SHERIFFDOM OF LOTHIAN AND BORDERS AT LIVINGSTON

[2019] SC LIV 97

A59/16

JUDGMENT OF SHERIFF DOUGLAS A KINLOCH

in the cause

WEST LOTHIAN COUNCIL

Pursuer

against

THOMAS AITKEN CLARK and TURCAN CONNELL (TRUSTEES) LIMITED

Defenders

LIVINGSTON 15 November 2019

The Sheriff, having heard parties on the defenders' opposed motion, no 7/3 of process, refuses same; thereafter having heard parties on the defenders' opposed motion to seek leave to appeal, refuses same; continues the cause to day 2 of the diet of proof previously assigned for 26 November 2019 at 10.00 am within Livingston Sheriff Court, Civic Centre, Howden South Road, Livingston.

NOTE:

Motion

[1] The defenders' opposed motion, no 7/3 of process, to open up an envelope lodged by the pursuers and marked as "Confidential", called before me on 11 November 2019. At the hearing of the motion the pursuers were represented by Ms Hogg, Solicitor, and the defenders by Mr Garrity, Advocate. At the conclusion of the hearing I continued the case for

four days in order to consider the submissions made to me, and the case called again on 15 November 2019, when the defenders were represented by Ms Gill, Solicitor. On that date I gave the following *ex tempore* decision, which I have edited slightly.

Background

[2] In 1985 West Lothian Council ("the Council") sold an area of land to the late George Clark. The disposition contained a pre-emption clause in favour of the Council, giving them the right to buy back the land in the event that the buyer proposed to sell it, and obliging him to give notice to the Council of any intention to sell. In this action the Council seek a declarator against the executor of George Clark to the effect that a purported notice given to them in a letter sent in 2015 was not a notice at all, and was invalid.

[3] The crucial letter is dated 17 December 2015. In that letter Messrs Turcan Connell wrote to the Council stating that:

> "As required in terms of the Feu Disposition, we hereby give you notice on behalf of the Executors, that the Executors desire to dispose of that part of the Feu shown coloured red and brown on the plan annexed, by way of a sale."

[4] It is maintained by the Council that the notice is invalid on the basis that there was no brown area in the plan, or at least that it was not clear.

[5] Proof in the action commenced before me on 26 April 2019. On that date I heard the evidence in chief from the Council's first witness. She was Ms Richardson, who at the relevant time had been an in-house solicitor employed by the Council. At the conclusion of her evidence in chief the proof was adjourned to 26 November 2019.

Specification of documents

[6] Prior to the proof commencing the defenders had lodged a specification of documents, number 28 of process. In terms of that specification the defenders sought to recover *inter alia* the following: –

> "All correspondence, reports and other documents… Showing or tending to show:
> a. The pursuer's understanding of the nature and extent of the area of land shown coloured red and brown on the plan attached to said Notice ("the site")."

[7] By interlocutor dated 10 April 2019 the specification was granted, subject to slight amendment. Certain documentation was initially produced by the Council in terms of the specification, but after some further time the Council took the view that they were in possession of other documentation which fell within the terms of the specification. They also took the view, however, that this further documentation was confidential to them, being covered by legal privilege.

[8] As I understand it, the documents in respect of which privilege is claimed, consist of emails which contain legal advice given by the legal department of West Lothian Council to the department of the Council which was dealing with the issue of the pre-emption clause. The basis of the privilege claimed, which is said to prevent disclosure, is accordingly that the emails (and any other documents) contain legal advice.

[9] Accordingly, on 22 October 2019 the Council's legal department wrote to the sheriff clerk's office stating that they enclosed "a sealed Confidential envelope which contains papers which are covered by the defender's specification of docs but in respect of which legal privilege is asserted. I have written to the defender's agents and intimated to them that this has been lodged. I understand that they intend to lodge a motion seeking the court's authority for the envelope to be opened."

[10] Unfortunately a member of the sheriff clerk's office who did not realise the significance of the letter, opened the envelope and advised the defenders' agents that the contents could be collected. A member of staff from the defenders' agents collected the documents, copied them, and forwarded them to Counsel who was appearing for the defenders. The contents of the envelope are therefore already in fact known to the defenders' agents, although Counsel for the defenders advised me in court that he had no recollection of the nature of the documents. To some extent, therefore the outcome of this motion may be academic.

Motion to open up envelope

[11] The defenders' motion was opposed by the Council. The parties helpfully lodged written submissions in support of their respective positions prior to the motion being heard. They are available for reference. At the conclusion of the hearing I continued the case to call again on 15 November 2019, in order that I could have time to consider the submissions made to me.

[12] As I understood it, it was common ground between the parties that legal advice given by a solicitor to a client was privileged and confidential to the client. It did not matter that the solicitor was an in-house solicitor giving advice to another department of the same organisation. The advice was still confidential. That view appears to me to be correct. The hearing before me was therefore conducted on the basis that the emails, and any other documents, which contained legal advice were privileged, unless that privilege had been lost in some way.

Section 1 of 1852 Act

[13] In this connection the defenders argued that the Council had indeed lost its right to maintain confidentiality in relation to the documents. Counsel for the defenders founded on section 1 of the Evidence (Scotland) Act 1852. Its terms are somewhat antiquated, and I will not reproduce them here, but according to the textbook on evidence by Fiona Raitt the effect of section 1 is said to be as follows:

> "In addition, by virtue of S1 of the Evidence (Scotland) Act 1852 the privilege is lost if the client calls that legal adviser as a witness… This section provides that where a solicitor, who is or has been an agent for an accused, is called to testify, the accused cannot insist on the confidentiality of certain matters on the grounds of agent-client privilege. The choice rests with the client. If the client wishes to preserve the confidentiality of the relationship with their legal agent then they have to forgo the opportunity of citing the agent as a witness. If the priority is to have the agent as a witness then confidentiality is lost."

[14] If that statement of the law is correct, then it would appear that the Council have given up their right to confidentiality by calling Miss Richardson, their law agent, as a witness.

[15] I was referred by both sides to the Outer House case of *Whitbread Group plc* v *Goldapple Ltd* 2003 SLT 256. While the outcome of the case does support the defenders to some extent, Lord Drummond Young also referred to the privilege being lost under section 1 only where evidence "goes well beyond matters of simple fact". The suggestion is that the effect of section 1 is not as absolute as suggested in the textbook just mentioned. Other than the *Whitbread* case there appears to be little authority on the application of section 1.

[16] In any event, as I understood him Counsel for the defenders conceded that the very wide interpretation suggested by the wording of section 1 itself and in the textbook by Fiona Raitt was probably to be seen as too wide. But, he argued, even if section 1 does not give

rise to an automatic and immediate loss of privilege, Miss Richardson had given evidence which went beyond simple factual evidence, and by calling her as a witness on their own behalf the Council had lost legal privilege by virtue of section 1.

[17] In relation to the effect of section 1, I do not find that the Council has lost privilege simply by calling Miss Richardson as a witness. I share the more restricted interpretation of section 1 suggested by Lord Drummond Young. The mere fact of calling a solicitor as a witness cannot surely mean, in my very respectful view, that the solicitor can then be asked what advice he gave the party. Of course, it may well be that if the evidence of the solicitor goes beyond mere factual evidence, then under section 1 legal privilege is lost, but I think that the nature of the evidence given in the *Whitbread* case was sufficiently different from the evidence in the present case to mean that the outcome of *Whitbread* does not determine the outcome of the present action.

Waiver

[18] The remaining question then is whether the Council have impliedly waived their right to confidentiality by virtue of the evidence given by Miss Richardson. The defenders' Counsel argued that this was exactly what they had done.

[19] The question of waiver of confidentiality is dealt with in Walker and Walker's *The Law of Evidence in Scotland*, fourth edition, at 10.1.5. There it is said as follows:

> "Confidentiality may be waived by the party who is entitled to assert it. Waiver does not depend on the subjective intention of the party, but is determined objectively: the court will ask whether the party's conduct has been inconsistent with confidentiality being retained."

[20] Prof Davidson deals with the subject at 13.31 in his textbook on evidence. There he says that:

> "The privilege is that of the client, and cannot be claimed by anyone else. The privilege may therefore be waived by the client, either expressly or impliedly."

[21] It is, in my view, accordingly necessary to consider the evidence given by Miss Richardson to see whether in leading that evidence the Council have given up their right to claim confidentiality over any advice given to the relevant department.

Evidence of Miss Richardson

[22] Miss Richardson explained in her evidence that she commenced work as a solicitor in West Lothian Council's legal department in 2015. She said that she remembered finding out that a letter had come in from Turcan Connell regarding the right of pre-emption while she was on holiday. She explained that she was told by someone in the relevant department that the Council might be interested in buying back the land. She obtained a copy of the feu disposition in terms of which the Council had sold the land, and looked at it. She explained that she could not see any brown area on the plan sent by Turcan Connell, this being an area of land referred to in the letter in relation to which it was said that the Council had a right of pre-emption. She said that she discussed matters with another person in the relevant department. She explained that this person could not see the brown area either. She said that they contacted Turcan Connell to say that they could not identify the brown area. She referred to the Council having 21 days under the right of pre-emption to indicate that they wished to buy the land. She indicated that the Council needed to know the extent of the land being offered back to them in order to calculate a price which might be offered for it. She referred to the right of pre-emption giving rise to an obligation on the part of the buyer of the land to offer it back to the Council.

Decision

[23] It is my view that in giving this evidence Miss Richardson was fundamentally giving factual evidence as to the sequence of events relating to the time after the purported notice sent by Turcan Connell had been received. In doing so, however, it was necessary for her to explain the legal background to the matter. It would have been impossible, in my view, for the Council to have led evidence as to the circumstances which gave rise to this action without that evidence touching on some of the legal matters which may well be at the heart of the present proceedings. It would have been impossible to understand all that she did without knowing of the legal background, and her view of it. It was therefore necessary for Miss Richardson to explain in her evidence the legal issues which she felt had arisen in order to explain what happened as a matter of fact. While she gave evidence as to her own views regarding the effect of the letter sent by Turcan Connell she was not in any way giving evidence as to the advice which she had given her department.

[24] On that view of her evidence I have come to the conclusion that by calling Miss Richardson as a witness, and in the evidence actually given by Miss Richardson, there is nothing to lead to the conclusion that the Council have to be seen as having waived their right to legal privilege. In my view Miss Richardson's evidence may well be relevant to the decision of the court in relation to this action. It would be entirely against notions of fairness, in my view, to reach the conclusion that the Council would have had to refrain from calling Miss Richardson as a witness or risk losing all right to claim confidentiality over any advice given by their legal department to the other relevant department.

[25] The result of this is that the defenders' motion to open up the confidential envelope is refused.

Leave to appeal

[26] At the conclusion of the hearing before me on 15 November 2019 the solicitor who appeared for the defenders sought leave to appeal my decision. She stated that she accepted that in terms of the Courts Reform (Scotland) Act 2014 she required leave, and as that reflected my own understanding I proceeded on the basis. That application was opposed by the solicitor for the Council.

[27] Having heard parties, I refused leave to appeal for the following reasons. First, it was said that if the defenders had sight of legal advice given regarding the pre-emption clause it might be relevant to cross examination of Miss Richardson, or other witnesses. It seemed to me that this was entirely speculative. Cross examination of Miss Richardson about the evidence she gave (and of other witnesses in due course) can take place without restriction, whether or not it is known what legal advice may have been given. Secondly, there has already been considerable delay in this case. The evidence in chief of Miss Richardson was heard over six months ago, and if an appeal were to be marked then it might be many more months until her evidence, and thereafter the case, could be concluded. I did not think that this would be satisfactory. Finally, the agent for the pursuers did not wish to have a ruling on the point from the Sheriff Appeal Court at this stage in order to prevent possible complications in the action if an appeal were ultimately taken and allowed.