ROCHESTER v FUJITSU GENERAL NEW ZEALAND LTD

Court of Appeal (CA147/02) 12 March 2003
Gault P, McGrath, Anderson JJ

Court of Appeal — Practice and procedure — Appeal against Employment Court decision — Discovery — Whether respondent's statements in proceedings amounted to waiver of legal professional privilege — Three classes of documents — Second class of documents protected by legal professional privilege — First and third class of documents were documents prepared for litigation — Mere reference to documents did not amount to waiver.

The proceedings between the parties concerned claims of breach of confidentiality and breach of employment contracts.

The appellants sought disclosure of documents concerning the preparation, drafting, and filing of a third amended statement of claim, documents concerning advice from senior counsel in December 2001 and January 2002 relating to the third amended statement of claim, and documents relating to the reasons why the first respondent was not ready for trial set down for September 2001.

The appellants argued that the respondents had waived legal professional privilege in relation to the documents through statements made by the first respondent's general manager and senior counsel during a hearing for leave to file a fourth amended statement of claim. During those proceedings the first respondent's general manager referred to matters surrounding the filing of the third statement of claim, including a reference to a misunderstanding on the part of the first respondent's previous counsel. The general manager also referred in his affidavit to proposed changes to the statement of claim based on advice received by senior counsel. The final statements in dispute regarded an affidavit by the respondent's solicitor which referred to a meeting with counsel regarding the solicitor's view of the enormity of the case.

The Employment Court held there was no waiver of privilege.

The appellants submitted that the Employment Court had incorrectly held that the respondents had not waived privilege in respect of the documents. It was alleged that the Employment Court erroneously focused on whether the material in question was legal advice, rather than whether privilege had been waived. It was also submitted that because the respondents had relied upon the privileged information in seeking leave to file a further statement of claim, it would be unfair not to allow the appellants to challenge those privileged statements.

Held, (1) the appellants needed to show that the statements made by the general manager and solicitor were inconsistent with maintaining the privilege attaching to them. It was not enough to show it was unfair in the abstract not to let the appellants see the first respondent's legal advice or other privileged

communications in view of the reliance placed on them before the Employment Court. (para 18)

(2) In respect of the first category of documents, the affidavit in question referred to the conduct of the first respondent's former counsel in relation to seeking leave to file the third amended statement of claim. Such assertions were not disclosures of a kind that created unfairness as would impute waiver of the privilege attaching to a party's preparations for litigation. They were logically unconnected to such advice as was given by former counsel and amounted to no more than assertions of the former counsel's alleged failings. Such a reference provided no justification for requiring the surrender of related material forming part of counsel's preparation for the litigation. The position was the same in relation to the third category of documents. (para 19)

(3) The second category of documents was of a different nature as they concerned legal advice of counsel rather than preparations for litigation. They were protected by legal professional privilege. While the respondent's manager made reference to the fact that leave to file the proposed amended statement of claim was sought as a result of advice received from the respondent's newly engaged counsel, such a statement was no more than a bare reference to legal advice, made in an interlocutory proceeding to explain why a party sought leave to file a fresh pleading. To give as the explanation for a belated application to amend a pleading that it was the result of very recently obtained legal advice, without more, did not meet the test for waiver of privilege as set out in *Miller v CIR* (cited below). (para 21)

Appeal dismissed; costs in favour of respondents ($3,000).

Cases referred to

Miller v CIR [1999] 1 NZLR 275; (1998) 18 NZTC 13,961

Ophthalmological Soc of NZ Inc v Commerce Commission [2003] 2 NZLR 145, (2003) 16 PRNZ 569 (CA)

Appeal

This was an unsuccessful appeal against an Employment Court decision which held the respondents had not waived legal professional privilege in respect of certain documents.

J Ablett-Kerr QC, C A Reaich and *S A Saunderson-Warner* counsel for appellants (Darryl Michael Rochester, Peter Mihu, and Carl Wheeler)

J G Miles QC and *C L Elliott* counsel for respondents (Fujitsu General New Zealand Ltd and Fujitsu General (Australia) Pty Ltd)

Introduction

[1] This is an appeal against a judgment delivered by Judge Shaw in the Employment Court holding that the respondents were not required to make available for inspection certain documents as they had not waived legal privilege attaching to them. The appellants contend in this Court that the manner in which the respondents made reference to privileged material in the course of interlocutory proceedings in the Employment Court was inconsistent with their continuing to maintain the privilege, and that in the case of documents in three categories the privilege had been waived. They seek orders for production of the documents concerned.

Background facts

[2] Fujitsu General New Zealand Ltd, the first respondent, is the plaintiff in the Employment Court in a proceeding against the appellants whom it formerly employed. The second respondent Fujitsu General (Australia) Pty Ltd is the parent company of the first respondent. It engaged the first appellant Mr Rochester in March 1998 to set up a business selling Fujitsu's air conditioning products in New Zealand. On 1 July 1998 the first appellant became the manager of the first respondent which had been formed for purposes which included undertaking that business. The first appellant remained in that position until 11 November 1999 when he is said to have resigned. On 17 November he commenced employment with a company then named Melco New Zealand Ltd ("Melco"), a competitor of the first respondent, as its manager in charge of air-conditioning.

[3] The second appellant, Mr Mihu, was employed by the first respondent as its northern region sales manager between May 1998 and June 2000. His responsibilities are said to have covered the sale of air-conditioning equipment. On 19 June 2000 he was also employed by Melco. Likewise the third respondent, Mr Wheeler, who was employed by the first respondent between November 1998 and December 1999 as its central region sales representative, became employed by Melco in December 1999.

[4] The first respondent commenced its proceeding in the Employment Court on 21 July 2000 alleging breach of duties of confidence. The relevant confidential information is said to be the appellants' knowledge of the first respondent's discounted pricing structure and details of its relationships with certain key customers. It is alleged that the appellants used the confidential information to undercut Fujitsu's prices and to target its customers by offering them subsidies and rebates thus benefiting both Melco and themselves at the first respondent's expense.

[5] At one stage the Employment Court scheduled a fixture for hearing the proceeding on 3 September 2001. Judge Shaw granted the first respondent's application for an adjournment of this fixture in a reserved judgment delivered on 16 August 2001. A new fixture date of 29 October was set but this also had to be abandoned.

[6] In the meantime, on 11 October 2001 the solicitors acting for the first respondent, who had instructed new outside counsel, filed its third amended statement of claim, seeking damages for breach of duties of confidence and misuse of confidential information, and orders for delivery up of all documents and

material of the first respondent. A timetable for the proceeding was then agreed by the parties and was the subject of orders made by Judge Shaw on 19 December 2001. Briefs of evidence were required to be filed by the first respondent by 27 February 2002. The orders provided for the proceeding to be heard on 8 April 2002.

[7] Early in 2002 there was a further change of counsel acting for the first respondent following which present counsel for the respondents were instructed. The same solicitor has acted for the respondent throughout.

[8] On 27 February 2002 the first respondent sought enlargement of the time by which it was required to provide its briefs of evidence, asserting that delays by the appellants in answering interrogatories, and the need for the first respondent to attend to various interlocutory applications had delayed its preparation for the trial. In an effort to retain the fixture on 8 April 2002 Judge Shaw dealt with this application and further applications concerning interrogatories during March and delivered judgments on 4 and 14 March 2002. On 21 March 2002 her Honour, following a further hearing, gave leave to the first respondent to add the second respondent as a plaintiff and to amend the pleadings to introduce a new cause of action for breach of employment contracts by the appellants. On 25 March following a telephone conference addressing different issues the Judge issued a minute formally vacating the fixture for 8 April 2002.

Application for discovery of privileged documents

[9] On 12 April 2002 the appellants applied to the Employment Court for further particular discovery and disclosure for inspection of three categories of documents said to be in the possession of the first and second respondents. They were:

> (a) documents concerning the preparation, drafting and filing of the third amended statement of claim in the Employment Court . . .
> (b) documents concerning advice received from senior counsel in December 2001/January 2002 relating to the third amended statement of claim . . .
> (c) documents relating to the reasons why the first respondent was not ready for the two week trial that was set down to begin on 3 September 2001 . . .

Judge Shaw heard this application on 4 and 20 June and delivered a reserved judgment dismissing it on 27 June 2002. The present appeal is brought against that judgment.

The appellants' argument

[10] Privilege is said by the appellants to have been waived by the respondents in relation to the first of these categories of documents as a result of statements by Mr Naylor, general manager of the first respondent, in an affidavit made in support of the application for leave to file a fourth amended statement of claim. Mr Naylor said in an affidavit sworn on 20 March 2002 that due to a "mixture of time pressure and apparent misunderstanding on the part of (the first respondent's former counsel)" he was not given the opportunity to review a draft of the proposed third amended statement of claim before it was filed. He added that there was "a like misunderstanding and lack of proper consultation" by (the counsel concerned) with the first respondent's solicitor. Mrs Ablett-Kerr said in the course of her argument that this amounted to a denial by Fujitsu that the third amended statement of claim

was its document. Mr Naylor also referred in the same affidavit to the change of counsel representing the first respondent in the litigation early in 2002, adding that he did not wish to explain the reasons why former counsel, and legal advisers assisting him, were no longer involved.

[11] Mrs Ablett-Kerr for the appellants contends that these assertions waived privilege in documents relating to the preparation, drafting and filing of the third amended statement of claim. She submitted that, by implication, the content of the communications concerned was deployed in order to persuade the Employment Court to grant leave to file the fourth amended statement of claim at the hearing on 4 and 20 March 2002. She emphasised in oral submissions today the context in which these statements were made. The first respondent was in trouble at the time through its failure to comply with the timetable. Counsel said that its conduct required disclosure of material relevant to the veracity of these statements, in fairness to the appellants. Counsel also said that the disclosed material would have to be considered in deciding the appeal against the judgment of 21 March 2002. It would be necessary to determine whether what Mr Naylor said was inaccurate or had misled the appellants. The accuracy and veracity of Mr Naylor's comments, in any event, would also be relevant to an assessment of his credibility at the trial of the proceeding.

[12] Privilege in the second category of documents comprising advice of current senior counsel for the respondents was said to have been waived as a result of what was said in the last paragraph of Mr Naylor's affidavit:

> 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 as such proposed changes are based on advice received from senior counsel in December 2001/January 2002.

Mrs Ablett-Kerr points out that this reference to counsel's legal advice was made in order to persuade the Court to grant the application for leave to file the amended claim. She submits it goes beyond a bare reference to the mere fact that legal advice was given, and that it was unfair for the respondents to be able to so rely upon the advice without disclosing it to the defendants. The content of the advice could be inferred from a consideration of changes in the proposed amended statement of claim before the Court.

[13] Waiver of the third category of documents is said to arise from an affidavit filed in support of the first respondent's application to adjourn the fixture originally made for August 2001. Mr Naylor relevantly stated in an affidavit dated 9 August 2001 that:

> Since Mr (W) withdrew as counsel for the plaintiff, I have met with lawyers assisting the plaintiff's new counsel . . ., twice. Until the meetings with his assistance I was unaware of the details or the enormity of what was required from the (first respondent) 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.

[14] An affidavit was also filed at this time by Mr Verboeket, who has been the solicitor for the first appellant in the litigation throughout. He observed that he was an intellectual property lawyer who did not generally practice in commercial litigation in particular of the size and complexity of the present proceeding. This

assertion, Mrs Ablett-Kerr said, was made to justify why little had been done in preparing briefs of evidence for the scheduled hearing on August 2001. Mrs Ablett-Kerr also argues that the veracity of this evidence must also in fairness be tested, as it is relevant to the credibility of Mr Naylor and to the state of the first respondent's case at the time.

[15] Finally the appellants submit that Judge Shaw erroneously focussed in the judgment subject to appeal on whether the material in question was "legal advice", rather than simply being subject to legal privilege, when deciding the waiver application.

Decision

[16] The issues raised by the appeal can be resolved shortly by the application of principles recently stated by this Court in *Ophthalmological Soc of NZ v Commerce Commission* [2003] 2 NZLR 145, (2003) 16 PRNZ 569 (CA). In that judgment the Court stated the test for establishing whether there had been waiver of legal privilege (including both legal professional privilege and litigation privilege) as follows:

> It is the court's objective judgment as to the consistency of the conduct with maintaining the privilege which must be assessed in all the circumstances. That requires a close analysis of the particular context: what is the issue in relation to the privilege; how does the evidence relate to that issue, and is there inconsistency that could lead to injustice if the privilege is upheld. The weight given to fairness in the Court's exercise of judgment will differ according to the circumstances including the character of the privilege which it is said has been waived . . . (para 30).

[17] In that case, the Court was satisfied that references to material subject to litigation privilege in an affidavit filed in support of an interlocutory proceeding seeking leave to amend the statement of claim, was not conduct inconsistent with maintaining the privilege in all the circumstances. The deponent had referred to the content of evidence to be given at trial by an economist who had been briefed by the party concerned. The reference to the evidence was made in support of an application for leave to file an amended pleading reflecting the tenor of that evidence. The Court took the view that prior indication to the trial Court of the content of evidence to be called, to add weight to an application to amend pleadings, in the circumstances did not involve any unfairness or breach of natural justice inconsistent with maintaining the claim to privilege.

[18] In the present case the appellants must accordingly show that the statements made by Mr Naylor and Mr Verboeket were inconsistent with maintaining the privilege attaching to them, not simply that it is unfair in the abstract not to let the appellants see the first respondent's legal advice, or other privileged communications, in view of the reliance placed on them before the Employment Court.

[19] In respect of the first category of documents, the affidavit in question refers to the conduct of the respondent's former counsel in relation to seeking leave to file the third amended statement of claim. We accept that Mr Naylor referred to that conduct in an effort to persuade the Judge that the application to file an amended claim was meritorious. It was apparently seen as necessary or desirable to disclose what were said to be problems of lack of communication by former counsel in the

preparation of the amended claim. We assume without deciding that these are privileged communications. In our view such assertions are not disclosures of a kind that create such unfairness, as objectively should impute waiver of the privilege attaching to a party's preparations for litigation. They are logically unconnected to such advice as was given by former counsel and amount to no more than assertions of his alleged failings. Such a reference provides no justification for requiring the surrender of related material forming part of counsel's preparations for the litigation even accepting that what is disclosed could be confined by the Court. The reference was to the conduct of the respondents' previous lawyers, which was probably neither necessary nor even helpful to the first respondent's case. It certainly was not objectively inconsistent with maintaining the confidentiality of its preparations for litigation.

[20] The position is the same in relation to the third category of documents for which privilege is said to have been waived. These are documents relevant to Mr Naylor's assertion he lacked awareness of the scale of what was required of the respondents in pre-trial preparation. He asserts that this lack of awareness was only cured by communications with the respondents' former counsel shortly before Mr Naylor made his affidavit of 9 August 2001 Mr Verboeket supported his assertions in an affidavit of his own. All that Mr Naylor does in the relevant section of his affidavit is to reveal the fact that he had only belatedly become aware that briefs had to be prepared and the scale of work required of his company to do that. Such a statement, whether fully accurate or not, is also not inconsistent with keeping the substantive content of preparations for litigation confidential in the interests of sound administration of justice through the effective conduct of litigation under the adversary system.

[21] The second category of documents is of a different nature, concerning as it does legal advice of counsel rather than preparations for litigation. They are protected by legal professional privilege. Mr Naylor made a reference to the fact that leave to file the proposed amended statement of claim was sought as a result of advice received from the respondents' newly engaged counsel. It was however no more than a bare reference to legal advice, made in an interlocutory proceeding to explain why a party sought leave to file a fresh pleading. This is so even if the tenor of the advice could be inferred from an analysis of the proposed fourth amended statement of claim. To give as the explanation for a belated application to amend a pleading that it was the result of very recently obtained legal advice, without more, does not meet the tests for waiver of privilege. This is plain from *Miller v CIR* [1999] 1 NZLR 275, at p 297 a decision cited by Judge Shaw. It is perfectly consistent with keeping the content of legal advice confidential, at least in the present circumstances, simply to refer to the fact that it was given and that the wish to amend is the result of that advice. The message conveyed is simply that the application is responsibly motivated.

[22] Accordingly we are not satisfied that any of the references in Mr Naylor's affidavit to material covered by legal professional privilege or litigation privilege were of such significance as to displace the aspects of privilege concerned. In those circumstances it is unnecessary for us to address further arguments to the effect that the Judge wrongly focussed on legal professional privilege where in two of the categories litigation privilege was in issue. We would however add that we are satisfied that in deciding that in the case of each category of documents the

respondents' conduct did not amount to a waiver of privilege, the Judge correctly applied the legal principles in question.

[23] The appeal is accordingly dismissed. The appellants must pay costs of $3000 to the respondents together with disbursements and reasonable travel and accommodation expenses of counsel to be agreed or failing agreement determined by the Registrar.