Singapore Journal of Legal Studies
[1991] pp. 158 - 167

WAIVER OF LEGAL PROFESSIONAL PRIVILEGE

This note argues that there is merit in having some notion of implied waiver of legal professional privilege in terms of promoting fairness of trial and the interest of the administration of justice. Since the Evidence Act rules out the possibility of implied waiver, the desirable objectives of fairness of trial and finality of litigation may have to be achieved by recognizing that an advocate has ostensible authority to waive the privilege (although express consent to waiver may be lacking).

I. INTRODUCTION

THERE are four provisions in the Evidence Act[1] dealing with legal professional privilege and of these, two touch on waiver of privilege. The first is section 128(1) which provides (without the proviso) that:

> No advocate or solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate or solicitor by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment.

The second, section 130 stipulates that:

> If any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 128; and if any party to a suit or proceeding calls any such advocate or solicitor as a witness, he shall be deemed to have consented to such disclosure, only if he questions such advocate or solicitor on matters which but for such question he would not be at liberty to disclose.

These two provisions reveal a conception of waiver which is markedly different from that maintained by the English courts. Since section 128 mentions express consent while section 130 speaks of deeming consent,

---

1 Evidence Act (Cap 97, 1985 Rev. Ed.).

the apparently clear conclusion is that generally consent to waiver must be express. Section 130 engrafts a limited exception in that one category of implied waiver is approved of, namely that of calling one's advocate and solicitor to testify as to privileged matters.[2] Section 131 might be seen as reinforcement of the general denial of implied waiver. It provides that:

> No one shall be compelled to disclose to the court any confidential communication which has taken place between him and his legal professional adviser unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others.

If then section 131 has already embodied some notion of correcting any misimpressions created by partial disclosure, (which is an instance of implied waiver), it would seem unlikely that those other examples or circumstances amounting to implied waiver which have been left out are not altogether abrogated.

In contrast, the English position accepts that waiver may be implied. Intentional waiver needs little comment and clearly is efficacious[3] but even though the intent to disclose privileged materials is lacking, the singular characteristic of the English doctrine is that the courts are willing to imply a waiver where appropriate circumstances exist. So, for example, if part of a document is put in evidence, there will be an implied waiver of the whole of it.[4] Indeed, there is some authority that inadvertent disclosure may well amount to implied waiver[5] and this has been where a controversy of sorts presently rages.[6]

II. JUDICIAL REJECTION OF IMPLIED WAIVER

No Singapore court has yet declared the non-existence of implied waiver but in Malaysia where the relevant provisions are *in pari materia, Dato' Au ba Chi* v. *Koh Keng Kheng*[1] appears to be the first decision that waiver of legal professional privilege must be strictly express.The Malaysian

---

2 It is important to note that merely calling one's advocate and solicitor without questioning him on privileged matters is bereft of any significance as far as waiver is concerned.

3 See *e.g. George DolandLtd.* v. *Blackburn Robson Coates & Co.* [1981] 1 W.L.R. 529, at p. 538.

4 See *e.g. Burnett* v. *British Transport Commission* [1956] 1 Q.B. 187.

5 See *Great Atlantic Insurance Co.* v. *Home Insurance Co.* [1981] 1 W.L.R. 529. Generally, Howard *et al.* (eds.) *Phipson on Evidence* (14th ed., 1990) at para. 20-36 *et seq.*

6 See *e.g.* N. H. Andrews, "The Influence of Equity upon the Doctrine of Legal Professional Privileges" (1989) 105 L.Q.R. 608.

7 [1989] 3 M.L.J. 445.

rejection of the English doctrine of implied waiver is evident both in counsel's concession and in the judgment of Eusoff Chin J.

The applicants were the defendants in a suit and the plaintiff's bundle of documents contained a seemingly privileged document which the defendants' solicitors had handed over to the plaintiff at some earlier time (before any dispute arose) in the defendants' presence. While the defendants were present at the exchange the learned judge accepted that they never gave their written consent to the release of the privileged document. That absence of consent secured for the defendants the removal of the privileged document from the plaintiff's bundle because as Eusoff Chin J. said:

> The privilege is that of a client;[8] he may expressly waive the privilege under s. 126 [s.128 in Singapore] or impliedly under the latter part of s.128 [s 130 in Singapore].[9] (footnotes added)

It is interesting to note that although it was conceded by counsel that express consent was necessary, Eusoff Chin J. went further and expressed the view that express consent meant consent in writing which could take the form of an indorsement in the privileged document itself, saying:

> In my view this ... being a document containing instructions to the defendants' solicitors, is a privileged document, and cannot be released to anyone except with the express consent, ie consent in writing, given to the solicitors by each of the defendants. Even if the defendants' solicitors had given this document to the first plaintiff in the presence of all the defendants (which is disputed by the defendants), the fact that none of the defendants had objected to it, or that all had remained silent, did not constitute a waiver, since the law requires that the defendants must first give their express consent to their solicitors before the document could be released to anyone. Such consent could have been endorsed in the document itself, or given separately in writing to the effect that they consented to the document being released to the first plaintiff.[10]

Unfortunately, the ruling that express consent means consent in writing goes beyond fledging the arrow, so to speak. No authority is cited for so startling a proposition. If Eusoff Chin J. was thinking of the *Allen v.* Bone[11] line of cases, he would have misunderstood their effect because they do no more than assert that a retainer for contentious business must

---

8 See *e.g.. Proctor* v. *Smiles* (1886) 55 L.J.Q.B. 527.
9 [1989] 3 M.L.J. 445 at p. 446.
10 *Ibid.,* pp. 447-448.
11 (1841)4Beav. 493.

preferably be in writing for otherwise its non-existence will be presumed against the solicitor who seeks to rely on it for his costs. But apart from that, one might say that Eusoff Chin J. himself was being generous in recognising the existence of a category of implied waiver whereas more accurately, that category is no more and no less than a category of deemed consent or waiver rather than implied waiver.

III. MERITS OF SOME IMPLIED WAIVER

If indeed the legislative intention be so, relinquishment of a doctrine of implied waiver is not exactly indefensible. Nothing ever is without some merit of sorts. One might suggest, for example, that such a scheme escapes the uncertainty of result which plagues the English doctrine. The consequences of rejecting the existence of implied waiver are by no means trivial and would seem to warrant some more creative employment of the statute. For while it may be true that the English doctrine of implied waiver is by no means perfect and suffers from a surfeit of liberality,[12] the role that is played by some doctrine of implied waiver can be shown to be both necessary and convenient. First, a doctrine of implied waiver (not necessarily one coincident with the English doctrine[13]) can furnish useful promotion to the efficacious conduct of litigation. The efficient prosecution of litigation, whether civil or criminal, is aided considerably by the court being able to rely on whatever evidence has been brought before the court or trier of fact. It makes a mess of litigation if evidence having been adduced, the trier of fact must entertain the possibility that it has emerged without express consent of the client with a view to shutting it out or where it has actually got in, with a view to its expungement from the trial record. Of course, if a client is sought to be compelled to disclose privileged communications, counsel may be expected to be alerted and to raise the privilege on his client's behalf. That is not at all the concern in implied waiver cases which represent the obverse situation. Here it is normally counsel who has himself elicited privileged communications from his own witness and every one involved should be able to rely on that so as to get on with the litigation. Counsel for the opposite side, for example, should be able to take those matters mentioned as proved where there is no reason to doubt the credibility of the witness. Indeed, one must not overlook the fact that counsel may well wish himself to rely on the privileged materials in advance of his

---

[12] The principal criticism of Andrews, see *supra*, note 6, is that it is wrong that inadvertent disclosure can amount to waiver. In his view, there ought to be a general requirement that waiver must occur intentionally.

[13] If Andrews' criticism of the English doctrine is accepted, one would not permit inadvertent disclosure of privileged materials to amount to implied waiver.

client's cause; so that to that end he has in exercise of his professional discretion introduced the materials.[14]

Fairness of trial too is at stake.[15] Fairness explains why a party in a trial should not be allowed to disclose in part and claim privilege over the remainder. The opposite party must be afforded the opportunity of satisfying himself that the party allegedly waiving his privilege is not misrepresenting his position by plucking certain materials out of their context whilst concealing really vital information.[16] Indeed, it has been said that the underlying principle of the doctrine of implied waiver is one of fairness in the conduct of trial and does not go further than that.[17] According to Deane J., a person may have used privileged material in such a way that it would be unfair for him to assert the privilege and deny access to material which he has elected to use to his own advantage.[18] One could of course advocate the irrelevance of whether an advantage will be gained and focus entirely on the effect of prejudice or embarrassment caused to the opposite party in the conduct of the cause.[19] That is a matter of detail which does not detract from the value of encouraging fairness of trial.

Yet another factor is consistency with the law of agency. A doctrine of implied waiver squares well with the notion of authority to conduct a cause whereas its rejection sits quite uncomfortably beside it. The law of agency clothes counsel, so to speak, with authority to make formal admissions.[20] Now although only express authority in effect is generally sufficient to make the admissions binding on the client,[21] nevertheless, recognition of the interest of administration of justice has led to the recognition of the efficacy of ostensible authority. In *Turner*[22] counsel for one of the defendants in the course of his mitigating speech made

---

[14] Moreover, the status of some materials may be controversial and counsel may calculate that there is more to be gained by waiving any possible privilege. See *e.g. Great Atlantic Insurance Co.* v. *Home Insurance Co.* [1981] 1 W.L.R. 529.

[15] It would seem that the English doctrine is bottomed on fairness to the opposite party. While it may be that the interest of the administration of justice is recognized, more often than not, it is fairness which is articulated as the justification for implied waiver.

[16] See Mustill J. in *Nea Karteria Maritime Co. Ltd.* v. *Atlantic & Great Lakes Steamship Corp. (No 2)* [1981] Com. L.R. 138, 139.

[17] See Hobhouse J. in *General Accident Fire and Life Assurance Corp.* v. *Tanter* [1984] 1 W.L.R. 100. But any reliance on technicality is eschewed in *A-G (N.T.)* v. *Maurice* (1987) 69 A.L.R. 31 at p. 35.

[18] *A-G (N.T.)* v. *Maurice* (1987) 69 A.L.R. 31 at p. 43.

[19] See *e.g. Transamerica Computer* v. *International Business Machines* 573 F. 2d. 646 (1987); *Weil v. Investment/Indicators, Research & Management Inc.* 647 F.2d 18 (1981).

[20] Generally, *Phipson on Evidence supra,* note 5, at para. 24-53.

[21] In fact a solicitor (or counsel) has implied authority to make formal admissions, see *Elton* v. *Larkins* (1832) 1M. & Rob. 196; *R* v. *Downer* (1880) 14 Cox C.C. 486. Further, a solicitor is advised to obtain a written retainer for litigation. The combination of these two rules yields the proposition in the text that in effect only express authority will render the formal admission binding on a solicitor's client.

[22] (1975) 61 Cr. App. R. 67.

certain statements which amounted to admissions of his client's involvement in a conspiracy to rob. The trial judge, Eveleigh J., admitted the statements as admissions made by an agent within the apparent scope of his authority. The point taken on appeal was that Eveleigh J. should have excluded the evidence following counsel's disclosure that he had had in fact no instructions to make the admissions, but instead had admitted it, though cautioning the jury that it would not be safe to use counsel's speech in mitigation as evidence against his client. The Court of Appeal was not prepared to say that there had thereby been an error because in the words of Lawton L.J.:

> Whenever a barrister comes into Court in robes and in the presence of his client tells the judge that he appears for that client, the court is entitled to assume, and always does assume, that he has his client's authority to conduct the case and to say on the client's behalf whatever in his professional discretion he thinks is in his client's interest to say.[23]

That proposition Lawton L.J. saw as one involving circumstantial evidence derivable in turn from the principle that whenever a fact has to be proved, any fact having probative effect and not excluded by a rule of law is admissible to prove that fact. Although it is not very clear from the judgment, it seems moreover that that proposition transcends the competing principle that normally a party seeking to rely upon an admission must prove that the agent was duly authorised to make it.

The inference that follows is founded on contrast and comparison. An admission made by counsel is generally bound to involve some facts which would otherwise be privileged. If counsel's admission without express authority may, nonetheless, be admissible by virtue of his ostensible authority, how is it that counsel may not impliedly waive his client's privilege? *Turner* was a criminal case and courts are very anxious and unsparing in criminal cases to ensure the fairest possible trial. Yet if the existence of an ostensible authority to make admissions is recognized in such cases, what qualifications could possibly attach in civil cases?

Without some doctrine of implied waiver, what we are faced with is an anomaly in the local law. While we are clear that calling one's advocate to testify on privileged matters is deemed to be a waiver of privilege, we cannot be too sure about such fairly equivalent acts as relying on a privileged document or calling by one's counsel a witness to testify as to matters which are privileged. A literal reading of the Evidence Act drives us to say that such equivalent acts being neither comprehended by the first or the second limb do not amount to waiver; so that since the client has not consented in writing privilege is not

---

[23] *Ibid.*, at p. 82.

lost. So if the trier of fact has taken the priviledged matter into consideration, an appeal may possibly be brought on the ground that the privilege was not in fact waived. Again, supposing that counsel introduces privileged communications into the trial record because he calculates that his client's cause is better advanced in this way; nevertheless, the privileged materials must be deprived of effect. The advocate must be constrained to prove his case by non-privileged materials.

V. SOME SOLUTIONS

How then to proceed? The objective can be put simply. It is expedient to recognize a limited doctrine of implied waiver in some form, directly or indirectly, which will serve to protect a client's interest in the privilege as well as the interest in the administration of justice. Additionally, in fashioning such a doctrine, two factors need to be accommodated. Although the chief advantage of such a doctrine is felt most in litigation, it is not without some value outside of it. To suggest that implied waiver be allowed to operate in a pre-dispute environment seems indefensible if one takes the view that the information by virtue of section 128's insistence on express consent really belongs to, *i.e.* is the property of, the client; and if the information is the property of the client, how can he lose it except by clearly intending to abandon it?[24] In a pre-trial and post-dispute situation, the considerations are more delicately balanced. Though the vital considerations of fairness of trial, the administration of justice and the efficacy of legal representation are not yet directly engaged, indirectly they may be affected. Perhaps while there is force generally in the argument that implied waiver is unattractive in a pre-trial setting, one needs to recognize that certain pre-trial steps may be taken which are so intimately connected with the litigation as to affect the conduct of the cause of action.[25] In the English cases some sensitivity to the distinction between trial and pre-trial conditions is discernible though it cannot be said that much guidance is afforded as to the significance of the distinction. Thus, Hobhouse J. refused to apply the doctrine of implied waiver to discovery of documents.[26] But in another case Hirst J. reached the opposite conclusion.[27] In principle, the discovery of documents is a step intimately connected with the conduct of a cause

---

[24] This is Andrews' argument, see *supra*, note 6. Further, although there may have been reliance by the opposite side, there is no real injustice in denying him the use of the privileged materials (in a situation where no express consent has been given) because his exposure to the materials will enable him to obtain alternative evidence.

[25] This idea may be seen in such cases as *Rondel* v. *Worsley* [1969] 1 A.C. 191; *Rees v. Sinclair* [1974] 1 N.Z. L.R. 180; *Saif Ali v. Sidney Mitchell & Co.* [1980] A.C. 198.

[26] *General Accident Assurance Fire & Life Corp. Ltd.* v. *Tanter* [1984] 1 W.L.R. 100 at p. 114. See also *Curlex Manufacturing Pty. Ltd.* v. *Carlingford Australia General Insurance Ltd.* [1987] 2 Qd. R. 335.

[27] *Pozzi* v. *Eli Lilley & Co., The Times*, December 3, 1986.

the impediment of which may adversely affect the chances of an early and efficient trial or of a settlement in lieu of trial.[28] It would seem right therefore to countenance the possibility of implied waiver in discovery cases. Any fear that such a view amounts to drawing the boundary of implied waiver too widely will perhaps be ameliorated somewhat by the principle in *Guinness Peat Ltd.* v. *Fitzroy Robinson Partnership*[29] which precludes implied waiver where the party seeking to benefit from the disclosure has acted in bad faith or acquiesced in a manifest mistake.

Then also, it must be realized that it is the doctrine of waiver which defines the limits of the equitable doctrine of *Ashburton* v. *Pape*[30] as confirmed in *Goddard* v. *Nationwide Building Society.*^ Where waiver begins, the equitable doctrine ends. So if it is shown that privilege has indeed been waived by a client, it is no longer possible for him to assert his right to an injunction to restrain any other person from using the privileged materials. Now although the equitable doctrine is not mentioned in the Evidence Act, yet as clarified in the recent cases, it is no longer to be seen as being inconsistent with the tenor of the statute and one may with some confidence regard it as part of the local law.[32] To a great extent the statute's insistence on express waiver actually creates more opportunities for employment of the equitable doctrine because obviously if someone else has got hold of my privileged materials I should not hesitate to get it back and prevent their use in court. Insisting on express waiver means that I will not be frustrated in my demands by the answer of implied waiver. So the fear is that if a doctrine of implied waiver is created, it will compromise the clarity of the position as presently understood. But that need not be, if whatever doctrine is created is kept strictly to the service of the administration of justice.

There are in the present view two possible solutions which may be suggested and described as frontal assaults, neither of which is wholly convincing. The first involves straining at the statute, since a literal and simple reading of the statute transpires to be uncongenial. The basic corner stone is section 2(2) of the Evidence Act which supplies the licence to maintain a common law rule which is consistent with the Act in full rigour. Upon that foundation, we may construct an argument as follows. Since the statute already recognizes express and deemed waiver, it is not really inconsistent to juxtapose some doctrine of implied waiver alongside these statutory categories of waiver. In the present view, the argument is at best insecure. It turns the construction of section

---

[28] See *Hooker Corp. Ltd.* v. *Darling Harbour Authority* (1987) 9 N.S.W.L.R. 538 at pp. 540-541.

[29] [1987] 1 W.L.R. 1027.

[30] [1913] 2 Ch. 469.

[31] [1987] Q.B. 670. Thus, it is now put beyond doubt that the rule of evidence in *Calcraft* v. *Guest* [1898] 1 Q.B. 759 'yields to' the equitable jurisdiction.

[32] *Cf. Along Said* v. *Kulop Hamid* (1927) 6 F.M.S.L.R. 108.

128 on its head because if it was correct, every draughtsman who wanted to provide for express consent solely would have also to declare that implied consent would be insufficient and there does not appear to be such a rule of statutory interpretation.

The second solution, still statute-based, borrows somewhat from the judgment of Ong Hock Thye J. in *Soh Ten Seng* v. *P.P.*.™ The idea is that if a provision expressly deals with an act which forms part of a continuous and larger continuum, then one may legitimately declare that all other parts of the continuum, though not expressly mentioned, are likewise part of the subject matter of the statute. So since calling one's advocate or solicitor to testify as to privileged matters is deemed to be waiver, all other equivalent acts such as calling a witness (not an advocate) to testify to privileged matters will be treated similarly. Unfortunately, our courts have shown some diffidence in applying bold sweeps to codifications[34] and the argument does require a certain amount of innovation. It might seem pretty delicately hung to some who may well dispute the equivalency of such acts as calling a witness to testify on privileged matters to calling one's advocate to testify on privileged matters.

A third possibility therefore is offered. Taking its starting point from *Turner,* it employs the law of agency in out-flanking the Evidence Act. The Act which provides for express waiver is accepted *in toto;* equally the provision relating to deemed waiver. It is equally conceded that there is no doctrine of implied waiver known to and importable into the Act. But then one steps outside the Act into the law of agency and there one boards the vehicle of ostensible authority. While section 128 does indeed declare that no advocate shall disclose without the express authority of the client, yet it is precisely where things are done without express authority that the value of ostensible authority as a proper doctrine is called in aid.[35] If further one sees that the foundation of this ostensible authority lies precisely in the interest of the administration of justice,[36] those situations which are presently anomalous will be resolved satisfactorily on the basis of an ostensible authority to waive. The coincidence between ostensible authority and implied waiver need not be

---

[33] [1964] M.L.J. 380 at p. 382.

[34] Although it should be easier to strain at a code.

[35] *Seee.g.Waughv.H.B.Clifford&SonsLtd.* [1982] 1 A11E.R. 1095 atp. 1105. Apossible point of distinction is that section 128 imposes a statutory duty on the advocate not to disclose which must not be overcome by a side-wind of ostensible authority reasoning. But there is no reason why it should matter that the limitation on authority is statutory in nature as opposed to a contractual one if in both instances only the regulation of the affairs of private individuals is at stake. *Cf. Re Vandervell's Trusts (No. 2)* [1974] 3 AH E.R. 205 where estoppel was successfully raised in spite of a statutory declaration that a transfer of equitable interest not evidenced by writing would be unenforceable.

[36] Other types of ostensible authority depend upon reliance and facilitation of commercial relationships.

exact. For example, where a party is not represented by counsel, it is meaningless to speak of ostensible authority to waive but it is not meaningless to recognize the possibility of implied waiver. One must of couse define the ostensible authority of an advocate and solicitor in relation to privileged materials and hope that its fashioning will be sensitive to the needs of the administration of justice. Recalling that in *Data' Au ba Chi* v. *Koh Keng Kheng* the exchange of privileged information in fact occurred in the client's presence, is it too much of an obstacle that the judgment of Eusoff Chin J. implicitly stands for a rejection of ostensible authority? It should not be, for the argument here is consistent with the non-existence of ostensible authority in a pre-dispute environment. It argues that the ostensible authority to waive the privilege exists only in a trial and certain pre-trial contexts.

TAN YOCK LIN*

* B. Sc. (Lend.), Dip. Econ., B.A., B.C.L. (Oxon.), Senior Lecturer, Faculty of Law, National University of Singapore.