ICLR: King's/Queen's Bench Division/1953/Volume 2/CHANTREY MARTIN (A FIRM) v. MARTIN. - [1953] 2 Q.B. 286

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[COURT OF APPEAL]

CHANTREY MARTIN (A FIRM) v. MARTIN.

1953 July 3, 14.

Somervell and Jenkins L.JJ.

Practice - Discovery - Chartered accountant - Audit of client's accounts - Working accounts and other papers produced in preparation of final audit - Property in - Disclosure.

Working accounts and other papers which are brought into existence by chartered accountants in the preparation of a final audit of a client's books are the property of the accountants and not of the client; and in the event of litigation to which the accountants are party, such accounts and papers, if relating to matters in question in the litigation, are proper to be disclosed to the other party.

Leicestershire County Council v. Michael Faraday & Partners Ld. [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483 followed.

Gibbon v. Pease [1905] 1 K.B. 810; 21 T.L.R 365 and *Ex parte Horsfall* (1827) 7 B. & C. 528 distinguished.

Decision of Barry J. reversed.

APPEAL from Barry J. (in chambers).

The plaintiffs, Chantrey Martin & Co., were a firm of chartered accountants, and according to the statement of claim endorsed on the writ, the defendant Martin was in their employment from about July 18, 1951, to April 22, 1952, as a senior audit clerk at a salary of £43 6*s.* 8*d.* per calendar month, payable in advance on the first day of each month. They alleged that on the last-mentioned date the defendant, in breach of his contract of service, absented himself from his duties without leave or notice, thus terminating, his employment without notice either given or received, and without reasonable cause. The plaintiffs therefore claimed to recover from the defendant a sum of £93 13*s.* 4*d.*, made up of one month's salary paid in advance, one month's salary in lieu of notice, and £7 alleged to have been lent to the defendant by the plaintiffs.

The defendant, by his defence and counterclaim, denied the alleged breach of contract; contended that on April 18, 1952, the plaintiffs had wrongfully dismissed him from his employment; and counterclaimed £130, being three months' salary in lieu of notice.

In his particulars he alleged that in auditing, in the course of his duties, the books of a limited company, a client of the plaintiffs, he discovered certain irregularities in the company's audited accounts for a previous year; that he reported the irregularities to the senior partner of the plaintiffs' firm, who refused to allow any adjustments to be made, and who summarily dismissed him when he refused to be a party to finalizing the draft accounts and making the tax computations unless the suggested adjustments were made.

In their reply the plaintiffs denied the allegations of irregularities in the draft and audited accounts of the client company for 1950, and also the alleged wrongful dismissal of the defendant.

By a summons the defendant obtained from a master an order for the disclosure of certain documents relating to the auditing of the client company's accounts which the plaintiffs admitted having in their possession, but for which they claimed privilege on the ground that they were the property of the client company.

On appeal to him Barry J. reversed the master's decision, and the defendant now appealed.

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Ashe Lincoln Q.C. and ***Lloyd-Davies*** for the defendant. Before the master the plaintiffs took the point that the defendant could not call for disclosure of these working accounts because the plaintiffs held them merely as agents for their client. That was rejected by the master, who held that the accountants, as independent professional men, had produced the accounts by their own skill and work, and that the ownership vested in them and not in the client. The judge reversed that decision, holding, apparently on the authority of *Gibbon v. Pease*,1 that the documents were the property of the client and therefore the accountants had no right to disclose them. There appears to be no direct authority of this court as to the position of an accountant.

[SOMERVELL L.J. What are working accounts?]

Papers produced by accountants in the course of preparing a profit and loss account, and the computation of tax. In *Leicestershire County County v. Michael Faraday & Partners Ld*.2 the Court of Appeal, holding that the relationship between the county council and rating valuers was that of client and a professional man and not that of principal and agent, decided that documents, maps and plans prepared by the valuers in carrying out their expert duties were their own property. See also *London School Board v. Northcroft*,3 approved in the *Leicestershire case*.2 *Gibbon v. Pease*4 was concerned with the ownership of completed plans prepared by an architect, and is to be distinguished. So also is *Ex parte Horsfall*,5 where drafts and copies of deeds prepared by an attorney were held to be the property of his client, because the client, having paid for everything, was entitled to possession. A solicitor is in a special position.

Where an accountant is employed to produce a profit and loss account a term might be implied in the contract that without the consent of the client he should not publish the document to the whole world; but if the accountant wants to make use of the account for his own private purpose it is submitted that he would be entitled so to use it; and anyone who is engaged in litigation to which the document is germane is entitled to have disclosure. If the document is in the hands of the client the client can, it is submitted, be required to produce it, if it is germane to the litigation.

1 [1905] 1 K.B. 810; 21 T.L.R. 365.

2 [1941] 2 K.B. 205; 57 T.T.R. 572; [1941] 2 All E.R. 483.

3 (1889) Hudson on Building Contracts, 4th ed., Vol. 2, p. 147.

4 [1905] 1 K.B. 810.

5 (1827) 7 B. & C. 128.

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Leon MacLaren for the plaintiffs. There appears to be no direct authority on the relationship of accountant and client, but it is submitted that an accountant is the agent of his principal in rather the same way as a solicitor. The documents which a solicitor brings into being in the process of litigation are the property of his client, and if another solicitor comes into the case he may demand all the papers from the original solicitor.

[JENKINS L.J. All the documents which a solicitor produces are included in his bill of costs and are paid for by the client.]

So, also, an accountant charges for each piece of work which he does in carrying out an audit.

[SOMERVELL L.J. Is there any authority that where documents are relevant to litigation the court will not make an order for disclosure because it would be a breach of the rights of a third party?]

I do not know of any authority as to the power of limited disclosure. The documents in question are in law the property of the client and the agent cannot be compelled to produce them if they are in the agent's possession.

Ashe Lincoln Q.C. replied.

Cur. adv. vult.

July 14. JENKINS L.J., reading the judgment of the court, said: This is an appeal by the defendant from an order of Barry J., dated June 4, 1953, allowing an appeal by the plaintiffs from a master's order, dated May 22, 1953, which had ordered the production by the plaintiffs of certain documents disclosed in their affidavit of documents as relevant documents in their possession or power, which they objected to produce on the grounds stated in such affidavit. The question in the appeal is whether the judge was right in holding that the grounds relied on by the plaintiffs were sufficient in law to entitle them to refuse production of all or any, and if so which, of these admittedly relevant documents.

[His Lordship stated the facts, and the nature of the claim, defence and counterclaim, and continued:] The circumstances on which the defendant's allegation of wrongful dismissal is based are set out in particulars contained in the defence and amplified in further and better particulars subsequently delivered, pursuant to a request by the plaintiffs. The short effect of these particulars was that in March, 1952, the defendant, in the course of his duties, commenced an audit for the financial year ending August 31, 1951, of the books of a certain limited company

which was a client of the plaintiffs, the method being to take the figures for the financial year ending August 31, 1950 and to build up the next year's figures with reference to the appropriate heading of the previous year; that in the course of such audit the defendant discovered certain irregularities in the audited accounts for the year ending August 31, 1950, which the plaintiffs had audited; that prior to April 18, 1952, he had discussed his draft accounts for the year ending August 31, 1951, and the audited accounts for the previous year, with the plaintiffs' senior partner, H. G. Martin, and had suggested adjustments to correct the irregularities he had detected; that that partner refused to allow these adjustments to be made and ordered the defendant to make tax computations on the basis of the unadjusted accounts; and that on April 18, 1952, after a further discussion of the accounts in question, in which the partner maintained his former attitude, the defendant told the partner that he would not be a party to finalizing the draft accounts or making the tax computations unless the suggested adjustments were made; whereupon the partner, acting for the plaintiffs, summarily dismissed him. The alleged irregularities in the accounts in question, as particularized by the defendant, included understatement of sales, understatement of gross profit, and understatement of administration expenses and salaries, and were (in effect) alleged by the defendant to be calculated to mislead the shareholders and to evade payment of the proper amount of tax on the profits of the client company.

The plaintiffs, in their reply, denied the whole of the defendant's allegations of irregularities in the draft and audited accounts of the client company and also denied the alleged dismissal of the defendant.

Such being the nature of the case on the pleadings, it could not well be disputed that all documents in the plaintiffs' possession or power relating to the preparation of the client company's accounts for the years ending August 31, 1950 and 1951, are documents relating to matters in question in the action, and therefore proper to be disclosed. As we have already mentioned, they were in fact duly included in the plaintiffs' affidavit of documents, but with an objection taken in the body of the affidavit to their production, the validity of this objection being the subject of the present appeal.

The objection was taken by the plaintiffs in their affidavit of documents in these terms: "We object to produce any of the documents set forth in the second part of the first schedule

hereto on the grounds following: (a) As to certain of the documents numbered in the said part of the said schedule such documents are the property of 'the client company' ... and are in the plaintiffs' custody possession or power solely as accountants to the said 'client company' and not otherwise."

The documents in question are those lettered (A) to (K) in the second part of the first schedule to the affidavit, namely: "(A) The file or files of all working papers and schedules relating to the audit for the year ended 31/8/50 of the books of 'the client company' clients of the plaintiffs. (B) The first draft accounts of 'the client company' for the year ended 31/8/50 as prepared by Mr. Fradd. (C) Partial re-draft of the accounts of 'the client company' for year ended 31/8/50. (D) the final typed accounts of 'the client company' for year ended 31/8/50. (E) The correspondence between plaintiffs and the Inland Revenue in regard to these accounts and the tax computations thereon. (F) the private ledger of 'the client company' containing entries for the year ended 31/8/50. (G) The file or files of all working papers and schedules relating to the audit for the year ended 31/8/51 of the books of 'the client company.' (H) The draft accounts of 'the client company' for the year ended 31/8/51. (I) Notes and calculations relating to these draft accounts made by Mr. H. G. Martin during the course of his discussion with the defendant on these matters and attached to the said file of working papers. (J) The draft tax computation relating to the said draft account prepared by the defendant and his notes and comments written thereon. (K) The private ledgers of 'the client company' containing entries for the year ended 31/8/51."

It seems clear that "possession or power" for the purposes of an order for production under the Rules of the Supreme Court, Ord. 31, r. 14, as distinct from inclusion in an affidavit of documents under r. 12 of the same Order, does not mean actual corporeal possession irrespective of legal ownership, but sole legal possession, conferring on the party against whom production is sought a right and power to deal with the documents in question. Thus a party will not be ordered to produce a document which, though in his actual corporeal or physical possession, belongs wholly to a third party or to a third party jointly with himself: see *Kearsley v. Philips*.1 It follows that

1 (1882) 10 Q.B.D. 36, 40; (1883) 10 Q.B.D. 465 (C.A.).

no order for production could properly be made in respect of the private ledgers of the client company comprized in items (F) and (K) above, for these are clearly the property of the client company and not of the plaintiffs. This is recognized by the defendant, who makes no claim to production in respect of items (F) and (K).

We have no note of the judge's reasons for deciding that the remainder of the documents listed above should not be produced, but we were told by counsel that his decision was based on *Gibbon v. Pease*,2 where it was held that the plans prepared by an architect, employed by a building owner to carry out alterations to certain houses, were the property of the building owner. It would seem, therefore, that the judge took the view that the working papers, drafts, notes, calculations, and typed final accounts, brought into being by the plaintiffs in the course of, or as preliminaries to, the auditing of the client company's accounts, and the ascertainment of its tax liability, were by parity of reasoning the property of the client company, and accordingly that on the principle above stated the plaintiffs should not be compelled to produce them.

The ratio decidendi in *Gibbon v. Pease* is thus stated by Lord Collins M.R.3: "In my opinion the contract in this case resulted in the making of plans the property in which passed to the building owner on payment of the remuneration provided under the contract. I find a difficulty in distinguishing this case from that of a contract to paint a picture or to design a coat of arms, as to which no question of ownership could arise." There are, however, other cases, to which we understand the judge was not referred, in which a different conclusion was reached in circumstances bearing a closer resemblance to those of the present case. In *Leicestershire County Council v. Michael Faraday & Partners Ld*.,4 rating valuers were employed by a county council for five years to give advice and assistance in connexion with the valuation of hereditaments in the council's area, and at the termination of the five years' agreement the council claimed to be entitled to all documents, books, maps and plans which had been prepared by or had come into the possession of the valuers in the course of, or for the purpose of, the performance of their duties. The Court of Appeal (affirming Macnaghten J.) rejected that claim, and held that the relationship between the county council and the valuers

2 [1905] 1 K.B. 810; 21 T.L.R. 365.

3 [1905] 1 K.B. 810, 813.

4 [1941] 2 K.B. 205; 57 T.L.R. 572; [1941] 2 All E.R. 483.

was that of client and professional man and not that of principal and agent; that the documents which the valuers had prepared in carrying out their expert work were their own property; and that, as the agreement did not contain any provision requiring the valuers to hand over the documents to the plaintiffs, they were not bound to hand them over.

In an earlier case, *London School Board v. Northcroft*,5 of which approval was expressed in the *Leicestershire County Council case*,4 a similar conclusion was reached by A. L. Smith J. with respect to certain papers of calculations and memoranda prepared by quantity surveyors in the course of their employment by building owners on work which they had duly completed. Having regard to these two authorities we think that the proper conclusion in the present case is that (apart from correspondence with the Inland Revenue comprised in item (E), to which we will return) all the documents listed above, other than the client company's ledgers, are the property of the plaintiffs.

This conclusion is not, we think, displaced by *Ex parte Horsfall*,6 to which we were also referred, where drafts and copies of deeds prepared by an attorney were held to be the property of the client. The case proceeded on the short ground that "he who pays for the drafts, etc., by law has a right to the possession of them," and was, we think, rightly explained by Mr. Ashe Lincoln, for the defendant, as turning upon the nature of the services rendered by an attorney or solicitor and the system upon which he is remunerated for those services. Even in the case of a solicitor there must, we should have thought, be instances of memoranda, notes, etc., made by him for his own information in the course of his business which remain his property, although brought into existence in connexion with work done for clients.

It was, however, contended for the plaintiffs that even though these documents were their own property they should not be ordered to be produced, because they embodied information which was the subject of professional confidence as between the plaintiffs and the client company, and their production, and the consequent disclosure of their contents, would be a breach by the plaintiffs of their duty to the client company. Outside the area of legal professional privilege, which is not in question

4 [1941] 2 K.B. 205.

5 Hudson on Building Contracts, 4th ed., Vol 2, p. 147.

6 7 B. & C. 528.

here, we do not think that this is a sufficient ground for refusing, an order for production. In Bray on Discovery (1885), at p. 194. we find this general proposition: "It is no ground for resisting production that a person not before the court has an interest in the document: *Kettlewell v. Barstow*7; unless it is an interest in the nature of property." In developing this proposition, at p. 206, the author said that "the mere fact that the giving of the discovery will involve a breach of confidence as against some third person or in any way affect or prejudice his interests does not constitute of itself an independent objection to giving the discovery, a disclosure under the compulsion of the court being for this purpose distinguished from a voluntary disclosure out of court."

Applying this statement of the law to the present case, we think that (apart from the correspondence with the Inland Revenue) all the documents above listed (other than the ledgers) should be produced, but we think that the order should be made upon an undertaking by the defendant and the defendant's solicitors not to divulge their contents to any person otherwise than for the purposes of the present litigation, and not to use the information contained therein for any collateral purpose.

As to the correspondence with the Inland Revenue, this presumably comprises letters received from the Inland Revenue and copies of the letters written to the Inland Revenue. In conducting this correspondence the plaintiffs must, as it seems to us, have been acting as agents for the client company for the purpose of settling with the Inland Revenue the client company's tax liability. In *Leicestershire County Council v. Michael Faraday & Partners Ld*.8 MacKinnon L.J. distinguished that case from cases such as *Gibbon v. Pease*9 in these words: "... but I think that those cases are radically different from the present case, as being concerned with the relative rights and duties of principal and agent. If an agent brings into existence certain documents while in the employment of his principal, they are the principal's documents and the principal can claim that the agent should hand them over."

We are accordingly of opinion that these letters (both the copies of those sent and the originals of those received) should be considered as the property of the client company, with the

7 (1872) L.R. 7 Ch. 686, 693.

8 [1941] 2 K.B. 205, 216.

9 [1905] 1 K.B. 810.

result that on the principle above stated the plaintiffs should not be ordered to produce them.

Accordingly, with the exception we have just stated, we would allow this appeal.

Appeal allowed.

Solicitors: *B. L. Harris & Co.; Nash, Field & Co*.

A. W. G.