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DISCOVERY OF DOCUMENTS PREPARED PARTLY FOR ANTICIPATED LITIGATION AND PARTLY FOR OTHER PURPOSES ..

Submitted for the L.L.B. (Honours) Degree at the Victoria University of Wellington.

1986 ..

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I INTRODUCTION

II DISCOVERY

(i) The Function

(ii) The Code of Civil Procedure - The High Court Rules

III LEGAL PROFESSIONAL PRIVILEGE

(i) The Rationale

(ii) The Development in the United Kingdom and Australia

(iii) The New Zealand Position

Guardian Royal Exchange Assurance v Stuart

Application of the "dominant purpose" test

The effect of the Stuart Case

Comments

IV CONCLUSION

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LLB (Hons) Legal Research Paper

1986

I INTRODUCTION

The law protects from disclosure a variety of materials relating to litigation and to the relationship between lawyer and client. This protection operates to varying degrees both in pre-trial discovery and in questioning of witnesses during the trial. The discussion in this paper is concerned with the pre-trial phase and will relate to the privelege which affects the addressing of evidence - that relating to communications between lawyers, clients and third persons and to notes and working materials of the lawyer, which has been generally described as legal professional privilege.

Attention will be directed, in particular to the recent changes in positions of documents prepared partly for the purpose of anticipated litigation and partly for other purposes.

II DISCOVERY

The Function

The discovery of documents, originally an equitable device, is today the process by which the parties to a civil cause or matter are enabled to obtain within certain defined limits full information of the existence and contents of all relevant documents relating to matters in question between them.[1]

The process operates in 2 successive stages, beginning with

(i) the disclosure in writing by one party to the other of all the documents which he has or had in his possession, custody or power relating to matters in question in the proceedings: followed by

(ii) the production and inspection of the documents disclosed, either by the opposite party or the court, except for documents which privilege from or objections to productio is properly claimed.

The function of discovery is really to assist parties in appraising the strengths or weaknesses of their respective cases and thus eliminating surprise and providing the basis for the fair disposal of proceedings before or at the trial.

The Code of Civil Procedure - High Court Rules

In New Zealand, the laws governing the process of discovery are now entrenched in the High Court Rules of the Code of Civil Procedure. Under these Rules, after a statement of defence has been filed any party who has filed a pleading may by notice for discovery serve on the party who has filed the defence, require that party to give discovery of the documents which are or have been in his possession relating to any matter in question in the proceedings.[2] The documents in question must be relevant to some issue between the parties.[3] That is, every document which not only would be evidence upon any issue but also which may directly or indirectly enable the applicant to advance his own case or damage the case of his adversary.

Discovery is given by supplying a list of documents in a prescribed form which includes all relevant documents in the party's possession, custody or power.[4] A description of relevant documents no longer in the possession of the party making the list must also be given.[5]

For the purposes of this paper Rule 295 is perhaps most important for it provides that a party being served with notice for discovery may apply to the court for an order not requiring the party to give discovery or that he may give it in a limited manner. Rule 298 (5) then provides that if privilege is claimed as a reason for objection to discovery, the party so claiming msut justify such a claim.

Under Rule 311 the courts have authority to inspect and examine any document for which privilege is claimed. In addition to this point, Jenkins L J in WestMinster Airways v Kuwait Oil[6] expressed the view that whether the court should inspect documents for which privilege is claimed, is for the discretion of the court and that each case depends on its own circumstances. That if looking at the affadavit, the claim for privilege is formally correct and prima facie proper then the court should generally accept the affidavit as justifying the claim without going further and inspecting the documents.

In conclusion, the need for and importance of the discovery process was again emphasised in Fletcher Timber Ltd v Attorney General[7] where the Court of Appeal held that "in our setting and against the procedural background, our rules express the social philosophy that except where there is a valid claim to privilege, a party needs to have access to all documents relating to the case in order for justice to be done."

III LEGAL PROFESSIONAL PRIVILEGE

It is not always clear the distinction between the purpose for which information is obtained and the purpose for which a document recording information is brought into existence. It is with the latter purpose with which the law of professional legal privilege is concerned.

The Rationale

In considering the rationale of legal professional privilege, it is most important to keep clear the distinction between the type of privilege which attaches to:-

(a) communications between client and solicitor; AND

(b) communications between client/solicitor and third parties.

The first, solicitor client privilege is well known and established. The rationale for which is, that if a client does not have a guarantee of confidence, his candour will be inhibited with the result that he would be unable to obtain full and frank legal advice.[8]

> "If a man knows that he is making a confidential report to his solicitor he is much more likely to state accurately what has happened than if he is afraid that somebody presently seeing that report may take proceedings against him in respect of statements that he has made which may be defamatory" per Lord Edmund Davis.[9]

Solicitor client privilege extends beyond the content of litigation and protects any communication made to a lawyer in bona fide effort to obtain legal advice.[10] This is because "if the privilege was confined to communications connected with suits begun or intended or expected or apprehended, noone could safely adopt such precautions as might eventually render any proceedings superfluous" - per Lord Brougham.[11]

Accordingly solicitor client privilege has also been held to extend to protect communications with legal adviser's subordinates[12] and also communications by an agent of the client to the legal advisor.[13]

The second, legal professional privilege which attaches to third party communications, arises out of the adversarial mode of trial which relies so completely upon the self interest of the parties themselves to investigate and present evidence.

The adversary trial depends to some extent upon surprise. So it is argued that legal professional privilege is necessary to prevent disclosure of evidence rather than facts which might lead to witness tampering and suborning perjury. As explained by Jessel M R in Benbow v Low[14]

> "If you give one side the opportunity of knowing the particulars of the evidence that is to be brought against him, then you give a rogue an enormous advantage. He then may be able, although he has no evidence in support of his own case, to shape his case

and his evidence altogether in such a way as to defeat entirely the ends of justice."

This approach however seems to be out of keeping with the modern view in favour of greater pretrial disclosure and despite its long and respectable history, is gradually but surely being eroded.

Another argument in support of legal professional privilege is that without it the adversarial motivation to investigate fully might be impaired. That is, a party might deliberately refrain from conducting a thorough investigation hoping to borrow on the work of his opponent. Furthermore, by contrary hypothesis, arguably, the abolition of the privilege could produce a disincentive to investigate fully in delicate areas or at least to commit to writing sensitive information. Counsel might be fearful of uncovering unfavourable information or of pursuing in written form an investigation into a delicate area if all had to be disclosed. An initial unfavourable impression of one aspect of the case might produce an unwillingness to look further. On the other hand however, it is suggested that there is a strong motivating force of party self interest and the risks associated with either "free riding" or "backsliding" are so minimal that it is doubtful that either would be pursued as a conscious strategy. Indeed, greater acceptance of the fact that disclosure is not inevitably destructive of party motivation, is indicated by the general drift towards more complete pretrial disclosure.

Perhaps however, the most convincing rationale for legal professional privilege is that suggested by the "works product" test. It was explained in the leading American decision, Hickson v Taylor[15] where Murphy J in delivering the opinion of the court held that a lawyer, as an officer of the court is bound to work for the advancement of justice while faithfully protecting the rightful interests of his client. That for the proper preparation of a client's case, it is essential that a lawyer work with an intrusion of privacy, free from unnecessary intrusion by opposing parties and their counsels.

"One side may not ask to see proofs of the other sides witnesses or the opponents brief or even know what witnesses will be called: he must wait until the card is played and cannot try to see it in the hand" per Lord Wilberforce.[16]

Third party communications unlike solicitor client communications are privileged only if they come into existence after litigation was contemplated or commenced and were made with a view to such litigation. Furthermore, information obtained from third parties by the solicitor merely to enable him to give general advice to his client is a matter as to which no litigation is in prospect has never traditionally fallen within the protective umbrella of privilege unlike solicitor client privilege, is relative and qualified.

To summarize, the legal professional privilege is based upon the need to foster adversarial investigation and preparation.

It extends to third party communications. To decide whether it's protection ought to be extended, the question is whether disclosure would unduly impair the orderly functioning of the adversarial process. On the other hand, solicitor client privilege are absolutely protected. To determine its applicability the question is whether the maker had uppermost in his mind the fact that he was speaking to his lawyer to get advice. Unfortunately however, almost all the cases in this area of the law make mixed references to solicitor client privilege and legal professional privilege, but with a clear emphasis on the former.[17]

So, "in order to establish an objection to the inspection of a document on the ground of legal professional privilege, two things must be shown to concur - namely, (a) that when the document came into existence there was an existing action or the anticipation of litigation, and (b) that the documents came into existence either by the advice of the party's solicitor or for the purpose of being submitted to such solicitor. Where litigation had not been actually commenced or threatened, there must have been a definite prospect of it, and not merely a vague anticipation; and if the circumstances were such that it might be reasonably inferred that litigation would naturally follow the act which the party anticipated would result in litigation, then, although no action was actually threatened, there was a well founded, and not merely a vague, anticipation of litigation" - per Cooper J.[18]

The Development in the United Kingdom and Australia of Legal Professional Privilege Attached to Documents Prepared Partly For the Purpose of Anticipated Litigation and Partly For Other Purposes.

It has been well established the documents prepared solely for the purpose of anticipated litigation are protected by legal professional privilege. It is also equally well established that the same documents if prepared for other purposes are not privilege. The position of documents prepared partly for the purposes of anticipated litigation and partly for other purposes has however, relatively recently, experienced a dramatic change, both in the United Kingdom and Australia.

In the United Kingdom the leading authority on the law relating to this head of privilege is the House of Lords decision in Waugh v British Railway Board.[19] In order to fully appreciate the full impact of the Waugh case it is necessary to consider the pre-existing law.[20]

Prior to the decision in the Waugh case there was a difference of opinion in the English authorities as to the exact extent documents prepared partly for anticipated litigation were privilege from disclosure.

Initially, it was relatively established that documents were privileged only if they had been made confidentially and for the purpose of litigation and not in the ordinary course of the duty of the person making the documents. If a report

or communication was made in the ordinary course of duty of the agent or servant whether before or after the commencement of the litigation, it is not privilege and must be produced. This was the decision of the court in Woolley v North London Ry. Co.[21] This strict and narrow approach applied by the courts in favour of those who sought to obtain inspection of documents made for dual purposes or more, continued and reached its "high water mark" in Anderson v Bank of British Colombia.[22] The Anderson case was then specifically approved by the House of Lords in Jones v Great Central Ry Co.[23] However, just three years later, in the Court of Appeal decision of Birmingham and Midland Motor Omnibus Co Ltd v London & North Western Ry Co.[24] The emphasis in the Court's attitude towards discovery shifted to legal professional privilege and a less pretrial disclosure.[25] It was in the Birmingham case though, that the difference in opinions of the English authorities before the Waugh case, originated. This difference in opinion was due to the judgements of Buckley L J and Hamilton L J which though both reached the same conclusion, did so for different reasons. Buckley L J was of the opinion that[26]

> "It is... not necessary that the affidavit should state that the information was obtained solely or merely or primarily for the solicitor, it it was obtained for the solicitor in the sense of being procured as materials upon which professional advice should be taken in proceedings pending, or threatened, or anticipated... it is nonetheless protected because the party who has obtained it intended if he could to settle the matter without resort to a solicitor at all."

Hamilton L J however, said:[27]

> "To hold such documents privileged merely because it can be shown of them, not untruthfully, that the principal, who made them part of the regular course of business and of the duties of his subordinates, foresaw and had in mind their utility in case of litigation, feared, threatened, or commenced, would in my opinion be unsound in principle and disastrous in practice..."

Vaughan Williams L J held that he preferred the judgement of Buckley L J to that of Hamilton L J. Subsequently the Court of Appeal in Ogden v London Electric Railway Co[28] applied the principles stated by Buckley L J in the Birmingham case though it did not make a definite choice between the two competing views. The same problem arose in Longthorn v British Transport Commission where Diplock J appeared to prefer Hamilton L J view and held that neither the Birmingham case nor the Ogden case established that privilege could be made out, no matter how insubstantial the purpose of the submission to the solicitor might be. Further doubt was cast upon Buckley L J view in Alfred Crompton Amusement Machines Ltd v Customs and Excise Commissioners (No. 2)[29] where Lord Cross preferred and Lord Kilbrandon expressly favoured the view of Hamilton L J in the Birmingham case.

In 1976 this area of the law was once again under scrutiny, this time by the High Court of Australia in Grant v Downs.[30]

The court in delivering its judgement made clear that it did not consider itself bound by any authority nor did it feel compelled to choose between either views expressed in the Birmingham case. The substantive issue of law in this case was whether or not the staff of a psychiatric centre had been negligent in the care of a patient who had died in unusual circumstances after escaping from his room. In the course of interlocutory proceedings for discovery, the nominal defendant disclosed the existence of certain reports relating to the death but objected to produce them on the grounds of legal professional privilege. The reports had been prepared for several purposes one of which was for submissions to legal advisers in anticipated civil proceedings. The other purposes related to the general running of hospital. The one issue for the court was whether or not the reports were protected by legal professional privilege. The court unanimously held that the reports were not privileged. However, their Honours were unable to agree on an appropriate test as the criterion for this head of legal professional privilege.

The majority consisting of Stephen, Mason and Murphy J J concluded that privilege attached to third party communications should be confined within very strict limits and applied what was described as the "sole purpose test".

Their Honours, in reaching this decision, first referred to Hamilton L J decision in the Birmingham case stressing his Lordship's observations that:

"(i) that privilege does little, if anything, to promote full and frank disclosure or truthfulness (ii) that the day to day records of a corporation which come into existence in the ordinary course of its business may lend themselves to a claim of privilege if the purposive element of a submission to a solicitor is too easily satisfied, thereby excluding effectively the documents from production and inspection or at least subjecting the other party to the disadvantage of surprise when they are used."[31]

In further support of their decision, their Honours expressed the opinion that support for the view "that the existence of the privilege makes it more difficult for the opposing party to test the veracity of the party claiming privilege by removing from the area of documents available for inspection documents which may be consistent with that case. To this extent the privilege is an impediment, not an inducement, to frank testimony and it detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise."[32] Their Honours thought that this was especially so when privilege is claimed by a corporation which by its nature "brings into existence voluminous records and reports which may serve a variety of purposes, included in which is the submission of documents to a solicitor for the purpose of obtaining legal advice, or for existing or anticipated litigation."[33] Accordingly their Honours found it irreconcilable that an individual litigant though not required to disclose information communicated to his legal adviser was however bound to

disclose his own knowledge of the relevant facts. Their Honours thought it unjustifiable that "privilege can attach to documents which, quite apart from the purpose of submission to a solicitor would have been brought into existence for other purposes in any event, and then without any attendant privilege." This was a risk which their Honours held should be eliminated if possible.
Thus a major reason why their Honours preferred the "sole purpose" test was because they felt that if any less strict test were applied "an advantage and immunity" would be conferred on corporations which is not enjoyed by the ordinary individual.

His Honour Barwick C J however preferred a less strict test and held that a document produced with other purposes in mind would not be precluded from privilege if "the document which was brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."[34]

His Honour Jacobs J proposed yet another different test in the form of a question: "...does the purpose of supplying the materials to the legal adviser account for the existence of the material? I use the word purpose here in the sense of intention - the intended use."[35]

The Australian High Court has since reaffirmed the majority decision in Grants v Downs by purporting to follow it and applying the sole purpose test in National Employers Mutual General Insurance Association v Waind.[36]

Less than four months after the judgement was given in the Waind case, the House of Lords delivered its judgement in Waugh v British Railway Board.

In this case the action was brought as a result of a fatal railway accident. The plaintiff in bringing the action also made an interlocutory application for discovery of a report made by officers of the British Railways Board two days after the accident. Production was resisted on the grounds of legal professional privilege. The documents in question had clearly been made for dual purposes. One for railway operation and safety purposes and the other for the purpose of obtaining legal advice in anticipation of litigation. Both purposes were regarded to be of equal importance.

Their Lordships unanimously agreed that the issue in this case exemplified the situation where there were two legal principles which each pointed to a different conclusion: the first being that all relevant evidence should be addressed to the court in order for all relevant rules of law to be applied and the second being the need for confidentiality of communications between lawyer and client. Their Lordships further agreed that while privilege may be required in

order to induce candour in statements made for the purposes of litigation, it is not required in relation to statements whose purpose is different, for example to enable a railway to operate safely. To carry the protection further into cases where the purpose of preparing the documents for anticipated litigation was secondary or equal to another purpose would be excessive and unnecessary in the interest of encouraging truthful revelation.

Their Lordships however found the majority judgement in Grants v Downs to be too strict and one which would confine the privilege too narrowly.
As in effect the "sole purpose" test meant that such reports must always be disclosed, because it is unlikely that there will not be even the subsidiary purpose of ascertaining how work can be improved. In reaching this decision however, the House of Lords did not address the important question of whether communications of all corporate agents and employees warrant the protection of legal professional privilege. There is little doubt in the case of communications made by a senior corporate officer in a position to speak on behalf of the corporation. But should the same protection necessarily extend to communications made by lower level employees?

Instead the House of Lords preferred and adopted the "dominant purpose" test propounded by Barwick C J that preparation of the documents either for legal advice to be used in reasonably apprehended or pending litigation, had to be the dominant purpose of its existence in order to attract privilege from disclosure.

Finally it is interesting to note that even though the defendant in this case was the British Railway Board, a public company, the court was of the view that legal professional privilege "cannot be denied some validity even where the defendant is a public corporation whose duty it is so it might be thought, while taking all proper steps to protect its revenues, to place all facts before the public and to pay proper compensation to those it has injured."[37]

The New Zealand Position

Until 1985 the New Zealand test was neither the sole or dominant purpose but rather the "appreciable purpose" test applied by the Court of Appeal in Konia v Morley.[38]

In this case the appellant brought a civil action against a public officer on grounds of police powers. He also sought discovery of reports by a police disciplinary inquiry made in connection with the incident. Production of these documents were resisted on the basis that they had also been prepared for the future use of the Crown legal advisors and so were subject to legal professional privilege.

In the Court of Appeal, McCarthy P held that "though a privilege purpose giving rise to privilege was not the only reason for the document being brought into existence, never the less privilege could still be claimed. His Honour then purported to adopt the test advanced by Diplock J in the Longthorn case:

> "there (can) be privilege even if the documents submission to a solicitor was not a dominant or substantial purpose for its existence; it must however be an appreciable purpose"[39]

This apparently remained the New Zealand position until the Court of Appeal decision in Guardian Royal Exchange of New Zealand v Stuart[40] though there had been indications in preceding cases favouring a stricter test.[41]

Guardian Royal Exchange Assurance v Stuart

This case arose out of an insurance claim. The plaintiff's house and its contents had been badly damaged by fire. The house however, had been insured with the defendant against damage by fire under a reinstatement policy. Notification of the incident was duly given to the defendant and a claim for reinstatement laid. From an early stage however the plaintiff had been made aware that the defendant entertained suspicion but did not, pending further investigation commit itself to any definite attitude to the claim. This remained the situation until 7 months later. And only after the plaintiff commenced an action did the defendant file a statement of defence pleading that the plaintiff had deliberately started the fire and was therefore barred from recovery. The plaintiff then took out an order seeking disclosure of reports made by third parties investigating the fire, who had been commissioned by the insurance company. The defendant objected to their production on

grounds of legal professional privilege claiming the reports had been obtained for submission to legal advisors for advice in the impending litigation.

The Court of Appeal however concluded that litigation in this case had been no more than a possibility and that the documents had been commissioned for mixed purposes. The immediate and primary purpose being to enable the defendants and its legal advisors to decide whether or not to contest the plaintiff's claim. The second purpose was for the use of legal advisors in defending an action if it was decided to deny liability.

Note that the Court in delivering its judgement made it clear that it did not consider itself inhibited by its previous decision in Konia v Morley. On the basis that in the Konia case the appreciable purpose test had been adopted largely in deference to English authorities since overruled. Furthermore, in that case the Court had not been required to commit itself to a definite test nor consider any stricter test as public interest immunity had been the main focus of attention.[42]

The Court then "untrammelled by what was said in the Konia case" adopted the "dominant purpose" test.

> "When litigation is in progress or reasonably apprehended, a report or other document obtained by a party or his legal advisor should be privileged from inspection or production in evidence of the dominant

> purpose of its preparation is to enable the legal adviser to conduct or advise regarding litigation" - per Cooke J[43]

So the documents were held not to be privileged and not protected from disclosure.

The Court in arriving at its decision reemphasised the distinction between confidential communication between client and solicitor on one hand, and the preparation of a report whether internal in an organisation or from an outside source, wholly or partly for the purpose of submission to legal advisors, on the other hand.

In relation to the latter situation the Court recognised two competing policy considerations involved as the need for a party to obtain legal advice on existing, pending or anticipated litigation unrestricted by the apprehension that the information made available to his solicitor may find its way into his opponent's hands. On the other hand, the requirement of a fair trial that all facts and documents relevant to the determination of any issue be freely available to the court and the parties.

In the Court's opinion a fair balance between the two policy considerations could only be achieved by adopting the "dominant purpose" test. Their Honours rejected the "sole purpose" test on the basis that to adopt it would "frustrate the expectations of confidentiality, naturally and reasonably entertained by people involved in litigation."[44]

Application of the "dominant purpose" test

The Court of Appeal in Stuart case was clearly of the opinion that the application of the "dominant purpose" test would be an easier task than the application of the appreciable purpose test, which their Honours thought was also not as precise as the former test. The "dominant purpose" test would also be easier to apply because it was a familiar concept from other branches of the law, in particular insolvency and taxation, their Honours said.

The effect of the Stuart case

The effect of the decision in the Stuart case has been, arguably, to narrow the ambit of the doctrine of legal professional privilege. In fact, it serves only to reinforce the emerging picture of a movement in the courts attitude and decisions towards a more open and inquisitional approach. This does not however necessarily mean that there is a gradual erosion of the adversarial system of administration of justice or a movement away from the high values attached to legal professional privilege between solicitor and client as was reflected in the cases R v Uljie and Commissioner of Inland Revenue v West Walker.[45] But rather there could perhaps be an increasing significance attached to the social policies underlying the disclosure of documents relating to any questions in proceedings. Richardson J reflected this change in attitude in the

following words:

> "...the privilege...detracts from the fairness of the trial by denying a party access to relevant documents or at least subjecting him to surprise. We should start from the basis that the public is best served by rigidly confining within narrow limits the cases where material relevant to litigation may be lawfully withheld."[46]

His Honour Cooke J also stated that:

> "there is an increasing awareness in the common law world that the tactics of the adversary system are not the be all and end all of the route of justice."[47]

This movement towards a more open approach can also be seen by the fact that the Court of Appeal not only reaffirmed its jurisdiction to inspect documents for which privilege is claimed but was in fact even readier to do so than previously.

> "...in general a Judge who is in any real doubt and is asked by one of the parties to inspect should not hesitate to do so..." - per Cooke J.[48]

> "The benefit of a fair resolution of that doubt outweighed the disadvantage of a trial judge having seen the documents that in the end are to remain privilege" -per Thompkins J.[49]

Thompkins J further added that should in any particular case inspection was likely to create any significant problems, then the issue of privilege could always be resolved by a

judge other than the trial judge.

Also in relation to the new emphasis on the openness of inspection" approach, the Court focussed on the form of the affidavit of documents for which privilege is claimed. Thompkins J in reference to this point expressed the view that:

> "...documents should be described in a way that informs the party seeking discovery and the court, of the nature of the document, te date it came into existence, the person who created it and the person to whom it is addressed, if any..."[50]

His Honour further stated that the "global method" of describing privilege documents is not appropriate.

Finally the Court pointed out that this movement towards a more open approach with regards to information was in line with the idea of a contemporary movement towards open government in New Zealand as expressed in Fletcher Timber Ltd v Attorney General.

Comments

It is perhaps unfortunate that a probable result of the Court of Appeal decision in the Stuart case is that insurance companies will now have a more difficult task detecting and pursuing insurance fraud cases. As every time such matters came to litigation the company would have to submit all of its relevant reports and "findings" to the other party. So a possible adverse consequence is that companies wishing to avoid a similar result would then have a greater tendancy to deny all claims so that litigation would become a certainty and every report then commissioned could be said to have been done for the dominant or sole purpose of litigation.

However, there is perhaps much to be said about the argument that the purpose of legal professional privilege is to protect the orderly preparation for trial and where preparation is impossible or substantially frustrated by the application of the privilege, then in light of the underlying purpose, the privilege should yield. The courts here are faced with a problem of balancing the needs of the plaintiff against the needs of the defendant. And in cases where the defendant has no other access to information crucial to the case, then surely disclosure of such documents should prevail over privilege and non-disclosure.

Finally, it is comforting to note that the Court of Appeal's decision to adopt the "dominant purpose test" is in line with other Commonwealth jurisdictions (with the exception of Australia).

In Canada, the Nova Scotia Court of Appeal in Davis v Harrington [51] on reliance of the Waugh case, also chose to adopt the "dominant purpose test" Thus reaffirming the genera trend towards greater pre trial disclosure and the modern view in favour of a more open approach.

CONCLUSION

The consequences on lawyer and client communications:

The Court of Appeal in Stuart case unanimously reaffirmed the traditional view that communications between a lawyer and client would remain privilege irrespective of whether or not they had been with a view to pending or anticipated litigation. Unless of course the communications had been made for a criminal or unlawful purpose, then their pr privilege status might be removed.

The consequences on lawyer/client and third party communications:

The Court in Stuart case felt that it would not be justified in departing from the traditional view that when litigation is not in prospect the communications between a party or his solicitor and a third party are not privilege, even though they may have been for the purpose of giving or obtaining legal advice.

In considering the consequences of client and third party communications it is interesting to note that the Court of Appeal by choosing to adopt the "dominant purpose" test in respect to documents prepared partly for obtaining legal advice in reasonably anticipated litigation, has gone a full circle. By this, what is meant is that initially it was thought that a document may not perhaps lose its privilege character because it was not brought into existence solely

for the purpose of being laid before the party's solicitor but if it was the primary reason of its origin. This was so held in the case the Kaupokonui case [52] in 1902 by Cooper J.

However in 1927, Skerret C J in Laurenson v Wellington City Corporation [53] said "it is clearly settled that it is not necessary that the affidavit should state that the information in respect of which privilege is claimed was obtained "solely" or "merely" or "primarily" for the solicitor in the sense of being procured as material upon which professional advice should be taken in proceedings pending, threatened, or anticipated"

His honour appeared to be of the option that as long as one of the purposes for which ths document in question came into existence, was to be submitted to legal advisor for advice on anticipated litigation, then that would be sufficient to make the document privileged.

In 1976, the Court of Appeal purported to adopt the "appreciable purpose" test advanced in the Longthorn case by Diplock J, in the case of Konia v Morley.

Today it is relatively clear that the Stuart case does represent the law relating to this head of legal professional privilege and which provides that the "dominant purpose" test is the correct test to be applied.

If we can accept that there is some similarity in the meaning of the words "primarily" and "dominant", then it becomes obvious by what is meant by what was earlier referred to as "having gone a circle". [54]

Footnotes

1. See Halsburg Vol 13 p.2 & 3 Para 1

2. See High Court Rules, Rule 293

3. Fletcher Timber v Attorney General (1984) 1NZLR 290 at p.299

4. See High Court Rules, Rule 298 - Contents of List

5. See High Court Rules, Rule 298

6. (1950) 2 ALLER 596 at 603

7. (1984) 1NZLR 290

8. The rationale was well put by Jessel M R in Anderson v Bank of British Colombia (1876) 2 Ch D. 644 at p 649: "The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary to use a vulgar phrase that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbound confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent (for it is his privilege, and not the privilege of the confidential agent), that he should be enabled properly to conduct his litigation. That is the meaning of the rule."

9. Waugh v British Railway Board (1979) 2 ALLER 1169 at 1180

10. In Lawrence v Campbell 4 Drew 485 at p. 490, Kindersley V C held that: "It is now not necessary, as it formerly was, for the purpose of resisting production, that the communications should be made either during or relating to an actual or even to an expected litigation. It is sufficient if they pass as professional communications in a professional capacity."

11. Greenhough v Gaskell My & K 98 at p.103

12. Anderson v Bank of British Colombia (1876) 2 Ch D 641

13. Wheeler v Le Merchant (1881) 17 Ch D 675, 682, 684, And Jones v Great Central Railway CO (1910) AC 4, 6.

Footnotes Cont'd

14. (1880) 16 Ch D 93 at p.95

15. (1945) 329 US. 495 at pp. 510 - 511: See also Sharpe Discovery - Privilege and Preliminary Investigative Reports 59 Can Vor Rev. 830 at p. 835

16. Waugh v British Railway Board (1979) 2 ALLER 1169 at p. 1172

17.. It has been suggested that the failure to distinguish clearly the two separate and distinct grounds for privilege in the litigation context has resulted in the unsatisfactory changes in this area of the law. See Sharpe; Discovery - Privilege and Preliminary Investigative Reports.

18. The Kaupokonui Cooperative Dairy Co Ltd v Trengrouse & Co (1905) 25 NZLR 241

19. (1979) 2 ALLER 1169

20. See also Seabrook v British Transport Commission (1959) 2 AIIER 15.

21 (1869) LR 4 CP 602

22. (1876) @ 2 Ch D 644

23. (1910) AC 4

24. (1913) 3 KB 850

25. It has been suggested that a possible reason for this change in the court's attitude was due partly to the growth in the number of actions by the individual against the corporation which by nature of the corporate structure produces much more confidential dommunication/documents than an individual would.

26. (1913) 3KB 850 at 856

27. (1913) 3 KB at p. 859

28. (1933) 49 TLR 542

29. (1974) AC 405

30. (1976) 135 CLR 674

31. ibid at pp 685 - 686

32. ibid p. 686

33. idem

34. ibid p 677

Footnotes Cont'd

35. ibid p 692

36. (1979) 24 ALR 86

37. (1979) 2 AIIER 1169 at 1172

38. (1976) 1 NZLR 455

39. ibid p. 459

40. (1985) 1.NZLR 596

41. See :- Barker J in Chandris Lines Ltd V Wilson & Horton Ltd (1981) 2 NZLR 600 at 608
- Ferguson v NZFS Commission (High Court, Wellington, A204/79, 25 Feb 1982, Davison C J.)
- Price (JH) Ltd v Bashford (High Court, Nelson, A24/84, 5 July 1984, Eichelbaum J)
See also - R v Uljie (1982) 1 NZLR 561 where the Court indicated that this area of the law might require reconsideration but it was not prepared to do so then.

42. See - (1985) 1 NZLR 596 at p. 601

43. ibid p.602

44. supra n. 39

45. (1954) NZLR 191

46. (1985) 1 NZLR 596 at p. 604

47. supra n. 39

48. ibid p. 599

49. ibid p. 608

50. ibid p. 607

51. 115 DLR (3d) 347, affg. 39 N.S.R. (2d) 199

52. (1905) 25 NZLR 241

53. (1927) NZLR 510

54. This trend has also occurred in the English authorities. This trend has also been observed by Jacobs J. in Grant v Downs (1976) 135 CLR 674 at p. 691.

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