DISCOVERY AND PRIVILEGE

" The practice with regard to discovery and the production and inspection of documents, and the objections which can be made on the ground of privilege, are really a reconciliation between two principles. The first principle is that professional legal advice and assistance is at times essential in the interests of justice, and without the assistance of some protection it could not be obtained safely or effectually. Accordingly, the principle has become established that confidential communications passing between a person and his legal advisers are absolutely privileged. On the other hand, there is another principle that it is in the interests of justice that all material and relevant documents should be before the court to enable it to arrive at a true and proper conclusion, and also in order that the parties should not be taken by surprise. The practice which has developed is a reconciliation between these two principles." [1]

Under the rules of civil procedure the time for the disclosure of documents and any claim to privilege is on discovery on an affidavit (or list) of documents.[2] In drafting for a litigant an affidavit of documents with a claim of privilege the professional adviser is often tempted to adapt, if not to adopt, a particular formula from a book of precedents, a formula which in the words of Hamilton L.J. is often a "hybrid, made up by combining a variety of phrases which have passed muster in

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1. *Per* Havers J. in *Seabrook* v. *British Transport Commission* [*1959*] 1 W.L.R. 509, 513. (In relation to professional privilege both s. 129 of the Evidence Ordinance of the Federation of Malaya and s. 130 in Singapore also use the term "confidential communication...[with]...his legal professional adviser.")

2. R.S.C. order 31 (Federation of Malaya) and R.S.C. order 30 (Singapore). Both these Orders are based on the English R.S.C. order 31; the Singapore Rules do not, however, contain a provision for a "list" of documents *in lieu of* an affidavit.

decided cases." [3] Hamilton L.J. went on to say that it was "dangerous to rely on these artificial creations. Claiming privilege in an affidavit of documents is not like pronouncing a spell, which once uttered, makes all the documents taboo. The draftsman should draw each affidavit with reference to the actual facts of the case and bearing them in mind. The selection of well-tried formulae from a precedent book only leads to that inconsiderate swearing which is the bane of the practice as to discovery." [4]

Two recent English decisions considered the difficulties Hamilton L.J. had in mind. In *Seabrook* v. *British Transport Commission*[5] a widow and administratrix of an employee of the Commission brought an action under the Fatal Accidents Acts, 1846-1908, and Law Reform (Miscellaneous Provisions) Act, 1934, against the defendants alleging negligence and breach of statutory duty as her deceased husband's employers. In discovery proceedings privilege was claimed for " correspondence between and reports made by the defendants' officers and servants" on the ground that these documents were "documents which came into existence and were made by the defendants or their officers after this litigation was in contemplation, and in view of such litigation wholly or mainly for the purpose of obtaining for and furnishing to the solicitor of the defendants evidence and information as to the evidence, which will be obtained or otherwise for the use of the said solicitor to enable him to conduct the defence in this action and to advise the defendants." To clarify the exact position of the documents in respect of which privilege was claimed an officer of the defendants swore a further affidavit setting out the long-established practice of the defendants (and the railway companies before them), whereby these documents came to be made. The reason for their being made was that, "amongst other things, in the event of a claim for damages being received, they could be passed on to the commission's solicitor to enable him to advise the commission on their legal liability and, if necessary, to conduct their defence to these proceedings."

The plaintiff submitted two contentions in resisting the commission's claim to privilege. She contended firstly, that the documents were not sufficiently identified. After some hesitation Havers J. held that the documents were sufficiently identified, saying that there never was "any necessity...to set out in detail each item with its date; it is sufficient to put them into their proper class of document, provided that the description is sufficient to identify them with reasonable certainty."

Secondly, from the affidavit claiming privilege it would appear that the documents came into being as the result of and in the course of the

3. *Birmingham & Midland Motor Omnibus Co. Ltd.* v. *London & North Western Railway Co.* [1913] 3 K.B. 850, 860.

4. *Ibid.*

5. [1959] 1 W.L.R. 509.

well-established system of inquiry and report on accidents, irrespective of whether or not a claim was made and as a subsidiary purpose that they might usefully be utilised if and when litigation was threatened and, therefore, argued the plaintiff, privilege did not arise as the defendants did not establish that the documents came into existence for the dominant if not the substantial purpose of being placed before the solicitor for the purpose of advising or conducting the possible defence of the commission against any claim which might arise. The plaintiff invited the judge to look at the documents in question in the exercise of his discretion[6] to see whether the claim to privilege was properly established. Havers J. declined to do this and after a review of the authorities from *Woolley* v. *North London Railway Co.*[7] to *Westminster Airways Ltd.* v. *Kuwait Oil Co. Ltd.*[8] adopted the tests applied by the Court of Appeal in the last mentioned case. If the documents were sufficiently identified and the claim to privilege formally correct no inspection will be ordered if they were within the privileged area and the court should accept the affidavit without examining the documents. It did not matter that the documents were prepared for purposes other than being put before the commission's solicitor. Havers J. held that it was sufficient if this was one of the purposes, even if this purpose was not a dominant or substantial one and he dismissed the plaintiff's appeal against the Master's refusal to order production.

In *Longthorn* v. *British Transport Commission*[9] the Master had ordered production of documents and the defendant commission appealed to the judge in chambers. The plaintiff, an employee of the commission, brought an action for damages in negligence and breach of statutory duty and sought inspection of documents described as "correspondence between and reports made by the defendants' officers and servants and correspondence between the defendants and their solicitor." The claim to privilege was originally made in the list of documents on the ground that the documents came into existence "wholly or mainly for the purpose" of providing the solicitor material to advise the defendants and to conduct the defence in the action. Subsequently an affidavit of documents was substituted for the list and privilege was claimed in a different form. The documents were said to be made "for the purpose (inter alia) of obtaining for and furnishing to the solicitor of the defendants evidence and information as to the evidence which will be obtained." The reference to possible litigation did not appear in the claim to privilege but in the description of the documents in question which were described

6. Under R.S.C. order 31 rule 19A(2). (The corresponding rule in the Federation of Malaya is similarly numbered. The Singapore rule is R.S.C. order 30 rule 18(4).)

7. (1869) L.R. 4 C.P. 602.

8. [1951] 1 K.B. 134; [1950] 2 All E.R. 596.

9. [1959] 1 W.L.R. 530.

as documents "which came into existence after this claim was anticipated and for the purposes inter alia of obtaining and furnishing to the solicitor of the defendants information and evidence for the use of the said solicitor."

Diplock J. thought that the form in which privilege was claimed originally in the list would have been sufficient of itself to establish privilege, the form in which it was claimed in the affidavit was insufficient, of itself, to establish conclusively a claim for privilege. The description of the documents as "correspondence between and reports made" were too wide to assist the judge to say whether the nature of the documents was such that a sufficiently substantial purpose would be that of showing to the solicitor. He had said earlier that he was not satisfied that the mere fact that showing to the solicitor may be one of the purposes, however insubstantial and however improbable, is a ground for a claim of privilege.

The particular document of which inspection was sought was a report of and evidence before a private inquiry held by the defendants into the accident in which the plaintiff was injured and at which the plaintiff himself had given evidence. Having held that the affidavit did not sufficiently establish privilege the judge, in the exercise of his discretion, looked at this particular document which described the inquiry as being held not so much to establish guilt or attach blame but rather to ascertain the cause of the accident with a view to safeguarding against any possible similar happening in the future. Diplock J. held that on the face of the document it showed that the purpose of the inquiry was not for the purpose of furnishing to the solicitor and as a consequence the document was not privileged.

In *Seabrook's* case Havers J. thought that in these days whenever a man is fatally injured in the course of his work on the railway line, the British Transport Commission is entitled to say there is at least a possibility that litigation would ensue. In *Longthorn's* case Diplock J. had no hesitation in saying that he agreed with every word that Havers J. said in *Seabrook's* case. That Longthorn's injury was not a fatal one cannot have made any difference and one must only conclude that the different wording in which privilege was claimed in the affidavit in Longthorn's case was the one thing that led Diplock J. to look at the document and come to the conclusion he did.

The opening words of the report in question also provided Diplock J. with another ground for saying that no privilege could be claimed. After indicating the purpose (see above) of the inquiry the chairman invited Longthorn to co-operate towards the purpose and Longthorn willingly

promised to do so. In the concluding paragraph of his judgment Diplock J. said that it seemed to him that the plaintiff was misled into giving evidence at the inquiry and if he were wrong in his main ground he would hold that the defendants were estopped from claiming privilege in respect of that part of the document which contained the plaintiff's evidence. Although Diplock J. did not develop this subsidiary ground for his judgment, the representation the defendants were estopped from denying was the statement of the chairman of the inquiry on the purposes of the inquiry and on the basis of which the plaintiff co-operated in the inquiry. But for this statement, or should there have been any reference to possible use in subsequent litigation, the plaintiff might have declined to give evidence before the inquiry. This is perhaps the first reported case where a party was estopped from claiming privilege and may well lead to interesting developments in the law of discovery.

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