having waived the legal professional privilege to that extent the Representor could not now assert it in relation to other matters. He referred to *Paragon Finance plc and others v. Freshfields*

[1999] 1WLR 1183 where Lord Bingham of Cornhill CJ stated at 1188 - "A client expressly waives his legal professional privilege when he elects to disclose communications which the privilege would entitle him not to disclose. Where the disclosure is partial, issues may arise on the scope of the waiver. Practical difficulties occur in determining such issues But the law is clear. While there is no rule that a party who waives privilege in relation to one communication is taken to waive privilege in relation to all, a party may not waive

privilege in such a partial and selective manner that unfairness or misunderstandings may result". 13. Does such unfairness arise here? In our judgment, it does not. The Representor has not disclosed what information was given to Advocate Scholefield upon which he gave his advice in 1993; but in any event, there is no unfairness to the respondents. They are not even defendants in the JFSC proceedings. The Paragon case was on entirely different facts. There, the solicitors were defendants in the proceedings and required release from the obligation of confidence in order to defend themselves. 14. Some confusion appeared to us to be evident from the respondents' submissions in relation to the distinction between the duty arising from legal professional privilege and the obligation of confidence arising from possession of confidential information belonging to another. Even if there had been a total release from the duty of legal professional privilege, which in our judgment there has not, there remains the obligation of confidentiality. Apart from the specific documents disclosed to Advocate Wheeler, we can see no evidence of a waiver of confidentiality in relation to the information given to Advocate Scholefield (and now in the hands of the respondents) in the context of the then existing relationship of lawyer and client. 15. As to the relevance of the information to the JFSC proceedings, it appears to us plain that it may be relevant. The precise way in which the case may develop is uncertain, but it is clear that issues will or may arise which are close to the heart of the advice sought and obtained from Advocate Scholefield in relation to the Delta Scheme. It seems to us that there was a tacit acceptance of that possibility by Advocate Scholefield when he agreed to withdraw and to establish a Chinese Wall. 16. Should we then, in the exercise of our discretion, grant the injunction notwithstanding the inconvenience and expense to the investors that was underlined to us by Advocate Le Quesne in the course of his submissions? We remind ourselves that in May 1996, an undertaking was given by Advocates Le Quesne and Scholefield of the respondents in the clearest terms. Advocate Lacey, then acting for the Representor, wrote to Advocate Scholefield in the following terms:- "I refer to our telephone conversations last week with reference to the conflict as raised concerning your own involvement in the above proceedings for and on behalf of the Plaintiffs. You confirmed to me last Friday that you do indeed have a professional conflict and are unable to act further on behalf of any of the Plaintiffs in the above litigation. You then proceeded to propose that Advocate Le Quesne take over the conduct of the litigation on behalf of the Plaintiffs upon your undertaking that you would cease immediately to be involved in the litigation, that in effect a "Chinese wall" will be immediately imposed insofar as your own knowledge/involvement with Cater Allen Trust Company (Jersey) Limited in connection with the matters raised in this litigation is concerned vis-à-vis Advocate Le Quesne's future conduct of the litigation on behalf of the Plaintiffs. You furthermore confirmed that the file which you hold relating to Cater Allen Trust Company (Jersey) Limited and A. P. Black (Jersey) Limited would be put into a safe place and that the Plaintiffs in the above litigation would have no access whatsoever to the contents of that file. You further confirmed that none of your advice to Cater Allen Trust Company (Jersey) Limited has to date been disclosed to any of the Plaintiffs. I am able to confirm that Cater Allen Trust Company (Jersey) Limited and A. P. Black (Jersey) Limited

are prepared for your firm to continue acting on behalf of the Plaintiff in the above litigation providing the undertaking and assurances given by your, as detailed above, are observed fully". On 31 st May 1996, Advocate Le Quesne replied - "Christopher Scholefield will write to you separately in relation to the undertaking which you seek, and which I know that he will give. I can confirm too that I know nothing of the earlier exchange between him and your client which has given rise to the apparent conflict, save that there was such an exchange; I know nothing of the contents. I also confirm that I will do my best to ensure that I learn nothing of the contents, and if I should learn any such thing, I will inform you". On 3 rd June 1996, Advocate Scholefield wrote - "You felt that I had been inconsistent in my remarks as to whether or not I have a conflict of interest in continuing to act for the Plaintiffs in this case. The existence of a Cater Allen re A. P. Black file certainly makes a conflict look likely, but upon consideration of its contents, I can see nothing relevant to the cause of action upon which the Plaintiffs rely. However, to avoid further difficulty I hereby confirm to you that I am handing over conduct of this matter to my partner, Advocate David Le Quesne and I give you my professional undertaking that I shall have no further active role in the conduct of this case". 17. Notwithstanding those undertakings, the Chinese Wall was, without notice to the Representor, torn down, if we may employ the epithet used by Mr. Binnington, early in 1999. The breach of the undertakings was confirmed by Advocate Le Quesne when he wrote to Advocate Wheeler, following receipt of Advocate Wheeler's report, on 22 nd March 1999, stating - "I write this letter not as the legal representative of the Plaintiffs, but as a partner of Advocate Scholefield. In your report you have quoted or referred to an allegation that "Cater Allen, through its director Mr. Langton, sought the advice of Advocate C. I. Scholefield as to the necessary consents required to be obtained in Jersey for APB(J)L". The quotation comes from paragraph 6.6 of your report and from Mourant du Feu & Jeune's letter to the Attorney General of 3 rd July 1996 which is at section 5 of appendix 1. The following sentence in that letter reads "In the light of the legal advice obtained, no application was considered necessary, nor made, for any permits under the Collective Investment Fund (Jersey) Law 1988 ("the 1988 Law"). The clear meaning of this is that Advocate Scholefield either specifically advised that it was not necessary to make an application under the 1988 Law, or that, in circumstances in which it was appropriate for him to advise on the necessity of such an application, he did not advise that it was necessary. The alternatives really amount to the same thing. I have discussed this in detail and at length with Advocate Scholefield and we have separately and together examined the file, Advocate Scholefield's notes of advice given to Cater Allen before, at the time of and subsequent to this particular matter, and accounts for Cater Allen before, at the time of and subsequent to this matter". 18. Advocate Le Quesne submitted that the breach of the Chinese Wall was a side issue. The wall had been breached because Advocate Wheeler's report contained a serious mistake following the lie that legal advice was sought by and given to the respondents by Advocate Scholefield in April 1992. When pressed by the Court as to the express terms of the undertaking which he had given, Advocate Le Quesne replied that he should perhaps have included in his undertaking a proviso about dishonesty and that that was why he had

felt obliged to disclose what was wrong. 19. In our judgment, that explanation is wholly unsatisfactory. A professional undertaking is a serious matter. If lawyers are not able to rely completely upon undertakings given by colleagues, the basis of trust which underpins much work of the profession will be eroded. It is clear from Advocate Le Quesne's letter that the undertaking was broken not in the interests of the investor clients but in the perceived interests of the respondents. Whether or not there was an inaccuracy in the report of Advocate Wheeler caused by the Representor (and we make no finding in that respect), the breach of the undertaking, particularly without notice to the Representor or its legal advisers, was wrong. The interests of the respondents could have been protected in other ways. So far as Advocate Le Quesne was concerned, his duty was to respect the undertaking given until he was released from it. 20. We accordingly find, in the exercise of our discretion, that it is right and in the interests of justice that an injunction should issue in the terms of paragraph A of the representation on the first ground advanced by Mr. Binnington. In the light of our finding on that ground, there is no need for us to consider the second ground advanced by counsel for the Representor. We wish to add only this. The hearing of the representation was conducted by consent and for good reasons in camera. While we are prepared to hear submissions on the matter, there appears to us on the face of it to be no good reason why this judgment should not be delivered in open court.

Authorities. Hirschfield-v-Sinel

(1999) JLR 55 . Les Pas Holdings-v-Receiver General & States Greffier

(1995) JLR 163 . Bolkiah-v-KPMG

(1999) 2 AC 222 . Re A, a firm of Solicitors (2000) 1 Ll Rep 31. Halewood International-v-Addleshaw Booth & Co. (2000) 1 Ll Rep 298. Paragon Finance-v-Freshfields

(1999) 1 WLR 1183 . Page Last Updated: 02 Nov 2015 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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