



IN THE SUPREME COURT  
HELD IN PORT VILA  
REPUBLIC OF VANUATU

CIVIL CASE NO. 2 OF 1995

(Civil Jurisdiction)

**BETWEEN:** JOHN GILBERT  
MC CORMACK, Investor of  
P. O. BOX 107, Sans Souci,  
N. S. W. 2219, Sydney,  
AUSTRALIA.

**Plaintiff**

**AND:** LINDSAY DAVID BARRETT,  
Chartered Accountant of Barrett  
& Sinclair, 1st Floor,, Prouds  
Building, Kumul Highway,  
Port Vila, Efate in the Republic of  
Vanuatu.

**First Defendant**

**AND:** ADRIAN SINCLAIR, Chartered  
Accountant of Barrett & Sinclair,  
1st Floor, Prouds Building,  
Kumul Highway, Port Vila, Efate  
in the Republic of Vanuatu.

**Second Defendant**

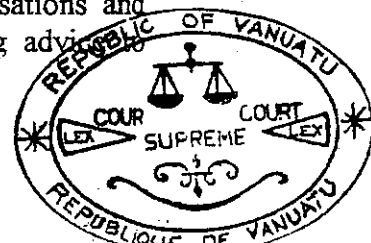
**APPLICATION IN CHAMBERS ON THE BASIS OF A SUBPOENA DUCES  
TECUM AT SITTING OF THE SUPREME COURT BEFORE THE CHIEF  
REGISTRAR LUNABEK VINCENT.**

**( O. 39. r. 31 )**

Mr. Garry Blake for the Plaintiff.

Mr. Juris Ozols for Mr David Hudson and Mr Robert Sugden Partners, Hudson & Co,  
a non - party to the proceedings.

This is an application before the Chief Registrar in Chambers requesting Mr. David Hudson & Mr. Robert Sugden Partners, Hudson & Co to produce to the Plaintiff's counsel all originals or where originals are not held, copies of all files including but not limited to all correspondence, diary notes, memoranda, notes of conversations and accounts in relation to Hudson & Co acting on behalf of or providing advice to Michael Kennedy in "File Number 3083 - Mr M. Kennedy".



Mr Juris Ozols, at that time working for Hudson and Co, said that Michael Kennedy who was the man behind a Company which is the subject of a criminal proceedings before the Supreme Court of Vanuatu and involving John Gilbert Mc Cormack, the above named Plaintiff came to see him in or about November 1993 to obtain legal advice on certain matters.

Mr Juris Ozols stated that Michael Kennedy gave instructions that advice should remain confidential and not to be disclosed to any party including the First and Second above named Defendants.

It should be noted that Michael Kennedy flew out of the jurisdiction of this country and could not be located. He is somewhere in Australia. However, said Juris Ozols, his instructions as to the confidentiality of the legal advice still stand and that the conferences held with Michael Kennedy are subject to Solicitor and client privilege so that no documents are available to any parties to this litigation.

Mr Garry Blake, on behalf of the Plaintiff, argued that instructions given at that time by Mr Juris Ozols to Michael Kennedy were not privileged and submitted that there is need for argument before a Judge.

Both Counsels were asked by the Chief Registrar whether they wish the matter be adjourned and transferred before a Judge in order to give them the opportunity to put their full arguments on the issue of validity of the Privilege claimed.

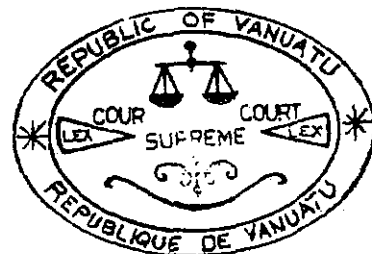
It seems that both Counsels sought first a ruling from the Registrar on the point in issue. Mr Juris Ozols sought a ruling from the Chief Registrar to the effect that there is no evidence as to particular piece of advice sought by Michael Kennedy and that the said Kennedy was not charged and was not convicted of any criminal offence. In this respect, he said the mere fact that Kennedy has some connection with criminal proceedings did not put the legal advice out of privilege.

It has to be understood as explained by Professor Bernard C. Cairns in Australian Civil Procedure - Third Edition p. 334 - 335 - 336 that the purpose of legal professional privilege is to preserve confidentiality between legal adviser and client. As such the privilege protects from disclosure communications between a client and a legal adviser for the purpose of obtaining legal advice. It also protects from disclosure documents prepared for use in existing or anticipated litigation.

Legal professional privilege is intended to ensure full and frank disclosure between a client and the client's legal adviser in order to promote the cause of Justice.

To attract legal professional privilege the communication must be a confidential communication with a legal practitioner, or one made for the purpose of existing or anticipated litigation.

It should be noted that there is a basic conflict between discovery and legal professional privilege. These competing interest were resolved in Seabrook Vs British Transport Commission ( 1 W. L. B. 509 ) in this way: One view was to confine privilege to communications made solely for the use of legal practitioners. That narrows the scope of Privilege. The other approach was to extend privilege to a document or communication where one purpose of bringing it into existence was to obtain legal advice.



Obviously not all communications with a legal adviser are to obtain confidential legal advice. Such communications are not privileged.

Thus, the case of Queen Vs Cox and Railton ( Q. B. D. [1884] p. 153 ) is the authority for the proposition that all communications between a solicitor and his client are not privileged from disclosure, but only those passing between them in professional confidence and in the legitimate Cause of Professional employment of the solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it, are not privileged from disclosure.

Mr Garry Blake referred the Registrar to the above case ( re The Queen Vs Cox and Railton ) as the leading source of Law in this area and said that in the present case, the advice given to Michael Kennedy was advice as to operations of sales made in Vanuatu. There are offences committed in Vanuatu out of the said operations which were proved to be connected to Kennedy's sales.

Michael Kennedy escaped the jurisdiction of Vanuatu with the help of some persons and it is unlikely that he will come back. Mr Blake submitted then that this is clear evidence that advice given are related to the commission of crime.

I found it difficult to make a ruling as to the validity of the privilege claimed as I have already said both counsels involved in this application, reserved their full arguments before a Judge. Yet, they expect from the Chief Registrar a ruling on the point concerned. Thus, I have to reach a decision, in any event.

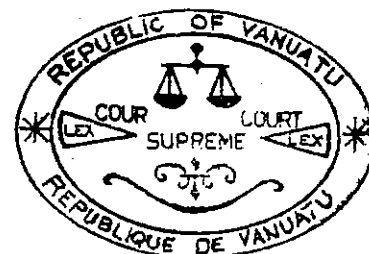
It is worth mentioning that when counsels appear before the Registrar in Chambers on an arguable issue within the jurisdiction of the Registrar, it would be, I think, appropriate for them to argue fully their case with the supported relevant authorities in the same way as they would normally do before a Judge. In this way, I think, the Registrar, as well as a Judge, would be in a better position to make a decision on the point in issue.

In the case of Williams Vs Quebrada Railway, Land and Copper company (1895) 2 ch. 751, Kekewish J. said (at p. 756):

*" ... The judgement in Reg. Vs Cox is based on general principles, and does not draw any distinction between a case of crime and a case of civil fraud ... ( and thus, my emphasis ) ... the case of Reg. Vs Cox is applicable to civil as well as criminal cases "*

In Williams Vs Quebrada Railways, the order for production and inspection of documents on which privilege was claimed was made against the Defendant. In the case before us, although the order sought is not against the Defendant(s) but a non - party to the proceedings, the result will remain the same. It seems to me, therefore, that if the case alleged by the statement of claim be true, there can be no professional privilege for the document in question.

I respectfully agree with Kekewish J. in the approach he had followed in the case of Williams vs Quebrada Railways (referred to above) as to the production of the document in question and I thus adopted it as my own in this case.



I was extremely reluctant to order the production of these documents without knowing something about them. It might be that, after all, privilege had not been aptly claimed, or I might inadvertently and unfairly to Mr David Hudson & Mr Robert Sugden Partners of Hudson & Co make them produce a number of documents which could only be used for the purpose of harassing them, and might have no direct bearing on the matters in question; and therefore I endeavoured to fall back to the rules.

Sub - rule 2 of r. 19 of Order 33 of the Western Pacific High Court (Civil Procedure) Rules, 1964 says this:

*"Where on an application for an order for inspection privilege is claimed for any documents, it shall be lawful for the Court to inspect the documents for the purpose of deciding as to the validity of the claim of privilege".*

My difficulty was whether I could insist on seeing the documents in question here, because the rule says:

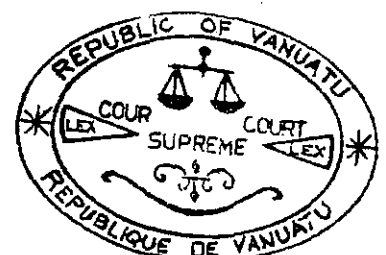
*"For the purpose of deciding as to the validity of the claim of privilege"*

I got the documents concerned, namely *"File No.3083 - M. Kennedy"* from Mr Juris Ozols and I had made up my mind that the claim of privilege was invalid. I wish to see them because I wish to stop, if I could, the production of useless documents, the production of which would only harass and do no good, but would only cause trouble and costs. Mr Juris Ozols assented to my seeing them. I have seen them, and I have come to the conclusion that the Plaintiff's counsel must have an opportunity of looking at them.

I ought not to express any decided opinion whether they do or do not support the Plaintiff's application, but I do say that they require the closest investigation on behalf of the Plaintiff.

**Therefore there must be an order for the production and inspection of the document concerned in the following:**

- 1. That Mr David Hudson & Mr Robert Sugden Partners, Hudson & Co of Port Vila, do at all reasonable times, on reasonable notice, produce at Messrs George Vasaris & Co, Barristers & Solicitors, situated at 2nd Floor, Law House, Kumul Highway, Port Vila, Efate, Republic of Vanuatu, the following documents, namely File No. 3083 - M. Kennedy;**
- 2. And that Mr Garry Blake, counsel for the Plaintiff be at liberty to inspect and peruse the documents so produced, and to make notes of their contents, and be entitled to be supplied with copies thereof on payment of the proper charges;**



3. And that it is ordered that in the meantime all further proceedings be stayed;
4. And that the costs of this application be reserved.

DATED AT PORT VILA this 9th Day of November 1995.



**LUNABEK VINCENT**  
Chief Registrar

