SRJ v Person(S) Unknown being the author and commenters of Internet blogs, D & Co.

Case No: HQ13X05802

High Court of Justice Queen's Bench Division

10 July 2014

[2014] EWHC 2293 (QB)

2014 WL 3387744

Before: Sir David Eady Sitting as a High Court Judge (In Private)

Date: 10 July 2014

Hearing date: 11 June 2014

Representation

Philip Marshall QC and Ruth den Besten (instructed by Osborne Clarke) for the Claimant.
Stephen Davies QC (instructed by Davies and Partners) for the Respondents.

Judgment

Sir David Eady:

1 The Claimant has been given permission for anonymity by order of Kenneth Parker J dated 20 May 2014. It is a corporate entity which provides services to the UK and other governments. It now seeks an order requiring the Respondents, identified for the moment only as D & Co, to disclose the name of the Defendant, who is a former client. He is the author of at least two blogs in which confidential information was published. The Claimant has reason to believe that he may well be a current or past employee. That is based not only upon the nature of the confidential information he has apparently disclosed, but also on the terms of a unilateral undertaking he gave on 8 May 2014. On that occasion, on the day upon which he withdrew instructions from the Respondents, he undertook that he did not hold any confidential information other than "in connection with any employment relationship". That is effectively a half-admission that he retains some such information obtained while in employment with the Claimant.

2 The Claimant wishes to obtain the Defendant's identity in order to make an assessment of the risks which he posed, and may continue to pose, so far as other confidential information is concerned. That is a matter of protecting not only their own interests but also those of clients. Furthermore, the Defendant is in breach of an order made by Wilkie J dated 11 April 2014, whereby he was required to provide confirmation on oath that all domain names and email addresses used in connection with the

relevant blogs had been transferred to the Claimant, or deleted, and that all materials containing confidential information held by him have been delivered up. He has not complied with that order, and another reason for obtaining his identity is that the Claimant wishes to take steps to enforce it. It is true that the Defendant has sought to provide some assurance by means of the unilateral undertaking to which I have referred, since he stated that he wished unilaterally to demonstrate his intentions for the present and future and undertook that he would not, whether directly or indirectly:

> "(i) misuse the Claimant's confidential information in any way;
>
> (ii) directly or indirectly encourage any other person to terminate or seek to vary any contractual or employment relationship with the company or authorise, direct, assist or cause or procure or enable any other person to do any of the above"..

He also undertook, as I have said, that any confidential information he held was "legitimately held in connection with any employment relationship", and further that he would delete as a matter of priority any domain name or sub-domain or email address purchased or registered by him which was used in connection with either of the relevant blogs and further agreed, not at any stage, to take any steps to reactivate, reinstate or reuse any of the said domain names, sub-domains or email addresses. Nevertheless, that is not the same as complying with the outstanding court order.

3 There would appear to be no dispute that the court has an inherent jurisdiction to make an order requiring solicitors to disclose a client's details (as confirmed, but not bestowed, by s.37(1) of the Senior Courts Act 1981) and/or pursuant to its jurisdiction in respect of solicitors as officers of the court. Accordingly, submits Mr Marshall, it is simply a question of whether the court should on this application make such an order in the exercise of its discretion.

4 In the forefront of his argument, Mr Marshall placed a passage from the judgment of Henderson J in JSC BTA Bank v Solodchenko (No 3) [2011] EWHC 2163 (Ch) at [38]. He argues that it provides useful guidance to the court when called upon to exercise such a discretion. In that case, on the particular facts, Henderson J did make an order for disclosure, but it is important to note the particular reasons he gave for taking that somewhat unusual course. In that case, the primary purpose of the disclosure was to aid enforcement of a committal order already made. As the Judge made clear, in the absence of that, he would probably not have been prepared to make the order sought. He was concerned that all reasonable efforts should be made to ensure that the relevant contemnor, Mr Shalabayev, was apprehended and that he could begin to serve the sentence of imprisonment imposed upon him. He added at [39]:

> "Whatever advice he needed for the purposes of the committal proceedings has already been given, and he has not appealed against the committal order. The right of Mr Shalabayev to seek and obtain privileged legal advice from [his solicitors] is not in issue. What he cannot reasonably do, in my judgment, is to keep a confidential line of communication with [them] open for that purpose, while at the same time expecting his contact details to be withheld from those charged with enforcement of the committal order."

5 As part of the background context, it is also important that I refer to what the learned Judge said at [31]. Having referred to certain nineteenth century authorities, he commented as follows:

> "In my view these cases … do provide valuable illustrations of the reasons why the appropriate course will normally be to refuse such an application where the address was provided to the solicitor in confidence for the purposes of obtaining legal advice."

6 Having referred to these important matters of background, I can now set out the general guidance contained at [38] to which Mr Marshall refers:

> "…In the first place, I feel no real doubt that the court has jurisdiction to make the order sought. I base that conclusion both on the [A J Bekhor & Co Ltd v Bilton [1981] 1 QB 923] line of authority and on the power of the High Court to give directions to solicitors as officers of the court. It is unnecessary for me to consider whether jurisdiction could also be founded on the Norwich Pharmacal line of cases, and I prefer to leave that question open. Secondly, I consider that the court must be alert not to make any order which might inhibit the fundamental right of Mr Shalabayev to seek and obtain legal advice from [his solicitors]. Thirdly, the court should as far as possible respect the express condition of confidentiality subject to which Mr Shalabayev has provided his contact details to [his solicitors], while noting that the only reason for this … is the fears that Mr Shalabayev says he has for the safety of himself and his family. Fourthly, there is a clear distinction in modern English law (although there was not at the date of the Victorian authorities which I have examined) between a client's right to claim legal professional privilege, which is absolute, and the right to protection of confidential information, which is capable of being overridden by other considerations, not least in the context of disclosure under the CPR (and previously the RSC) where it is well established that confidentiality does not of itself justify non-disclosure of a relevant document or information. Fifthly, there is a strong public interest in ensuring obedience to court orders generally, and in not allowing the court to be baffled by the complexities of international fraud cases and opaque asset-holding structures. Sixthly, the public interest which I have just mentioned applies with particular force to enforcement of the committal order against Mr Shalabayev, because part of the purpose of committing a contemnor to prison is to encourage belated compliance by him with the court orders which have been flouted."

7 On the basis of this guidance, Mr Marshall argues that an order should be made in the present case, having regard to the following factors in particular. First, he submits that "the court has never treated the identity of a client as information that can be the subject of a claim to legal professional privilege". As will shortly emerge, that is a general proposition which is questionable. In support of it, however, Mr Marshall

advanced a number of "good reasons". Normally, he says, a client's name will have been supplied before any retainer comes into existence and provided simply for the purposes of general communication. This may be true, on a purely numerical basis, but each case has to be considered carefully on its own facts. Here, Mr Marshall argues that the name of the Defendant was communicated to the individual solicitor at D & Co before any decision was made by the firm to act on his behalf or to provide advice. He infers from this that "the supply of the Defendant's name cannot be the subject of legal professional privilege". He regards this as a matter of clearly established principle and cited two modern cases in support: *R v Manchester Crown Court, ex parte Rogers [1999] 1 WLR 832* and R (Miller Gardner) v Minshull Street Crown Court [2002] EWHC 3077 (Admin).

8 Mr Davies QC, on the other hand, began by analysing first principles and submits that this is a rather superficial interpretation of the authorities. In the first place, he submits that, when properly understood, the authorities do not decide that identity can *never* be subject to legal professional privilege. It is necessary, in particular, to have regard to the words of Lord Bingham CJ in R v Manchester Crown Court, ex parte Rogers at p 839B-F:

> "It is in my judgment important to remind oneself of the well established purpose of legal professional privilege, which is to enable a client to make full disclosure to his legal adviser for the purposes of seeking legal advice without apprehension that anything said by him in seeking advice or to him in giving it may thereafter be subject to disclosure against his will. It is certainly true that in cases such as *Balabel v Air India [1988] Ch 317* , the court has discountenanced a narrow or nit-picking approach to documents and has ruled out an approach which takes a record of a communication sentence by sentence and extends the cloak of privilege to one and withholds it from another. It is none the less true that legal professional privilege applies, and applies only, to communications made for the purpose of seeking and receiving legal advice.
>
> In this case we must consider the function and nature of the documents with which we are concerned. The record of time on an attendance note, on a time sheet or fee record is not in my judgment in any sense a communication. It records nothing which passes between the solicitor and the client and it has nothing to do with obtaining legal advice. It is the same sort of record as might arise if a call were made on a dentist or a bank manager. A record of an appointment made does involve a communication between the client and the solicitor's office but is not in my judgment, without more, to be regarded as made in connection with legal advice. So to hold would extend the scope of legal privilege far beyond its proper sphere, in my view …"

Mr Davies draws attention particularly in that passage to the words "without more" in the penultimate sentence.

9 That passage was cited by Fulford J (as he then was) in the Divisional Court in R (Miller Gardner) v Minshull Street Crown Court at [19] and he thereafter continued:

> "…As Lord Bingham stated during the course of his judgment, it is necessary to consider the function and nature of the documents. As a result although documents may be located at a solicitor's office, they do not attract legal professional privilege for that reason alone.
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> 20. That decision provides strong support for the proposition that the provision of an individual's name, address and contact number cannot, without more, be regarded as being made in connection with legal advice. It records nothing which passes between the solicitor and client in relation to the obtaining of or giving of legal advice. Taking down the name and telephone number is a formality that occurs before the legal advice is sought or given. As my Lord observed during argument, providing these details does no more than create the channel through which advice may later flow: see in this regard the case of Studdy v Sanders and others (1823) 2 D and R 347 .
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> 21. It follows, in my judgment, that the identity of the person contacting the solicitor is not information subject to legal professional privilege and the telephone numbers of the brothers, equally, are not covered by this protection; neither are the dates when one or either of those men phoned the office. Moreover, the record of appointments in the office diary and attendance notes, in so far as they merely record who was speaking to the solicitor and the number they were calling from, fall within the same category. Other details contained within the attendance notes may well be covered by legal professional privilege depending on what, if anything, was discussed."

Once again, the important words of qualification in that passage ("without more") need to be emphasised. As Fulford J made clear, the extent to which legal professional privilege will apply must depend upon precisely what was discussed or conveyed.

10 I must now turn to the important decision of Teare J in JSC BTA Bank v Ablyazov [2012] EWHC 1252 (Comm). This was a case in which the learned Judge, having carefully considered the earlier authorities, came to the conclusion on the facts before him that the telephone number and email address of the relevant client *were* protected from disclosure by legal professional privilege. The respondent solicitors were Addleshaw Goddard LLP and the claimant wished to obtain information regarding their conference call facility and email facility so as to be able to track down the first defendant's location. There was evidence before the Judge that Addleshaw Goddard and the relevant defendant had set up the conference call facility and email facility expressly for the purpose of giving and receiving confidential and privileged legal advice.

11 It is important to have regard to the way in which Teare J directed himself at [13]:

> "…However, it is impossible to predict all the circumstances in which an order of the type sought in the present case may arise. For that reason it is, I think, permissible and preferable to hold that the court has jurisdiction to make an order of the type sought pursuant to section 37 of the Supreme Court Act 1981 but that in deciding whether the order is 'just and convenient' in any particular case, or whether the court should, in the exercise of its discretion, make the

> order sought the court must necessarily take into account both the absolute nature of the right to confidential and privileged legal advice and the prior right to have access to such advice. It may be that taking such matters into account will necessarily mean that the order sought will be refused where it requires disclosure of information protected by legal professional privilege or where its effect is to deny a person access to legal advice. But I do not consider that that renders the court's discretion illusory. Rather, it shows that the court must carefully consider all the circumstances of the case in order to decide whether the order is just and convenient and if so whether the order should be made."

12 Teare J distinguished the circumstances before him from those confronting the Divisional Court in, respectively, the Rogers and Miller Gardner cases. At [24] he pointed the contrast in the Rogers case:

> "…In my judgment the connection between the telephone number and the email address and the seeking and receiving of legal advice in the present case is clear and manifest. By contrast the function and nature of the record of the applicant's time of arrival in R v Manchester Crown Court, ex parte Rogers was to record his time of arrival. It was not to enable him to seek and receive legal advice though that probably was the purpose of his arrival at the solicitor's office. The time of his arrival was not information provided by the applicant to the solicitor in confidence."

13 He went on, at [25], to consider the facts in the Miller Gardner case:

> "In R (Miller Gardner) v Minshull Street Crown Court the name and telephone number of the caller were taken down as a formality 'to create the channel through which advice may later flow'. That might be thought to be helpful to [counsel's] argument but it is not apparent that the name and telephone number were provided to the solicitor in confidence in the same way as the telephone number and email address were provided by Addleshaw Goddard to the first defendant in the present case."

14 Teare J then cited a passage from *The Law of Privilege (2nd edn)* , edited by B Thanki QC, at p73:

> "It is suggested that confidentiality is the touchstone and that privilege applies to facts known to a lawyer for the purposes of giving legal assistance or advice … "

The learned Judge thought that passage to be supported by authority and, in particular, by Studdy v Sanders , cited above, and by the words of James LJ in *Re Cathcart, ex parte Campbell (1869–70) LR 5 Ch App 703* , 705:

> "If, indeed, the gentleman's residence had been concealed; if he was in hiding for some reason or other, and the solicitor had said, 'I only know my client's residence because he has communicated it to me confidentially, as his solicitor, for the purpose of being advised by me, and he has not communicated it to the rest of the world', then the client's residence would have been a matter of professional confidence; but the mere statement by the solicitor, that he knows the residence only in consequence of his professional employment, is not sufficient."

15 He referred back to Lord Bingham's qualifying words "without more" in the Rogers case and expressed the view that this "additional requirement" might well be fulfilled in circumstances where a client has given information in confidence for the purposes of seeking and receiving legal advice.

16 Having concluded that the telephone number and email address were protected from disclosure by legal professional privilege, Teare J found this to be a powerful reason for also concluding that it was not just and convenient to make the order sought or, if it was, that the order sought should not be made in the exercise of the court's discretion: see at [29].

17 In the light of these authorities, Mr Davies argues, first, that the communication of the client's identity to D & Co was on the facts of this case within the scope of legal professional privilege and thus absolutely protected. I should at this stage, therefore, consider the evidence in a little further detail.

18 In his witness statement of 9 June 2014, the partner made clear at the outset of his account that his firm was no longer instructed by or on behalf of the Defendant; that his firm had no financial or commercial interest in the outcome of the dispute; and that their only interest was to adhere to their professional obligations. It seems to me that he has been scrupulously careful in treading a delicate path.

19 The witness statement contained the following evidence:

> "4. In case it should assist, I will summarise the position at the outset. At all times during our retainer by the Client, circumstances of confidentiality surrounded his name. He communicated his identity confidentially for the purpose of being advised by my firm and gave express instructions that he retained my firm on condition that his identity should be kept confidential and should not be disclosed. I have taken the view at all times that disclosure of the client's name would have the practical effect of disclosing confidential communications between lawyer and client. In other words, unlike the vast majority of cases, the identity of the client was not a routine communication but it was the very information which linked him to the case and potential liability to the Claimant. In effect, the advice he sought was inextricably bound up with his anonymity.
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> 5. The outline circumstances of the instruction were as follows. I had an exploratory meeting with a person using a pseudonym on 2 April 2014. In the particular circumstances of the proposed instructions, it was thought better

> that I used this pseudonym at all times. I gained a broad understanding of the issues in these proceedings. I understood that there had been ongoing communications on a without prejudice basis between him and Osborne Clarke during which he had remained anonymous. Significant progress had been made towards agreement and he thought that agreement could be achieved. His concern was that getting close to an agreement he needed the assistance of a lawyer to ensure that he did not get caught out with the legal meaning of any document that was concluded. This was especially as he recognised that he was up against experienced lawyers. There had been very recent exchanges of email between him and Osborne Clarke. The reason for the urgency was that, as he understood the position, proceedings had to be served by 3 April 2014 i.e. the following day and therefore pressure was being put upon him to conclude the matter very quickly. His express instruction to me was that, should I agree to act, his identity should remain strictly confidential.
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> 6. I looked at the paperwork showing the state of the without prejudice discussions and noted his desire to resolve the matter. The Client was keen to know whether I thought I could assist in the delicate circumstances facing him. I am an experienced negotiator and also an experienced mediator. Given the Client's determination to resolve the matter and the confidential details that he disclosed to me, the progress which had already been made in the discussions and assuming good faith all round, I thought that I could usefully assist and that it was likely that I could help him achieve an agreement on the basis required by him which, in particular, would involve the non-disclosure of his identity to the Claimant.
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> 7. During the meeting the Client disclosed what I believe to be his true identity to me. He could not have made it clearer that he was doing so in the strictest confidence and for the purpose only of obtaining my advice and assistance. I took appropriate measures within the firm to maintain his anonymity."

20 Despite his best efforts, the solicitor told me that he was unable to achieve a meaningful solution which he could recommend to the Defendant. He discussed matters with him and noted that he had concerns about continuing to fund the matter. The instructions were terminated on 8 May of this year. Later the same day, as I have made clear, the Defendant proffered his unilateral undertaking, which the solicitor understood to be his best attempt to comply with the default judgment without disclosing his identity.

21 If Mr Davies is correct in his submission that, as in the case before Teare J, the communication of the information in question (i.e. the Defendant's identity) was the subject of legal professional privilege, then that would be an end of the matter. It would be an "absolute" protection (the description applied by Henderson and Teare JJ, as cited at [6] and [11] above respectively).

22 On the other hand, Mr Davies developed an alternative submission. If I were to take the view that legal professional privilege did not apply in this case, then he argues that it would not simply be a question of applying the court's discretion on the particular

facts of this case. It would be necessary, he submits, to take into account a "settled practice", whereby the court should be very slow to undermine the confidence attaching to a communication between a client and his solicitor. He was suggesting, in effect, that there should be a preliminary stage to address what is in effect a presumption against disclosure. A judge in my position would then need to consider whether the general public policy factors underlying such a presumption are sufficiently outweighed by the specific circumstances of the particular case.

23 Mr Davies submitted that such a presumption was effectively acknowledged both by Henderson J and by Teare J in their respective judgments, although not in so many words. I have referred already to the judgment of Henderson J, at [31], where he said that "… the appropriate course will normally be to refuse such an application where the address was provided to the solicitor in confidence for the purposes of obtaining legal advice". Similarly, I mentioned what was said by Teare J at [29], when he referred to his conclusion (on legal professional privilege) as "a powerful reason" for concluding that it would not be just and convenient to make the order or that, in any event, the order should not be made in the exercise of the court's discretion.

24 Mr Davies referred to an important case in the House of Lords which, as it happens, does not appear to have been cited before either Henderson J or Teare J. Before turning to it, however, it is appropriate that I set the scene by reference to the judgment of Pickford LJ in Guaranty Trust Co of New York v Hannay & Co [1915] 2 QB 536 , 563:

> "The first and, in my opinion, the only really correct sense of the expression that the Court has no jurisdiction is that it has no power to deal with and decide the dispute as to the subject-matter before it, no matter in what form or by whom it is raised. But there is another sense in which it is often used, i.e., that, although the Court has power to decide the question it will not according to its settled practice do so except in a certain way and under certain circumstances."

Mr Davies argues that Henderson J, at [31], was effectively giving voice to a "settled practice" in this context to the effect that the court will *normally* refuse an order that a solicitor should disclose information given to him in confidence by a client.

25 This point was picked up by Lord Scott in the *House of Lords in Fourie v Le Roux [2007] UKHL 1, [2007] 1 All ER 1087* at [25] *et seq* . The case before their Lordships concerned the grant of a *Mareva* injunction when proceedings were not in existence, and no undertaking had been given to launch them imminently. It had been held by a deputy judge at first instance, and in the Court of Appeal, that the judge had lacked jurisdiction to grant such an order in those circumstances. It was in this context that Lord Scott considered the ambiguous nature of the word "jurisdiction", as used in that case. He addressed the matter in the following passage, at [25]:

> "…The references to jurisdiction made both by Sir Andrew Morritt V-C and by the deputy judge … read as though they had in mind jurisdiction in the strict sense. If they did, then I think they were wrong. It seems to me clear that Park J had jurisdiction, in the strict sense, to grant an injunction against Mr Le Roux and Fintrade. Both were within the territorial jurisdiction of the court at the

> time the freezing order was made. Both were, shortly after the freezing order had been made, served with an originating summons in which relief in the form of the freezing order was sought. There is no challenge to the propriety or the efficacy of the service on them. The power of a judge sitting in the High Court to grant an injunction against a party to proceedings properly served is confirmed by, but does not derive from, s37 of the Supreme Court Act 1981 and its statutory predecessors. It derives from the pre- Judicature Act 1873 powers of the Chancery courts, and other courts, to grant injunctions (see s16 of the 1873 Act and s19(2)(b) of the 1981 Act). The issue is, in my opinion, not whether Park J had jurisdiction, in the strict sense, to make the freezing order but whether it was proper, in the circumstances as they stood at the time he made the order, for him to make it. This question does not in the least involve a review of the area of discretion available to any judge who is asked to grant injunctive relief. It involves an examination of the restrictions and limitations which have been placed by a combination of judicial precedent and rules of court on the circumstances in which the injunctive relief in question can properly be granted. The various matters taken into account by the deputy judge and Sir Andrew Morritt V-C respectively in holding that Park J had no jurisdiction to make the freezing order were really, in my respectful opinion, their reasons for concluding that, in the circumstances as they stood when the matter was before him, it had not been proper for Park J to have made the order. That, in my opinion, is the real issue."

26 Thus it is that Mr Davies urges me to find room for an intermediate or preliminary stage, if I conclude that the court has jurisdiction to make the order, so as to allow for consideration of a "settled practice" in this context. One must be careful not to become involved in semantic disputes, or to give undue weight to the attaching of labels to particular factors that have to be taken into account. In the end, it may be that one can do no better than refer to the terminology of Teare J, at [13], in his judgment, cited above:

> "…[T]he court must necessarily take into account both the absolute nature of the right to confidential and privileged legal advice and the prior right to have access to such advice. It may be that taking such matters into account will necessarily mean that the order sought will be refused where it requires disclosure of information protected by legal professional privilege or where its effect is to deny a person access to legal advice. But I do not consider that that renders the court's discretion illusory. Rather, it shows that the court must carefully consider all the circumstances of the case in order to decide whether the order is just and convenient and if so whether the order should be made."

27 I have come to the conclusion, in the light of the circumstances of this unusual case, and in particular the evidence given by his solicitor, that the information as to the Defendant's identity was indeed the subject of legal professional privilege and thus protected (whether "absolutely" or according to settled practice). Even if it were not,

there are powerful reasons not to override the duty of confidence. It was not simply a piece of neutral background information, as would generally be the case with a client's name, since both he and his solicitor were well aware that the Claimant was keen to establish his identity (for perfectly legitimate reasons): it was accordingly central to their discussions about the retainer that confidentiality should be maintained.

28 I am conscious of the concerns of the Claimant, on behalf of itself and its clients, as to possible harm arising from the Defendant's breaches of confidence. I do not wish to minimise these concerns for one moment, and it is naturally with some reluctance that I find myself unable to grant the relief sought. Nevertheless, in weighing those matters against the plainly important policy considerations underlying both confidence and legal professional privilege, I must take into account the evidence to the effect that these breaches of confidence took place some time ago; that the blogs appear to have been dormant for some time; and that the Defendant has given a unilateral undertaking to protect the Claimant's confidential information in the future. Of course, I acknowledge that he is in breach of the order made by Wilkie J and that the Claimant, for no doubt good reason, is disinclined to trust his assurances. Nevertheless, I am not persuaded in all the circumstances that it is *necessary* to go behind the undertaking of confidence given by the Defendant; still less that it would be appropriate, or in accordance with law, to go behind the legal professional privilege which I have upheld.

29 In the circumstances I refuse the relief and dismiss the application.