CASE NOTES

GRANT v. DOWNS[1]

Traditionally legal professional privilege prevents disclosure of confidential communications passing between a client and his legal adviser. The Full High Court in *Grant* v. *Downs* has reaffirmed the existence of the privilege and its underlying customary rationale. However, it has also emphasized that the scope of the privilege must be strictly contained within that rationale. The privilege operates as an exception to the general rule that obliges the disclosure of all evidence relevant to litigation to the opposing litigant. The reaction of the High Court in this case closely accords with Wigmore's attitude to the privilege

> "[i]ts benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle."[2]

The Facts

The appellant, a widow, sought damages from the nominal defendant and the duty medical officer at a government psychiatric centre. She alleged that due to their negligence, her husband, then an inmate of the psychiatric centre, had been allowed to escape from his room and subsequently suffered death from exposure. Shortly after the incident, a number of official reports concerning the death were made by certain government employees for their superiors. The appellant sought discovery of these documents. The respondents claimed that the reports were the subject of legal professional privilege on the basis that a material purpose of the preparation of the reports was for submission to legal advisers in the event that disciplinary action, coronial proceedings or an action for damages may arise.

Rath J. in the New South Wales Supreme Court upheld an appeal from a decision of the Master. He ruled that the documents appeared to be routine reports of an administrative nature and therefore were not privileged. However, his Honour gave leave for the respondents to file a further affidavit of discovery. This enabled the respondents to particularize the circumstances in support of their claim that one purpose of the

[1] (1977) 51 A.L.J.R. 198.
[2] Wigmore J. H., *Evidence* (McNaughton Rev., Boston: Little Brown & Co., 1961) p. 554, Vol. 8, para. 2291.

preparation of the reports was submission to their legal advisers. Following this course of action, Rath J. held that the claim to privilege had been made out. The principle applied by his Honour was that a document is privileged if it came into existence for more than one purpose provided that its submission to a legal adviser was one of those purposes.[3]

The appellant applied to the High Court after she was refused leave to appeal to the Court of Appeal. The unanimous decision of the High Court was that the respondents were not entitled to resist production of the reports on the grounds of legal professional privilege.

The Background

The basis upon which legal professional privilege rests may be stated as follows[4]

> "The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available."

The privilege applies to confidential communications passing between a client and his legal adviser concerning the taking of legal advice—any such communications are permanently protected from disclosure without the client's consent.[5] All communications passing between the legal adviser and client, whether connected with actual or reasonably anticipated litigation[6] or the mere seeking of legal advice[7] are privileged. The scope of the privilege also extends to some communications between a legal adviser and third parties. Thus, where a legal adviser seeks information from a third party to enable him to advise or to aid in the conduct of litigation, the communications will be privileged if, at the time of making, litigation was at least anticipated.[8] Furthermore, in certain circumstances communications between the client and third parties will be entitled to the protection afforded by the privilege. They may be privileged where they take place between the client and a third party such as a non-professional agent[9] or

[3] [1974] 2 N.S.W.L.R. 401, 406, 407-9.
[4] *Grant* v. *Downs* (1977) 51 A.L.J.R. 198, 202 per Stephen, Mason and Murphy JJ.
[5] Wigmore, op. cit., para. 2292.
[6] *Wheeler* v. *Le Merchant* (1881) 17 Ch.D. 675.
[7] *Greenough* v. *Gaskell* (1833) 1 Myl. & K. 98; 39 E.R. 618; *Minet* v. *Morgan* (1873) 8 Ch. App. 361.
[8] *Wheeler* v. *Le Merchant* (1881) 17 Ch.D. 675.
[9] Either client or legal adviser may act through an agent without affecting the privilege if the agent serves only as an instrument for the communication.

employee and are made for the purpose of submission to the client's legal adviser in respect of current or anticipated litigation.[10]

It may be difficult to determine whether a particular communication falls within the privilege if the document has been brought into existence for purposes additional to that of submission to a legal adviser. Such a document might be regarded as qualifying for protection in the same way as any ordinary communication between client and legal adviser. However, if a document is not prepared solely or mainly for submission to a party's legal adviser, but would have come into existence in any event, it may be maintained that it should not be privileged. Protection in such circumstances would not foster the rationale underlying the privilege, namely, to encourage disclosure to the legal adviser; indeed it may harm the search for truth by needlessly restricting the relevant evidence available in litigation.[11]

The majority of cases decided this century favour the upholding of a claim to privilege if the submission to a legal adviser is one of the purposes[12] of the preparation of a document.[13] Thus, in *Birmingham & Midland Motor Omnibus Co. Ltd* v. *London & North Western Railway Co.*,[14] Buckley L.J. was able to state that it is not necessary

> "that the information was obtained solely or merely or primarily for the solicitor, if 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."[15]

On the other hand, some decisions have adopted a narrower view of the limits of the privilege.[16] In the *Birmingham* case for instance, Hamilton L.J., although he agreed with the result, thought that submission to a legal adviser must be the primary or substantial purpose accounting for the

[10] 13 Halsbury, 4th (ed.) para. 78.

[11] See *Grant* v. *Downs* (1977) 51 A.L.J.R. 198, 202-3.

[12] It has been held that the preparation of a document for some non-privileged purpose in the knowledge that it might possibly be useful to a legal adviser should litigation eventuate does not render that material privileged. See *Warner* v. *Women's Hospital* [1954] V.L.R. 410; *Cataldi* v. *Commissioner for Government Transport* [1969] 1 N.S.W.R. 561, affirmed [1970] 1 N.S.W.R. 65; *Grant* v. *Downs* [1974] 2 N.S.W.L.R. 401; (1977) 51 A.L.J.R. 198.

[13] *Birmingham & Midland Motor Omnibus Co. Ltd* v. *London & North Western Railway Co.* [1913] 3 K.B. 850; *Adam S.S. Co. Ltd* v. *London Assurance Corporation* [1914] 3 K.B. 1256; *The Hopper No. 13* [1925] P. 52; *Ogden* v. *London Electric Railway Co.* (1933) 149 L.T. 476; *Toohey's Ltd* v. *The Housing Commission of N.S.W.* (1952) 20 L.G.R. (N.S.W.) 236, affirmed (1953) 53 S.R. (N.S.W.) 407; *Weir* v. *Greening* [1957] V.R. 296; *Seabrook* v. *British Transport Commission* [1959] 2 All E.R. 15; *Patch* v. *United Bristol Hospital Board* [1959] 3 All E.R. 876.

[14] [1913] 3 K.B. 850.

[15] Ibid., at p. 856. Vaughan Williams J. agreed.

[16] *Woolley* v. *North London Railway Co.* (1869) L.R. 4 C.P. 602; *Parr* v. *London, Chatham & Dover Railway Co.* (1871) 24 L.T. 558; *Fenner* v. *London & South Eastern Railway Co.* (1872) L.R. 7 Q.B. 767; *Skinner* v. *Great Northern Railway Co.* (1874) L.R. 9 Exch. 298; *Anderson* v. *Bank of British Columbia* [1876] 2 Ch.D. 644; *Westinghouse* v. *Midland Railway Co.* (1883) 48 L.T. 462; *Collins* v. *London General Omnibus Co.* (1893) 68 L.T. 831; *Jones* v. *Great Central Railway Co.* [1910] A.C. 4.

creation of the document.[17] Some recent English decisions have preferred the reasoning of Hamilton L.J. to that of Buckley L.J.[18] The result has been a contraction of the scope of legal professional privilege. The decision in *Grant* v. *Downs* has narrowed the limits of the privilege even more.

The Decision

Stephen, Mason and Murphy JJ. delivered the leading judgment. Their Honours prefaced their analysis of the law with the following question[19]

> "What then are the relevant principles of law governing the privilege which attaches to communications and materials submitted by a client to his solicitor for the purpose of advice or for the purpose of use in existing or anticipated litigation, in particular when the materials have been called into existence to serve more than one purpose, submission to the solicitor being only one of the purposes? It is a question more easily asked than answered. . . ."

Their Honours referred to cases that had accepted the view that an accident report produced as a standard procedure could be privileged. They recognized that for such a document to be privileged litigation must be in reasonable contemplation at the time of its creation, although it is not essential that it had been produced following legal advice. However, their Honours pointed out that the mere preparation of a document in anticipation of litigation is not of itself sufficient to render that document privileged: "the document must be called into being for use in litigation or for advice and it is the extent to which this purpose is to be served by the preparation of the document that is in question."[20]

After considering the basis of the privilege their Honours pointed to a number of significant factors which suggested that its content ". . . should be confined within strict limits".[21] First, as far as corporations are concerned, whether they be companies or statutory authorities, it was thought that the privilege was of doubtful use in achieving its aim of full and frank disclosure to a legal adviser. Indeed, it was considered that the privilege might even be a hinderance to frank testimony. The proliferation of documents produced in the ordinary course of corporation business may lend itself ". . . to a claim of privilege if the purposive element of a submission to a solicitor is too easily satisfied . . ."[22] The loss of relevant evidence may hinder frank testimony by rendering it more difficult to test the veracity of witnesses or it could unfairly subject the other party to surprise. Moreover, their Honours stressed that a corporation ought not be in a better position to claim the privilege than an individual. Reports from a corporation's servants made to equip management with actual

17 Supra fn. 13, p. 860.
18 *Longthorn* v. *British Transport Commission* [1959] 2 All E.R. 32; *Alfred Crompton Amusement Machines Ltd* v. *Customs and Excise Commissioners (No. 2)* [1974] A.C. 405. See also *Maddison* v. *Goldrick* [1976] 1 N.S.W.L.R. 651, 665.
19 (1977) 51 A.L.J.R. 198, 201.
20 Ibid.
21 Ibid. at p. 202.
22 Ibid.

knowledge of what its servants have done are ". . . but a manifestation of the need of a corporation to acquire in actuality the knowledge that it is always deemed to possess and which lies initially in the minds of its agents".[23] In their Honours' view the fact that such documents may also serve a second purpose, that of communication to a legal adviser for advice or use in actual or anticipated litigation, should not result in the extension of the privilege. The conclusion of principle was stated thus[24]

> "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. It is true that the requirement that documents be brought into existence in anticipation of litigation diminishes to some extent the risk that documents brought into existence for non-privileged purposes will attract the privilege but it certainly does not eliminate the risk. 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."

In the instant case, it was clear that the reports in question did not fit within the sole purpose test outlined by their Honours. Submission of documents to the respondents' legal advisers was merely one of the material purposes of their production, even though they were prepared in reasonable anticipation of litigation.

Barwick C.J. delivered a separate judgment in which he proposed a slightly more liberal test based on the dominant purpose rather than the sole purpose of the document's creation. Preferring the word "dominant" to both "primary" or "substantial" his Honour stated the law thus[25]

> "[A] document which was produced or brought into existence either with the dominant purpose of its author, or of the person . . . under whose direction . . . 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 . . . in reasonable prospect, should be privileged and excluded from production."

Barwick C.J. also had no difficulty in denying the privilege sought to be accorded to the reports in question.

Jacobs J. adopted a different view altogether. In his opinion, the rules protecting legal professional privilege and those requiring disclosure of all evidence relevant to litigation may conflict when documents are brought into existence for a plurality of purposes. His Honour stated[26]

[23] Ibid. at p. 203.
[24] Ibid. at pp. 203-4.
[25] Ibid. at p. 199.
[26] Ibid. at p. 204 (emphasis added).

> "When there is only one purpose, that of communication to the legal adviser, or where among a plurality of purposes there is a purpose *certainly* to communicate the material to the legal adviser in order to obtain his advice or action in litigation which is pending or in fact expected, the first rule applies. The communication is privileged. But when the material is prepared or the confidential exchange of information takes place with a plurality of purposes, one of which is the communication thereof to the legal adviser but only in the *contingency* of actual or of proposed or threatened litigation, there is difficulty in reconciling the two rules and in refining them so that the purposes which they are both intended to serve are best met."

The above paragraph from his judgment indicates that his Honour would draw a distinction here—that there exist two different situations where a document is produced for multiple purposes including its communication to a legal adviser for use or advice in actual or anticipated litigation. On the one hand, there are cases where there is a definite intention at the time of preparation of the document to submit it to a legal adviser; material in this category is to be privileged. On the other hand, there are cases where the intention is contingent, the material being regarded as possibly useful to the legal adviser and to be communicated to him if the expected litigation renders that necessary. In his Honour's opinion the reports in question came into this second category and were not privileged. After reviewing the authorities and the facts, Jacobs J. concluded that

> "where the purpose, in the sense of intended use of the documents, is that of submission to legal advisers, but only in the contingency of actual or proposed or threatened litigation, that purpose or intention must account for the bringing of the documents into existence."[27]

Accordingly, his Honour rejected the claim to privilege because the documents were routine administrative reports. There was no indication that they would not have been produced quite apart from their possible utility in the event of litigation.

As a result of *Grant* v. *Downs*, it is suggested that the sole purpose test explained in the judgment of Stephen, Mason and Murphy JJ. must be regarded as the determinant of this aspect of legal professional privilege. Their Honours' concern to set the limits of the privilege strictly in accordance with its rationale prompted them to adopt a narrower test than either the dominant purpose criterion of Barwick C.J. or the distinct tests proposed by Jacobs J. A document will no longer be privileged if submission to a legal adviser was merely one of the purposes, or even the substantial purpose, for its production. Rather, not only must a document satisfy the ordinary pre-requisites essential to a successful claim, but it must have been produced with the sole intention of using it for submission to a legal adviser for his advice or assistance.

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[27] Ibid. at p. 206.

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