In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 291

BETWEEN:-

CHUBB BERMUDA INSURANCE LTD
(formerly known as ACE BERMUDA INSURANCE LTD)

Plaintiff

-v-

FORD MOTOR COMPANY

Defendant

RULING

(In Camera)

Whether to lift stay for purposes of hearing injunction application – whether bill of costs and other material produced on taxation is subject to an implied undertaking – whether bill of costs produced on taxation is privileged – whether waiver of privilege – whether to grant injunctive and declaratory relief

Date of hearing: 20th September 2017
Date of ruling: 24th October 2017

Mr David Edwards QC and Mr Alexander Potts, Sedgwick Chudleigh Ltd, for the Plaintiff

Mr Jan Woloniecki and Mr Nathaniel Turner, ASW Law Limited, for the Defendant

Issues

1. I am asked to rule on whether and to what extent: (i) a bill of costs and other material produced on taxation is subject to an implied undertaking which prohibits other parties from using it for purposes other than the taxation; (ii) a bill of costs produced on taxation is a privileged document; and (iii) whether a party producing privileged material on taxation waives privilege for the purposes of that taxation only or alternatively waives privilege generally. These questions, which fall to be considered in their particular factual context, are not addressed by any reported cases in Bermuda.

Background

2. The Plaintiff ("Chubb") is an exempted insurance company incorporated in Bermuda. The Defendant ("Ford") is a motor vehicle manufacturer headquartered in the United States.

3. Chubb provided excess liability cover to Ford. Ford made a claim under the policy but Chubb declined coverage. This gave rise to a dispute between them as to whether the policy covered the claim.

4. By an Originating Summons dated 14th July 2015 Chubb sought to restrain Ford from litigating the dispute in the United States as Chubb claimed that this would breach an arbitration clause in the policy.

5. On 8th March 2016 I made a consent order ("the Consent Order") which: (i) made provision to protect the confidentiality of the proceedings, following a contested hearing as to which I gave a reserved ruling on 6th January 2016 which is reported at [2016] Bda LR 1; (ii) stayed the Originating Summons

generally on terms that Ford gave undertakings not to litigate the dispute in the United States; and (iii) awarded costs to Chubb, to be taxed forthwith on the standard basis, if not agreed.

6. The Consent Order provided that Chubb had liberty to restore the proceedings for further hearing in the event of any alleged non-compliance by Ford with its undertakings; or in the event of any threatened breaches by Ford of the arbitration agreement, which was acknowledged to be valid and binding, contained in the policy.

7. The parties were unable to agree costs. On 7th September 2016, Chubb commenced taxation proceedings under RSC Order 62 by lodging a Bill of Costs at the Registry and sending a copy to Ford. On 25th November 2016 Ford lodged its Objection to the Bill of Costs and on 16th December 2016 Chubb filed its Reply.

8. On 7th or 8th March 2017, Ford's US attorneys, McGuire Woods LLP ("McGuire Woods"), emailed a letter to Chubb's US attorneys, Clyde & Co US LLP, which pointed out the hurdles which Ford suggested that Chubb would face in the arbitration. On 15th April 2017 McGuire Woods emailed a revised version of the letter which contained additional information relevant to a possible resolution of the dispute. Both versions of the letter ("the McGuire Woods letter") contained numerous references to information contained in Chubb's Bill of Costs and stated that Ford intended to use this information to support its claims in the arbitration. Ford filed affidavit evidence for the present hearing in which they confirmed this intention.

9. The taxation hearing commenced on 8th March 2017. It was adjourned part heard to 26th April 2017, when it was adjourned generally. This was to give the parties time to obtain a decision from the Court as to what, if any, use Ford could make in the arbitration of the material disclosed by Chubb on the taxation.

10. By a summons dated 29th June 2017, Chubb sought orders: (i) that the summons be heard in camera, and other orders protecting confidential and privileged material disclosed in the hearing; (ii) that the stay of the

Originating Summons be lifted to the extent necessary to enable Chubb to make the application contained in the summons; (iii) declaring that the Bill of Costs and any other material that Chubb might produce on taxation was privileged and confidential, save to the extent that privilege and confidentiality had been waived for the purposes of taxation; and (iv) prohibiting Ford from using any such material, including the references to it in the McGuire Woods letter, for any purposes other than that of the taxation.

11. I dealt with Chubb's application to protect confidential and privileged material at the start of the hearing and ruled *inter alia* that the hearing should take place in camera.

Stay

12. The Originating Summons was stayed generally. In my judgment the breadth of the wording of the stay means that in order for the Court to deal with the present application the stay would have to be lifted. But it need not be lifted generally: it could be lifted for the purpose of dealing with that application and no further.

13. The law on the test for a stay was summarised by Ward LJ, giving the judgment of the Court, in Wagstaff v Colls [2003] CP Rep 50; [2003] EWCA Civ 469 EWCA at para 52:

"*The test is established by Cooper v Williams [1963] 2 Q.B. 567. I have already cited Lord Denning's judgment that the stay can be removed 'if proper grounds are shown'. Danckwerts L.J. said at p. 582:-*

> *'I am quite satisfied that a stay of this kind is not equivalent to the position when a judgment has been given; but it is a process which can be removed for good cause. In my experience stays have often been removed when the facts required that step to be taken, and I would point out that it is also possible to set aside a consent order in proper conditions.'*

Perhaps it goes without saying, but, as Fox L.J. held in Hollingsworth v Humphrey [Independent, 21st December, 1987],

> *'In deciding whether "proper grounds are shown" (or "good cause" is shown) for lifting the stay it is necessary to consider all the circumstances of the case."*'

14. In the present case, the circumstances include an allegation that Ford has breached and threatens to commit further breaches of an implied undertaking. An implied undertaking is an obligation which is owed to the Court and can therefore (only) be released or modified by the Court. See Bourns Inc v Raychem Corp [1999] 3 All ER 154 *per* Aldous LJ, giving the judgment of the Court, at 169 d. A threatened breach of an implied undertaking can be restrained by an injunction and an actual breach can be punished by an order for committal. If Ford used documents at the arbitration hearing with the leave of the arbitral tribunal but without the leave of the Court then, if the Court subsequently found that the documents were subject to an implied undertaking, Ford would be guilty of contempt.

15. Moreover, the Consent Order contained a provision that costs were payable forthwith. The taxation should not await the outcome of the arbitration, which is likely to take some time as not all the arbitrators have yet been appointed. But unless it does await the outcome, then, if I do not rule on the merits of Chubb's application, Chubb will have to proceed without knowing whether any further material which it wishes to produce on taxation would be available to Ford to deploy in the arbitration. It would in my judgment be unfair to put Chubb in this invidious position.

16. As to Chubb's claim for privilege, it is common ground that pursuant to sections 19 and 20 of the Arbitration Act 1996 the arbitral tribunal would have jurisdiction to rule on this, as on the admissibility of evidence generally, even though it is not a question which has been referred to arbitration. However the questions raised by Chubb about privilege, and indeed implied undertakings, are relevant not only to this taxation but to taxations in general. They are in my judgment of general public importance.

17. Jan Woloniecki, who appeared for Ford, submitted that the test for a stay was not "*good cause*" or "*proper grounds*", but whether there had been a material change of circumstances. He relied upon Digicel v Cellone and others [2012] Bda LR SC, which concerned a dispute between two cellphone

providers. Against the wishes of the plaintiff, Ground CJ stayed the action to allow the disputes to be referred to the Telecommunications Commission under the Telecommunications Act 1986. The plaintiff applied to set aside the stay on the ground that circumstances had changed. Ground CJ accepted that this was the applicable test, stating at para 36:

"*whether it is regarded as strictly res judicata, as the defendants argue, or whether simply as matter of good practice, I take it to be established beyond argument that the courts will not reopen even an interlocutory decision unless there has been a material change of circumstances: see eg London Underground Ltd v NUR [1989] IRLR 343.*"

18. In Digicel v Cellone and others, the plaintiff sought a permanent lift of the stay whereas in the instant case Chubb seeks a limited lift of the stay for a specific purpose related to taxation which will not frustrate the purpose for which the stay was granted. That is sufficient to distinguish the cases. Cooper v Williams was not cited to Ground CJ and the case upon which he relied, London Underground Ltd v NUR, a decision of the Queen's Bench Division, was not concerned with a stay, but with the circumstances in which a party enjoined by an injunction made at an *inter partes* hearing could apply to discharge the injunction rather than appeal against it.

19. Moreover, the case was not authority for the proposition for which Ground CJ relied upon it. Simon Brown J (as he then was) set out several grounds on which an application to discharge an *inter partes* injunction could be made, one of which was that there had been a material change of circumstances since the injunction was granted. However the judge accepted counsel's submission that these grounds did not exhaust the circumstances in which the enjoined party could seek discharge of the injunction instead of appealing against it, and that the Court could entertain an application to discharge an injunction made following a full *inter partes* hearing "*where justice requires it*".

20. Digicel v Cellone and others, then, does not displace the test for the lifting of a stay established by Cooper v Williams. The outcome of Digicel – the application to lift the stay was dismissed – would no doubt have been the same had the Court applied a "*proper grounds*" or "*good cause*" test, as the

ground relied on to get the stay lifted was a material change of circumstances.

21. For the reasons given above, I am satisfied that there are proper grounds or good cause (the terms are in my judgment different ways of saying the same thing) for lifting the stay in the present case for the limited purpose of determining Chubb's application. I will do so. This does not undermine the purpose of the Consent Order, which was to prevent the parties litigating their dispute in the courts as it was covered by an arbitration agreement. Neither does it usurp the function of the arbitrators. The Court will determine whether certain material is available to be deployed in the arbitration: whether any such available material is relevant and admissible will then be a matter for the arbitrators.

22. Although I need not be satisfied that there was a material change in circumstances after the Consent Order was made, I am satisfied that on Chubb's case in fact there was; namely Ford's threat to use in the arbitration material produced on taxation by Chubb that was protected by an implied undertaking and legal professional privilege.

23. Had I not lifted the stay, it would of course have been open to Chubb to cut the Gordian Knot by seeking the same injunctive relief but in a fresh action.

Implied undertaking

24. The documents disclosed by a party during discovery are subject to an implied undertaking that they will only be used for the purposes of the proceedings in which they are disclosed. In Bourns Inc v Raychem Corp the Court held that the principle extended to documents which were disclosed on taxation, even where disclosure was voluntary. See the judgment of Aldous LJ at 169 d (for the principle) and 170 g – h (for its extension):

"*If the taxing master had ordered the documents to be disclosed to Raychem then there could be no doubt that the disclosure would have been subject to the implied undertaking. True, there was no such order, but the disclosure was made in circumstances where the documents were requested, they were directly relevant to an issue and natural justice*

meant that an order for production was necessary. In the circumstances it would be right for the court to imply an undertaking even though Bourns disclosed the documents without an order being made. In my judgment where a party to taxation discloses to a payer documents for the purpose of the taxation which are relevant to an issue and therefore should in the interests of justice be disclosed, an implied undertaking arises so that the documents can only be used for the purposes of those proceedings. That happened in this case: therefore the documents were disclosed subject to that undertaking."

25. The principle protects not only the underlying documents but information derived from them. As Lord Oliver, giving the judgment of the House of Lords in Crest Homes Plc v Marks [1987] 1 AC 829, stated at 854 A – B:

"*... the implied undertaking applies not merely to the documents discovered themselves but also to information derived from those documents whether it be embodied in a copy or stored in the mind.*"

26. David Edwards QC, who appeared for Chubb, submitted that in the premises the bill of costs, and any supporting documents, was subject to an implied undertaking. It was produced on compulsion, as Chubb had to produce a bill of costs in order to recover its costs on taxation. To the extent that any part of it, and any supporting documents, was produced voluntarily, the implied undertaking still applied. And it applied to the entries in the bill of costs just as it would have applied to the primary sources from which that information was derived.

27. Mr Woloniecki submitted in reply that the principle in Bourns Inc v Raychem Corp was not applicable to a taxation in Bermuda because: (i) it only applied to underlying documents and other primary sources, not to the entries in a bill of costs derived from them; and (ii) in Bermuda, unlike the position under the RSC in England and Wales when Bourns Inc v Raychem Corp was decided, there was no compulsion to produce the supporting papers and vouchers: cf RSC Order 62/29(5)(b) (Bermuda) with RSC Order 62/29(7)(d) (England and Wales): in England and Wales, the party seeking costs had to supply the supporting documents to the taxing master but not the other party, although the taxing master had the power to order the production of any document, as does the Registrar in Bermuda. Mr

Woloniecki further submitted that in any event the entries in the bill of costs went beyond what was reasonably necessary for the purposes of taxation and were therefore not produced under compulsion.

28. In my judgment, it is clear from the authorities cited by Mr Edwards that the implied undertaking applies to all material produced on taxation, irrespective of whether it is contained in the bill of costs or the supporting documents. It is not helpful to attempt to draw a distinction between material produced voluntarily and material produced on compulsion. The party seeking taxation of its costs is acting under compulsion in that, in order to recover the costs which it claims, it must produce sufficient material on taxation to substantiate its claim. A pro forma bill of costs containing a bare minimum of information is unlikely to suffice. The level of detail provided, whether contained in the bill of costs or in supporting papers and vouchers, is a matter for the judgment of the party submitting the bill, and is in that sense voluntary.

29. It is open to Ford to apply to the Court to be released from the implied undertaking. See Crest Homes Plc v Marks per Lord Oliver at 854 B and 860 B and Re Lehman Ltd (ruling: discovery) [2011] Bda LR 56 SC at paras 33 – 38. But there is no such application before the Court.

Privilege

30. In this judgment, "*privilege*" is used as shorthand for "*legal professional privilege*". Legal professional privilege is a single privilege which consists of two heads: legal advice privilege and litigation privilege. See Three Rivers DC v Bank of England (No 6) (HL(E)) [2005] 1 AC 610 ("Three Rivers 6") *per* Lord Carswell at para 105.

31. Not all documents or parts of documents produced on taxation will be privileged, although they will all be subject to an implied undertaking. However it may be important to determine whether privilege applies to all or part of such documents because whereas the Court can release a party from an implied undertaking, only the party entitled to assert privilege over a

document can waive privilege. Privilege is in that sense "*absolute*". See Three Rivers 6 *per* Lord Scott at para 25.

32. Surprisingly, there appear to be no reported case in Bermuda or England and Wales as to whether privilege attaches to a bill of costs lodged for the purposes of taxation. There are, however, plenty of cases supporting the proposition that it attaches to a bill of costs supplied by a solicitor to her client. They were summarised by Rimer J in Dickinson (t/a John Dickinson Equipment Finance) v Rushmer (t/a FJ Associates) [2002] 1 Costs LR 128 Ch D at para 12:

"*I accept that the solicitors' bills delivered to the claimant are privileged documents. Sir G J Turner V-C held in* Chant v Brown (1852) 9 Hare 790 *that such bills are privileged, on the ground that 'an attorney's bill of costs is, in truth, his history of the transaction in which he has been concerned' (see 794). In Turton v Barber (1874) LR 17 Eq 329 , Sir Charles Hall V-C also held, without adding much in the way of reasons, that such bills are privileged. More recently, in International Business Machines Corp and Another v Phoenix International (Computers) Ltd [1995] 1 All ER 412 , the claimant (which was represented by leading and junior counsel) accepted that solicitors' bills 'are documents for which privilege could have been claimed and that any solicitor would realise this' (see 419j); and Aldous J appears to have regarded that concession as correct, saying (at 424b) that 'the reasonable solicitor would have been in no doubt that the legal bills were privileged documents'*."

33. Mr Woloniecki invited me to reject this approach for the "modern" approach which is adopted in Australia and New Zealand and endorsed by the learned editors of Phipson on Evidence, Eighteenth Edition, at para 23-57:

"*An approach which has much to commend it is that taken in New Zealand where it has been held that bills of costs and statements of account are not privileged by their nature but that they may be privileged, or parts may be blanked out, if disclosure would in respect of the particular bill tend to reveal privileged matters.*"

I can see the attraction of the antipodean approach. However in Bermuda the case law of England and Wales is more strongly persuasive, and it is that which I shall apply.

34. Mr Woloniecki submitted that, insofar as it was privileged, a solicitor client bill of costs was only privileged because it attracted legal advice privilege as a solicitor client communication. A bill of costs produced for the purposes of taxation was not a solicitor client communication and was therefore not privileged. Thus, Mr Woloniecki submitted, the presence or absence of privilege was determined by the purpose for which a bill of costs was prepared.

35. With Mr Woloniecki's purpose test in mind, I considered first whether a bill of costs submitted for taxation would be covered by litigation privilege. This head of privilege includes (but is not limited to) documents which were brought into existence with the dominant purpose of conducting or aiding in the conduct of litigation. See Waugh v British Railways Board [1980] AC HL 521 *per* Lord Edmund-Davies at 543 H – 544 C. Taxation is litigious: as Aldous LJ stated in Bourns Inc v Raychem Corp at 158 f – g: "*The adversarial system of law applies to taxation of costs*". It is common ground that a draft bill of costs would be privileged. This accords with the rationale for litigation privilege explained by Lord Roger in Three Bridges No 6 at para 52 that: "*each party should be free to prepare his case as fully as possible without the risk that his opponent will be able to recover the material generated by his preparations*".

36. Mr Edwards submitted that a bill of costs submitted for taxation was subject to litigation privilege, but subject to a limited waiver for the purposes of the taxation. I shall deal with waiver below. Mr Woloniecki submitted that a bill of costs submitted for taxation was different in kind to a draft bill of costs prepared for taxation, and that waiver did not arise because it was not a document falling within the class of documents for which litigation privilege could ever be claimed. He submitted that the distinction was analogous to the distinction between a draft pleading and a pleading which had been filed and served, as to which he referred me to the judgment of Aldous LJ, with whom Roch LJ agreed, in Visx Inc v Nidex Co [1999] FSR 91 EWCA. The question was whether answers given to interrogatories in proceedings in the United States were privileged. The Court held they were not. Aldous LJ stated at 106:

"*In my view the question of whether or not waiver took place does not arise and does not have any application in this case. No doubt any drafts that were produced were privileged and privilege in those documents has not been waived. However, a document containing answers to interrogatories which is served upon another party is not a privileged document and therefore waiver never occurs. Why is it not privileged? Because it is not a document falling within the class of documents for which legal professional privilege can ever be claimed. The answers may be confidential and restriction may be placed upon disclosure, but the document is no more privileged than is a pleading.*"

37. This passage suggests that even when a document is produced for the purposes of litigation, once it is served on another party the presence or absence of privilege will depend upon its contents. As to this, Mr Edwards submitted, a bill of costs, irrespective of whether it is produced for taxation or by a solicitor for her client, is privileged because of its contents. Ie a bill of costs contains material which is privileged independently of the fact that it has been put into a bill of costs. I agree. That was the reason given in Chant v Brown as to why a bill of costs is privileged: "*an attorney's bill of costs is, in truth, his history of the transaction in which he has been concerned*". This was an example of the principle, established by the 19th century authorities, that legal advice privilege applied not only to documents passing between the client and his legal advisers (and, by parity of reasoning, to oral communications between them), but also to evidence of the contents of such communications (eg a bill of costs). See Three Rivers DC v Bank of England (No 5) [2003] 1556 EWCA *per* Longmore LJ, giving the judgment of the Court, at para 21. Content which is privileged anyway remains privileged when put into a bill of costs irrespective of whether the bill of costs is prepared for the solicitor's client or for the purposes of taxation.

38. The real question, then, is not whether a bill of costs produced on taxation is privileged – clearly, it is – but whether privilege necessarily extends to each and every entry. As the general rule is that a bill of costs is privileged, the presumption is that any given entry will be privileged unless the party challenging privilege can show that it is not. It has been said that, in relation to a document, privilege: "*involves a right to keep confidential the document*

and the information in it", *per* Aldous LJ in Bourns Inc v Raychem Corp at 167 *j*. Thus an entry will not be privileged, because it does not contain confidential information, if it records: (i) what took place in the presence of the opposite party; (ii) communications with the opposite party; or (iii) matters of fact which are in the public domain. See Ainsworth v Wilding [1900] 2 Ch 315 Ch D *per* Stirling J at 322 – 325 *passim,* as pithily summarised in Halsbury's Laws of England, Volume 12, Fifth Edition, para 650.

39. Mr Woloniecki submitted that whereas the entries in the bill of costs on taxation submitted by Chubb were too detailed to attract the protection of an implied undertaking, they were not detailed enough to qualify as privileged. However, whether an entry is privileged depends upon whether the communication or activity described is privileged, not upon the level of detail with which it is described. I was referred to a sample of five specific entries in the bill of costs, which are identified in a Confidential Appendix to this judgment, and heard submissions as to whether they are privileged. I am satisfied that they are, as they all concern either communications between Chubb and its legal advisers or communications and activities undertaken for the purpose of anticipated litigation.

40. To sum up, I am satisfied that the bill of costs produced by Chubb on taxation is privileged. I do not exclude the possibility that it may contain entries which are not privileged, but I was not referred to any which were not.

41. In submitting the bill of costs for taxation, Chubb necessarily waived privilege, but only for the purposes of the taxation hearing. I am satisfied that the law on waiver as it applies to this situation was as summarised by Gloster LJ in Eurasian Natural Resources Corpn Ltd v Dechert LLP [2016] 1 WLR 5027 EWCA at para 49:

> "*while an application for detailed assessment of costs inter partes may necessarily entail some waiver of privilege, that waiver is (i) limited; (ii) temporary; and (iii) extends only to the opposing party and the judge*".

42. Ford could have been in no doubt that Chubb intended only to waive privilege for the limited purpose of the taxation hearing because the bill of costs stated:

> "*For the avoidance of doubt, by filing this bill of costs and any supporting documents, including in relation to any taxation hearing, the Plaintiff does not intend to waive any applicable legal advice or litigation privilege (or similar privileges recognised under U.S. law).*"

Summary

43. To answer the questions with which this judgment began, but in the particular context of the bill of costs produced by Chubb:

(1) The bill of costs, and any other material that Chubb may produce on taxation, is subject to an implied undertaking which prohibits Ford from using it for purposes other than the taxation. However Ford can apply to be released from the undertaking.

(2) The bill of costs is privileged, although privilege will not extend to any entries which do not record confidential matters.

(3) Chubb has waived privilege for the limited purpose of the taxation only, and not generally.

Remedies

44. An injunction may be granted by an interlocutory order of the Court in all cases in which it appears to the Court to be just or convenient that such an order should be made: see section 19(c) of the Supreme Court Act 1905. As Mr Edwards submitted, a well-recognised instance of that discretion is the grant of an injunction to restrain a breach of confidence. See Snell's Equity, Thirty-Third Edition, at para 9-019. An injunction prohibiting the use of documents in breach of an implied undertaking or in breach of privilege would fall within that rubric. I am satisfied that, absent an injunction, there is a strong likelihood that the bill of costs and possibly other material

produced by Chubb on taxation will be used by Ford for purposes of the arbitration.

45. With that in mind, I make the following orders and declarations:

(1) That the stay of the Originating Summons be lifted to the extent necessary to enable Chubb to make the application contained in the summons.

(2) That the Bill of Costs and any other material that Chubb might produce on taxation is: (i) subject to an implied undertaking by Ford not to use it for purposes other than the taxation; and (ii) privileged, save to the extent that privilege has been waived for purposes of the taxation.

(3) That Ford is prohibited from using any material produced by Chubb on taxation, including the references to it in the McGuire Woods letter, for any purposes other than that of the taxation, including, but not limited to, the arbitration between the parties relating to the underlying dispute which gave rise to this action.

46. I shall hear the parties as to costs.

Dated this 24th day of October, 2017

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Hellman J