

FULL COURT

BETWEEN:

CURLEX MARKETING PTY LTD AND ADD-ON
PTY LTD

(Plaintiffs)
Appellants

AND:

CARLINGFORD AUSTRALIA GENERAL
INSURANCE LIMITED

(DEFENDANT)
Respondent

JUDGMENT - McPHERSON J.

Delivered the 30th day of October, 1986.

The appellant is the plaintiff in an action to recover consequential losses, including loss of profit, pursuant to a policy of insurance issued by the defendant. The plaintiff conducted a manufacturing business in premises destroyed by fire on May 19, 1983. These matters are alleged in paragraphs 5 and 6 of the statement of claim in the action. The defence puts in issue the alleged losses and also relies on non-disclosure of various matters including failure of the plaintiff to disclose that it, or associated companies, were, as it is alleged, in a condition close to insolvency at the time of the fire (Defence, para. 4). In addition the allegation is made that the plaintiff failed to comply with a condition of the policy in that it did not give the defendant information about its claim, including details of the re-establishment of its business after the fire, and details relevant to the operation of its business before the fire.

It appears to be common ground that in one way or another these pleadings raise issues about the income or profit of the plaintiff's business both before and after the fire. It also appears that many of the plaintiff's financial and accounting records, which might have been expected to have disclosed such information, were destroyed in the fire. The defendant accordingly considered it

prudent to engage accountants to assess the value of the plaintiff's insurance claim. The accountants' draft report is dated August 21, 1985 and is addressed to the defendant's solicitors. When discovery was had in the action their report was disclosed as item 95 in Part 1 of Schedule 1 of the defendant's affidavit of documents, where it is described as "draft report, Peat Marwick Mitchell & Co. to Ian Barron & Co (pages 1 to 5 inclusive and the first schedule)". In Part 2 of the same Schedule objection is taken to production of various documents "including pages six to eleven inclusive of a draft report by Peat Marwick Mitchell & Co dated August 21, 1985."

It is conceded that the report, or pages 6-11 of it, is entitled to the benefit of legal professional privilege, subject only to the matter now to be mentioned. That is that, by disclosing the report in Part 1 of Schedule 1, the defendant waived its right to claim privilege in respect of the whole of the document, and so is not entitled to withhold any of it from production and inspection. de Jersey J, before whom the matter came in the Commercial Causes Jurisdiction, was invited to and did examine (as we have also done) the draft report. His Honour decided that the objection to production was well taken and that the privilege had not been waived. From that decision this appeal is brought by the plaintiff.

The foundation of the plaintiffs' submission both on appeal and below is the decision of the English Court of Appeal (Templeman, Dunn L.JJ.) in Great Atlantic Insurance Co. v. Home Insurance Co. [1981] 1 W.L.R. 529. That decision was followed by Barker J in Chandris Lines Ltd. v. Wilson & Horton Ltd. [1981] 2 N.Z.L.R. 600, although at a time when only The Times report of the English case was available to His Honour. See [1981] 2 N.Z.L.R. 600, at 609. The essence of the Great Atlantic decision, as the plaintiff before us submitted it to be, is that a party may be held to have waived his claim to privilege if he discloses part of a document the subject matter of which is

"the same as" that with respect to which he claims privilege.

In my respectful view, no such principle exists in relation to discovery of documents, or production or inspection of documents as forming part of the process of discovery. To show this, it is necessary to look at the history of discovery and more particularly of the practice with respect to objections to production of parts of documents.

The history of the matter is this. Originally the defendant to a suit in Chancery was obliged to set out in his answer all material documents, and to do so in full. See Wigram : Points in the Law of Discovery (2nd ed.) at 199-200. By what, writing in 1840, Wigram described as the "modern practice", the defendant was permitted, instead of setting out the documents in extensu, to describe the documents in his possession or power, and to do so either in the answer itself or in a schedule to it (Ibid, at 200). The plaintiff then applied to the Court for production and inspection of the documents discovered. Production in this context meant deposit in the Office of the Record and Writ Clerk in Chancery. See Kerr : Treatise on the Law of Discovery (1870), at 71. The practice of allowing the documents to be produced at the office of the party's solicitor was a later development adopted in the interests of convenience - see Brown v. Sewell (1880) 16 QBD 517, at 518-519, per Jessel M.R. - which was later followed at common law : Ibid.

Under the Chancery procedure before the Judicature Act objections to producing documents were made by the defendant upon the application by the plaintiff for an order for production. The objection might be to production of the whole document, or it might be to production of only part of it founded on a variety of grounds, such as irrelevance; its relation only to the defendant's own case; or legal professional privilege. Such objections were taken by affidavit, which, in order to reduce costs, were

ordinarily filed before the plaintiff's application for production was made: see, for example, Llewellyn v. Badeley (1842) 1 Ha. 527; 66 E.R. 1140. If the objection was to production of only part of a document, the practice was for the defendant to seek liberty to seal up those parts of the document the production of which was objected to : Curd v. Curd (1842) 1 Ha. 242; 66 E.R. 1036. In time such orders came to be made more or less of course, so that at an even later date textwriters spoke of liberty to seal up as the usual order : cf. Bray on Discovery (1885), at 237. Sealing up was originally the only means of protecting parts of a document against production because it was - and generally still is impermissible to tear apart or otherwise mutilate a document in order to protect parts of it from production : Ayres v. Levy (1868) 19 L.T. 8. An example of an affidavit claiming to seal up part of a document is to be found in Kettlewell v. Barstow (1872) L.R. 7 Ch.App. 686, at 690.

At common law the right to discovery was extremely limited until the enactment of the Evidence Act 1851 (14 & 15 Vice. c. 99) in England. Section 6 of that Act conferred on the common law courts a power to order only an inspection of documents : Hunt v. Hewitt (1852) 7 Ex. 236; 155 E.R. 931. However, three years later a power to order discovery was vested in those courts by the Common Law Procedure Act 1854; 17 & 18 Vice. c. 125, s. 50 : see Forshaw v. Lewis (1855) 10 Ex. 712; 156 E.R. 626. The two decisions mentioned adopted the practice in Chancery in matters of discovery and inspection arising at common law under those statutory provisions, which in due course emerged in Queensland as ss. 73 and 72 respectively of The Evidence and Discovery Act of 1867.

An aspect of the Chancery practice adopted by the common law courts was that of permitting the party producing a document to claim upon a sufficient affidavit to seal up those parts of it that he objected on some proper ground to producing. See Forshaw v. Lewis (1855) 10 Ex. 712, at 716, per Parke B. Thereafter there are many

decisions recognizing or applying the rule that sealing up of parts of documents was permissible : see Riccard v. Blanuri (1854) 4 El. & Bl. 329, at 340; 119 E.R. 127, at 131; Hill v. Great Western Ry. Co. (1861) 10 C.B.(NS) 148, at 149; 142 E.R. 406, at 407; Bull v. Clarke (1864) 15 C.B.(NS) 851; 143 E.R. 1020; Houghton v. London & County Assurance (1864) 17 C.B.(NS) 82, at 83; 144 E.R. 32, at 34.

As a result the practice of sealing up the parts of documents to which the objection to produce was taken prevailed both at common law and in equity. It continued to be followed after the Judicature Act, as can be seen, for example, in Jones v. Andrews (1888) 58 L.T. 601; and is referred to by textwriters both present and past : see Bray on Discovery, at 237; Ross : The Law of Discovery (1912), at 162-163; Simpson, Bailey & Evans : Discovery and Interrogatories, at 201. In providing for an affidavit of documents at common law, s. 50 of the Common Law Procedure Act 1854 expressly envisaged that the deponent would declare in that affidavit "whether he or they objects or object (and, if so, on what grounds) to the production" of documents. The claim to immunity from production of part of a document is now taken in the affidavit of documents itself. The relevant part may be described, or it may be identified simply as a part sealed up. The practice of sealing up or, nowadays, covering up parts of documents continues, in my experience, to be adopted in Queensland. The choice of method is doubtless dictated largely by convenience. Where large numbers of parts of documents are involved, the only practical course is to identify the parts that it is objected to produce as being those parts that have been sealed up. To describe in some other way each portion of each document for which immunity is claimed would ordinarily be impracticable as well as unnecessarily prolix. In the present case, the method chosen by the defendant was to take the objection in Part 2 of Schedule 1 to producing a described portion of the document, it being a case in which the physical form of the document lent itself to that course. No doubt when the time for production and inspection arrives, the defendant will cover

up pages 6 to 11 of the report. On the authority of Ayres v. Levy, supra, he would not be justified in removing those pages from the report.

The point to be gathered from this digression is that for at least 150 years it has been possible to resist on some proper ground production of parts of discoverable documents, and to do so entirely without reference to the question whether the part in respect of which non-production was claimed was of "the same subject matter" as another part as to which production was not resisted. Of the many cases referred to here, not one - until in 1981 Great Atlantic Insurance Co. v. Home Insurance Co., supra, is reached - suggests that the right of a party to object to production of parts of a discovered document depends on their being concerned with "entirely different subject matters or different incidents", so as in effect to be capable of division into two separate memoranda (Cf. [1981] 1 W.L.R. 529, at 536). The whole history and practice of sealing up parts of documents is against the existence of such a limitation. Usually, if not in most cases, the subject matter of the portion disclosed will in practice be the same as that claimed to be immune from production. On that footing, it would be a course fraught with considerable risk for the discovering party to concede that any part of the document is discoverable. So much is indeed accepted in the judgment of Templeman L.J. in the Great Atlantic case. His Lordship says ([1981] 1 W.L.R. 529, at 536):-

"In my judgment, the simplest, safest and most straightforward rule is that if a document is privileged then privilege must be asserted, if at all, to the whole document unless the document deals with separate subject matters so that the document can in effect be divided into two separate and distinct documents each of which is complete."

I cannot accept that such a practice is conducive to the policy that underlies discovery, or consistent with the kind of complete candour that is traditionally associated

with the duty of full disclosure in affidavits of documents. If accepted, it would in this instance mean that the defendant would, in order to protect the portion of the draft report in respect of which privilege is claimed, have been bound to claim privilege in respect of the whole of the draft report of the accountants. I cannot see what benefit would have resulted to the plaintiff from following such a course, quite apart from the serious difficulties of assessment both for practitioners and the courts inherent in the adoption of "some or different subject matters" as the criterion for deciding whether privilege may be claimed, or has been waived, as to part of a document in the course of discovery. In my view, the decision in the Great Atlantic case, in so far as it can be said to apply such a criterion to production in the course of discovery of parts of documents, as to which privilege has been either claimed or waived, should not be followed in this jurisdiction.

I have confined the foregoing remarks to discovery because I do not mean to question the correctness of the decision in Great Atlantic Insurance Co. v. Home Insurance Co., supra, in the context in which it was decided. It was not a case involving any question of waiver of privilege on discovery. It arose out of an interlocutory appeal taken in the course of trial of an action. In opening the plaintiff's case at trial, counsel had read from and relied upon two paragraphs of a document, as to the balance of which a claim of legal professional privilege was later asserted. He had done so without knowing that there was more of the document than the part that he read out. Notwithstanding this error, the plaintiff was held to have waived its claim of privilege as to the balance of the document. The decision, which, with respect, appears plainly to be correct, was concerned with the principle that a party cannot ordinarily claim at trial to use part of a document in support of his case, while at the same time also claiming to conceal the remainder of it from his opponent. In modern times the principal illustration of the rule is the decision in Burnell v. British Transport

Commission [1956] 1 Q.B. 187, on which the Court of Appeal placed extensive reliance in the Great Atlantic case. The basis of the rule is, as the Court of Appeal there recognized ([1981] 1 W.L.R. 529, at 538-539), "the possibility ... that any use of part of a document may be unfair or misleading". Cf. also General Accident Fire & Life Assurance Corp'n Ltd v. Tanter [1984] 1 W.L.R. 100; and Phipson on Evidence, 13th ed., para. 1520, at 306. A similar principle also underlies another rule of trial practice, which enable counsel to call for, inspect, and cross-examine upon a document used by a witness to refresh his memory, and to do so without being required to put it in evidence, provided that in doing so he does not go beyond those portions of the document resorted to by the witness : see R. v. McGregor [1984] 1 Qd. R. 256, at 264. In both instances the document is being "used" in support of a litigant's case. In contrast, the fact of a document being discovered does not mean that it will be "used" at trial, discoverability and admissibility in evidence being distinct questions. That the Court of Appeal was not attempting to lay down any contrary rule appears to be shown by the observation in the Great Atlantic case ([1981] 1 W.L.R. 529, at 539, that "Once disclosure has taken place by introducing part of the document into evidence or using it in court, it cannot be erased."

It nevertheless remains true that in Great Atlantic the Court of Appeal considered that support for the approach it took was to be found in a decision involving questions of discovery. In Churton v. Frewen (1865) 2 Dr. & Sm. 390; 62 E.R. 669, the defendant objected to produce, on the ground of legal professional privilege, a report made at the request of defendants' solicitors. The report was the result of a search conducted by an expert of ancient documents relevant to the litigation. It was a fair inference that the report contained not only extracts from or copies of the documents (which were not privileged) but, interspersed among them, observations and comments by the expert upon their character and effect, which were entitled to privilege. Kindersley V.-C. thought it "quite impossible

to separate the different portions", and "very dangerous", as trenching upon the principle that protected the report, to require production for inspection of those portions of the report which consisted of copies or extracts from the ancient documents. With respect, the decision cannot be regarded as authority for a proposition that privilege can be claimed for part of a document only if it embodies a different or distinct subject matter. His Honour's reason for not requiring the document to be produced with the privileged parts sealed up was not that a waiver of privilege would follow, but that "it would hardly be possible to seal up and effectually protect from inspection those parts which constitute the report, and which it is admitted there is no right to see" (62 E.R. 669, at 671). Had there been no such risk, it seems likely that production would have been ordered, with liberty to seal up the privileged parts, whether they dealt with the same or a different subject matter. The decision is no more than an illustration of the rule that a document or part of a document not itself the subject of privilege may be protected from production because of what it reveals about some other document or part that does attract a claim of privilege : cf. Packer v. Deputy Commissioner of Taxation [1985] 1 Qd.R. 275, at 285.

An even earlier case that may be both compared and contrasted with Churton v. Frewen, *supra*, is Carew v. White (1842) 5 Beav. 172; 49 E.R. 142, in which Lord Langdale M.R. reluctantly ordered production of diaries containing business entries material to the partnership litigation notwithstanding that they also contained entries concerning private and family matters which were not relevant to any issues. He did so because the defendant having "mixed his private affairs with the partnership transactions, it is his duty "to separate them, and if he cannot, he must necessarily suffer the inconvenience arising from his own act." The learned Master of the Rolls did, however, add that the defendant was entitled to "the usual order for sealing up those paras not relating to the partnership

transactions, and he may, if he can, avail himself of this qualification" (49 E.R. 542, at 544).

Both cases involved documents containing a mixture of matter that was discoverable and liable to production with matter that was not. In Carew v. White the objection to production failed not because the subject matters were the same - they were different - but because, assuming it was impossible in a practical sense to segregate or isolate the two subjects, the objection to produce went only to relevance. In Churton v. Frewen the objection succeeded not because the two subjects were different - they were the same - but because the objection was founded on legal professional privilege.

In the present case the material the subject of the claim for privilege (pages 6 to 11 of the report) is capable of isolation from the remainder of the report (pages 1 to 5 and the schedule). It was therefore possible for the defendant, as it did in its affidavit of documents, to claim privilege from production of a described part (pages 6 to 11) of the report. Had that not been possible, or had it been impracticable to seal up parts of the document, it may, on the authority of Churton v. Frewen, supra, have been open to the defendant to claim privilege from production in respect of the whole of the report. Failure to do so involved no question of waiver of privilege on the part of the defendant. To that, the question whether the subject matter of pages 1 to 5 of the report was the same as, or different from, that of pages 6 to 11, was and is in my view quite irrelevant.

The learned judge was therefore correct in refusing to order production of the whole document. The appeal should therefore be dismissed with costs.