FUJITSU GENERAL NEW ZEALAND LTD v ROCHESTER (NO 3)

Employment Court, Wellington (WC6D/02)
Shaw J

4-20 June (2 days);
27 June 2002

Practice and procedure — Application for discovery — Whether waiver of legal professional privilege — Three separate classes of documents — Degree to which legal opinion had been referred — Comments made by counsel in relation to documents — Whether amounted to disclosed legal advice — Whether disclosure of content of opinion — No reference made to content of opinion or advice — No basis to find implied waiver — Legal professional privilege not to be lightly displaced.

The litigation history between the parties involved numerous applications, including the first plaintiff obtaining leave to file a third amended statement of claim. The defendants sought access to three classes of documents which concerned legal advice in relation to the filing of a third statement of claim and in relation to reasons why the plaintiffs were not prepared for the substantive fixture. Normally, the documents would have been protected by legal professional privilege, as they constituted legal advice. However, the defendant argued the privilege that attached to the first two classes of documents had been waived by statements made by the first plaintiff's counsel in relation to errors made in the third amended statement of claim, and in relation to advice given by senior counsel. The defendant also alleged that the privilege that attached to the third class of documents had been waived by statements made by two counsel engaged by the first plaintiff. The statements were related to the perceived enormity of the litigation between the parties and counsel obtaining information regarding the need to file briefs of evidence. It was alleged that the privilege which attached to all three classes of documents had been waived because the first plaintiff's counsel had gone beyond merely referring to the existence of the privileged material, and had actually discussed the details of the legal advice given.

Held, (1) the references to the actions of the first plaintiff's previous counsel did not amount to a waiver of legal professional privilege. The statements made related merely to previous counsel's intention to file new causes of actions and to the preparation of amended statements of claim. There was no overt or even covert reference to the content of any legal advice given to the first plaintiff. (paras 14, 15)

(2) In referring to advice given to the plaintiff's counsel by senior counsel, there was no reference to the content of that advice. Applying the distinction between the fact of advice and its content as set out in *Talleys Fisheries Ltd v Cullen* (cited

below), the absence of references to the content of the advice meant the first plaintiff had not waived privilege. (para 19)
Talleys Fisheries Ltd v Cullen (2001) 15 PRNZ 426 applied

(3) The fact that the first plaintiff became aware of the need to file briefs of evidence did not amount to a waiver. Even it had been possible to infer that the information had come from a lawyer, it was not possible to state that the advice formed the basis of a legal opinion. The advice related to a matter of procedure. The necessity for briefs of evidence had been in the public domain for some time. (para 20)

(4) Legal professional privilege was not to be displaced lightly. A dangerous precedent would have been set if waiver of privilege was permitted on the basis of inferences of what counsel may or may not have said. (para 21)

Application dismissed; costs reserved.

Cases referred to
A-G for the Northern Territory v Maurice 161 CLR 475
Benecke v National Australia Bank (1993) 35 NSWLR 110
Cory-Wright & Salmon Ltd v KPMG Peat Marwick (1992) 5 PRNZ 518
Equiticorp Industries Group Ltd v Hawkins [1990] 2 NZLR 175; (1990) 2 PRNZ 19; (1990) 5 NZCLC 66,295
Miller v CIR [1999] 1 NZLR 275; (1998) 18 NZTC 13,961 (CA)
Registered Securities Ltd (in liq) v Craddock unreported, Williams J, 24 May 1999, HC Auckland, CP593/97
Securitibank Ltd (in rec & in liq) v Rutherford (No 28) (1984) 2 NZCLC 99,073 (CA)
Talleys Fisheries Ltd v Cullen (2001) 15 PRNZ 426
Tau v Durie [1996] 2 NZLR 190; (1996) 9 PRNZ 7

Application
This was an unsuccessful application for discovery of documents on the grounds that the first plaintiff had waived legal professional privilege.

C L Elliott and *P C R Verboeket* counsel for plaintiffs (Fujitsu General New Zealand Ltd and Fujitsu General (Aust) Ltd)
J M Ablett-Kerr QC counsel for first and second defendants (D M Rochester and P Mihu)
C A Reaich counsel for third defendant (C Wheeler)

SHAW J (reserved): [1] In its application for particular discovery from the first plaintiff, the defendants allege that the plaintiff has waived legal professional privilege vested in three separate classes of documents that are, or have been, in its possession, custody, or power (including the possession, custody, or power of Peter Verboeket and Co, Russell McVeagh, or any other solicitors, former solicitors, counsel or former counsel). These three classes are:

1. Documents concerning the preparation, drafting, and filing of the third amended statement of claim in these proceedings.

2. Documents concerning the advice received from senior counsel in December 2001/January 2002 that deals with issues inadequately dealt with in the third amended statement of claim.
3. Documents relating to the reasons why the first plaintiff was not ready for the two-week fixture beginning 3 September 2001.

[2] The defendants allege that any privilege that attached to the documents in classes one and two was waived in an affidavit of Kim Naylor sworn on 20 March 2002. They say the privilege attaching to documents in the third class was waived in affidavits of Peter Verboeket sworn on 7 August 2001 and Kim Naylor sworn on 9 August 2001. The first plaintiff strongly opposes this application.

[3] The hearing was interrupted by an adjournment. Mr Elliott made some submissions at the first hearing which touched on what had been said at another interlocutory hearing on 20 March of this year. Both Mrs Ablett Kerr and Mr Reaich objected to Mr Elliott's reference to that. In the adjournment a further affidavit was prepared by Mr Wheeler, the third defendant. Mrs Ablett Kerr advises that the affidavit seeks to put the defendants' point of view as to what was said in Court on that day. I have not read that affidavit because the plaintiffs objected to it. Having reviewed the defendants' application, and looking at the submissions of all counsel on this application, I am of the view that what was said in Court on 20 March 2002 is very much a side issue to the principal argument in this case. That argument is whether, by statements in three affidavits, the first plaintiff waived its legal professional privilege. I find that Mr Wheeler's evidence about who said what during submissions in Court is not necessary to assist me in my deliberations and on that basis I rule that it should not be admitted.

[4] In relation to classes one and two the defendants rely on the extracts from the affidavit which were set out in the application:

1. Affidavit of Kim Naylor dated 20 March 2002:

> I also wish to clarify one matter in relation to the third amended statement of claim. This varied in a number of respects from the second amended and earlier statements of claim. This third amended statement of claim was prepared and filed by Mr Smith and his juniors at Russell McVeagh. Unfortunately, in what I would have to put down as a mixture of time pressure and apparent misunderstanding on the part of Russell McVeagh and Mr Smith, I was not given the opportunity to review a draft of the then proposed amended statement of claim before it was filed. I understand that a like misunderstanding and lack of proper consultation by Russell McVeagh with Fujitsu's solicitor, Mr Verboeket, occurred.
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> While I accept that the third amended statement of claim was filed by Russell McVeagh I think it is necessary to understand the circumstances under which this occurred.
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> . . . . .
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> In my view this step was necessary to cater for Fujitsu's interests, but was also aimed at meeting the 8 April 2002 deadline. It is also appropriate to point out that the proposed fourth amended statement of claim seeks to clarify matters that were inadequately dealt with in the third amended statement of claim, and such proposed changes are based on advice received from senior counsel in December 2001/January 2002.

[5] In relation to the third class, the defendants rely on the following material:

1. Peter Verboeket affidavit of 7 August 2001:

> I am an intellectual property law practitioner and do not generally practice in the area of commercial litigation, and certainly not litigation of this size and complexity. I was not

prepared for the volume of interlocutory application and correspondence leading up to the trial date, nor for the continuing difficulties with discovery by Melco in the High Court, and I have found it extremely difficult to cope with, given my limited resources and obligations in my more usual area of practice. The continuing discovery skirmishes have made it impossible for me to prepare for a hearing. Mr Wigley was formerly counsel for the plaintiff. He is a sole practitioner, and was no more able to prepare for such a large and complex trial than I was.

2. Kim Naylor affidavit of 9 August 2001:

I am responsible for the day to day management of this case for the plaintiff, and am the plaintiff's primary contact point for its legal advisers.

Since Mr Wigley withdrew as counsel for the plaintiff, I have met with lawyers assisting the plaintiff's new counsel, Justin Smith, twice. Until the meetings with Mr Smith's assistants I was unaware of the details or of the enormity of what was required from the plaintiff in terms of trial preparation. It is only since those meetings that I have become aware of the need for briefs of evidence to be prepared and filed, and the date on which they should be filed.

[6] The defendants also refer to a part of written submissions of then counsel for the first plaintiff, Mr Smith of Russell McVeagh, dated 7 August 2001. He told the Court the plaintiffs had prepared no evidence at all for the trial despite the fact that it was set down to commence within one month. Further he said "The identities of only one or two witnesses have been determined. The content of any evidence is understood only in a general sense."

[7] The defendants say that the extracts from the affidavits of Mr Verboeket and Mr Naylor are to be seen in the context of Mr Smith's submissions.

Waiver of legal professional privilege — the principles

Privilege may be held to have been impliedly waived, without the opposing side having seen the relevant document, where the party claiming privilege has relied on its contents. A waiver of privilege may be implied, even though it may not have been intended. Whether a waiver should be imputed depends on whether it would be unfair or misleading to allow a party to refer to or use material, and yet assert that the material or material associated with it is privileged from production. Generally a party cannot state the content or alleged content of a legal opinion and yet claim to withhold that opinion from inspection where to do so would be unfair or misleading. However legal professional privilege is an important concept and should not be lightly displaced.[1]

[8] Counsel referred to a number of cases[2] and the principles which could be extracted from them. They did not disagree about these but were at odds about their

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[1] *Laws NZ*, Wellington, Butterworths, 1992, para 71.

[2] *A-G for the Northern Territory v Maurice* (1986) 161 CLR 475; *Benecke v National Australia Bank* (1993) 35 NSWLR 110; *Cory-Wright and Salmon Ltd v KPMG Peat Marwick* (1992) 5 PRNZ 518; *Registered Securities Ltd (in liq) v Craddock* unreported, Williams J, 24 May 1999, HC Auckland, CP593/97; *Equiticorp Industries Group Ltd v Hawkins* [1990] 2 NZLR 175; (1990) 2 PRNZ 19; *Talleys Fisheries Ltd v Cullen* (2001) 15 PRNZ 426; *Tau v Durie* [1996] 2 NZLR 190; (1996) 9 PRNZ 7; *Securitibank v Rutherford (No 28)* (1984) 2 NZCLC 99,073 (CA) per Baker J; *Miller v CIR* [1999] 1 NZLR 275; (1998) 18 NZTC 13,961 (CA).

application on the facts of this case. In *Talleys Fisheries Ltd v Cullen* (2001) 15 PRNZ 426, Wild J at p 429 succinctly summarised the principles:

> (a) An affirmation of the importance of legal professional privilege — 'a significant protection and one which underpins our system of justice. It will not . . . be lightly set aside' per Gallen J at pp 521-522 in *Cory-Wright.*
> (b) The principle that, whether waiver should be implied, depends on whether it would be unfair or misleading to allow a party to refer to or use the material in the proceeding, whilst asserting that privilege renders it immune from production.
> (c) Thus, waiver will be implied where natural justice demands that material which one party uses to advantage be made available to the other(s) so that it may scrutinise it and/or answer it.
> (d) The point that reference merely to the existence of legal advice will not constitute waiver, but reference to the nature of the advice will. The distinction is between the fact of the advice, and its content.

[9] I have carefully reviewed the authorities cited. It is clear that the outcome in each case depended on its facts, particularly the extent of reliance on legal opinions which the applicants wish to gain access to. Whether the privilege attaches to a legal opinion will depend on the degree to which it has been referred to or deployed and whether that reference is confined to the mere existence of the opinion or extends to disclose any of its content. It also depends on the use to which the reference is made. For example in *Tau v Durie* [1996] 2 NZLR 190; (1996) 9 PRNZ 7, the statement of defence referred to the defendant obtaining a legal opinion on his powers to preside. This was found by McGechan J to have invited an inference as to the favourable content of the opinion and therefore was more than a "mere passing reference to the opinion." In that case the privilege was waived. In different circumstances Gallen J held[3]

> There is nothing intrinsically unfair in saying 'I have brought these proceedings because I have obtained legal advice to support such action'. That must apply in almost every case.

[10] Each of the classes of documents will be dealt with separately.

Class 1 documents — *concerning their preparation, drafting, and filing of the third amended statement of claim*

[11] Mrs Ablett Kerr submits for the defendants that the privilege has been waived because the plaintiffs went far beyond merely referring to privileged material. She referred to the reasons in Mr Naylor's 20 March affidavit as to why Fujitsu should be granted leave to file the third amended statement of claim. In the course of that, he explained that when Mr Smith became counsel for the first plaintiff he prepared and filed a third amended statement of claim. Mr Naylor said he was not given the opportunity to review a draft of the proposed claim before it was filed. He referred to "a like misunderstanding and lack of proper consultation . . . with Fujitsu's solicitor, Mr Verboeket, . . .".

[12] Mrs Ablett Kerr says that Mr Naylor deposed these things at a time when it was vitally important for Fujitsu to persuade the Court to admit the fourth statement of claim and noted that in his submissions on the application, counsel for the first plaintiff referred to Mr Naylor's affidavit. She says that in the affidavit Mr Naylor

[3] *Cory-Wright and Salmon Ltd v KPMG Peat Marwick*, at p 522.

has raised the conduct of Fujitsu's former solicitors including the process by which drafts of that pleading were prepared and the extent to which Fujitsu and Mr Verboeket were involved in that process. She says the defendants require access to the material relied on by Mr Naylor for the purposes of prosecuting their appeal against this Court's decision to grant leave to file the fourth amended statement of claim and, secondly, she says the accuracy and veracity of Mr Naylor's comments will be relevant on the issue of his credibility and reliability as a witness at trial. Mrs Ablett Kerr accepted, however, that relevance is not an element for determining implied or imputed waiver of legal privilege.

[13] Mr Elliott characterised Mr Naylor's statement in his 20 March affidavit as reference only to the process which led to the filing of the statement of claim rather than to the content of the legal advice given. He submitted that Mr Naylor's evidence was intended by way of background only. It was given to rebut certain statements by Mr Rochester and was not used to advance the application to file the fourth amended statement of claim.

[14] I have considered Mr Naylor's evidence. There is no basis to find an implied waiver of legal professional privilege as it attaches to the first plaintiff's dealings with Mr Smith. The references to Mr Smith were about:

- What he told the Court concerning the first plaintiff's intention to file new causes of action or add new particulars.
- The fact that he and his juniors at Russell McVeagh prepared and filed the third amended statement of claim.
- An apparent misunderstanding and lack of consultation by Russell McVeagh with Mr Naylor and Fujitsu's solicitors.

[15] There is no overt or even covert reference to the content of any legal advice given to the first plaintiff by Mr Smith. Apart from stating the obvious about his role in preparing and filing an amended statement of claim the only other statements are opinions by Mr Naylor which are open to challenge but which do not refer to the content of legal advice.

Class 2 documents — *concerning the advice received from senior counsel in December 2001-2002 that deals with issues inadequately dealt with in the third amended statement of claim*

[16] Mr Naylor then referred to the fourth amended statement of claim and said that the "proposed changes are based on advice received from senior counsel in December 2001/ January 2002."

[17] Mrs Ablett Kerr says that there was no reason to refer to the advice received from senior counsel except to persuade the Court that the amendments were appropriate in the face of opposition from the defendants. In supplementary submissions, Mr Reaich submitted that although there is no direct reference to the content of senior counsel's advice in Mr Naylor's affidavit this can be "gleaned" from the fourth amended statement of claim. He invites the Court to infer from the pleadings the advice or opinion of senior counsel given to the first plaintiff.

[18] Mr Elliott counters by relying on *Securitibank Ltd (in rec & in liq) v Rutherford (No 28)* (1984) 2 NZCLC 99,073 (CA) and *Miller v CIR* [1999] 1 NZLR 275; (1998) 18 NZTC 13,961 (CA) . Both these cases concern statements similar to those made by Mr Naylor. In *Miller* a departmental officer deposed

that he had relied on a legal opinion in coming to a decision about a tax assessment. Blanchard J said (p 297; p 13,976):

> That cannot possibly, in our view, amount to a waiver of privilege. If it were otherwise, anyone whose explanation for an action was that he or she relied upon legal advice would be obliged to disclose the terms of the advice; and to have the benefit of the privilege, such a person would effectively have to stand mute, offering no explanation at all for his or her behaviour.

[19] I agree with the first plaintiff. In referring to senior counsel's advice Mr Naylor does not refer to the content of that advice or to whether it exists in the form of an opinion or legal document. It is therefore distinguishable from the *Tau v Durie* facts which mentioned both the opinion that was obtained and what its subject-matter was. Applying Wild J's distinction between the fact of the advice and its content I conclude that in the absence of reference to the content of the advice the first plaintiff has not waived its privilege in respect of senior counsel.

Class 3 documents — *relating to the reasons why the first plaintiff was not ready for the 2 weeks' fixture beginning 3 September 2001*

[20] Mrs Ablett Kerr advanced similar arguments in respect of statements made by Mr Verboeket in his 7 August affidavit and Mr Naylor's affidavit dated 9 August. The only part of this evidence which has any potential at all for the implication of a waiver are references to meetings with lawyers assisting Mr Smith. Mr Naylor says since those meetings he became aware of the need for briefs of evidence to be prepared and filed and the dates on which they should be filed. There is in fact no reference to who told Mr Naylor about these matters. Even if it were possible to infer that the information came from the lawyers (and that is not at all certain from his affidavit) I do not accept that this advice forms the basis of a legal opinion. This is a matter of procedure. The necessity for briefs of evidence to be prepared had been in the public domain for some time as a result of the innumerable interlocutory proceedings in this matter.

Conclusion

[21] I am mindful that legal professional privilege should not be lightly displaced. It would set a dangerous precedent to permit a waiver of this privilege on the basis of inferences about what counsel may or may not have said. For the reasons expressed I find that the defendants have failed at the first hurdle to establish a waiver of the first plaintiff's legal professional privilege. They have not been able to demonstrate that the first plaintiff has made reference to the content of advice received from either its solicitors or counsel, both past and present. The question of the fairness of allowing parts of privileged information to be referred to without reference to the material in its entirety therefore does not arise.

[22] The defendants' application for particular discovery against the first plaintiff is refused on the basis that legal professional privilege attaches to the documents sought by the defendants.

Costs

[23] These will follow the event but are otherwise reserved.