IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

C.P. 62/96

BETWEEN: A &P CAIN LTD, a duly registered company carrying on business at Vaimoso

PLAINTIFF

A N D: THE ELECTRIC POWER CORPORATION established pursuant to the Electric Power Corporation Act 1972.

DEFENDANT

Counsel: TRS Toailoa for plaintiff
KM Sapolu for defendant

Hearing: 9 May 1997

Judgment: 9 October 1997

JUDGMENT OF SAPOLU CJ

This is a motion by the plaintiff for an order directing the defendant to make certain documents in its possession or power available to the plaintiff for inspection. The motion followed an order taken out by the plaintiff for discovery. The defendant has opposed the motion claiming legal professional privilege.

Briefly, the present proceedings arose out of an action by the plaintiff claiming damages against the defendant for wrongful repudiation of contract. In essence that means an action for breach of contract seeking damages. It is claimed that under the contract, which was partly by word of mouth, partly by writing, and partly by conduct, the parties had agreed that the plaintiff was to do certain work as part of a project called the Rural Electrification Project. However, the defendant later wrongfully repudiated the contract. The defendant has denied the claim and has sought to defend it.

The documents which are the subject of the motion for inspection are those numbered 19 to 24 in the defendants list of documents. More explicitly they are shown in the defendant's list of documents as follows:

19. Letter dated 2nd March 1995 from the [defendant's] general manager to the Attorney-General

20. Letter dated 14th March 1995 from [defendant's] general manager to Mr Williams, Office of the Attorney-General

21. Letter dated 19th April 1995 from [defendant's] general manager to Attorney-General

22. Letter of advice dated 26th April 1995 from Office of the Attorney-General to [defendant's] general manager.

23. Letter dated 27th June 1995 from [defendant's] general manager to the Attorney-General referring RS Toailoa's letter for advice.

24. Letter dated 9th August 1995 from the Attorney-General to the [defendant's] general manager.

It is thus clear that the documents for which inspection is sought to be ordered by the Court are letters of correspondence between the defendant's general manager and the Attorney-General and his Office.

For present purposes, I do not consider it necessary to go through all the numerous authorities, old and new, on the question of legal professional privilege. It would be sufficient to refer to a general statement of the privilege which is contained in *Cross on Evidence (1996)* 5th NZ edn by DL Mathieson. It is there stated in para. 10.20 at p272:

> "In both civil and criminal cases, confidential "communications between a client and the client's legal "adviser, and certain communications between client "or legal adviser and third parties do not have to be "revealed in evidence.
>
> "As is pointed out in para17 of the 16th Report of the "English Law Reform Committee the privilege covers "three kinds of communication:
>
> " (a) communications between the client or his " agents and the clients professional legal " advisers; and
>
> " (b) communications between the client's " professional legal advisers and third parties, " if made for the purpose of pending or " contemplated litigation; and
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> " (c) communications between the client or his " agent and third parties, if made for the " purpose of obtaining information to be " submitted to the client's professional " legal advisers for the purpose of obtaining " advice upon pending or contemplated " litigation.
>
> " Evidence of such communications may not be given " unless the client, the privilege-holder, waives the " privilege."

It is clear from the facts of this case that the privilege stated in (b) and (c) in the passage just cited from *Cross on Evidence* does not apply in this case. There was also no suggestion that the communications in this case between the defendant's general manager and the Attorney-General or his Office were communications between the defendant's legal adviser and a third party for the purpose of pending or contemplated litigation. Neither was there any suggestion that the communications between the defendant's general manager and the Attorney-General or his Office were communications between the defendant or its agent and a third party. In other words counsel did not suggest that the Attorney-General or his Office was a third party for present purposes. I am also of the view that on the facts the Attorney-General was not a third party. In the area of legal professional privilege where there are communications with third parties, I do not need to say any more than to refer to such authorities as *Waugh v British Railways Board [1980] AC 521; [1979] 2 All ER 1169; Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart [1985] 1 NZLR 596; General Accident Fire & Life Assurance Corporation Ltd v Elite Apparel Ltd [1987] 1NZLR 129; Carlton Cranes Ltd v Carsolidated Hotels Ltd [1988] 2 NZLR 555.* See also the more recent case of *Ventouris v Mountain [1991] 1 WLR 607; [1991] 3 All ER 472.*

The real question, as I see it, is whether the documents in respect of which an order for inspection is sought fall within the first branch of legal professional privilege as stated in *Cross on Evidence.* That is to say, do the letters of correspondence between the defendant's general manager and the Attorney-General and his Office constitute communications between a client and his professional legal adviser. Here I do not need to go into the rationale for legal professional privilege which is grounded

in public policy or into the recognised limitations to the extent of the privilege. Those issues were not raised, or sufficiently raised, in this case. It would, however, be most useful for enlightment on those issues to refer to the principal New Zealand authorities on this branch of privilege such as *Commissioner of Inland Revenue v West-Walker [1954] NZLR 191; R v Ulgee [1982] 1 NZLR 561; Rosenberg v Jaine [1983] NZLR 1.*

Of those authorities, perhaps the most explicit statement on this type of privilege is that in *Rosenberg v Jaine [1983] NZLR 1* where Davison CJ said at p. 7-8:

> "1. The privilege is that of the client who may waive
> " it if he so chooses but unless it is waived then the
> " legal adviser must uphold it...
>
> "2. The privilege prohibits from disclosure communications
> " oral, written and now mechanically or electronically
> " recorded between a client and his legal adviser for the
> " purpose of obtaining legal advice or assistance.
> " As Lamer J said, in delivering the judgment of the Supreme
> " Court of Canada in *Descoteax v Mierzwinski (1982) 70CCC*
> " *(2d) 383, 413; 28 CR (3d) 289, 320.*
>
> " '... a lawyer's client is entitled to have all communications
> " 'made with a view to obtaining legal advice kept confidential.
> " 'Whether communications are made to the lawyer himself
> " 'or to employees, and whether they deal with matters of an
> " 'administrative nature such as financial access or with the
> " 'actual nature of the legal problem, all information which a
> " 'person must provide in order to obtain legal advice and which
> " 'is given in confidence for that purpose enjoys the privilege
> " 'attached to confidentiality. This confidentiality attaches to all
> " 'communications made within the framework of the solicitor-
> " 'client relationship which arises as soon as the potential
> " 'client takes the first steps and consequently even before the
> " 'formal retainer is established'
> " A breach of the duty to refrain from disclosing privileged
> " conversations gives a client a right of action against his legal
> " adviser."

It is clear that information given by a client to a legal adviser for the purpose of obtaining legal advice or assistance is privileged unless the client has waived that privilege. In my view payment of a retainer or fee is not necessary. In many cases a client fails to pay a retainer, fee or the full fee charged by a lawyer for legal advice or assistance. In some of those cases the lawyer sues the client for recovery of his fee. But in none of them has it been suggested that the lawyer is thereby free to disclose communications made between himself and his client for the purpose of obtaining legal advice and assistance. Neither has it ever been suggested that the failure of a client to pay a retainer or his fees shall be taken to mean that the client has thereby waived his privilege.

Before going further, there are two important issues I wish to refer to now. Firstly, in a motion for an order for inspection of documents which party should bear the burden of satisfying the Court that inspection should be ordered. I am of the view that the party who is moving for an order for inspection of documents carries the burden of satisfying the Court that inspection is necessary for the purpose specified: see the judgment of Parker LJ in *Ventouris v Mountain [1991] 1 WLR 607; [1991] 3 All ER 1472* with which Sir Michael Kerr concurred.

The second issue is whether in proceedings for a motion for an order for inspection of documents, the Court has power to inspect the documents for itself in order to arrive at a just decision. The answer must be that in an appropriate case the Court has the power to inspect for itself the documents which are the subject of a motion for inspection in order to arrive at a just decision. To see and inspect the documents would reduce the chances of the Court coming to a wrong and unjust

decision. It would also inspire confidence in a Judge coming to a particular decision if he had inspected the documents for himself. Not to see the documents would mean the Court's decision would be very much guided by what counsel opposing the motion for inspection tells the Court. But naturally counsel opposing the motion would not like to say much about the contents of the documents in the presence of counsel moving the motion. In New Zealand the power of the Court to inspect for itself the documents which are the subject of contested proceedings for an order for inspection is now well established. The power will be exercised where it is appropriate to do so in order to arrive at a just decision: see for instance *Guardian Royal Exchange Assurance New Zealand Ltd [1985] 1 NZLR 596* per Cooke J at p.599, per Tompkins J at p.606. I hold that this Court also has such power.

That brings me to the real question in this case, that is, whether legal professional privilege attaches to the documents in issue. As already stated, these documents are letters of correspondence between the defendant's general manager and the Attorney-General and his Office. It is now clear to me beyond doubt, after inspection of the relevant documents, that documents numbered 19,20 and 21 were letters from the defendant's general manager to the Attorney-General for a legal opinion regarding the claim by the plaintiff against the defendant for compensation/damages. Document 22 is a legal opinion given by a senior lawyer of the Attorney-General's Office on the referral by the defendant's general manager. Document 23 is a letter from the defendant's general manager to the Attorney-General referring to a letter from the solicitor for the plaintiff claiming compensation/damages. It is clear that the purpose of the letter which is document 23 was to seek the legal

opinion of the Attorney-General on the claim by the solicitor for the plaintiff. Document 24 is that legal opinion from the Attorney-General.

On these facts I am of the clear view that the documents in issue are privileged and therefore should not be made available to the plaintiff for inspection. The documents clearly constitute communications between the defendant as client and the Attorney-General and lawyers of his office as professional legal advisers for the purpose of obtaining legal advice as well as that advice. I am satisfied that in the present circumstances, the Attorney-General whose legal opinion was being sought by the defendant as a quasi-government statutory corporation was acting and responding to requests from the defendant in the capacity of a legal adviser. In the same circumstances the defendant was a client.

Any lawyer who is well acquainted and familiar with the legal work in the Office of the Attorney-General would know that on numerous occasions quasi-government statutory corporations request legal opinions from the Attorney-General and the lawyers on his staff on legal issues. Such requests for legal opinions were never turned down unless the matter is to proceed to a Court hearing when the statutory corporation concerned would then be advised to engage a barrister in private practice to appear for it in Court. It was never suggested then that when a quasi-government statutory corporation makes a referral to the Attorney-General or his Office for a legal opinion or when such an opinion is given, those communications were not protected by legal professional privilege. As Lord Atkin said in *Minter v Priest [1930] AC 358 at 615;*

> "If a person goes to a professional legal adviser for the purpose
> "of seeing whether the professional person will give him
> "professional advice, communications made for the purpose of
> "indicating the advice required will be protected."

That must include the advice itself which is given by the legal adviser. So here we have the defendant, a person, going to the Attorney-General, a professional legal adviser, seeking a legal opinion on the claim by the plaintiff. Obviously communications between the Attorney-General and the defendant seeking a legal opinion from him regarding the plaintiff's claim must be privileged.

An attempt was made to draw a distinction between documents numbered 19 to 22 and the documents numbered 23 and 24 on the basis that the first lot of documents came into existence before the substantive action for damages by the plaintiff was pending or contemplated and the last two documents came into existence when the plaintiff's substantive action was contemplated. I would point out that under the branch of legal professional privilege which is relevant to the present motion for inspection of documents, it is not necessary to consider that distinction between a litigation which is reasonably apprehended or contemplated and a litigation which is not. Such a distinction would be relevant where litigation privilege is claimed under the heads of legal professional privilege in (b) or (c) in the passage cited earlier in this judgment from *Cross on Evidence* (1996) 5th NZ edn by DL Mathieson para 10.20 at p.272.

There was also some suggestion that the Attorney-General and lawyers on his staff being salaried lawyers, communications to or from them for the purpose of giving legal advice or assistance are not privileged. By a salaried lawyer I take it to mean that the Attorney-General and lawyers on his staff who are paid with a fixed salary and not by fees by each piece of legal work they do must be salaried lawyers. If this is correct, then it would mean that communications for the purpose of legal advice with and by lawyers who are employed on a salary basis in private law firms would also not be privileged. On reflection I do not accept this suggestion and there is no sound authority for it. Legal professional privilege which is now firmly established at common law is grounded in public policy. To say that one of the criteria for deciding the applicability or otherwise of legal professional privilege to a particular communication with or by a lawyer depends on how a lawyer is paid his remuneration does not appear to me to be sound in principle or in public policy.

In any event Lord Denning MR in a judgment with which Karminski and Orr LJJ concurred said this in *Crompton Ltd v Customs and Excise Commissioners [1972] 2 QB 102 at p.129* about salaried legal advisers:

> "Many barristers and solicitors are employed as legal advisers,
> "whole time by a single employer. Sometimes the employer is
> "a great commercial concern. At other times it is a government
> "department or a local authority. It may even be the government
> "itself, like the Treasury Solicitor and his staff. In every case these
> "legal advisers do legal work for their employer and for no one
> "else. They are paid, not by fees for each piece of work, but by a
> "fixed annual salary. They are, no doubt, servants or agents of the
> "of the employer. For that reason Forbes J thought they are in a
> "different position from other legal advisers who are in private
> "practice. I do not think this is correct. They are regarded by the
> "law as in every respect in the same position as those who practice

"on their own account. The only difference is that they act for "one client only, and not for several clients. They must uphold the "same standards of honour and of etiquette. They are subject to "the same duties to their clients and to the Court. They must "respect the same confidences. They and their clients have the "same privileges. I have myself in my early days settled scores of "affidavits of documents for the employers of such legal advisers. "I have always proceeded on the footing that the communications "between the legal advisers and their employer (who is their "client) are the subject of legal professional privilege; and I have "never known it questioned. There are many cases in the books "of actions against railway companies where privilege has been "claimed in this way. The validity of it has never been doubted."

Finally it was also suggested that an order for inspection of documents in this case would encourage good public administration and accountability. No available authority was submitted to the Court for this suggestion which if accepted would create a new and very broad exception to legal professional privilege. It could also seriously undermine or stifle candid and confident communications between a client and his legal adviser if the client knows that what he says in confidence to his legal adviser for the purpose of it obtaining legal advice or assistance could be disclosed in the interests of 'good public administration' and 'accountability'. Whatever those expressions mean in this context, they do appear that they will subordinate or subsume the interests of an individual client to those of the public at large. In the absence of full and proper legal submissions on that point, I am not at present prepared to extend the law that far.

For all the foregoing reasons the motion is dismissed.

Costs are reserved.

TFM Sapolu
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CHIEF JUSTICE

Solicitors:
TRS Toailoa for plaintiff
KM Sapolu Apia for defendant