IN THE SUPREME COURT OF QUEENSLAND No. 6571 of 1998

Brisbane

Before Williams J

[QUEENSLAND LAW SOCIETY v ALBIETZ & ANOR]

BETWEEN:

QUEENSLAND LAW SOCIETY INC Applicant

AND:

F N ALBIETZ First Respondent

AND:

SIR LENOX HEWITT Second Respondent

JUDGMENT - WILLIAMS J

Judgment delivered 29 October 1998

CATCHWORDS:

Legal professional privilege - advice sought in performance of statutory function - waiver - disclosure of conclusion results in implied waiver as to reasoning s.43(1) Freedom of Information Act 1992.

Counsel: D Kelly for applicant
G Sorensen for first respondent
Solicitors: McCullough Robertson for applicant
P H Shoyer for first respondent
Hearing Date: 15 October, 1998

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1 In October 1993 the second respondent made a charge against a solicitor pursuant to s.6(2)(a) of the Queensland Law Society Act 1952. Thereafter, pursuant to the provisions of that statute and in particular s.6(2)(c), the applicant was obliged to investigate the matter and then refer the matter to the Statutory Committee constituted pursuant to that legislation for hearing. It is implicit in those statutory provisions that if the applicant concluded after its investigation that the matter of complaint ought not to proceed to a hearing before the Statutory Committee it could decline to refer the matter of complaint to that body. The applicant delegated investigation of the complaint in question to its Professional Standards Committee. In the course of conducting its investigation the Professional Standards Committee invited further submissions from the second respondent, his solicitor, the solicitor named in the charge, and his solicitor. Thereafter that Committee decided to seek advice from "one of the Society's panel solicitors for disciplinary matters" in relation to the matters of complaint. That advice was sought from Mr Brian Bartley of Corrs Chambers Westgarth.

2 It would appear that all matters relevant to the complaint, including the advice received from Mr Bartley, were considered by the Committee at a meeting on 15 August

1996. That resulted in the letter of 22 August 1996 in the following terms being sent to the second respondent:

> "I refer to my letter to you of 20 June 1996.
>
> At its meeting held on 18 July 1996, the Professional Standards Committee resolved not to take any action in respect of the conveyancing matters.
>
> The Committee resolved at the same meeting that one of the Society's panel solicitors for disciplinary matters be instructed on the Society's behalf to advise in relation to your complaints arising from the American Express Litigation.
>
> Mr Brian Bartley of Corrs Chambers Westgarth was engaged and his opinion was considered by the Committee at its meeting held on 15 August 1996.
>
> Mr Bartley's opinion was that the conduct of Michael Robinson did not amount to unprofessional conduct and did not warrant disciplinary action being taken to safeguard the public interest. The Professional Standards Committee adopted the advice of Mr Bartley and resolved that no disciplinary action would be taken against Michael Robinson in respect of any of the matters raised by your firm on behalf of Sir Lenox Hewitt.
>
> The Society's file has now been closed."

3 On or about 10 February 1997 the second respondent then sought access to Mr Bartley's advice under the provisions of the Freedom of Information Act 1992. Given the decision in Queensland Law Society Incorporated v Albietz [1996] 2 Qd R 580 the applicant was amenable to the provisions of that legislation. The applicant however refused to give the second respondent access to the advice in question on the ground that it was exempt matter within the meaning of s.43(1) of the F.O.I. Act: "Matter is exempt matter if it would be privileged from production in a legal proceeding on the ground of legal professional privilege". Subsequently the second respondent applied to the first respondent, the Information Commissioner constituted pursuant to the F.O.I. Act, to have that refusal reviewed.

By decision in writing dated 24 June 1998 the first respondent determined that the advice was not exempt from disclosure under the Act on the basis that, although legal professional privilege attached to it, such privilege had been waived by the applicant by its conduct.

4 The applicant now seeks judicial review of that decision by the first respondent pursuant to s.20(1) of the Judicial Review Act 1991. The solicitor who appeared for the first respondent indicated that his client abided the decision of the court, but later he responded to particular requests from the court for assistance. The second respondent did not appear, but indicated that he would abide the decision of the court; essentially he contended that the decision of the first respondent was patently correct.

5 Bartley's advice was tendered as exhibit 1, and I ordered that it be placed in a sealed envelope at the end of the hearing.

6 Given the decision of the High Court in Waterford v The Commonwealth (1987) 163 CLR 54 the applicant would be entitled to claim legal professional privilege with respect to the advice from Bartley. Waterford was concerned with legal advice given to a Government Department by salaried legal officers employed by the Department. At 63-4 Mason and Wilson JJ said:

> "The common law, in the view that we have taken, recognises that legal professional privilege attaches to confidential, professional communications between government agencies and their salaried legal officers undertaken for the sole purpose of seeking or giving legal advice or in connection with anticipated or pending litigation."

Brennan J at 74 said:

> "In any event, I should think that the public interest is truly served by according legal professional privilege to communications brought into existence by a government

> department for the purpose of seeking or giving legal advice as to the nature, extent and manner in which the powers, functions, and duties of government officers are required to be exercised or performed. If the repository of a power does not know the nature or the extent of the power or if he does not appreciate the legal restraints on the manner in which he is required to exercise it, there is a significant risk that a purported exercise of the power will miscarry. The same may be said of the performance of functions and duties. The public interest in minimising that risk by encouraging resort to legal advice is greater, perhaps, than the public interest in minimising the risk that individuals may act without proper appreciation of their legal rights and obligations. In the case of governments no less than in the case of individuals, legal professional privilege tends to enhance application of the law, and the public has a substantial interest in the maintenance of the rule of law over public administration. Providing the sole purpose for which a document is brought into existence is the seeking or giving of legal advice as to the performance of the statutory power or the performance of the statutory function or duty, there is no reason why it should not be the subject of legal professional privilege."

7 Here the applicant was seeking legal advice as to how the duty imposed on it by s.6(2) of the Queensland Law Society Act should be exercised. Insofar as the advice was given to it for that sole purpose the communication was privileged.

8 It is of some significance to note that the court in Waterford specifically rejected an argument addressed to it by counsel for the appellant to the effect that legal professional privilege did not extend to a communication which "relates ... to ... the manner in which a person should exercise a power of an administrative nature conferred upon him by law ...". (See especially judgment of Mason and Wilson JJ at 62-3).

9 Here Bartley's advice was directed to how the power conferred on the applicant by s.6 of the Queensland Law Society Act should be exercised, but for the reasons given

in the High Court judgment that does not afford a basis for excluding it from the umbrella of legal professional privilege.

10 That then leads to the next question - has there been a waiver of privilege by the applicant? The conclusion reached by the first respondent was that the reasons communicated to the applicant in the letter of 22 August 1996 established a waiver.

11 The leading authority on waiver of legal professional privilege is the decision of the High Court in Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475. Mason and Brennan JJ dealt with the problem as follows:

> "The limiting effect of legal professional privilege on the availability of evidence otherwise relevant is confined, *inter alia*, by the doctrine of waiver. The litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. Professor Wigmore explains:
>
> "When his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder." (Wigmore, Evidence in Trials at Common Law (1961) Vol. 8, Par. 2327, p. 636)"
>
> In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter ... Hence, the implied waiver enquiry is at bottom focussed on the fairness of imputing such a waiver." (487-8).

12 To similar effect was the reasoning of Gibbs CJ at 481; he also referred to Wigmore. After doing so he said: "The decisions in which this question has been considered seem to me to be particular applications of the rule that in a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production". (See also Deane J at 493). That reasoning has been applied by Hodgson J in Standard Chartered Bank of Australia Ltd v Antico (1995) 36 NSWLR 87 and the Court of Appeal in Bayliss v Cassidy & Ors (Unreported) CA No. 1225 of 1998, Judgment 11 March 1998. In each of those cases it was held that in the circumstances the use by, reference to and reliance on the legal advice by the party in whom the privilege was vested constituted a waiver.

13 Here, the applicant in notifying the second respondent of its decision under s.6 of the Queensland Law Society Act gave as the only reason for not referring the matter to the Statutory Committee for hearing the fact that "Mr Bartley's opinion was that the conduct of Michael Robinson did not amount to unprofessional conduct and did not warrant disciplinary action being taken to safeguard the public interest". The applicant "adopted the advice". The applicant did not attempt in any way to expand on that by indicating why in the circumstances the conduct in question did not amount to unprofessional conduct or warrant disciplinary action being taken to safeguard the public interest. In other words in discharging its statutory duty the applicant merely informed the second respondent that it relied on and adopted a legal opinion which it had obtained.

14 In those circumstances I am of the view that the applicant has made such use of the opinion that it would be unfair or misleading to allow it to maintain the claim of privilege. There has been a waiver to the extent that the conclusion reached by a named legal adviser has been

disclosed in circumstances where that conclusion is adverse to the interests of the second respondent; in those circumstances it is only just that the waiver as to one part of the protected communication (the conclusion) should result in waiver as to the rest of the communication on that subject matter (that is the reasoning leading to that conclusion).

15 In the course of argument counsel for the applicant conceded that if the second respondent had sought judicial review of the applicant's decision then he would have had a "much stronger case" for contending that it would be unfair for the applicant not to disclose the advice on which its decision was based. That may well be so, but it is a separate question whether or not there has been such waiver as to disentitle the applicant to maintain the claim of privilege against the second respondent on an application under the F.O.I. Act. If anything the nicety of the distinction drawn by counsel for the applicant only serves to highlight the unfairness to the second respondent of the applicant expressly relying on the advice to justify its decision without disclosing the advice.

16 In the course of his reasoning the first respondent in dealing with s.43(1) of the F.O.I. Act said: "It is probably appropriate to hypothesise that the applicant for access under the F.O.I. Act is the party in the hypothetical legal proceedings who seeks production of the matter in issue". Counsel for the applicant took issue with that observation and submitted that it constituted an error of law which vitiated the reasoning of the first respondent. The argument was that s.43 (1) by referring to "a legal proceeding" was in effect referring to "any legal proceeding". Given the premise that privilege may be waived for some purposes but not others (a general proposition which can be assumed for present purposes) it was said that if the applicant could demonstrate that in some hypothetical legal proceeding it could still maintain a claim for privilege notwithstanding the use made of the

advice in the letter of 22 August 1996, the matter was "exempt matter" for purposes of s.43(1).

17 That in my view cannot be the proper construction to place on s.43(1). It is not necessary in this case to finally determine whether or not the first respondent was correct in limiting the hypothetical legal proceeding to a proceeding in which the applicant for access under the F.O.I. Act was a party. In my view it is sufficient for present purposes to say that where the advice has come into existence for the purpose of facilitating the discharge by the applicant of a statutory duty, and use has been made of the advice in connection with that matter in such a way as to constitute a waiver of privilege, the applicant cannot defeat the second respondent's application under the F.O.I. Act by relying on s.43(1).

18 I have read Bartley's advice and in my view there is nothing in it which warrants any departure from the reasoning disclosed above.

19 In the circumstances the application for statutory review should be dismissed, but no order should be made as to costs.