

419. Disclosure and inspection—legal professional privilege—estoppel—Bermuda

B was the settlor of a trust which he applied to set aside on the grounds of undue influence. During the proceedings disputes arose over discovery in the action and it was held by Ground, J. in the High Court that B had waived legal professional privilege in respect of certain documents. Following that decision B served a third list of documents and, for the first time, made a claim to joint privilege for himself and his wife in respect of certain of the documents. It was held that B was precluded from raising joint professional privilege. B appealed.

Held, dismissing the appeal, that (1) the court below had not considered the question of joint privilege, so issue estoppel in the usual sense was not applicable; (2) viewed practically, the order was a final order *Henderson v. Henderson* [1843-60] All E.R. Rep. 378 applied, and (3) the finding that the plaintiffs could not raise the joint privilege points was correct on the basis that the B's wife was privy in interest to B and it would be unconscionable to rely on joint privilege.

THYSSEN-BORNEMISZA v. THYSSEN-BORNEMISZA (1999-2000) 2 I.T.E.L.R. 467, Ashwood (President), CA (Ber).

420. Disclosure and inspection—letters—claimant's correspondence with expert witness—"material instructions" contained within correspondence

[Civil Procedure Rules 1998 (SI 1998 3132) Part 35 r.35.10(3), r.35.10(4).]

C, a defendant in a personal injury action, applied for an order to disclose the whole of two letters from S to his expert witness. S had obtained permission to rely on a number of reports and letters from an expert, a consultant in accident and emergency medicine. S had disclosed the existence of a further letter from the expert in his list of documents. C had obtained a copy of that letter which indicated that the expert was responding to a letter from S's solicitors and from S. On obtaining a copy of the letter from S's solicitors to the expert, it became clear that in fact S had sent two letters to the expert. S provided C with edited versions only of the two letters from S to the expert, his solicitors having indicated that irrelevant parts of the letters had been deleted.

Held, granting the application, that there had been a failure to comply with the Civil Procedure Rules 1998 Part 35 r.35.10(3) in that the expert, in making reference to the letters but not their contents, had not stated the substance of all his material instructions. By virtue of r.35.10(4), the instructions were not privileged. The court being satisfied that the statement of instructions was incomplete, it was prepared to order disclosure of S's letters insofar as they contained "material instructions". The court accepted that disclosure of part of a letter constituted disclosure of all of it provided the undisclosed part dealt with an entirely different subject matter. The judge read and considered the contents of the letters without their being shown to C and was satisfied that the totality of the letters dealt with general and special damages and with other issues in the case, such that they could not be said to deal with an entirely different subject matter.

SALT v. CONSIGNIA PLC, August 2, 2002, Judge Bradbury, CC (Bow). [*Ex rel.* Robert Weir, Barrister, Devereux Chambers, Devereux Court, London].

421. Disclosure and inspection—mistake—inadvertent disclosure of privileged documents

[Civil Procedure Rules 1998 (SI 1998 3132) Part 31 r.31.20.]

A appealed against an order ([2002] EWHC 562) requiring him to deliver up to the solicitors representing the Commissioner of Police two opinions of counsel which had been disclosed by mistake and restraining him from making use of those opinions save for the purposes of an appeal. A had been arrested on suspicion of theft or criminal damage, but a decision had been made not to charge him. A brought proceedings against the Commissioner of Police alleging wrongful arrest and false imprisonment. Counsel's opinions, which had influenced the decision not to charge A, were inadvertently sent to A's solicitors when documents were inspected under the Civil Procedure Rules 1998 Part 31 r.31.20.