

THE COMMISSIONER OF INLAND REVENUE

v.

FRANZ GEORG KEIL

[HIGH COURT, 1993 (Ashton-Lewis J), 15 September]

Civil Jurisdiction

B *Evidence- legal professional privilege-nature of the privilege- whether attaching to memoranda of business agreements.*

C The Commissioner sought access to copies of 3 agreements which were kept by a solicitor on behalf of his client. Upon being refused on the grounds of legal professional privilege the Commissioner sought declarations. The High Court analysed the nature of the privilege and HELD: (i) it only arose in the case of documents brought into existence solely for the use of the legal adviser and (ii) in the circumstances the documents were not privileged.

Cases cited:

D *Alfred Crompton Amusement Machines Ltd v. Customs and Excise Commissioner No. 2* [1974] AC 405
Allen Allen and Hemsley v. The Deputy Commissioner of Taxation (1989) 20 FCR 576
Baker v. Campbell (1983) 153 CLR 52
Grant v. Downs (1976) 135 CLR 674.
National Employers Mutual General Insurance Association Limited v. Waind (1979) 53 ALJR 355
E *Packer v. Deputy Commissioner of Taxation* (1985) 1 Qdr 275
Waugh v. British Railways Board (1980) AC 521

Action for declaratory Judgment in the High Court.

F *G. Keay* for the Plaintiff
 Defendant in person.

Ashton-Lewis J:

In this matter the Plaintiff by way of Originating Summons seeks the determination by the Court of the following questions:-

G “(1) whether a proper claim of legal professional privilege can be claimed by the Defendant on behalf of his client or clients in respect of three documents contained within a sealed envelope currently in the possession of the Defendant upon his business premises?”

- (2) whether a proper claim of legal professional privilege can be claimed by the Defendant to prevent the Plaintiff, or any officer properly authorised by him, from exercising the rights accorded to him in terms of section 50(5)(a) of the Income Tax Act Cap 201?"

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And Orders declaring:-

- “(i) THAT a claim of legal professional privilege cannot properly be claimed by the Defendant on behalf of his client or clients in respect of the said three documents;
- (ii) THAT therefore the Plaintiff, or any officer properly authorised by him, is entitled to inspect such documents when exercising his powers in terms of section 50(5)(a) of the Income Tax Act;”

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Before me were:-

- (1) Affidavit and annexures of John Charles Roache of 15/10/92 supporting the Plaintiff's claim.
- (2) Legal submissions of Counsel for the Plaintiff.
- (3) Affidavit and annexures of the Defendant dated 9/12/92,
- (4) Legal submissions of the Defendant.

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The facts are briefly as follows. The Defendant is a Barrister and Solicitor in Suva and the professional legal adviser to three clients whose identities are not relevant to this matter.

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In July, 1992 Mr John Roache, an officer of the Plaintiff requested the Defendant to give him access to, for the purposes of inspection and perusal, three unsigned Deeds of Agreement relating to the business arrangements between the three clients of the Defendant. The Plaintiff wished to inspect the documents in question because it had formed the opinion that they were relevant to the three clients' taxation liability in Fiji.

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On the 27th of August 1992 Mr Roache met with the Defendant at his office in Suva and requested access to the documents pursuant to the powers vested in him under Section 50(5)(a) and (b) of the Income Tax Act Cap 201. Section 50(5)(a) and (b) states:-

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- “50(5) (a) The Commissioner or any officer authorised by him in writing (upon the production of his written authority) shall at all reasonable times be entitled to enter upon any lands, buildings or places for the purpose of inspecting all books and documents, whether in the custody or under

- A the control of a public officer or a body corporate or any other public officer or a body corporate or any other person whatsoever, if the Commissioner or officer considers such inspection likely to assist in the ascertainment of the income of any person or in the collection or recovery of tax and may inspect any such books or documents and may without fee or reward make extracts or copies of any such books or documents.
- B (b) The Commissioner or any officer authorised by him may, for the purposes of any inspection under this subsection, require the production of any book or document by any person in whose custody or control such book or document may be and may require any such person to give all reasonable assistance in the inspection and to answer all proper questions relating thereto.”
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D The Defendant declined to give Mr Roache access to the documents advising him that he had been instructed to claim legal professional privilege in relation to them. The Defendant further advised that the documents in question were unsigned agreements relating to monies owed by companies owned by the three clients, and to the legal relationship between themselves in this regard. It was agreed between Mr Roache and the Defendant that the documents would be sealed in a brown paper envelope while Mr Roache took further advice.

E On the 9th of September, 1992, another meeting took place in the Defendant's office between Mr Roache, Mr G. Keay, the Legal Adviser to the Plaintiff, a Mr N. Smith of the Plaintiff Commission and the Defendant and his partner Mr W. Morgan. Again, Mr Roache requested access to the documents pursuant to Section 50 (5)(a) and (b) of the Income Tax Act, and again, the Defendant refused on the ground of legal professional privilege. At that meeting the Defendant advised Mr Roache that the documents had nothing to do with expected or pending litigation between the parties and that their purpose was to give legal advice. Mr Roache suggested to the Defendant that the documents did not under the circumstances as explained by him attract legal professional privilege. It was agreed that the Defendant would seek further advice and instructions from the Fiji Law Society and his three clients

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G The parties met again at the Defendant's office on the 22nd of September, 1992, where again Mr Roache requested access to the documents under Section 50(5)(a) and (b) of the Income Tax Act. The Defendant once again refused to give him access to the documents claiming legal professional privilege. Mr Roache then asked the Defendant to give a better explanation and description of the documents in order for him to gain a clearer understanding of the Defendant's position. The Defendant described the documents as unsigned memoranda of agreement between his three clients with regard to their business

dealings with each other, drawn up upon their instructions and which he expected to be signed in due course.

Mr Roache advised the Defendant that he took the view that the unsigned memoranda of agreement did not attract legal professional privilege in that they were simply unexecuted copies of contractual agreements relating to transactions between the Defendant's clients, and that they were drawn up in the normal commercial environment between the Defendant and his three clients. As such, they were neither confidential communications of advice between each client and the Defendant, nor did they come into being for the purpose of expected or pending litigation.

Before me the Plaintiff submitted that the Declarations sought in its Originating Summons should be granted because legal professional privilege did not attach to the documents which are the subject of this application.

The Plaintiff submitted that legal professional privilege only applied to documents brought into existence for the sole purpose of seeking legal advice, and for use in current or anticipated litigation. The documents in the Defendant's affidavit being unsigned draft contracts which merely evidenced certain business transactions between the Defendant's clients they did not fall within the categories required to attract legal professional privilege.

Opposing the Plaintiff, the Defendant submitted that because the documents were unsigned they constituted confidential advice by the Defendant to the three clients and attracted legal professional privilege. The Defendant conceded that if the documents were signed by the clients they would not then attract the privilege. The basis of that concession was founded on an acceptance of the views expressed in the judgment of Murphy and Dawson JJ in Baker v. Campbell (1983) 153 CLR 52 where Their Honours expressed the view that documents such as contracts, conveyances, declarations, of trust etc, amounted to evidence of the status of legal obligations and transactions between parties, and could not be categorised as confidential or the giving or receiving of advice. The Defendant emphasised that while the contracts remained unsigned they maintained the character of legal advice rather than duly executed contracts which evidenced agreed transactions and business relationships or status between the clients. The Defendant also submitted that the form of the documents should not be the ground upon which the question of legal professional privilege was decided, but that the test should be whether the contents of the documents themselves constituted confidential legal advice as between the clients and himself.

Are the documents which are the subject of this case, and more particularly the information contained in them protected by legal professional privilege?

Counsel were unable to point to any authority in Fiji which could assist the Court in answering that question and my own research for local authority has

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proven unfruitful. I believe that assistance can be gained from both the English and Australian decisions in this regard.

A The purpose of legal professional privilege is to preserve confidentiality between the lawyer and his client. Legal professional privilege protects from disclosure communications made between a lawyer and his client for the purpose of obtaining confidential legal advice. The privilege also protects from disclosure certain documents prepared for use in existing or anticipated litigation. The rationale behind legal professional privilege is that frank and complete disclosure

B between a lawyer and his client is indispensable for the effective and proper conduct of litigation. Legal professional privilege does not apply to routine communications made between a lawyer and his client in the course of their lawyer\client relationship. To attract the privilege, the communication must be a confidential communication, or one made for the purpose of existing or anticipated litigation.

C Contention in the past has arisen over whether to attract legal professional privilege a communication between a client and his lawyer such as contained in a document or report etc., was made solely for the use of the lawyer or whether only one of, or a dominant purpose for its being brought into existence was for the use of the lawyer.

D If legal professional privilege only attaches to a document brought into existence solely for the use of the professional legal adviser then the scope of the privilege is considerably narrowed and reflects the importance of confidentiality as its basis. The dominant purpose application or test in this area broadens the position because it extends the privilege to a document for which only one of the purposes, or the dominant purpose for bringing it into existence was for the use of the professional legal adviser in the giving of legal advice to the client. In Alfred Crompton Amusement Machines Limited v Customs and Excise Commissioners No 2 [1974] AC 405 the House of Lords applied the narrow sole purpose test and held that internal memoranda were not privileged because only one of their uses was for submission to an internal legal department.

E However, that approach was altered in 1980 when the House of Lords committed itself to the broader dominant purpose test in Waugh v British Railways Board [1980] AC 521. The effect of that decision in the United Kingdom has been to broaden the privilege to the point that now if the communication or document was made or came into existence dominantly, but not solely for the use of a professional legal adviser, legal professional privilege will apply to protect the communication or document from disclosure.

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The High Court of Australia considered this question in Grant v. Downs (1976)135 CLR 674. The Court applied the sole purpose test in that case and held that a report on an escape from a Mental Hospital was not privileged because in addition to being submitted to the Crown Solicitor for legal advice, it was also used to review security procedures at the Hospital. The report was

therefore, not solely for the use of the Crown Solicitor and thus not privileged.

Under the sole purpose test as applied by the High Court, a communication would only attract legal professional privilege if it had been (a) brought into existence for the sole use of the legal adviser, (b) was confidential and, (c) was used for obtaining advice or in existing or expected litigation. As a result of that decision the range of communications which attract legal professional privilege in Australia has been substantially reduced.

A similar result was arrived at in National Employers Mutual General Insurance Association Limited v. Waind (1979) 53 ALJR 355, where an Insurance Assessor's report was denied privilege because it was used by the company to decide whether to pay the claim as well as to obtain legal advice,

Originally legal professional privilege was confined to litigious proceedings as an exclusionary rule of evidence. However in Baker v. Campbell (1983) 153 CLR 52, the High Court of Australia extended the privilege beyond those bounds and held that legal professional privilege applied to all confidential communications with a legal adviser for the sole purpose of obtaining legal advice whether in regard to litigious proceedings or not.

At this point I think that it is important constantly to bear in mind that it is confidentiality that is the basis of legal professional privilege. It is the confidential nature of the communication between the client and his legal adviser that creates the privilege. When a client gives information to his lawyer for the purpose of being passed onto, or used by another person, then that communication will not attract legal professional privilege.

Also, a communication with a legal adviser, while confidential, but not for the purpose of obtaining legal advice will not attract the privilege. In Packer v. Deputy Commissioner of Taxation (1985) 1 QdR 275, the Full Court held that trust account ledger entries on behalf of the Plaintiff did not attract legal professional privilege. The Plaintiff's submission that the privilege attached to the entries because they revealed confidential advice given to the Plaintiff by his legal advisers was rejected, the Court holding that the entries in the trust account ledger were not communications for the purpose of giving confidential legal advice.

That decision was followed in 1989 in Allen Allen and Hemsley v The Deputy Commissioner of Taxation (1989) 20 FCR 576. The Respondent sought access to the trust account records held by the Appellant in its capacity as professional legal advisers to its client. The Appellant at first refused access claiming legal professional privilege. The Court held that the privilege did not apply because the trust account records did not reveal the contents of any confidential legal advice.

Thus, the position in Australia would now appear to be that if a document or

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A communication with a legal adviser is both confidential, being made solely for the use of the legal adviser, and is for the purpose of advising the client, whether in relation to litigious proceedings or not, then it will attract legal professional privilege if it so claimed. Provided a communication to a legal adviser is solely for his own use, is confidential and for the purpose of obtaining legal advice it will attract the privilege irrespective of whether there was anticipated or existing litigation in that regard.

B I am of the opinion that the Australian approach to the application of legal professional privilege is one which ought to be followed in Fiji. The narrow sole purpose approach of the High Court in Grant v. Downs (1976) 135 CLR 674, as opposed to the broader dominant purpose approach of the House of Lords in England would appear to maintain that which has always been at the heart of the common law privilege, i.e. confidentiality between the client and the professional legal adviser. Under the dominant purpose test the concept of confidentiality is eroded in that the communication can be open to scrutiny and use by others yet still attract the privilege. With the greatest of respect to the eminent jurists in the House of Lords I can see no compelling reason to move away from the notion of confidentiality between the client and the professional legal adviser as being the basis on which legal professional privilege is founded.

C To do so would I believe, broaden this very important area of the traditional solicitor/client relationship in a way that was never envisaged or intended. The potential for the privilege to be abused and used as a screen for activities between numerous parties for which the privilege was never intended is greatly increased under the dominant purposive approach. Such a situation was foreseen by Stephen, Mason & MurphyJJ in Grant v. Downs (1976)135 CLR 674 where at p688 Their Honours said:-

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F “All that we have said so far indicates that unless the law confines legal professional privilege to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings the privilege will travel beyond the underlying rationale to which it is intended to give expression and will confer an advantage and immunity on a corporation which is not enjoyed by the ordinary individual. It is not right that the 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 attracting any attendant privilege. For this and the reasons which we have expressed earlier we consider that the sole purpose test should now be adopted as the criterion of legal professional privilege.”

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The narrow sole purpose test I believe more fairly meets, and satisfies the competing interests and tensions between a party who seeks access to

information and an opposing party who wishes that information to remain confidential.

In the matter before the Court the documents in question are unsigned agreements or contracts setting out the business and commercial relationship between the Defendant's three clients. While unsigned at this stage, the Defendant advised the Court that he expected them to be signed in due course. The Defendant submitted that while the agreements remained unsigned they retained the quality of being purely confidential advice to which the privilege attached but, which would not apply once the agreements were signed. I do not agree with the Defendant's submission in this regard. I think such an approach which pivots the question of privilege attaching to those particular documents on whether they are executed or not, does not place sufficient emphasis on the constituent elements of the privilege as authoritatively developed under the common law with regard to its application to communications within the relationship between a legal adviser and his client.

In his submissions the Defendant also urged the Court to look at the substance of the agreements themselves to ascertain whether the contents of those agreements could be categorised as advice of a confidential nature. I agree with the Defendant in this regard. It is important to look at the contents and substance of the agreements over which the privilege is claimed and to ask whether they can be categorised as being confidential communications between the defendant and his clients, their sole purpose being for the use of the Defendant with each of those three clients, and, that as drafted they constitute advice to the three clients.

After reading and perusing the agreements in question I am satisfied that they do not fall into those categories. The agreements are not confidential in that they set out and define the intended legal business relationship between the Defendant's three clients. The agreements are to be exchanged between the clients and would no doubt be pleaded as the basis of any litigation in the event of legal action between them in this regard. Thus, the agreements did not come into being solely for the use of the Defendant in the giving of professional legal advice. The agreements even though unsigned do not constitute advice in themselves nor were they brought into existence for the sole purpose of obtaining legal advice. They are in fact the product of, or the end result of the advice given to the three clients by the Defendant. The Defendant admitted that he expected the agreements to be executed by the three clients in due course. They are thus the crystallisation of the instructions and advice between the Defendant and his three clients, and, as I have said above, form the basis and framework of the commercial relationship between themselves. As such, the unsigned agreements are neither solely for the use of the Defendant vis-a-vis each client, and are thus not confidential, nor do they constitute advice.

I am further fortified in the conclusion that I have reached in this regard by the

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dicta of Murphy J in Barker v. Campbell (1983) 153 CLR 52, where at page 86 His Honour said:-

A "The privilege does not attach to documents which constitute or
evidence transactions (such as contracts, conveyances,
B declarations of trust, offers or receipts) even if they are delivered
to a solicitor or counsel for advice or for use in litigation. It is
not available if a client seeks legal advice in order to facilitate
the commission of crime or fraud or civil offence (whether the
C adviser knows or does not know of the unlawful purpose) (see
Reg v. Cox and Railton; Bullivant v. Attorney-General (Vict.);
R. v. Smith but is of course available where legal advice or
assistance is sought in respect of past crime, fraud or civil offence.
Hence the subject matter of the privilege is closely confined: in
brief it extends only to oral or other material brought into existence
for the sole and innocent purpose of obtaining legal advice or
assistance."

I am satisfied that legal professional privilege does not attach to the unsigned
agreements which are the subject of this matter, and that the Plaintiff may
properly inspect and take copies of them pursuant to the provisions of Section
D 50 (5)(a) and (b) of the Income Tax Act.

Accordingly, I grant the Plaintiff the declarations set out in the terms of its
Originating Summons. I make no order as to costs.

E Before concluding, I would like to add that I have had the opportunity of
reading the guidelines attached as an annexure to the Plaintiff's affidavit. Those
guidelines have been agreed to between the Australian Commissioner of
Taxation and the Law Council of Australia, and set out the procedure to be
followed by Officers of the Commissioner when seeking access to lawyer's
premises and records. I understand that Officers of the Commissioner of Inland
Revenue in Fiji attempt to follow those guidelines whenever practicable in the
F conduct of their duties with regard to lawyer's premises and records.

G Such guidelines are extremely thorough and helpful. I can only hope that the
initiative will be taken here in Fiji and that representatives of the Law Society
and the Commissioner of Inland Revenue will meet together and agree upon a
similar set of guidelines suitable to our local conditions. I am sure that such an
exercise would contribute greatly to an increase in the understanding and
cooperation between the profession and the Commissioner's Office.

Such understanding and cooperation I believe will have the effect of avoiding
any unnecessary confrontation in the sensitive, and at times difficult area of
Solicitor/Client and the Commissioner of Inland Revenue.

(Declarations pronounced)