Judgment 14/2003

A v A
Royal Court
(Divorce file 5919)
31st October, 2002

Matrimonial cause – application by both parties for discovery and further and better particulars – relevance of Rules 44 (c) and 56 of the Matrimonial Causes Rules – legal professional privilege – whether the questions as to discovery etc. could not have been settled by correspondence between Counsel

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

MATRIMONIAL CAUSES DIVISION

Before Rosalyn Le Couteur Brelsford, Lieutenant-Bailiff.

On the 31st day of October, 2002.

Between:

A

Wife

and

A

Husband

IN THE MATTER OF the Wife's application for a Declaration, Discovery and Further and Better particulars and the Husband's application for Discovery and Further and Better particulars;

WHEREAS on the 17th October, 2002, THE LIEUTENANT-BAILIFF, having heard advocates A.M.Ozanne and P.T.R.Ferbrache, Counsel for the Wife and Husband respectively, RESERVED JUDGMENT;

THE LIEUTENANT-BAILIFF this day issued Judgment in the terms attached hereto and DISMISSED the Wife's application for a Declaration, ADJOURNED the Wife's application for Discovery to enable further details to be provided regarding the identification of the documents required, GRANTED the Wife's application for Further and Better particulars, DISMISSED the Husband's application for Discovery and GRANTED the Husband's application for Further and Better particulars with the proviso that in paragraphs 2.1 (both paragraphs), 2.2, 2.3, 2.4 and 2.5 the words "date", "time" and "place" be replaced by the words "the occasion" or "occasions".

And the Court RESERVED the matter of costs.

M. J. KING
Her Majesty's Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

MATRIMONIAL CAUSES DIVISION

BEFORE Rosalyn Le Couteur Brelsford, Lieutenant Bailiff

Between:

A

Wife

v

A

Husband

Date of Hearing: 17th October, 2002
Date Judgment handed down: 31st October, 2002

Advocate for the Wife:- A. M. Ozanne

Advocate for the Husband:- P. T. R. Ferbrache

In the matter of the following applications

(a) The Wife's application for:

(i) A Declaration

(ii) Discovery

(iii) Further and better particulars

(b) The Husband's application for:

(i) Discovery

(ii) Further and better particulars.

1. Background to the applications

(1) the Husband and the Wife applied for a Judicial Separation order, which was granted on 30th September, 2002 ("the Order").

(2) The Order provided, inter alia, that:

(a) The Husband was to provide:

(i) £1,000,000 to be used to purchase a residence.

(ii) £600,000 ("the Lump Sum") to be paid into a settlement ("the Settlement").

(b) Until such time as the Lump Sum was paid into the Settlement, the Husband was to pay the Wife the monthly sum of £5,000.

(c) The Husband was to pay to the Wife for the benefit of the Children pursuant to paragraph 9 of the said Order the sum of £5,000 per annum for each child.

(3) The Settlement has yet to be constituted.

(4) On 4th December, 2001, the Husband presented a petition for divorce.

(5) On 17th January, 2002, the Husband applied for a provisional order which was granted on or around 8th March, 2002.

(6) On 3rd April, 2002, the Husband applied for a final order, which was granted on 8th July, 2002.

(7) On 5th April, 2002, the Wife applied for leave to amend her entry of appearance to the divorce petition.

(8) On 23rd April, 2002, the Wife applied to set aside/vary the Order.

2. A declaration

The Wife is seeking a declaration to the effect that she may receive and cash the monthly payments in the form of cheques at present being made by the Husband pursuant to paragraph 9 of the Judicial Separation, without prejudice to her application to set aside/vary the said Order. Advocate Ozanne confirmed that this application was in respect of cheques received for maintenance of the children as at the moment the Husband is not making the maintenance payments ordered for the Wife albeit the reason for this is disputed.

Advocate Ozanne on behalf of the Wife stated that such a declaration would come under the inherent jurisdiction this Court has in matrimonial matters. Advocate Ferbrache on behalf of the Husband argued that he knew of no basis upon which such a declaration could be made, but the terms of the Order spoke for themselves and the consequences of the parties adhering to or denying these terms arose as a matter of law and would be decided at the substantive hearing.

Whether the Court can make such a declaration is irrelevant. The Order has been made and not appealed against by either party and, unless both parties agree, the Husband should be making the payments as ordered to the Wife and until the Order of Judicial Separation has either been set aside, varied or confirmed the Wife is entitled to receive and utilise these payments. It may well be that at the substantive hearing the payments made will be one consideration when the question of whether the Court should set aside, vary or confirm the terms of the Judicial Separation is decided but as Advocate Ferbrache stated this is a matter which will fall to be decided at the substantive hearing not now.

3. Husband's application for discovery

The Husband is seeking discovery of the advice received by the Wife from her legal advisors prior to her consenting to the Order of Judicial Separation. Advocate Ferbrache conceded that the advice at the time it was given would ordinarily have been subject to privilege but argued that as the Wife herself deposed to the existence of the advice such as in her affidavit sworn on the 23rd April, 2002, the claim of privilege in respect of the advice was ill founded. He further argued that the Wife's application to set aside/vary the Order was based upon claims of

(a) undue influence,

(b) misrepresentation, and

(c) mistake

and that therefore the advice was central to the Wife's application in that

(a) the extent to which the Wife was advised and the advice given was a matter the Court ought to take into account when considering whether undue influence has been brought to bear,

(b) the Wife alleging that the Husband misrepresented the terms and effects of the Order necessitated evidence as to whether or how the terms and effects of the Order were explained to her by her advisors, and

(c) the Wife's alleging mistake called into question what advice she had received. By bringing in the advice received into issue argued Advocate Ferbrache the Wife had by implication waived privilege in respect of it.

In support of his contention Advocate Ferbrache drew my attention to the Australian case of Telstra Corp Ltd. and Another v. BT Australasia Property Limited and Another [1998] 901 FCA, delivered on the 24th July, 1998. Therein, their Honours Branson and Lehane JJ held at p.16

> ""A party who initiates an undue influence case puts in issue in the proceeding the quality of his or her consent or assent (Commercial Bank of Australia Ltd –v- Amadio (1983) 151 CLR 447 per Deane J at 474). The quality of such consent or assent will ordinarily be affected by relevant legal advice received by the party. The principle that requires that in such circumstances the party not be entitled to maintain the confidentiality of such advice is one of fairness which goes to the integrity of the legal process. To allow a party to put in issue the quality of his or her consent or assent whilst, at the same time, withholding evidence relevant to that issue, would be to allow him or her unfairly to handicap the opposing party to the proceeding, and to compromise the ability of the court realistically to determine the issue. There is, in our view, little, if any, difference in principle between the undue influence case, the partial disclosure cases such as Benecke –v- National Australia Bank, and the "other use" cases such as Attorney General for NT –v- Maurice and Goldberg –v- Ng. In the three classes of cases the law implies a consent to the use of the privileged material, or, what is in reality the same thing, a waiver of the privilege, if by reason of some conduct of the party otherwise entitled to the privilege, it would be unfair to the other party, in a way which goes to the integrity of the legal process, for the privilege to be maintained."
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> Their Honours also held, at p.15:
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> "At common law it has also been held, in cases in which the state of mind of a party was in issue, that evidence could be called to establish the terms of legal advice, relevant to the party's state of mind, provided to that party. Thus, in Thomason –v- The Council of the Municipality of Campbelltown (1939) SR (NSW) 347, where it was necessary for the defendant to prove what knowledge the plaintiff had as to her legal rights, Jordan CJ held that privilege could not be invoked to prevent proof of relevant legal advice provided to her".
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> Similarly, their Honours referred to:
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> a. Hong Kong Bank of Australia Ltd –v- Murphy, where Smith J held that in raising and persisting with issues which concerned legal advice it had received, Hong Kong Bank was treated as having waived privilege in respect of that advice.
>
> b. Pickering –v- Edmunds where Duggan J held that where, by their pleadings, the plaintiffs put in issue their state of mind and knowledge of the legal effect of a deed, evidence could be led as to relevant legal advice received by them.

> Similar conclusions were reached by the High Court in X Corporation Limited –v- Y (a firm), delivered 16 May 1997. Therein, Moore-Bick J held at p.15
>
> "where a party himself puts the confidential relationship between himself and his lawyer in issue he will waive privilege in respect of documents passing between them which are relevant to the issues in the proceedings. He may put that relationship in issue either by bringing proceedings directly against his lawyer, or by raising an issue to which his conduct within that relationship is so directly relevant that it would be unfair to allow him to maintain privilege in documents created under it"."

Advocate Ozanne on behalf of the Wife argued that with regard to the development of the law in Australia it is clearly distinguished from and has developed differently to English law and that where the Royal Court (Civil) Rules are silent the Court must take notice of the Supreme Court Practice 1999. She referred to Order 25/5/30 which made clear that "privilege in all cases is the privilege of the client and not of the solicitor, legal advisor and may be waived by the clients but not by the solicitor or legal advisor" but it is not waived merely by referring to the documents in the pleading or in an affidavit. She referred further to Order 25/5/30 which states "a reference in an affidavit to a legal document or to a conversation with solicitors does not amount to any waiver of legal professional privilege in respect of the communication". Further she referred to Derby & Co. Limited v. Weldon (No. 10) 1991 1 WLR 660 (Order 24/5/30).

> "where however the party merely refers in interlocutory proceedings to the fact that he has obtained legal advice and states the effect of that advice without disclosing the substance of it or the extent of the instructions given to the legal advisor he does not thereby waive the right to claim privilege at the trial in respect of the legal advice itself".

Advocate Ozanne argued that the weight of English authority is now that the waiver usually applies only to communications between the client and solicitor whom he is suing which is not the position in this case. With regard to Advocate Ferbrache's reliance on the Telstra case she stated that it was clear that the Australian law of privilege and evidence had been widely modified by statutory amendment and reform and when seeking to rely on a case by analogy the comments of the Court of Appeal in the case of Pauline Julie Waterman v. Muriel Maude McCormack (2002) must be borne in mind. The Court of Appeal stated as follows:

> "Whilst it is, of course permissible to refer to other systems of law where inspiration has been drawn from such systems over a period of time, the assistance to be gained may be limited. As Lord Wilberforce said in Vaudin and Hamon (Ordres en Conseil Volume XXIV Page 164-5) "their Lordships referred to a number of authorities under various systems of law … these were said to be applicable or at least relevant by analogy to the present case. This argument appears to their Lordships to be too widely stated. If an argument based on analogy is to have any force it must first be shown that the system of law to which an appeal is made in general moreover the particular relevant portion of it, is similar to that which is

> being considered and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter". Thus "Although as this board has pointed in LaCloche v. LaCloche (1870) LR3PC 25 it is proper to look at related systems of law and commentators on them in order to elucidate the meaning of terms this particular legal provision under examination in any case must in the end be interpreted in the light of its own terminology, context and history"."

Advocate Ozanne submitted that bearing in mind the fundamental importance of the principle, the better authorities and the ones that should be followed are not Telstra but those contained and referred to in the Rules of the Supreme Court and in particular RSC Orders 24 and 25 as described above.

In R. v. Derby Magistrates' Court Exp. B [1996] A.C. 487, Lord Taylor, C.J. said:

> "The principle which runs through all these cases, and many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyers in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests ….. Nobody doubts that legal professional privilege could be modified, or even abrogated, by statute, subject always to the objection that legal professional privilege is a fundamental human right protected by the European Convention for the Protection of Human Rights and Fundamental Freedoms."

Accordingly any attempt to curtail the extent of legal professional privilege must be taken cautiously. This is not a case of the Wife suing her former legal advisor in which case she would have of necessity to have waived her claim to privilege and confidence in relation to all matters relevant to an issue in the proceedings. However, in this case the Wife has on several occasions confirmed that she is not seeking to hold her legal advisor responsible for the duress, misrepresentation and mistakes she is alleging but the Husband.

In her application she states that the Husband so undermined her ability to make any independent decision that she was accordingly unable to make an independent decision "even with the benefit of legal advice". In her affidavit in support of her application dated the 23rd April, 2002, she states in paragraph 22 "Advocate Le Marquand had warned me that income from a share port folio could go down. When I mentioned this to the Husband prior to the Judicial Separation he said I should get myself a decent advocate and Advocate Le Marquand did not know what he was talking about. The Husband reiterated that if I did not agree to his proposal I would get nothing I believed him as he had become secretive about his affairs". Again in paragraph 16 of her affidavit the Wife states "Although I had advocate's advice that I should not enter into

this Judicial Separation and indeed that the Husband had not made full and frank disclosure of his assets (or indeed any disclosure) I was so desperate to leave that I just wanted the matter over and done with. The Husband was controlling and threatened me that I would receive nothing. I ignored clear legal advice that I was acting contrary to my interests but due to my state of mind and my desperation to be free of the situation and remove the children who were so unhappy from the home I ignored this advice."

I refer again to part of the Telstra case referred to by Advocate Ferbrache

> "To allow a party to put in issue the quality of his or her consent or assent whilst at the same time, withholding evidence relevant to that issue, would be to allow him or her unfairly to handicap the opposing party to the proceeding and to compromise the ability of the court realistically to determine the issue."

However, in this case there is no suggestion that there was a lack of proper advice given to the Wife and therefore it cannot be said that the Wife has brought the legal advice into issue in the same way as if she were basing her case on the legal advice she had received. I have to weigh up whether a fair adjudication is possible without such a waiver of privilege and I do so find.

Although at the moment it would seem that the Wife has chosen not to bring her lawyer's advice into evidence she would seem to be relying on the fact that in spite of her lawyer's advice she did what the Husband wished. It may well be that the Wife therefore decides to call her legal advisor to support her own case when of course he will then be able to be cross examined. However, in view of the fact that it is quite obvious that the Wife did not feel in any way influenced by her legal advisor and is not suggesting she did not receive proper legal advice I do not wish to interfere with the fundamental principle of client/lawyer privilege.

4. Before proceeding to consider the Wife's application for discovery and both parties application for further and better particulars I wish to refer to the following. In this matter both counsel have submitted that Rule 56 of the Matrimonial Causes Rules provides that with regard to any matter for which the Rules do not specifically provide, the procedure applicable, shall, as nearly as circumstances permit, be that of the Royal Court in civil cases. In turn when the Royal Court (Civil) Rules 1989 are silent the Court will take notice of the Supreme Court Practice 1999 the applicable order in this case being Order 24 relating to discovery and inspection of documents. This can cause difficulty however in that not all applications in the Matrimonial

Causes Division proceed via pleadings as such and therefore the "applicable procedure" is not necessarily the right one in matrimonial matters although being of great assistance in others. In this context I would suggest that Rule 44(c) of the Matrimonial Causes Rules may be of some assistance in that it empowers the Court to order that evidence of any particular facts shall be given by production of documents or entries in books or by copies of documents or entries or otherwise as the Court directs.

5. Wife's application for discovery

By her application for discovery the Wife seeks an Order that the Husband produce 26 classes of documents all of which broadly relate to the financial circumstances of the Husband. Advocate Ferbrache argued that the Wife's application is in the form of an application for specific discovery and that the Court therefore has no jurisdiction to make an order for specific discovery unless (a) there is sufficient evidence that the documents exist, (b) the documents relate to matters in issue in the action, (c) there is sufficient evidence that the documents are in the possession, custody or power of the other party. When these prerequisites are met it is in the Court's discretion whether to order discovery.

Advocate Ferbrache further stated that an application for specific discovery must be supported by an affidavit deposing to a belief that the documents exist and that this has not been done. Further more, Advocate Ferbrache stated, in any event the documents sought, if and to what extent they may exist, are irrelevant in that the documents appear to relate solely to the Husband's financial circumstances whereas the application in support of which the documents are sought is an application to set aside or vary the Order of Judicial Separation. If there is any relevance he concluded it may have "overwhelmingly" been outweighed by the inconvenience and expense the Husband will be put to and indeed there is no evidence that the documents sought are within the possession, custody or power of the Husband.

Advocate Ozanne on behalf of the Wife argued that her application was not one of specific discovery and that as no affidavit of verification had been sworn by either party in this matter and therefore the list of documents was not yet conclusive the Wife was entitled to apply for a further and better list of documents. Accordingly as RSC Order 24/3/8 states an application may be made for a further and a better list of documents on the conditions that it appears "(a) from the list itself or (b) from the documents referred to in it

or (c) from admissions made either in the pleadings of the party making discovery or otherwise that the party making discovery has or has had other relevant documents in his possession, custody or power". Advocate Ozanne further drew my attention to RSC Order 24/2/11 stating that these words are not limited only to those documents which would prove or disprove any matter in question, rather they apply to "any document which it is reasonable to suppose contains any information which enable the party applying for discovery either to advance his own case or to damage that of his adversary, if it is a document which may fairly lead him through a train of inquiry which may have either of these two consequences" which such document must be disclosed. Advocate Ozanne also drew my attention to RSC Order 24 Rule 7 (relating to an Order for discovery of particular documents) which reiterated the fact that the party was and is entitled to apply for a further and better list where it appears on the face of the list already served or on the face of disclosed documents or on an admission that in all probability the party has or has had relevant documents beyond those disclosed. The note also makes it quite clear she stated that "for the purpose of such an application no affidavit is required".

I do not accept that the documents sought are irrelevant especially with regard to the question of the alleged misrepresentation and also with regard to a possible variation of the existing settlement. I do agree with Advocate Ferbrache, however, that some of the terms of the particulars to the application suggest some doubt whether certain classes of documents exist or what documents might be comprised within these classes. On the other hand it is imperative that all relevant information is before the Court for the substantive hearing and that a full and frank disclosure has been made and therefore I am going to adjourn this part of the Wife's application to enable Advocate Ozanne to provide evidence that in all probability the Husband has or has had the documents sought and that there is sufficient evidence that the documents exist. I would hope that this matter can now be resolved by correspondence between Counsel but if not the matter should come back before me at the earliest opportunity.

6. Wife's application for further and better particulars

Advocate Ozanne on behalf of the Wife argued that the Husband had made it quite clear in his affidavit that he found it impossible to file an affidavit at this early stage of proceedings and that she therefore assumed that he did not regard his affidavit as being in final form and that where the rules are silent the Court has an

inherent jurisdiction to make such orders as it feels fit in relation to the conduct of any matter before it. Advocate Ferbrache on behalf of the Husband argued that while a power to order the provision of further and better particulars of a pleading does exist this power did not extend to matters raised in affidavits and that the appropriate procedure in such an instance would be to either seek to administer interrogatories or to cross examine the deponent on the contents of the affidavit at the hearing of the matter. As it is not always necessary in the Matrimonial Causes Division for pleadings (as opposed to affidavits of means etcetera) to be filed by both sides I cannot accept Advocate Ferbrache's argument that in matrimonial applications one necessarily needs a pleading before further and better particulars can be ordered. I grant the application.

7. Husband's application for further and better particulars

I will grant this application but with the proviso that in paragraphs 2.1 (both paragraphs) 2.2, 2.3, 2.4 and 2.5 the words date, time and place be replaced by the words "the occasion" or "occasions".

8. It is a pity that the questions relating to discovery and further and better particulars could not have been settled by correspondence between Counsel thus keeping down costs and making unnecessary the "trial by ambush" which both parties are said quite rightly to oppose.

Costs reserved.

