ROYAL COURT
(Samedi Division) 112.
13th June, 1997

Before: The Judicial Greffier

Between	Bene Limited	Plaintiff
And	V.A.R. Hanson and Irene Shelton trading as VAR Hanson & Partners	First Defendants
And	John Smith	Second Defendant
And	The Public Services Committee of the States of Jersey	Third Defendant
And	The Public of the Island of Jersey (by original action)	Fourth Defendant

AND

Between	The Public of the Island of Jersey	Plaintiff
And	Bene Limited (by counterclaim)	Defendant

Application by the Second, Third and Fourth Defendants in the original action (hereinafter referred to as "the Public Defendants") for specific discovery of various categories of documents to be made by the Plaintiff in the original action (hereinafter referred to as "the Plaintiff").

Advocate P.C. Sinel for the Plaintiff;
Advocate M.J. Thompson for the Public Defendants.

JUDGMENT

THE JUDICIAL GREFFIER: This action relates to the property known as 27 Hill Street and 16 Queen Street, St. Helier. The Fourth Defendant took an assignment of an existing lease of these premises and sub-let the ground floor of 16 Queen Street to the Plaintiff. During 1991, it became apparent that there were certain problems with the building and, as a result of these, raking shores were put up on Queen Street in order to brace the frontage of the building towards that street. The Plaintiff has various complaints against the Public Defendants arising from this matter, including that all the work was done too slowly and that the raking shores were unnecessary and these complaints have led to a substantial claim for damages, for loss of profits. The Fourth Defendant has counterclaimed for two-fifths of the costs of the relevant work. The discovery of documents made by the Plaintiff has been extensive but attached to the Public

Defendants' Summons dated 19th August, 1996, was a Schedule seeking thirty-nine categories of documents by way of specific discovery. Categories 1-8 inclusive, 17, 21 and 39 had been dealt with at an earlier hearing.

In relation to categories 10, 16, 31, 34, 36, 37(a) to (e) inclusive and 38, Advocate Sinel stated in one of his affidavits that no further documents existed and, during the course of the hearing, Advocate Thompson indicated, on behalf of the Public Defendants that this was accepted. At the hearing, although there was no statement to this effect in his affidavits, Advocate Sinel also confirmed that there were no further documents in categories 9, 26 and 33 and this also was accepted on behalf of the Public Defendants.

The leading Judgment in Jersey in relation to specific discovery remains that of the Court of Appeal in Victor Hanby Associates Limited and Hanby v. Oliver (1990) JLR 337 CofA. The most important part of that Judgment is the summary which commences on line 37 on page 350 thereof and which reads as follows:-

> *"A party seeking further discovery after an affidavit has been made following an Order under r.6/16(1), must persuade the court, that, despite the affidavit, his opponent has not complied with the Order. It seems to us that it must be necessary, in these circumstances, for the party seeking further discovery to show, by evidence on oath, not only a prima facie that his opponent has, or has had, documents which have not been disclosed, but also that those documents must be relevant to matters in issue in the action. The court must be satisfied that the documents will contain information which may enable the party applying for discovery to advance his case, damage that of his opponent, or lead to a train of enquiry which may have either of those consequences. It is not enough to show only that the documents may be relevant in the sense described. A court faced with evidence which establishes no more than that the documents may or may not be relevant would not be entitled to disregard the oath of the party who, having (ex hypothesi) seen and examined the documents with the assistance of his advocate, has sworn, in effect, that they are not relevant.*
>
> *We should add that, even where a prima facie case of possession and relevance is made out, an order for specific discovery should not follow as a matter of course. The court will still need to ask itself the question whether an order for specific discovery is necessary for disposing fairly of the cause or matter."*

In this case, in addition to these principles, I had to consider claims by the Plaintiff that certain categories of documents were covered by legal advice privilege or by litigation

privilege and the counter-argument of the Public Defendants that in some cases, even if they were, there had been a waiver of such privilege.

The basic rule in relation to legal advice privilege is set out on page 161 of Matthews & Malek: Litigation Library: "Discovery" and reads as follows:-

> *"Communications between a lawyer in his professional capacity and his client are privileged from production if they are confidential and for the purposes of seeking or giving legal advice for the client."*

The issue of the involvement of third parties in relation to legal advice privilege is dealt with in section 8.14 of Matthews & Malek beginning on page 162 and the relevant section reads as follows:-

> *"In principle it should make no difference if the confidential communications concerned between lawyer and client are effected via third parties, whether they are the agent of the lawyer or the client. It also applies to an interpreter. However, the third party must be, not merely an agent of the solicitor or client in a general sense, but an agent for the purpose of communicating with the other party to give or obtain legal advice."*

The basic rule in relation to litigation privilege is set out in section 8.26 commencing on page 168 of Matthews & Malek and reads as follows:-

> *"Confidential communications made, after litigation is commenced or even contemplated, between (a) a lawyer and his client, (b) a lawyer and his non-professional agent, or (c) a lawyer and a third party, for the sole or dominant purpose of such litigation (whether for seeking or giving advice in relation to it, or for obtaining evidence to be used in it, or for obtaining information leading to such obtaining) are privileged from production."*

Section 8.32 on page 171 reads as follows:-

> *"When is litigation contemplated?*
>
> *First of all, the test is not when litigation commences. Nor is it even when the cause of action arises, nor when a decision is taken to obtain legal advice. Bray put the test in this way:*
>
> *"There must be some definite prospect of litigation and not a mere vague anticipation of it."*

The modern test is simply when litigation is "reasonably in prospect" which may precede in time all of the above. It should be noted that the "contemplated" litigation need not be the particular litigation in which the discovery is being sought, but may be other litigation, involving different parties and subject-matter."

Section 8.38 on page 174 deals with the matter of the purpose for which a document is brought into existence and commences as follows:-

"A document may be brought into existence for a number of purposes, and it will be necessary to analyse these purposes in considering whether it attracts litigation privilege. If a document is brought into existence for more than one purpose, it will only be privileged under this head if the dominant purpose for which it came into existence was that of submitting it to a lawyer for advice (or for obtaining it for that purpose) and use in litigation, actual or anticipated."

Section 8.40 on page 175 deals with communications with third parties and reads as follows:-

"There are two cases to consider: first, where the lawyer himself communicates with third parties, and second where the client does so. Each case itself can be sub-divided into two, agency or no agency. The case of the lawyer communicating with third parties is considered first. The third party may be the lawyer's own agent for communicating with his client, or he may be the client's own agent for communicating with his lawyer; in either case, the other conditions being satisfied, the communications in question will be protected. Alternatively, the third party may be no-one's agent, and the lawyer may be communicating with him as a principal, e.g. as an expert or as a witness. In that case, where the communication is made with a view to existing or contemplated litigation, it is protected, as where a surveyor's report is obtained by the lawyer so as to be able to advise his client or where a lawyer obtains documents coming into existence with a view to enabling him to carry on, or advise with reference to, actual or contemplated litigation; even if the documents are sent to him anonymously. It should be noted that, where a third party prepares a document (e.g. a report) which is privileged, the privilege is that of the client, not of the third party. If the client waives his privilege, the witness has none. Note also that although communications with an expert may be privileged, his opinion is not, and he can for example be served with a subpoena requiring him to testify as to his opinion and also reveal on what original materials he based that opinion."

Chapter 9 of Matthews & Malek deals with waiver of privilege. The start of paragraph 9.03 reads as follows:-

> *"WHAT IS A WAIVER?*
> *A waiver can be express or implied. An express consent to the opposing party's inspecting material known to be privileged is a waiver, though it can be withdrawn at any time before the inspection takes place. A deliberate supply of a privileged document to the opposing party in litigation or his agent or representative would normally amount to an express waiver. At the very least that confidentiality which is an essential element of privilege has gone."*

Section 9.13 on page 227 of Matthews & Malek begins as follows:-

> *"It is clear that mere inclusion of a privileged document in Schedule 1, Part 1 of the List of Documents will not be treated as a waiver of privilege; if the document was mistakenly so included, the Court will ordinarily permit the party whose document it is to amend the List at any time before inspection has taken place. But once inspection has taken place pursuant to the Rules, the general rule is that the privilege has gone, and it is too late to correct the mistake, the reason being that the substance of the document has been communicated to the other side, who (in the absence of special circumstances) cannot be prevented from giving secondary evidence of those contents or otherwise making use of them. The position is a fortiori if copies have been supplied."*

The last two lines of section 8.13 on page 162 of Matthews & Malek, which section is in relation to legal advice privilege, read as follows:-

> *"Nor does privilege attach to a solicitor's attendance note of what happens in court or at a meeting between the parties."*

The last quotation is based upon the case of Parry v. News Group Newspapers Ltd. (1990) 140 New L.J. 1719, C.A. and there is a relevant section on page 5 thereof which reads as follows:-

> *"In all those cases the solicitor's attendance note is recording what happened as a matter of record, setting out what passed publicly between the two parties or their advisers. It matters not whether the meeting or the telephone conversation was at the time without prejudice. The 'without prejudice' label may prevent something being given in evidence, but that is not on the ground of legal professional privilege with which we are alone concerned here. In the present case it is said that if the*

discussion between Mr Barton-Taylor and Mr Crone was originally without prejudice, it led to agreement and accordingly ceased to be without prejudice. That is a separate point. Documents which are merely without prejudice and not governed by legal professional privilege are disclosable, although it may be that they cannot be put in evidence until certain other matters have happened to remove the 'without prejudice' bar. That being so, it seems to me that the position is the same as in Ainsworth & Wilding. The attendance note is not a privileged document, but any communication by Mr Barton-Taylor to his clients informing them about his discussion with Mr Crone and advising them or seeking their comments or further instructions, or anything of that nature, is a privileged document."

In the case of George Doland Limited v. Blackburn Robson Coates & Co. (a firm) and another (1972) 3 All ER 959, there is a summary of the facts as follows:-

"During the hearing of the action the court, on the plaintiffs' application, admitted evidence given by their solicitor relating to a telephone conversation which he had had with the plaintiffs' managing director relating to two matters raised by the action. The defence sought to cross-examine the plaintiffs' solicitor as to any document which might have come into existence or any oral conversation which might have taken place from the date of the oral conversation up to the date of proceedings, including any proofs from witnesses or instructions to counsel.

Held - The mere fact that the plaintiffs might have waived the professional privilege which existed between client and solicitor, did not also result in the waiver of the further privilege which protected documents brought into existence for the purpose of litigation. Consequently, cross-examination would not be allowed on matters relating, for example, to brief to counsel and proofs taken from witnesses. However, the defendants, up to the date of the impending litigation, were entitled to cross-examine on any documents relating to the matters contained in the telephone conversation (see p 962 a to c, post)."

In the case of Great Atlantic Insurance Co v. Home Insurance Co and others (1981) 2 All ER 485, on page 492 there is the following relevant section:-

"In George Doland Ltd v. Blackburn Robson Coates & Co the deliberate waiver of privilege of certain communications between solicitor and client relating to two particular subject matters before litigation became pending or contemplated involved waiver of any other communications relating to those two subject matters but did not involve

waiver of the further privilege which applied to documents which were brought into existence after litigation was pending or contemplated. In Nea Karteria Maritime Co Ltd v. Atlantic and Great Lakes Steamships Corpn (11th December 1978, unreported) decided by Mustill J the judge succinctly summarised the position as follows:

'I believe that the principle underlying the rule of practice exemplified by Burnell v. British Transport Commission is that, where a party is deploying in court material which would otherwise be privileged, the opposite party and the court must have an opportunity of satisfying themselves that what the party has chosen to release from privilege represents the whole of the material relevant to the issue in question. To allow an individual item to be plucked out of context would be to risk injustice through its real weight or meaning being misunderstood. In my view, the same principle can be seen at work in George Doland Ltd v Blackburn Robson Coates & Co in a rather different context.'"

During the course of the hearing, I indicated that Requests 13, 18, 20, 24 and 25 would be refused. However, I am now going to analyse these Requests and all the remaining Requests in relation to which a decision is needed in order to give my decisions in relation thereto and the reasons therefor.

Requests 11, 12, 19, 27, 28 and 30 all raise similar points. In each case they relate to a meeting which took place between representatives of each side where there was a representative of Philip Sinel & Co present. The Public Defendants have obtained the notes of the meeting made by Mr. Carney or some other person who was working for the Plaintiff.

The Public Defendants' case is that such notes must exist, must be relevant to matters in issue between the parties and are necessary for disposing fairly of the cause or matter. The Plaintiffs do not deny this but allege that such notes are covered by litigation privilege upon the basis that the dominant purpose of the production of the notes was future litigation. The Public Defendants claim that the dominant purpose for the holding of the meetings and, therefore, for the production of notes was the matter of sorting out what work needed to be done to the property in order to render it safe and put it into a good state of repair. They also cite the Parry case in support of their contention that the notes of Philip Sinel & Co ought to be discovered.

It seems to me to be clear from the Parry case that insofar as the attendance notes of Philip Sinel & Co record what happened at the meeting, they are not privileged and are both relevant and necessary for disposing fairly of the matter. If, on the other hand, there are included on the notes advice which was to be given or was subsequently given to the Plaintiff or other

privileged material then such parts of the documents can properly be covered up. Accordingly, in relation to these categories, I am ordering specific discovery of those parts of the relevant notes which provide a record of what happened at the meetings. In my view, litigation privilege does not apply to those parts of the notes for two reasons:-

(a) firstly, because the dominant purpose of the production of the notes was to record what happened at the meeting and the dominant purpose of the meetings was to try to agree what work needed to be done and how it should be done; and

(b) because following the Parry case, such notes are not, in any event, privileged.

Request 13 related to the file copies of various documents which had been disclosed as part of papers held by the party to whom they had been written. I decided that, although these, technically, should have been disclosed on discovery, they were not necessary for disposing fairly of the cause or matter and so I refused this Request.

Request 14 related to a letter dated 13th February, 1992, written by a Mr. Mason of Alan Baxter & Associates, who were civil and structural engineers working on behalf of the Plaintiff, addressed to Mr. J Carney a quantity surveyor working on behalf of the Plaintiff. The letter refers to a meeting on site on 10th February, 1992, and encloses a preliminary report for the comments of Mr. Carney. It also makes reference to the costs of the work to be done and the best way of controlling this. The Public Defendants firstly seek the copy on the files of Philip Sinel & Co of the letter. This is refused for the same reason as Request 13, namely, that it is not necessary. The Public Defendants also seek all replies, comments and communications by Advocate Sinel in response to this letter and/or arising out of the report. The Plaintiff claims both legal advice privilege and litigation privilege in relation thereto. The Public Defendants claim that the dominant purpose for the production of any such documents was not litigation but an attempt to agree the extent of the repair works required.

Any legal advice which was given to the Plaintiff in relation to the report or the letter would be privileged. Any documents which were produced whose dominant purpose was for use in future litigation would be privileged. The issue does arise as to the point at which litigation was reasonably in prospect. Advocate Sinel says in his affidavits that it was reasonably in prospect from the time when he first started to act for the Plaintiff. Advocate Sinel is a specialist litigator and the very fact that the Plaintiff changed lawyers to him at a particular point in time tends to indicate that they were anticipating litigation. Accordingly, for the purposes of this hearing I have taken the view that litigation was a reasonable prospect throughout the period during which Advocate Sinel was acting for the Plaintiff.

In relation to Request 14 it is impossible for me, without looking at all the relevant documents, to determine which documents are relevant to matters in issue, necessary for the fair disposal of the action and not privileged. Advocate Sinel has sworn that all the documents are privileged and it does not seem to me that I can properly find otherwise and so this application is also dismissed.

Request 15 relates to a letter written by Mr. John Bisson of Bois Labesse, acting for the owner of the property, to Advocate Sinel dated 14th February, 1992. The details in Request 15 are inaccurate both as to the direction of the letter and as to the date thereof. The Request is for all communications between Philip Sinel & Co and Bailhache Labesse, including all notes of any conversation/meetings. The letter is in response to a letter dated 12th February, 1992, written by Advocate Sinel and from its contents it would appear that Advocate Sinel, on behalf of the Plaintiff, was urging the owner to enforce its rights as against the Public. The Plaintiff claims either that these letters are not relevant to any matter in issue or that they are not necessary or that they are covered by litigation privilege. It does not seem to me that the letter dated 12th February, 1992, would be covered by litigation privilege because it was written with a view to urging the owner to exercise their rights. In all probability the letter will indicate some dissatisfaction on the part of the Plaintiff but I cannot say that this Request has either passed the must be relevant test or the necessary test and so it is refused.

Request 18 relates to a telephone message from Advocate Sinel to Mr. Carney asking him to send on a copy of a letter written by the Second Defendant. The Request is for discovery of all notes maintained by both Mr. Carney and/or Advocate Sinel of all telephone conversations or meetings between them. This Request is refused because there is nothing here to displace the presumption that discovery has been made properly.

Request 20 relates to a note made by Mr. Carney of a telephone conversation which he had with Mr. Goodman. Mr. Goodman was an officer or employee of the parent company of the Plaintiff and it seems to me that for all effective purposes he was acting as an agent of the Plaintiff. The first part of the Request is for all telephone conversations, letters and communications between Mr. Carney and Mr. Goodman to be disclosed. It seems to me that any such communications were between one agent of the Plaintiff and another agent of the Plaintiff. This first part of the Request is in far too general a form and, in any event, there is nothing here to displace the presumption that discovery has been properly made and so it is refused. The second part of Request 20 relates to a reference in the note to a letter dated 8th May, 1992, between Mr. Carney and Philip Sinel & Co., which is to be sent to Mr. Goodman and there is a request for copies of that letter together with any letter to Mr. Goodman subsequent to the telephone conversation. It is

impossible for me, from the note, to know what was contained in that letter and to determine whether it is relevant and necessary or privileged. Accordingly, this Request is refused. The third part of this Request relates to a telephone call from Mr. Carney to Philip Sinel & Co., and this is very similar to Request 18 and it is refused for the same reasons.

Request 22 relates to a message from Mr. Goodman requesting that Mr. Carney ring him. This Request is extremely speculative and is similar to Request 18 and is similarly refused.

Request 23 relates to a note of a meeting between Mr. Carney and Advocate Sinel. The Request is for the disclosure of notes of all meetings between Mr. Carney and Advocate Sinel and of correspondence pursuant to or arising from such meetings. It is impossible for me to tell what would be relevant and necessary in relation to such meetings and, without looking at the contents of documents, to determine whether or not anything was covered by litigation privilege. There is, in my view, nothing to displace the presumption that discovery has been made properly and so this Request is refused.

Request 24 related to a letter written by the then Attorney General to Advocate Sinel. Mr. Carney had written notes on this and then sent it on to Mr. Goodman. The Request was for all communications between Mr. Carney and Mr. Goodman to be disclosed including notes of all or any meetings or telephone conversations. This is in much too wide terms and is also similar to the first part of Request 20 and is refused for the same reasons. The second Request under 24 is for all or any communications between Bene Limited and Mr. Goodman to be disclosed together with notes of all or any conversations or meetings between these entities. In my view, Mr. Goodman was acting as the agent of the Plaintiff at all relevant times and anything of this nature would have the nature of being an internal memo. The Request is, again, far too general and I cannot possibly determine issues of relevance and necessity or privilege and there is nothing put before me to displace the presumption that discovery has been properly completed.

Request 25 related to a letter dated 9th February, 1995, written by Mr. Carney to Mr. Mason of Alan Baxter & Associates. There is a reference in the letter to advice as to rights which exist under the terms of the assigned sub-lease of the Plaintiff. The Request is for discovery of all advice given as to the rights of the Plaintiff. The basis of the Request is that there has been a waiver of privilege in relation to such advice by virtue of the disclosure of this letter. Such advice would clearly be covered by legal advice privilege and might also be covered by litigation privilege. It does not seem to me that there is an issue between the parties as to what legal advice was given to the Plaintiff. Accordingly, it does not seem to me that there exists an issue in relation to which there has been a waiver of privilege. I am satisfied that there has not been any waiver of

privilege in this case. Thus, this Request fails under both the relevance test and the necessary test and upon the basis that such advice is privileged.

Request 29 related to Mr. Carney's notes of a meeting which was held on 27th March, 1993, at 11 a.m. involving various people who were acting for or working for the Plaintiff. This document is actually the notes of Mr. Carney in relation to that meeting. The first part of this Request is for discovery of all or any notes taken by Advocate Melia or anyone else from Philip Sinel & Co., and of all and any notes of other meetings between Philip Sinel & Co., and their client. The Public Defendants allege that there has been a waiver of privilege in relation to the notes of this meeting by virtue of the disclosure of Mr. Carney's notes. It does not seem to me that these notes relate to any particular issue between the parties and, therefore, I cannot see that there is an issue between the parties in relation to which a waiver has occurred. Furthermore, I am not satisfied that either the relevance test or the necessary test has been satisfied in relation to the notes of Philip Sinel & Co., in relation to this meeting. Accordingly, the first part of the Request is refused. The second part of the Request in relation to disclosure of notes relating to all of the meetings between Philip Sinel & Co., and the Plaintiff is far too wide. Insofar as legal advice was given at such meetings that would be privileged. Insofar as documents were produced for the purposes of future litigation that would be privileged. Furthermore, this Request is so general that I cannot possibly determine either the relevance or the necessary test and it does not seem to me that the presumption that discovery has been properly completed has been displaced. Accordingly, the second part of this Request is also refused.

Request 32 relates to part of Mr. Carney's time sheets. There is, in the Order of Justice, a claim for the costs of work completed by Mr. Carney up to a particular date and it seems to me that all time sheets which relate to that claim must be both relevant and necessary and ought to be disclosed on discovery. If those time sheets include notes for which a claim of privilege can properly be made then it seems to me that such a claim for privilege ought to be made by virtue of the relevant parts being covered up and, if an issue remains on these, then I can determine this at a later date.

Request 35 relates to a letter dated 7th February, 1992, addressed by Mr. Carney to Mr. Mason that is the letter of instructions which led to Mr. Mason's letter dated 13th February, 1992, to which I have already referred under Request 14. The first part of Request 35 is for a file copy and that is refused as being unnecessary. The second part relates to copies of letters written by Mr. Carney to any party. This Request is much too wide and must be refused as it is impossible for me to determine issues of relevance, necessity or privilege in relation thereto.

I shall need to be addressed by the parties both in relation to the time period for the making of specific discovery of the very limited categories of documents for which an Order has been made by me and I shall also need to be addressed in relation to the costs of and incidental to the application for specific discovery.

However, in closing this Judgment, I want to indicate my disapproval of the very general terms in which so many of the applications have been framed. If a Court is to be able to determine the tests of existence, relevance and necessity and also to determine matters of privilege then there must be a much clearer indication as to precisely what documents or categories of document are being sought and their precise relevance to matters in issue. Where an allegation of waiver of privilege is being made it ought to be clearly established as to the precise issue between the parties in relation to which such a waiver has been made. The principles set out in the George Doland Ltd and Great Atlantic Insurance Company cases are that only partial disclosure should not be allowed in relation to any issue in relation to which a waiver of privilege has occurred. In this case, the failure to tie in the allegation of waiver with any specific issue between the parties has meant that the waiver principle has not come into play for the benefit of the Public Defendants.

Authorities

Taylor -v- Hayter (1990) JLR 124.

Pacific Investments -v- Christensen and Others (3rd September, 1996) Jersey Unreported.

Great Atlantic Insurance Co -v- Home Insurance Co, (1981)2 All ER 485.

Balabel -v- Air India (1988) 2 All ER 246.

Derby Magistrates Court ex parte B, (1995) 4 All ER 526.

Nederlandse Reassurantie Groupe Holding NV -v- Bacon & Woodrow & others, (1995) 1 All ER 976.

Mathews & Malek on Discovery (1992 Ed'n) p.p. 157-178 and 222-227.

Channel Islands and International Law Trust Co Limited (in their capacity as Trustee of the Halifax Trust) -v- Jeffrey Pike and others, (8th July, 1992) Jersey Unreported.

Victor Hanby Associates Limited -v- Oliver (1990) JLR 337 CofA.

G Doland Ltd -v- Blackburn, Robson, Coates & Company (a firm) and Anor (1972) 3 All ER 959.

Fowkes -v- Duthie (1990) 1 All ER 338.

Parry & Anor -v- News Group Newspapers, Ltd. (22nd November 1990) "The Times"; (1990) 140 New L.J.1719 CofA.