IN THE SUPREME COURT OF NEW ZEALAND

SC 5/2010
[2010] NZSC 99

	BETWEEN	WILLIAM PATRICK JEFFRIES Appellant
	AND	THE PRIVACY COMMISSIONER Respondent

Hearing: 21 July 2010

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: P D McKenzie QC and D H O'Leary for Appellant
K E Evans for Respondent

Judgment: 12 August 2010

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Any claim of privilege must be referred for the determination of the Privacy Commissioner in accordance with this judgment.

C No order for costs is made.

REASONS

(Given by Elias CJ)

[1] The appeal concerns a claim of litigation privilege in respect of information sought by the Privacy Commissioner under her statutory powers. The appellant, Mr Jeffries, is a barrister. In 2000 he was instructed to act for Interact Architects and Designers to recover unpaid professional fees, charged in respect of architectural and building supervisory work for Mr and Mrs Powell, an American couple with

New Zealand residency. They had purchased a substantial property after obtaining approval under the Overseas Investment Act 1973 and had engaged Interact to design and supervise the construction of a home for them on the property. Interact applied for summary judgment on its claim, and Mr and Mrs Powell counterclaimed for breach of contract by Interact. They claimed that Interact's breaches of contract had disrupted their plans to settle in New Zealand. Interact failed to obtain summary judgment in the District Court. There was an attempt at arbitration which was unsuccessful because of the illness of the arbitrator appointed, which provides some explanation for the ongoing delay in determining the dispute. The dispute remains unresolved.

[2] In August 2003, Mr Jeffries applied to the New Zealand Immigration Service under the Official Information Act 1982 for information relating to Mr and Mrs Powell's successful applications for residency permits. Mr and Mrs Powell were advised of the request and, concerned at the detail about their movements into and out of New Zealand mentioned by Mr Jeffries, suspected that he had already obtained information from either the New Zealand Immigration Service or the New Zealand Customs Service. They complained to the Privacy Commissioner under s 67 of the Privacy Act 1993, seeking investigation of the apparent interference with their privacy by the two government departments. The initial complaint was followed by two further complaints, in January 2004 and June 2004 respectively, against Mr Jeffries personally, as well as against others. The Privacy Commissioner decided to investigate the first two complaints. She had already made inquiries of Mr Jeffries in relation to the first complaint against the government departments, to which he had made no substantive response.

[3] On 6 April 2006, the Privacy Commissioner gave notice under s 91(4) of the Privacy Act requiring Mr Jeffries to disclose details of any information he had obtained as to the movements of Mr and Mrs Powell and the circumstances in which the information had come into his possession, including the name of the person from whom it was obtained and whether it had been in response to any request by him. Mr Jeffries applied for judicial review of the notice, claiming that it was invalid on a

number of grounds, all of which have been found by the Courts below to lack substance[1] and in respect of which leave to appeal to this Court has been declined.[2]

[4] The point in issue on the appeal is one which arose in the course of argument in the Court of Appeal, when Mr Jeffries asserted for the first time that the communication to him, which he accepted had taken place, was the subject of litigation privilege. It seems not to have been considered by the Court of Appeal, which was understandably focussed on the challenge to the validity of the s 91(4) notice, whether such a claim to privilege could properly be raised in judicial review proceedings without having been first raised for determination by the Privacy Commissioner. After the hearing, Mr Jeffries was permitted to file an affidavit in which he said that the information about Mr and Mrs Powell's movements had been supplied to him on an unsolicited basis and that he had used it in preparation for an application by Interact to the District Court to rescind the reference of the dispute to arbitration. He maintained that Mr and Mrs Powell had put in issue their residency in New Zealand in the proceedings.

[5] The question whether privilege can be claimed for unsolicited information had not been the subject of argument at the hearing in the Court of Appeal. Again, that is not perhaps surprising since the point seems to have arisen late and its importance may not have been appreciated until the Court received the affidavit of Mr Jeffries, filed after the hearing. It was, however, unfortunate that the Court of Appeal felt able to dismiss the claim of privilege summarily and without hearing argument on the point:

> [42] Here, the communications cannot attract litigation privilege. Being unsolicited, they were not received by either the appellant or Interact for the purpose of conducting the litigation.

Whether litigation privilege can be claimed in respect of unsolicited communications is a point of general importance. Leave was accordingly granted to Mr Jeffries to

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1 *Jeffries v The Privacy Commissioner* HC Wellington CIV-2006-485-860, 22 May 2008 per Ronald Young J; *Jeffries v The Privacy Commissioner* [2009] NZCA 567 per Hammond, Chambers and Baragwanath JJ.

2 *Jeffries v The Privacy Commissioner* [2010] NZSC 34 at [2].

appeal to this Court on the question whether unsolicited communications are capable of attracting litigation privilege.

[6] In this Court, neither the appellant nor the Privacy Commissioner felt able to support the view expressed by the Court of Appeal. They were right to take that approach. For the reasons to be explained, we conclude that unsolicited communications may be privileged in the hands of a party or the party's legal adviser. Whether such claim of privilege was available in the present case was a question which should not have been entertained by the Court of Appeal. Its consideration in the proceedings for judicial review of the s 91(4) notice was premature. Such claim of privilege depends on a contextual inquiry yet to be held and which it is for the Privacy Commissioner to undertake, as is made clear by the scheme of the Privacy Act 1993.

Claim of privilege under the Privacy Act 1993

[7] The complaints received from Mr and Mrs Powell led to the Privacy Commissioner undertaking an investigation under s 69 of the Privacy Act. Such investigation is conducted in accordance with Part 9 of the Act, s 90(2) of which empowers the Privacy Commissioner to make such inquiries as she thinks fit. Under s 91(4) of the Act, the Privacy Commissioner may require any person to supply information relevant to the inquiry:

> (4) The Commissioner may from time to time, by notice in writing, require any person who in the Commissioner's opinion is able to give information relevant to an investigation being conducted by the Commissioner under Part 8 ... to furnish such information, and to produce such documents or things in the possession or under the control of that person, as in the opinion of the Commissioner are relevant to the subject-matter of the investigation or inquiry.

[8] In application of s 91(4), the Privacy Commissioner wrote to Mr Jeffries on 6 April 2006 in the following terms:

> Under s 91(4) of the Privacy Act 1993, I therefore require you to provide me with the information listed below. This is because you are, in my opinion, a person able to give information relevant to an investigation which I am conducting under Part 8 of the Privacy Act.

The information I require you to provide at this stage is as follows:

- Which body, organisation or person was the source of the information about the entry into New Zealand and exit from New Zealand of the Powells and their three children;

- The name of the individual who supplied this information to you (if known);

- The date or approximate date on which this information was supplied to you;

- Whether you requested this information, or whether it was provided to you on an unsolicited basis;

- A copy of any relevant documents, or other information that may assist me to determine who the correct respondent to the Powells' complaint is, and how the information came to be supplied.

[9] Section 94 of the Privacy Act provides for claims of privilege and the manner in which any such claim is to be treated:

> **94 Protection and privileges of witnesses, etc**
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> (1) Except as provided in section 119 of this Act [which excludes a claim of public interest immunity], every person shall have the same privileges in relation to the giving of information to, the answering of questions put by, and the production of documents and things to, the Commissioner or any employee of the Commissioner as witnesses have in any court.
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> (1A) Nothing in subsection (1) prevents the Commissioner or any employee of the Commissioner from–
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> (a) requiring, under section 91, the furnishing of any information or the production of any document or thing which is the subject of a complaint under Part 8 and in respect of which privilege is claimed by any person; and
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> (b) considering the information or inspecting any such document or thing–
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> for the purpose of determining whether the information, document, or thing would be properly withheld, but not so as to give the Commissioner or employee any information, or enable the Commissioner or employee to make any use of the information, document, or thing, that he or she would not, apart from this subsection, be entitled to.
>
> (1B) On the production of any information, document, or thing pursuant to subsection (1A), the Commissioner or any employee of the Commissioner–

(a) must not, without the consent of the producer of the information, document, or thing, and of any person who is the subject of the information, document, or thing, release the information, document, or thing, or any information derived from the document or thing, to any person other than–

(i) the producer of the information, document, or thing; or

(ii) any barrister or solicitor engaged by the Commissioner for the purpose of providing legal advice as to whether the information, document, or thing would be properly withheld by that producer under subsection (1); or

(iii) where the Commissioner gives his or her opinion on the claim of privilege to the Director of Human Rights Proceedings under paragraph (b), to the Director of Human Rights Proceedings:

(b) may give his or her opinion only to the parties to the complaint or to the Director of Human Rights Proceedings or to the Human Rights Review Tribunal as to whether or not the claim of privilege is valid:

Provided that nothing in this paragraph prevents the Commissioner or any employee of the Commissioner from releasing, either generally or to any particular person, the opinion in a form that does not identify either the producer of the information, document, or thing or any person who is the subject of the information, document, or thing:

(c) must not take into account the information or any information in the document or thing in forming any opinion concerning the release of any other information.

(2) No person shall be liable to prosecution for an offence against any enactment, other than section 127 of this Act, by reason of that person's compliance with any requirement of the Commissioner or any employee of the Commissioner under section 91 of this Act.

[10] Section 95 makes it clear that, subject to s 94, an obligation of secrecy imposed by the provision of any enactment does not apply to information required to be disclosed to the Privacy Commissioner. Similarly, s 119 provides that public interest immunity does not avail against a request for information by the Privacy Commissioner. For their part, however, the Privacy Commissioner and her staff are themselves under a statutory duty of secrecy imposed by s 116, except where disclosure gives effect to the Act. The statutory scheme is that claims of

privilege or statutory immunity do not excuse the obligation of disclosure to the Privacy Commissioner, for the purpose of her determination of the claims.

[11] In the case of claims of litigation privilege, therefore, the Privacy Commissioner determines the claim of privilege after receiving the information. The information so supplied cannot be used further until the question of privilege is determined and communicated to the parties to the complaint.[3] If a party considers that the decision of the Privacy Commissioner is erroneous in law on the question of privilege, the decision may be judicially reviewed.

[12] This sequence was not followed in the present case because the question of privilege was not raised with the Privacy Commissioner. Instead, the appellant raised the question of privilege in argument in the Court of Appeal and it was treated as an additional ground of judicial review in the proceedings challenging the validity of the s 91(4) notice. The approach was misconceived. A claim of privilege could not of itself provide grounds for judicial review of the notice under s 91(4) without undermining the procedure provided by s 94 and in particular the obligation under s 94(1A) to supply the information for the purposes of the Privacy Commissioner's assessment of the claim of privilege. The Court of Appeal ought properly to have refused to entertain a claim to privilege in the judicial review proceedings before it. No claim of privilege had been made to the Privacy Commissioner and there was no determination of privilege which might have been the subject of judicial review. Consideration of privilege by the Court of Appeal was premature and without foundation.

[13] The appeal must be dismissed, but on a different ground from that relied upon by the Court of Appeal. It considered that privilege was not available in respect of unsolicited communications.[4] The parties concur in the view that the Court of Appeal was in error in this approach. That is a conclusion with which we agree and which it is necessary to explain briefly so that the Privacy Commissioner can address the matter on a correct basis. Because of the doubts expressed as to whether the identity of an informant is information which can be within litigation

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3 See generally Privacy Act 1993, ss 94(1A) and (1B).

4 At [42].

privilege, we also explain why we are of the view that such information is capable of being within the privilege, depending on the context. Although we were invited by the parties to give further general guidance to the Privacy Commissioner in determining claims of privilege, we would resist the invitation beyond the indications that unsolicited information and the identity of an informant are not excluded, without more, from the scope of litigation privilege. Whether such a claim is in fact available in a particular case will depend upon contextual assessment against the text of s 56 of the Evidence Act 2006 and the policies which underpin litigation privilege. In the present case, that depends on facts still to be investigated and in respect of which there is no determination by the Privacy Commissioner. Without investigation it cannot be determined whether the information was or was not received or compiled by Mr Jeffries for the "dominant purpose of preparing for a proceeding or an apprehended proceeding". That is the test for litigation privilege used at common law[5] and adopted in s 56.

Litigation privilege in unsolicited communications

[14] The parties have been content to proceed on the basis that s 56 of the Evidence Act, although not in effect at the time the appellant received the communications in issue, states the elements of litigation privilege to be applied. It is therefore unnecessary for the purposes of this appeal to consider whether s 56 applies to communications before the Evidence Act came into effect. Nor is it necessary to consider to what extent s 56 simply restates the common law, beyond the adoption of the test of the "dominant purpose of preparing for a proceeding or an apprehended proceeding".

[15] Section 56 describes the "privilege for preparatory materials for proceedings", known at common law as "litigation privilege":

> **56 Privilege for preparatory materials for proceedings**
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> (1) Subsection (2) applies to a communication or information only if the communication or information is made, received, compiled, or

[5] *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 602 per Cooke J, at 604–605 per Richardson J, and at 606 per Tompkins J; applying *Waugh v British Railways Board* [1980] AC 521 (HL).

prepared for the dominant purpose of preparing for a proceeding or an apprehended proceeding (the proceeding).

(2) A person (the party) who is, or on reasonable grounds contemplates becoming, a party to the proceeding has a privilege in respect of–

(a) a communication between the party and any other person:

(b) a communication between the party's legal adviser and any other person:

(c) information compiled or prepared by the party or the party's legal adviser:

(d) information compiled or prepared at the request of the party, or the party's legal adviser, by any other person.

(3) ...

[16] As s 56 makes explicit and as the common law also recognised, privilege may be claimed for a communication to a party or his lawyer from a third party if for the dominant purpose of preparing for litigation. The policy behind the privilege contained in s 56, as was the case with litigation privilege at common law, is therefore the interests of justice in proper preparation for litigation.[6] As at common law, the privilege recognised by s 56 is not limited to documents or written communications, but extends to oral communications made to or received or compiled by a party or the lawyer of a party for the dominant purpose of preparing for proceedings. Neither the pre-Evidence Act authorities to which we were referred, nor the text writers, suggest a requirement that the lawyer or party has commissioned or otherwise sought the communication or information provided. Indeed, one leading text states flatly that "[i]t does not matter that neither the party nor the lawyer sought out such information",[7] citing *Re Thomas Holloway*.[8]

[17] *Re Thomas Holloway* was concerned with testamentary capacity and undue influence. Anonymous letters sent to the solicitor and to counsel for the plaintiffs were unanimously held to be within litigation privilege by a Court of Appeal comprising Cotton, Lindley, and Bowen LJJ, although the point was acknowledged to be novel. Cotton LJ considered that there was no difference in principle between

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6 *Waugh v British Railways Board* [1980] AC 521 (HL) at 542 per Lord Edmund-Davies; *Blank v Canada (Minister of Justice)* 2006 SCC 39, [2006] 2 SCR 319 at [27] per Fish J.

7 Bankim Thanki (ed) *The Law of Privilege* (Oxford University Press, Oxford, 2006) at [3.69].

8 *Re Thomas Holloway* (1887) 12 PD 167 (CA).

information obtained by a solicitor following public advertisement or inquiry of any particular person (which was accepted to be privileged) and information obtained as a result of unsolicited communications:[9]

> [W]here a solicitor is employed on behalf of his client, the information which he gets in reference to the litigation in which his client is concerned is to be protected. It has been said the solicitor has not obtained it. I think he has, because although there was no actual request by him and no labour was performed by him in obtaining these particular things, still it is in consequence of his labour and skill in prosecuting the case of his client that these communications are made to him.

Lindley LJ considered that it was irrelevant whether the solicitor had sought the information or taken pains to get it: "the question is, in what character he has got it".[10] The suggestion that the information was not obtained by the solicitor because "spontaneously given" was a distinction "too refined".[11] Bowen LJ, too, held that there was no difference between information received in response to inquiry made by the solicitor and information sent to him because it was "material for the purposes of the cause": in both such cases the letters were received "for the very reason that he was professionally employed".[12]

[18] Litigation privilege was already "well established" when its purpose was described in 1883 by Lord Blackburn in *Lyell v Kennedy (No 2)*:[13]

> [T]he law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing *anything which he gets when so employed*, and of preventing its being used against him, although it might otherwise be evidence against him. (emphasis added)

[19] Although the cases acknowledge that the privilege is a limitation on the general policy of openness and disclosure in litigation,[14] balance has been achieved

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9 At 170–171.
10 At 171.
11 Ibid.
12 At 173.
13 *Lyell v Kennedy (No 2)* (1883) 9 App Cas 81 (HL) at 86.
14 As to which, see *Waugh v British Railways Board* [1980] AC 521 (HL) at 531–532 per Lord Wilberforce and *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA) at 601 per Cooke J and at 604 per Richardson J.

through the "dominant purpose" test, instead of a more permissive[15] or more restrictive[16] threshold for connection with litigation. The "dominant purpose" test has been legislatively adopted in s 56. Where it is made out, the policy of s 56 is that the interests of the administration of justice in proper preparation for litigation justify the privilege.

[20] The expression of s 56 is inconsistent with its restriction to information obtained by a lawyer only after inquiry. Such restriction would introduce a significant qualification to the language used in the provision, which is neutral as to the manner in which the information is obtained. Section 56 attaches to any communication with the necessary dominant purpose "between the party's legal adviser and any other person", irrespective of how the communication arose. It attaches to any information "compiled or prepared" by the party's lawyer, irrespective of source. The controlling purpose in s 56(1) applies broadly to any communication or information "made, received, compiled, or prepared", without reference to its provenance. It is clear that under s 56, as at common law, the important question remains simply the "character" in which the information is made, received, compiled or prepared, as Lindley LJ considered was the case.[17] If a lawyer receives or compiles the information as legal adviser to a party and "for the dominant purpose of preparing for a proceeding or an apprehended proceeding", then the information or communication is privileged, however obtained.

[21] The purpose of the informant in providing information is not determinative. We are unable to agree in this respect with the submissions made on behalf of the Privacy Commissioner in suggesting that the purpose of the third party in making the communication may be decisive, or the submission of the appellant that the policy of the privilege includes promoting (or, at least, not "chilling") communications by

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15 As in the "appreciable purpose" test adopted in *Konia v Morley* [1976] 1 NZLR 455 (CA) and rejected for litigation privilege in *Guardian Royal Exchange Assurance of New Zealand Ltd v Stuart* [1985] 1 NZLR 596 (CA).

16 As in the "sole purpose" test adopted in *Grant v Downs* (1976) 135 CLR 674.

17 *Re Thomas Holloway* at 171.

informants. Other privileges and immunities protect informants.[18] Section 56, like the common law of litigation privilege it replaces, is concerned, rather, with preserving confidentiality in the preparation for a proceeding. What matters is the character of the information made, received, compiled or prepared by or on behalf of the party whose privilege it is. If for the dominant purpose of preparing for a proceeding, the information is within the scope of the privilege.

[22] In many cases where s 56 privilege applies, the information will be made or compiled by the lawyer or the party. There may be a question whether information created by a third party can be properly treated as "made" for the purposes of preparation for a proceeding unless it is commissioned by the party or his lawyer. But once "received" or "compiled" by the party or his lawyer for the dominant purpose of preparation for a proceeding it is within the scope of the privilege. The intent of the third party who makes the communication is not the focus because he does not have the conduct of preparation for the proceeding.

[23] Nor do we think that the matter is to be viewed, as counsel for the Privacy Commissioner suggested in written submissions, as a transaction between the third party and the lawyer or party so that inquiry needs to be directed to their "common understanding of their purpose at the point the information is imparted". These refinements and a transactional focus are not consonant with the policy of the privilege in broad protection of preparation for litigation, whether the information or communication is "made, received, compiled, or prepared" by the party or his lawyer or, at their request, by any other person. A third party supplying information may not appreciate its relevance to litigation preparation. The lawyer obtaining information may not appreciate at the point of receiving it how it bears on his preparation. Section 56, like the common law from which it is taken, is concerned with information within the control of the party or his lawyer. If that control (whether through making, receiving, compiling or preparing, or through requesting any other person to compile or prepare the information) has come about for the dominant purpose of preparing for a proceeding, the privilege is available.

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[18] See, for example, the Evidence Act 2006, s 64; Protected Disclosures Act 2000, ss 18–19; Criminal Disclosure Act 2008, s 17; Terrorism Suppression Act 2002, s 46; Financial Transactions Reporting Act 1996, s 17; and the Privacy Act 1993, s 29.

Can privilege extend to the identity of an informant?

[24] Both at common law and under s 56, the privilege attaches to any communication or information if "made, received, compiled, or prepared" for the dominant purpose of preparing for litigation. In some circumstances the name of the informant may itself be information received or compiled for the dominant purpose of preparing for litigation. That will often be the case where the informant is a potential witness and may also be the case where the identity of the informant is linked with the substance of the privileged information provided. In other cases, the identity of the informant may be irrelevant to the litigation and will not itself be information received or compiled for the purpose of its preparation. It is not possible to be more specific than to allow that the identity of the informant is capable of being within the scope of the privilege.

Result

[25] The appeal is dismissed. The claim of privilege, if maintained, must be raised by the appellant in answer to the Privacy Commissioner's request under s 91(4) of the Privacy Act 1993. If litigation privilege is asserted in terms of s 94(1) of the Privacy Act, it is for the Privacy Commissioner to determine the validity of the claim, in accordance with s 56 of the Evidence Act 2006 (which the parties have accepted applies to the claim), and after receipt of the information sought, as is required by s 94(1A) of the Privacy Act.

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