

SUPREME COURT OF QUEENSLAND

CITATION: *Broadbent v Medical Board of Queensland* [2010] QCA 311

PARTIES: **MICHAEL RUSSELL MARK BROADBENT**
(registrant/appellant)
v
MEDICAL BOARD OF QUEENSLAND
(applicant/respondent)

FILE NO/S: Appeal No 7059 of 2010
DC No 2962 of 2007
DC No 976 of 2008
DC No 1189 of 2008

DIVISION: Court of Appeal

PROCEEDING: Mention

ORIGINATING COURT: Queensland Civil and Administrative Tribunal at Southport

DELIVERED EX TEMPORE ON: 9 November 2010

DELIVERED AT: Brisbane

HEARING DATE: 9 November 2010

JUDGE: Fraser JA

- ORDERS:
- 1. The Appellant provide the Respondent with a list of all documents in the Appellant's possession or control which relate to or constitute communications in relation to the alleged compromise of the appeal by 10am, Wednesday 10 November 2010.**
 - 2. The Appellant provide the full text of exhibits annexed to the Appellant's affidavit sworn on 18 October 2010 subject only to excision of text which is subject to a valid claim of privilege and excision of text which is irrelevant and which would not affect the complexion of the relevant material.**
 - 3. That the Appellant provide the Respondent with a copy of all documents described in orders 1 and 2 by 10am, Wednesday 10 November 2010.**
 - 4. The Respondent undertakes to pay the Appellant's reasonable photocopying expenses in complying with order 3.**
 - 5. Costs of hearing reserved.**

CATCHWORDS: PROCEDURE – COURTS AND JUDGES GENERALLY – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – DISCLOSURE BY SOLICITORS: CHANGE OF SOLICITORS – where the respondent contended the appeal had been compromised – where the respondent sought disclosure of documents in the appellant’s possession or control concerning the alleged compromise – where the appellant annexed to his affidavit parts of emails between the appellant and his former solicitors relating to an offer of compromise – where the appellant made very substantial but partial disclosure of documents directly related to the question of the whether the appeal had been compromised – whether the appellant had waived legal professional privilege – whether the appellant should be ordered to provide further and better disclosure

COUNSEL: The appellant appeared his own behalf
K A McMillan SC for the respondent

SOLICITORS: The appellant appeared on his own behalf
Moray & Agnew for the respondent

FRASER JA: This appeal is set down for hearing for two days commencing this Thursday. The respondents contend that the appeal has been compromised by an exchange of emails between the respondent’s solicitor and the appellant’s solicitor in October of this year.

The respondents now seek an order for disclosure of the documents in the appellant’s possession or control that relate to the negotiations or discussions concerning the alleged compromise.

I have been referred to the copies of emails passing between the appellant and his solicitors in which he appears to have given instructions to make an offer to compromise the appeal, and I have been referred to emails in which it appears that the respondent’s solicitor sent an email accepting the offer to compromise the appeal.

Various issues about the alleged compromise have arisen. One issue concerns the question whether the solicitors for the appellant had actual authority, or perhaps ostensible

authority, to make an offer which would lead, upon acceptance, to an immediate compromise. A second issue arises with reference to Mr Broadbent's contention that to the extent that his solicitors had his actual authority to compromise the appeal, if at all, he had withdrawn that authority by an email or perhaps by conversations between him and his solicitors.

It is apparent that the copies of the emails disclosed by Mr Broadbent relating to these matters are incomplete in various respects. There are, for example, places in which Mr Broadbent has covered up part of the text of the emails on the ground that the part covered up is irrelevant. In doing so, however, he has, presumably accidentally, also covered up bits which are plainly directly relevant, referring directly to the question of the compromise of the appeal. There are also copies of emails which are indicated as being page 1 of 2 or 2 of 3, and so on, without the missing pages included.

I'm persuaded that the disclosure of the emails that directly relate to the question whether there was a compromise is incomplete. Mr Broadbent has assured the Court that he did his best to find the relevant documents, and I make no adverse comment about that, but nevertheless, as I have said, I'm persuaded that the disclosure is incomplete.

Mr Broadbent argued that he could not do any better for two reasons. First, he said that he had attempted to provide copies of the relevant communications and, having done so, he then threw away all the documents in his possession from which he had attempted to make the relevant copies, and he has no further information, no further documents, which he can provide. Secondly, he has terminated the retainer of his former solicitors and they no longer act for him. In that respect, he argued that he cannot get the relevant communications to disclose because his solicitors have claimed privilege over their files.

Of course, any legal professional privilege is not that of the solicitors so far as Mr Broadbent is concerned but it is his privilege, if there is any. In a letter from his

former solicitors, O’Keefe Mahoney Bennett, to the respondent’s solicitors, Moray & Agnew, dated 8 November 2010 Mr Broadbent’s former solicitors contend that they have spoken with Mr Broadbent and an insurer to confirm that “they wish us to retain legal professional privilege over our files”. On the face of that letter it appears that the claim of privilege came, as one would expect, from Mr Broadbent and not from the solicitors.

In any event, I am persuaded that the privilege could no longer subsist in relation to documents which directly relate to the question whether the appeal has been compromised, essentially for two reasons. The first is that Mr Broadbent has made a very substantial but partial disclosure of documents which directly relate to the question whether the privilege has been compromised. The fact that the disclosure is only partial is capable of presenting a misleading position. That amounts, in my opinion to a waiver of the privilege, upon which Mr Broadbent can no longer rely. The second reason is that Mr Broadbent has directly put in issue the question whether what on its face appears to be a binding compromise of the appeal in an exchange of emails, or at least arguably so, is not a binding compromise because of his withdrawal of authority, or because of other dealings between him and his solicitor relating to the compromise. That too, in my opinion, amounts to a waiver of the privilege.

That being so, there appears to be no reason why Mr Broadbent should not be ordered to provide further and better disclosure of the documents in his possession or control which directly relate to the question whether the appeal has been compromised, and I propose to make such an order.

1. The appellant provide the respondent with a list of all documents in the appellant’s possession or control which constitute communications in relation to the alleged compromise of the appeal by 10 am, Wednesday 10 November 2010;

FRASER JA: All right. That’s order number 1. So I make that order.

FRASER JA: So the order will be:

2. The appellant provide the full text of exhibits annexed to the appellant's affidavit sworn on 18 October 2010, subject only to excision of text which is the subject to a valid claim of privilege and excision of text which is irrelevant and which would not affect the complexion of the relevant material.

FRASER JA: I make that order.

3. The proposed order is that the appellant provide the respondent with a copy of all documents described in orders 1 and 2 by 10 am, Wednesday, 10 November 2010.

FRASER JA: I make that order. Those orders are made upon the respondent's undertaking to pay the appellant's reasonable photocopying expenses in complying with order 3.

FRASER JA: I'll order that the costs of this hearing today be reserved.