AMBARAM NARSEY PROPERTIES LIMITED v MOHAMMED YAKUB KHAN, MOHAMMED NASIR KHAN, MOHAMMED SABIR KHAN, MOHAMMED IQBAL KHAN, MOHAMMED MUKTAR KHAN & MOHAMMED AZAD KHAN & LAUTOKA CITY COUNCIL

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High Court Civil Jurisdiction
Gates J
2 November 2000

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Privilege for expert's report created for purpose of litigation — burden of proof for admissibility of evidence — admissibility of secondary evidence — factors affecting court's discretion on ruling of admissibility of evidence — tendering of report — Constitution ss 21(1), (2) 37(1) a), (b), (2), Fundamental Rights and Freedoms Decree 2000 [7/2000] s18

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The first defendant claimed privilege over an engineer's report which was created upon the first defendant's request for the purposes of litigation. The report was not disclosed since it was created during the litigation. The Plaintiff somehow acquired a copy of the said report and sought to use it in the same litigation. The first defendant claims privilege over the report, was not intending to rely on it at trial, thus had no need to exchange it during discovery.

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Held – (1) The burden of proof rests on the objector claiming privilege.

(2) whether the confidential information in the document was admissible is a balancing exercise between on the one hand the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information.

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(3) The copy of the report is not prevented by the claim for privilege form being used in evidence in light of factors including the modern trend against excluding probative evidence without strong cause, the relevance of the document, the admissibility of secondary evidence even if the report itself was inadmissible and the lack of moral obliquity on the part of the Plaintiff in its acquisition.

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(4) The limitations on the right to personal privacy set by the laws of privilege qualify as reasonable and justifiable intrusions into the right of privacy in a free and democratic society.

(5) Notwithstanding admissibility of the document, legal professional privilege still attached to communications in the form of instructions and briefings from the solicitors acting for the 2nd Defendants to the maker of the report prior to the preparation of his report.

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Liberty to the plaintiff to call the maker, who was formerly the 2nd Defendant's expert witness.

Cases referred to in Ruling:
appl ***Carlton Cranes Ltd v Consolidated Hotels Ltd*** [1988] 2 NZLR 555
cons ***D v NSPCC*** [1977] 1 All ER 599 *a*
appl ***Guardian Royal Exchange Assurance of N.Z. v Stuart*** [1985] 1 NZLR 596
appl ***Guinness Peat Properties Ltd v Fitzroy Robinson (a firm)*** [1987] 2 All ER 716
foll ***In Re Brianmore Manufacturing Ltd (in liq.)*** [1986] 1 WLR 1429
foll ***Kenning v Eve Construction Ltd*** [1989] 1 WLR 1189 *b*
cons ***Lord Ashburton v Pape*** [1913] 2 ChD 469
cons ***R v Tomkins*** [1978] Crim LR 290
appl ***Webster v James Chapman & Co.*** [1989] 3 All ER 938
cons ***Yousry*** 11 Cr. App. R. 13
cons ***Calcraft v Guest*** [1898] 1 QB
cons ***Lloyd v Mostyn*** (1842) 10 H & W 478
appl ***Harmony Shipping Co. SA v Davis & Others*** [1979] 3 All ER 177 *c*

B.C. Patel & Chen B. Young for Plaintiff
Mohammed Shamsud-Dean Sahu Khan for 1st Defendant
Anu Patel for 2nd Defendant

2 November 2000 **RULING** *d*

Gates, J.

The 1st Defendant claims privilege over a document, and asks the Court to prevent it from being adduced in evidence by the Plaintiff. It was not listed in the 1st Defendant's list of documents or in a supplementary list categorised as privileged from production pursuant to the High Court Rules Order 24 r. 5(2). *e* However, it only came into being after the filing of the List of Documents had been done. The document, dated 15 June 1999, is a report by Kingston Morrison, a firm of engineers, produced at the request of the 1st Defendants.

On 23 October 2000 I ruled orally that the copy of the report was not, by reason of privilege, to be prevented from being admitted. I said however that I would need to be convinced further of the admissibility of the report in the *f* manner it was first suggested it should be tendered in evidence. I said I would give my reasons later. I give them now.

I have no evidence before me as to what exactly Kingston Morrison was briefed to do. But from the report and its introductory parts it can be deducted that (i) the dominant purpose for the report's coming into being was to enable the 2nd Defendants legal advisers to conduct litigation or to advise regarding litigation *g* and (ii) that it came into existence when the litigation was already in progress: see **Guardian Royal Exchange Assurance of N.Z. v. Stuart** [1985] 1 NZLR 596 at 601 para. 50; **Carlton Cranes Ltd. v. Consolidated Hotels Ltd.** [1988] 2 NZLR 555. I find the report therefore was a privileged document.

It was clearly also a confidential document since it was addressed to "The Town Clerk/CEO", and it referred in its heading to this High Court Action.

Whilst the burden of proof rests on the party seeking to establish the admissibility of evidence, the claim for privilege must be made out by the objector

Guinness Peat Properties Ltd. v. Fitzroy Robinson (a firm) [1987] 2 All ER 716 at 721f. It was stated by Bharat Narsey, a director of the plaintiff company, in evidence that he had been handed the original report by Dr. Armogam Pillai, one of the appointed Administrators for the 2nd Defendant. Dr. Pillai gave evidence also, categorically denying that he had handed over any such material or the report to Mr. Narsey. Mr. Narsey seemed genuinely shocked at the suggestion when it was put to him by counsel for the 2nd Defendant, that he had never been handed any report by Dr. Pillai. Both witnesses in their ways were convincing. I found there was no evidence which tended to support or to detract from the evidence of these two witnesses. I am left in doubt therefore as to how Mr. Narsey acquired the report. That is far from saying however that any moral obliquity attaches to him or that he is guilty of a trick or fraud in acquiring a copy of the report. I have to treat his acquisition as free of fault.

I have read the report now, as I believe is the usually acceptable practice in order to resolve this issue: **Guardian Royal Exchange** (supra) at 599 para. 50. The report is clearly relevant to the issues in the pleadings. The 2nd Defendant asks me to restrain the Plaintiff from using the report or a copy in any way at all in these proceedings.

The 1st Defendant does not rely on the report, a fact which removes the obligation on that party to exchange it with the other parties in the usual way. The duty of disclosure only, remains. The 1st Defendant does not propose to call the expert maker of the report. Clearly if the expert were called the privilege would be lost. An election would have to be made, as it has been made here. In **Kenning v. Eve Construction Ltd.** [1989] 1 WLR 1189 at 1195B the choice was summarised:

> 'As I say, it seems to me that the solicitor's choice is simple. He must make up his mind whether he wishes to rely upon that expert, having balanced the good parts of the report against the bad parts. If he decides that on balance the expert is worth calling, then he must call him on the basis of all the evidence that he can give, not merely the evidence that he can give under examination-in-chief, taking the good with the bad together.
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> If, on the other hand, the view that the solicitor forms is that it is too dangerous to call that expert, and he does not wish to disclose that part of his report, then the proper course is that that expert cannot be called at all.

Even if I were to rule the report inadmissible, secondary evidence, on the authorities, is clearly admissible with or without a copy. For a witness could be confronted with an unidentified inadmissible document and asked if he still adhered to his last answer **Yousry** 11 Cr. App. R. 13; **R v. Tomkins** [1978] Crim. LR 290. If I had found that moral obliquity attached to the Plaintiff for the manner in which a copy of the report had been obtained I could have exercised an equitable discretion and prohibited the use of such a copy in the proceedings absolutely; **Lord Ashburton v. Pape** [1913] 2. Chap D 469. Sometimes the interests of justice or the public interest override the need to have available relevant evidence at trial as in **D v. NSPCC** [1977] 1 All ER 599, where the identity of informants in proceedings for the welfare of children were held to be privileged and the society was entitled to withhold such information from discovery.

In the end it boils down to a balancing act. Scott J. in **Webster v. James Chapman & Co.** [1989] 3 All ER 938 at 945a put it:

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> "The law regarding confidential information is, I think, now relatively well settled. The court must, in each case where protection of confidential information is sought, balance on the one hand the legitimate interests of the plaintiff in seeking to keep the confidential information suppressed and on the other hand the legitimate interests of the defendant in seeking to make use of the information. There is never any question of an absolute right to have confidential information protected."

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I accept also Scott J's opinion on the relevance to the exercise of this discretion of the circumstances in which the party seeking to be allowed to use the document, comes to acquire the document. At 945f his Lordship said:

> "The circumstances in which confidential information comes in the hands of a third party is, in my view, in many cases highly relevant in considering how the balance between the plaintiff (the person originally entitled to the confidential information) on the one hand and the third party on the other hand should he struck."

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It is said that once it was known that the Plaintiff was in possession of a copy of the report, or had sighted the report in the Council's files, corrective action should have been taken immediately to retrieve the copy, or to make it clear by letter that reliance could not be placed on the report since privilege was not being waived. In **Guinness Peat Properties Ltd. v. Fitzroy Robinson** (supra) the inclusion of a privileged letter in the Defendant's Part I List of Documents, resulted in the defendant's solicitors, upon discovering the mistake, making an application to court to prevent its use by the other side. The trial judge held privilege had not been lost, and the Court of Appeal upheld that, decision. Though only three cases were cited to Hoffmann J. in **In re Brianmore Manufacturing Ltd. (in liq.)** [1986] 1 WLR 1429 there remains a certain attractiveness in his Lordship's summary of the illogicality of upholding privilege on the one hand yet allowing secondary evidence of the privileged document on the other. The Court of Appeal in **Guinness Peat** could not wholly approve Hoffmann J's view which he had expressed at 1431f:

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> "The problem in this case, however, is that inspection in the sense of an examination of the documents had already taken place. The solicitor had acquired knowledge of their contents and had made some notes of what they said. It is accepted that he could give secondary evidence of the contents of those documents, that he could produce the photocopy which he had made and that the liquidator could be cross-examined on them. That, on the face of it, suggests that unless an order for the production of copies is made, the court will be in the position of receiving evidence about the contents of the documents, and being able to act upon that evidence but not have access to the best evidence, which is the documents themselves. That seems to me to be an illogical position. If the policy of the conduct of litigation requires that the privilege relating to those documents

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> should be preserved, then it would seem that it should be right that nothing at all about the documents should be put before the court. On the other hand, if, as is conceded, secondary evidence is going to be admissible, there seems to me to be no logic in the court not seeing the documents themselves."

Perhaps only the Supreme Court could revisit this area or Parliament deal with the illogicality.

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Weighing all the factors in this matter, including the modern trend against excluding probative evidence without strong cause, the relevance of the document, the lack of moral obliquity on the part of the Plaintiff or its Director in its acquisition, I rule that the copy of the report is not prevented by the claim for privilege from being used in evidence.

Tendering of the Document

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At first it was suggested by Plaintiff's counsel that the report stood on its own as a piece of evidence and that it could simply be produced as an admission by the 2nd Defendant in the hands of, and tendered through, the Plaintiff's director. I rejected that notion. It is not an admission by the 2nd Defendant, rather it is a mix of fact and opinion on the issues relating to the cause of damage to the Plaintiff's building expressed by a third party. Now it is proposed that the report

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will be tendered through by Mr. Wyborn the maker of the document.

Mr. Anu Patel for the 2nd Defendant objected. In his argument he re-visited the objections of confidentiality and the fact that the privilege had not been waived. These I have dealt with in the first part of my ruling. He also complained of non-disclosure. There was nothing of substance in this complaint since the 2nd Defendants have had the report themselves for over 15 months and should

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have been prepared therefore at trial to challenge any of the adverse comments so far as they reflected on their conduct in the matter.

Lastly, it is said the protection of the Constitution or the Fundamental Rights and Freedoms Decree 2000 [7/2000] extends to protect privacy and personal communications. He referred in particular to section 37 of the Constitution:

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> "37- (1) Every person has the right to personal privacy, including the right to privacy of personal communications.
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> (2) The right set out in subsection (1) may be made subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society.'

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and to section 21(1)

> "21- (1) This Chapter binds:
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> (a) the legislative, executive and judicial branches of government at all levels; central, divisional and local; and
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> (b) all persons performing the functions of .any public office.

> (2) The rights and freedoms set out in this Chapter apply according to their tenor and are subject only to the limitations under laws of general application permitted by this Chapter and to such derogations as are authorised under Chapter 14."

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It is obvious from a review of the cases dealing with similar situations and circumstances of acquisition of such a report that the courts are always mindful of individual rights of privacy. A litigant must be free to instruct his solicitor or his expert in order to prepare his case. However there are instances where the courts will permit such privacy to be intruded upon. These principles are reasonable and justifiable in a free and democratic society. They have been developed over many years and are carefully, as the cases indicate, pondered upon by the courts. In some instances the courts have placed a total prohibition on the use of the litigant's privileged documents by other litigants, and on other occasions they have permitted full use or at least a more limited use as secondary evidence as indicated in **Calcraft v. Guest** [1898] 1 QB; **Lloyd v. Mostyn** (1842) 10 H & W 478; and **In re Brianmore Ltd.** (supra).

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The limitations on the right to personal privacy set by the laws of privilege I conclude qualify as reasonable and justifiable in a free and democratic society [section 37(2)]. The plaintiff may call Mr. Wyborn who was formerly the 2nd Defendant's expert witness there being no property in an expert witness in the same way as with an ordinary witness **Harmony Shipping Co. SA v. Davis & Others** [1979] 3 All ER 177 at 182c where Lord Denning MR said:

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> "If there was a contract by which a witness bound himself not to give evidence before the court on a matter on which the Judge said he ought to give evidence, then I say that any such contract would be contrary to public policy and would not be enforced by the court. It is the primary duty of the courts to ascertain the truth; and, when a witness is subpoenaed, he must answer such questions as the court properly asks him. This duty is not to be taken away by some private arrangement or contract by him with one side or the other.'

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Legal professional privilege still attaches however, as Mr. B.C. Patel accepts, to communications in the form of instructions and briefings from the solicitors acting for the 2nd Defendants to Mr. Wyborn prior to the preparation of his report. Section 18 of the Decree has identical wording.

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For the purposes of this ruling I leave aside any question as to whether the Constitution or the Decree presently applies.

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Report admissible in evidence.

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