LEGAL PROFESSIONAL PRIVILEGE IN ADMINISTRATIVE PROCEEDINGS

BAKER v. CAMPBELL[1]

Introduction

Protecting the confidentiality of communications between solicitor and client has long been an area of particular sensitivity for the legal profession. As early as the sixteenth century, the English Court of Chancery recognised that certain communications made in confidence between solicitor and client may not be disclosed in evidence in judicial proceedings without the client's consent.[2] The modern principle, which became settled law after the landmark judgment of Lord Selborne, L.C. in *Minet* v. *Morgan*,[3] is that legal professional privilege will attach to confidential communications that were made either with reference to existing or contemplated litigation, or for the purpose of obtaining professional legal advice.

The difficulty in determining questions of legal professional privilege arises from the need to reach a compromise between two competing heads of public policy. The public interest in protecting the relationship of confidence with its inherent duty of secrecy that exists between solicitor and client must be balanced against the public interest in having litigation determined in the light of all relevant evidence. The continuing vitality of the law of legal professional privilege lies in the tension between these interests and in the differing emphases placed by judges upon each. The doctrine was explained in similar terms by the High Court of Australia in *Grant* v. *Downs*:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of justice by facilitating the representation of clients by legal advisers, the law being a complex and complicated discipline. That it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice, and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.[4]

---

[1] (1983) 57 A.L.J.R. 749.

[2] See *Berd* v. *Lovelace* (1577) Cary 62, 21 E.R. 33; *Dennis* v. *Codrington* (1580) Cary 100, 21 E.R. 53.

[3] (1873) L.R. 8 Ch. App. 361.

[4] (1976) 135 C.L.R. 674 at 685 *per* Stephen, Mason and Murphy, JJ.

As far as written communications between solicitor and client are concerned, the judgment in *Grant* v. *Downs* established that legal professional privilege is confined "to those documents which are brought into existence for the sole purpose of submission to legal advisers for advice or for use in legal proceedings".[5] It was stressed that a document which "quite apart from the purpose of submission to a solicitor, would have been brought into existence for other purposes"[6] would not be privileged from production upon this ground. Although the sole purpose test was obviously formulated to exclude such documents as contracts, conveyances and declarations of trust, the test also denies privilege even to documents whose overwhelming purpose is to facilitate the obtaining of legal advice, simply because another and possibly very minor purpose was also being served. For this reason, it is submitted that the sole purpose test is excessively narrow, a view that has been endorsed by the House of Lords in *Waugh* v. *British Railways Board.*[7]

Having defined the essential content of the privilege, further questions have arisen concerning its applications, if any, outside the courtroom. The common law rules relating to legal professional privilege were developed within the context of judicial proceedings over four centuries. It is only in recent years, with the rise of new administrative bodies capable of exercising wide non-judicial powers of investigation, that it has become necessary to consider the relevance of the privilege outside the judicial context. Because legal professional privilege traditionally operated to deny the Court what would otherwise be admissible evidence, it was sometimes assumed, until recently, that the privilege was merely a common law rule of evidence. As a result, the doctrine was thought to have no effect on the activities of non-judicial bodies which are generally not strictly bound by the statutory and common law rules of evidence.[8] This was the view asserted by Diplock, L.J. (as he then was) in the English Court of Appeal decision in *Parry-Jones* v. *Law Society*:

> . . . privilege, of course, is irrelevant when one is not concerned with judicial or quasi-judicial proceedings because, strictly speaking, privilege refers to a right to withhold from a court, or a tribunal exercising judicial functions, material which would otherwise be admissible in evidence.[9]

The correctness of the view expressed by his Lordship, which has been adopted in subsequent Australian authorities,[10] was the central question of law in *Baker* v. *Campbell.* Given the proliferation of statutes which

---

[5] *Id.* 688.

[6] *Ibid.* The test stated in *Grant* v. *Downs* was subsequently re-affirmed by the High Court in *National Employers' Mutual General Insurance Association Ltd.* v. *Waind* (1979) 141 C.L.R. 648.

[7] [1979] 2 All E.R. 1169 at 1174 *per* Lord Wilberforce; 1178 *per* Lord Simon of Glaisdale; 1182 *per* Lord Edmund-Davies and 1184 *per* Lord Russell of Killowen. Their Lordships preferred to adopt the wider "dominant purpose" test proposed by Barwick, C.J. in his dissenting judgment in *Grant* v. *Downs, supra* n. 4 at 677.

[8] See H. Whitmore and M. Aronson, *Review of Administrative Action* (1978) at 278; H. W. R. Wade, *Administrative Law* (5th ed. 1982) at 805 and 859; E. Campbell, "Principles of Evidence and Administrative Tribunals" in E. Campbell and L. Waller (eds.), *Well and Truly Tried: Essays on Evidence in Honour of Sir Richard Eggleston* (1982) at 36.

[9] [1969] 1 Ch. 1 at 9.

[10] *Brayley* v. *Wilton* [1976] 2 N.S.W.L.R. 495; *Crowley* v. *Murphy* (1981) 34 A.L.R. 496; *O'Reilly* v. *Commissioners of the State Bank of Victoria* (1982) 57 A.L.J.R. 130.

may lawfully require any person to produce documents and disclose information otherwise than in the course of judicial and quasi-judicial proceedings, the matter is obviously one of enormous practical importance to the confidentiality of solicitor-client communications. If the views of Diplock, L.J. were to prevail, then solicitors' files would be open to any administrative investigation carried out under such statutes as the Income Tax Assessment Act 1936 (Cth.), the Trade Practices Act 1974 (Cth.) and the companies and securities legislation. As the facts of *Baker* v. *Campbell* demonstrate, solicitors' files would also be vulnerable to search and seizure by a police constable acting pursuant to a search warrant. If, in the alternative, legal professional privilege were held to be a substantive rule of law, it would generally be available under any circumstances where communications between solicitor and client were threatened with compulsory disclosure.

The Facts

The plaintiff had retained Mr. O'Connor, a partner in the firm of Stone, James and Co. of Perth, as solicitor to advise him on certain aspects of a scheme he had devised for the purpose of minimising liability to tax under the Sales Tax Assessment Acts 1930 (Cth.). The firm held a number of documents relating to the plaintiff, some of which had been created for the sole purpose of tendering legal advice to the plaintiff otherwise than in relation to then existing or contemplated civil or criminal litigation.

On 6 July 1982 a stipendiary magistrate issued to the defendant, who was a member of the Federal Police, a search warrant pursuant to s. 10(b) of the Crimes Act 1914 (Cth.). Section 10 provides:

> If a Justice of the Peace is satisfied by information on oath that there is reasonable ground for suspecting that there is in any house, vessel, or place—
> (a) anything with respect to which any offence against any law of the Commonwealth or of a Territory has been, or is suspected on reasonable grounds to have been, committed;
> (b) anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission of any such offence; or
> (c) anything as to which there is reasonable ground for believing that it is intended to be used for the purpose of committing any such offence;
>
> he may grant a search warrant authorising any constable named therein, with such assistance as he thinks necessary, to enter at any time any house, vessel or place named or described in the warrant, if necessary by force, and to seize any such thing which he may find in the house, vessel or place.

The relevant warrant authorised the defendant to enter the premises occupied by Stone, James and Co. and seize the original or copies of: "correspondence, prospectuses, notes, opinions of Counsel, contracts, agreements, and other documents and instruments all of which have been produced or held by, for, or in respect of", the plaintiff and certain other named persons and companies. On 7 July 1982 the defendant, acting

pursuant to the search warrant, attempted to seize the documents held by the firm of solicitors. The plaintiff was later charged with various criminal offences relating to the evasion of Commonwealth sales tax.

In the present case, it was submitted by the plaintiff that the documents were protected from seizure under the search warrant because they were the subject of legal professional privilege, which had neither been waived nor otherwise lost by the plaintiff. The defendant submitted that he was entitled to seize any documents within the terms of the search warrant, regardless of whether they were the subject of any such privilege. In these circumstances, the question stated to the High Court was: "In the event that legal professional privilege attaches to and is maintained in respect of the documents held by the firm, can those documents be properly made the subject of a Search Warrant issued under Section 10 of the Crimes Act?"

Previous Anglo-Australian Authority

The initial difficulty met by the plaintiff's case for a negative answer to the stated question was, as Gibbs, C.J. frankly recognised, "that it flies in the teeth of decided authority in Australia".[11] In 1981, it was held by the Full Court of the Federal Court of Australia in *Crowley* v. *Murphy*[12] that a police constable, acting under a search warrant issued pursuant to s. 10 of the Crimes Act 1914 (Cth.), was not fettered by legal professional privilege when searching and seizing the files in a solicitors' office. Citing the authority of *Parry-Jones* v. *Law Society*, Lockhart, J.[13] (with whom Northrop, J. agreed[14]) held that the privilege is merely a rule of evidence with no relevance outside of judicial and quasi-judicial proceedings. *Crowley* v. *Murphy* was subsequently approved and applied by a majority of the High Court (Gibbs, C.J., Mason and Wilson, JJ.; Murphy, J. dissenting) in *O'Reilly* v. *Commissioners of the State Bank of Victoria*,[15] a judgment that was handed down only two months before the hearing of *Baker* v. *Campbell*. In *O'Reilly*, a solicitor to whom a notice had been given under s. 264 of the Income Tax Assessment Act 1936 (Cth.), was held to be obliged to produce documents to which the notice referred, notwithstanding that the documents would have been the subject of legal professional privilege in judicial proceedings.

In a most unusual move, which can be interpreted as a tacit acknowledgement of the deficiencies of legal research in the *O'Reilly* judgment, the High Court in *Baker* v. *Campbell* granted special leave for the plaintiff to re-argue the merits of the *O'Reilly* decision. The Court was strengthened in its decision by the fact that *O'Reilly* had been a judgment of only four of the High Court Justices, whereas the present case was heard by all seven Justices.

The statement of principle given by Diplock, L.J. in *Parry-Jones* v. *Law Society* had been adopted by the majority Justices in *O'Reilly* as a correct statement of the common law in Australia. Nevertheless, as was

---

[11] *Supra* n. 1 at 751.
[12] (1981) 34 A.L.R. 496.
[13] *Id.* 520.
[14] *Id.* 505.
[15] (1982) 57 A.L.J.R. 130.

explained by Dawson, J. in the present case, the authority of *Parry-Jones* is "but slender".[16] In *Parry-Jones*, the Law Society served upon the appellant, who was a solicitor, a written notice pursuant to the Solicitors' Accounts Rules 1945 (U.K.) requiring him to produce for inspection documents relating to his practice. The appellant sought an injunction to restrain the Law Society and its officers from acting upon the notice. Although it was held by both Lord Denning, M.R.[17] and Diplock, L.J.[18] (with both of whom Salmon, L.J. agreed[19]) that the rules overrode any privilege or duty of confidence that may have existed between solicitor and client, the general issue of legal professional privilege outside of judicial and quasi-judicial proceedings does not appear to have been argued at any length. The undeveloped statement of principle given by Diplock, L.J. was made in passing and without reference to decided cases. Moreover, the judgment was unreserved and the appellant's case was argued by the appellant personally. What is most damaging to the authority of *Parry-Jones* is that in recent English cases, notably in *Frank Truman Export Ltd.* v. *Metropolitan Police Commissioner*[20] and in *R.* v. *Peterborough Justice; Ex parte Hicks*,[21] it appears to have been assumed that legal professional privilege could validly be raised in appropriate circumstances against the production of documents to a police constable acting under a search warrant. The execution of a search warrant is a non-judicial proceeding, yet neither of these cases was cited in *O'Reilly*.

Perhaps the most significant shortcoming of the judgment in *O'Reilly* stems from its endorsement of the decision in *Crowley* v. *Murphy*, and particularly the judgment of Lockhart, J. In reaching the conclusion that legal professional privilege is merely a rule of evidence, and therefore holding that a police constable's powers of search and seizure were not restricted by the privilege, Lockhart, J.[22] (with whom Northrop, J. agreed[23]) quoted with approval a lengthy passage from *The Law of Search Warrants in Canada* by J. A. Fontana.[24] The passage quoted by Lockhart, J. itself substantially consisted of an *obiter dictum* by Osler, J. of the Ontario High Court of Justice in the case of *R.* v. *Colvin; Ex parte Merrick*.[25] In *Colvin*, Osler, J. expressed the view that legal professional privilege "is a rule of evidence, not a rule of property".[26]

Colvin had been decided in 1970, and Fontana's work had been published in 1974. Unfortunately, what Lockhart, J. had overlooked in 1981 was that Osler, J. had already specifically resiled from his earlier views. In *Re Presswood and the International Chemalloy Corporation*,[27] which had been decided in 1975, Osler, J. stated that the view he had expressed in *Colvin* was "erroneous"[28] and had been overruled by such

---

[16] *Supra* n. 1 at 779.
[17] *Supra* n. 9 at 8.
[18] *Id.* 9.
[19] *Id.* 10.
[20] [1977] 1 Q.B. 952.
[21] [1977] 1 W.L.R. 1371.
[22] *Supra* n. 12 at 520.
[23] *Id.* 505.
[24] (1974) at 150 and 151.
[25] (1970) 1 C.C.C. (2d) 8 at 13.
[26] *Ibid.*
[27] (1975) 65 D.L.R. (3d) 228.
[28] *Id.* 230.

authorities as *Re Director of Investigation and Research and Shell Canada Ltd.*[29] As the statement of Osler, J. implies, there has developed in Canadian law since the middle of the last decade a strong line of authority (to be considered *infra*) that legal professional privilege is not to be regarded as merely a rule of evidence, but rather as a substantive rule of law.[30] Regrettably, that line of authority was neither referred to in *Crowley* v. *Murphy* nor in *O'Reilly*.

It must be conceded, of course, that none of the foregoing criticism of *O'Reilly* touches upon the merits of that decision. What this criticism does suggest is that there exists a sufficiently large body of persuasive authority that was not considered by the Justices in *O'Reilly* to justify the High Court's present decision to reconsider the merits of that case. Having therefore freed themselves from any restrictions imposed by *O'Reilly*, the Justices in *Baker* v. *Campbell* could now consider the stated question from first principles.

The Judgments

As a preliminary question of law, it was either held or assumed by all members of the High Court that the execution of a search warrant pursuant to s. 10 of the Crimes Act 1914 (Cth.) is an administrative proceeding.[31]

In concluding that privileged documents could not properly be made the subject of such a warrant, the approach taken by the majority Justices (Murphy, Wilson, Deane and Dawson, JJ.) was firstly to consider the historical and conceptual basis of legal professional privilege. In the course of doing so, the point was made by Wilson, Deane and Dawson, JJ.[32] that when the privilege was initially recognised during the sixteenth century, it was confined to communications made with reference to particular existing litigation. The rationale of the privilege at this time was thought to be the professional obligation of the legal practitioner to preserve the secrecy of his client's confidences.[33] By the mid-nineteenth century, however, especially after the decision in *Minet* v. *Morgan*, the scope of the privilege was expanded to include communications made for the purpose of seeking legal advice in general, whether or not such advice was sought with reference to any existing or contemplated litigation. The Justices differed as to what they regarded these latter developments as being an indication of. Deane, J. was of the opinion that:

> The fact that the privilege is not restricted to the particular legal proceedings for the purposes of which the relevant communication may have been made or, for that matter, to proceedings in which the party entitled to the privilege is a party plainly indicates that the

---

[29] (1975) 55 D.L.R. (3d) 713.

[30] See R. A. Kasting, "Recent Developments in the Canadian Law of Solicitor-Client Privilege" (1978) 24 *McGill L.J.* 115.

[31] *Supra* n. 1 at 755 *per* Gibbs, C.J.; 760-761 *per* Mason, J.; 765 *per* Wilson, J.; 768 *per* Brennan, J. and 776 *per* Deane, J. Neither Murphy, J. nor Dawson, J. made a specific finding on the issue, however both judgments appear to be based on the assumption that the execution of a search warrant is an administrative act.

[32] *Id.* 765-766 *per* Wilson, J.; 774 *per* Deane, J. and 780 *per* Dawson, J.

[33] See W. H. Holdsworth, *A History of English Law* (3rd ed. 1944) vol. IX at 201-202; J. H. Wigmore, *Evidence in Trials at Common Law* (McNaughton revised ed. 1961) vol. VIII at 544.

underlying principle is concerned with the general preservation of confidentiality.[34]

If, as Deane, J. suggests, the public interest in the preservation of confidences forms the basis of legal professional privilege, it is difficult to appreciate why an analagous species of privilege is not accorded to other relationships of confidence, such as that between physician and patient or between priest and penitent.[35] For this reason, it is submitted that the rationale advanced by Deane, J. is unsatisfactory. If Deane, J.'s explanation were accepted, there would be little meaningful distinction between the (presently) quite separate concepts of privilege and confidence.[36] The fact that the common law has come to recognise a special privilege against disclosure in the case of solicitor-client relationships which has not been granted to other relationships of confidence tends to suggest in itself that something more than the preservation of confidences forms the basis of legal professional privilege. It is here that the reasoning advanced by Wilson and Dawson, JJ. is illuminating. For these Justices, the privilege is to be explained in terms of the unique function that the solicitor-client relationship serves in the administration of justice. In the words of Dawson, J.:

> Whilst legal professional privilege was originally confined to the maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship, it is now established that its justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice. This is why the privilege does not extend to communications arising out of other confidential relationships such as those between doctor and patient, priest and penitent or accountant and client.[37]

Having therefore considered the conceptual basis of the privilege, the majority Justices then went on to decide the extent of its operation, which was the crucial issue in the present case. In doing so, they were greatly assisted by the development of recent Canadian case law on the subject. It was previously mentioned that the prevailing view in Canadian law in 1970 was that legal professional privilege is a rule of evidence and not a rule of property. Five years later, the Canadian Federal Court of Appeal held in *Re Director of Investigation and Research and Shell Canada Ltd.* that s. 10(1) of the Combines Investigation Act 1970 (which gives the Director of Investigation and Research wide powers to enter premises and seize documents) did not override the doctrine of legal professional privilege. The view taken by Jackett, C.J., with whom the other members of the Court agreed, was that the protection given by law to the confidentiality of solicitor-client communications,

---

[34] *Supra* n. 1 at 774.

[35] See *Cross on Evidence* (2nd Australian ed. by J. A. Gobbo, D. Byrne and J. D. Heydon, 1980) at 280-284; *Phipson on Evidence* (13th ed. by J. H. Buzzard, R. May and M. N. Howard, 1982) at 295.

[36] See C. Tapper, "Privilege and Confidence" (1972) 35 *M.L.R.* 83; J. D. Heydon, "Legal Professional Privilege and Third Parties" (1974) 37 *M.L.R.* 601; P. Mathews, "Breach of Confidence and Legal Privilege" (1981) 1 *Legal Studies* 77.

[37] *Supra* n. 1 at 780-781. Compare with the reasoning of Wilson, J. at 765-766.

> . . . has, heretofore, manifested itself mainly, if not entirely, in the privilege afforded to the client against the compulsory revelation of communications between solicitor and client in the giving of evidence in Court or in the judicial process of discovery. In my view, however, this privilege is a mere manifestation of a fundamental principle upon which our judicial system is based, which principle would be breached just as clearly, and with equal injury to our judicial system, by the compulsory form of pre-prosecution discovery envisaged by the Combines Investigation Act as it would be by evidence in Court or by judicial discovery.[38]

The "fundamental principle" referred to by Jackett, C.J. is:

> . . . that the protection, civil and criminal, afforded to the individual by our law is dependent upon his having the aid and guidance of those skilled in the law untramelled by any apprehension that the full and frank disclosure by him of all his facts and thoughts . . . might somehow become available to third persons so as to be used against him.[39]

The decision in the *Shell Canada* case, and in the subsequent cases which followed it,[40] were approved and applied by the Supreme Court of Canada in *Solosky* v. *The Queen*,[41] where it was frankly acknowledged that "recent case law has taken the traditional doctrine of privilege and placed it on a new plane".[42] Most recently, the Supreme Court of Canada has stated in *Descoteaux* v. *Mierzwinski and the Attorney-General of Quebec*[43] that *Solosky* had "applied a substantive rule, without actually formulating it, and consequently, recognised implicitly that the right to confidentiality, which had long ago given rise to a rule of evidence, had also since given rise to a substantive rule."[44]

The idea that legal professional privilege, as a rule of evidence, was merely one manifestation of a more fundamental common law principle—a theme which also appears in the New Zealand authorities[45]—strongly commended itself to the Justices of the majority in *Baker* v. *Campbell.* Murphy, Wilson, Deane and Dawson, JJ.[46] all adopted a very similar line of reasoning to justify what is arguably an act of "judicial legislation" in expanding the application of the privilege well beyond its previously accepted limits in Australian law. In this respect, the judgment of Wilson, J. is particularly instructive because his Honour had formed one of the majority in *O'Reilly*. Recanting from his views expressed in *O'Reilly*, Wilson, J. now considers it erroneous to allow "the public interest which supports the privilege to be confined too closely to the context in which the relevant common law has evolved".[47] The context, of course, had

---

[38] *Supra* n. 29 at 722.

[39] *Id.* 721-722.

[40] *Re Borden and Elliot and The Queen* (1975) 70 D.L.R. (3d) 579; *Re B.X. Development Inc. and The Queen* (1976) 70 D.L.R. (3d) 366.

[41] (1979) 105 D.L.R. (3d) 745.

[42] *Id.* 757 *per* Dickson, J.

[43] (1982) 141 D.L.R. (3d) 590.

[44] *Id.* 604 *per* Lamer, J.

[45] *Commissioner of Inland Revenue* v. *West-Walker* [1954] N.Z.L.R. 191; *R.* v. *Uljee* [1982] 1 N.Z.L.R. 561.

[46] *Supra* n. 1 at 763 *per* Murphy, J.; 767 *per* Wilson, J.; 775 *per* Deane, J. and 780 *per* Dawson, J.

[47] *Id.* 765.

been supplied by judicial and quasi-judicial proceedings. The same theme was taken up by Deane, J.:

> . . . the doctrine of legal professional privilege arose and developed as a common law privilege protecting relevant communications between a person and his legal advisers from the consequences of the ordinary obligations of giving evidence and producing documents. In that context, the doctrine can properly be seen as a rule of evidence operating in judicial or quasi-judicial proceedings. So to see the doctrine does not, however, involve the conclusion that the fact that the confidentiality of a document or information would be protected by the doctrine of legal professional privilege in the courts of the land is irrelevant when one is considering whether statutory administrative powers should be construed as authorising the destruction or impairment of that confidentiality. To the contrary, it leads to the inquiry whether the doctrine of legal professional privilege is an emanation of a more fundamental and general common law principle.[48]

Reflecting the views of the majority Justices, Dawson, J. concluded that:

> The privilege extends beyond communications made for the purpose of litigation to all communications made for the purpose of giving or receiving advice and this extension of the principle makes it inappropriate to regard the doctrine as a mere rule of evidence. It is a doctrine which is based upon the view that confidentiality is necessary for the proper functioning of the legal system and not merely the proper conduct of particular litigation. It is inconsistent with that view to conclude that the compulsory disclosure of communications between legal adviser and client is in the public interest merely because the compulsion is for administrative rather than judicial purposes.[49]

Having posited the existence of a substantive common law principle protecting the confidentiality of solicitor-client communications, the remaining question for the majority Justices was whether the principle was abrogated by s. 10(b) of the Crimes Act 1914 (Cth.). Certainly s. 10(b) did not do so expressly because the section makes no mention of legal professional privilege. In these circumstances, it is a settled rule of statutory interpretation that general provisions in a statute should only be read as abrogating common law rights to the extent made necessary by the express words or necessary implication of the statute.[50] Applying this rule, the view was taken by Murphy, Wilson, Deane and Dawson, JJ.[51] that s. 10(b) evinces no positive intention to oust legal professional privilege and should therefore not be interpreted as doing so.

---

[48] *Id.* 774.

[49] *Id.* 781.

[50] *Sorby* v. *The Commonwealth* (1983) 57 A.L.J.R. 248 at 260 *per* Mason, Wilson and Dawson, JJ.; *R.* v. *Bishop of Salisbury* [1901] 1 K.B. 573. See *Odgers' Construction of Deeds and Statutes* (5th ed. by G. Dworkin, 1967) at 389-391; *Maxwell on the Interpretation of Statutes* (12th ed. by P. St. J. Langan, 1969) at 116-123; D. C. Pearce, *Statutory Interpretation in Australia* (2nd ed. 1981) at 87-92.

[51] *Supra* n. 1 at 764 *per* Murphy, J.; 767 *per* Wilson, J.; 776 *per* Deane, J. and 782 *per* Dawson, J.

The point of departure between the judgments of the majority Justices and those of Gibbs, C.J. and Mason, J., both of whom dissented, lies in the refusal of the latter Justices to recognise any fundamental common law principle which justifies the extension of the existing law. In the opinion of Gibbs, C.J., "the privilege exists for practical reasons, rather than to give effect to any basic principle".[52] Echoing the rationale of legal professional privilege given by the High Court in *Grant* v. *Downs*, the "practical reasons" cited by the Chief Justice were that for the proper conduct of litigation, it is necessary that litigants be represented by lawyers. For the lawyer, in turn, to effectively represent his client, he must be in full possession of all the relevant facts. The existence of legal professional privilege tends to promote such candour between a client and his legal adviser by ensuring that their communications remain confidential. It is significant that the Chief Justice confines his remarks to the conduct of litigation, which suggests, by default, that the "practical reasons" for the existence of the privilege cease to exist outside these circumstances. The same point was made more bluntly in the judgment of Mason, J.:

> At an earlier stage of its development the privilege applied only to communications made in relation to the litigation in which the privilege was claimed. Had the development stopped at this point, the privilege might well have reflected a more acceptable balance between the two competing public interests—one supporting the privilege, the other favouring the availability of all the relevant documents for use in litigation.[53]

If it is correct to analyse the doctrine of legal professional privilege in terms of balancing the need to protect the relationship of confidence between solicitor and client against the need to determine litigation in the light of all relevant evidence, then both Gibbs, C.J. and Mason, J. clearly favour the public interest in the latter. As Gibbs, C.J. explained,[54] when s. 10 of the Crimes Act 1914 (Cth.) was enacted, Parliament gave no indication that the generality of power conferred by s. 10 was to be limited in order to protect the confidentiality of solicitor-client communications. Furthermore, one might assume, as Mason, J. did,[55] that the very existence of a statutory obligation to provide information and produce documents tends to suggest in itself that there is a strong public interest in the disclosure of such information. Arguably, Parliament may have considered that the public interest which supports legal professional privilege "should yield to the higher public interest in the suppression of crime".[56] Persuaded by these considerations, it was concluded by Gibbs, C.J. (with whom Mason, J. substantially agreed) that:

> At the time when the Crimes Act was enacted, it had not been held or suggested that the rules governing legal professional privilege were other than rules relating to the giving of evidence and the production of documents in the course of legal proceedings. . . . The rule of

---

[52] *Id.* 754.
[53] *Id.* 757.
[54] *Id.* 755.
[55] *Id.* 758.
[56] *Id.* 755 *per* Gibbs, C.J.

> construction that the Parliament is presumed not to intend, by merely general words, to derogate from an existing privilege recognised by the common law does not assist in answering the present question, since the common law did not recognise legal professional privilege except in legal proceedings. It would seem to me impermissible to hold that the existing rules as to legal professional privilege should be given an entirely new operation, for the very purpose of reading down the words of a statutory provision.[57]

Both Justices were strengthened in their conclusions by the fact that no convenient procedure exists for the determination of claims to privilege made outside judicial and quasi-judicial proceedings.[58] The problem, which may prove to be one of considerable practical significance, is well illustrated by the facts of *Baker* v. *Campbell* itself. When a police constable is conducting a search of files in a solicitor's office, it is effectively impossible for a person unfamiliar with the law of legal professional privilege to make an instant decision on whether a particular document is privileged or not. Is the police constable merely to accept the opinion of the solicitor? Surely it is impractical for every such case to be resolved in cumbersome and expensive legal proceedings. It has to be admitted that one compelling argument for confining the privilege to judicial and quasi-judicial proceedings is that such a rule at least creates certainty and, more importantly, avoids placing the onus of deciding complex questions of privilege upon persons who are not lawyers. It remains to be seen whether, as Wilson, J. suggested, "the procedural difficulties can be overcome . . . if the members respectively of the police force and the legal profession co-operate in a reasonable and responsible way".[59]

The one judgment which stands quite apart from the others in *Baker* v. *Campbell* is that of Brennan, J. His Honour seems to have taken as a starting point an alternative submission made by the plaintiff based upon the wording of s. 10(b) of the Crimes Act 1914 (Cth.). That section provides for the seizure of "anything as to which there are reasonable grounds for believing that it will afford evidence as to the commission" of any offence against a law of the Commonwealth. The plaintiff's submission was that the phrase "will afford evidence" must be read as "will afford *admissible* evidence" because documents covered by legal professional privilege would not be admissible in evidence. This submission was specifically rejected by Gibbs, C.J., Mason and Wilson, JJ.[60] The reason for doing so was that the doctrine of legal professional privilege does not concern the admissibility of evidence. The privilege entitles a party to refuse to produce a privileged document, but it does not render the document inadmissible. Under the well-established, if somewhat unfair rule in *Calcraft* v. *Guest*,[61] original or secondary evidence may be given of the contents of

---

[57] *Ibid.*

[58] *Id.* 756 *per* Gibbs, C.J.; 758 *per* Mason, J.

[59] *Id.* 767.

[60] *Id.* 755 *per* Gibbs, C.J.; 761 *per* Mason, J. and 765 *per* Wilson, J.

[61] [1898] 1 Q.B. 759. See also *Lloyd* v. *Mostyn* (1842) 10 M & W 478, 152 E.R. 558; *Karuma* v. *R.* [1955] A.C. 197. These authorities are discussed in: New South Wales Law Reform Commission, *Working Paper on Illegally and Improperly Obtained Evidence* (1979).

a privileged document (assuming its contents to be otherwise admissible) if the opposing party has obtained the document or a copy of it.[62]

The approach taken by Brennan, J. was to explain that there are certain documents which both come within the doctrine of legal professional privilege *and whose contents would otherwise be inadmissible.* It is only these documents which, according to Brennan, J., may not be seized pursuant to s. 10(b):

> As s. 10(b) authorises the issue of a warrant to search for and to seize things as to which there are reasonable grounds for believing that they will afford evidence as to the commission of an offence, a warrant cannot authorise a search for and seizure of documents which, even if they be produced by and out of the custody of the prosecution, would not be admissible in evidence.[63]

The class of documents envisaged by his Honour falls into two species. The first species comprises mere expressions of legal opinion, which would not normally afford evidence of the facts upon which the opinion was based.[64] The second species of documents are those to which legal professional privilege attaches by reason of their having been brought into existence solely for use in litigation that is pending, intended or reasonably apprehended. The reason why such evidence would be inadmissible is not so clear. In the opinion of Brennan, J., the admission of such evidence would subvert the adversary system of litigation, particularly in criminal matters, by exposing the contents of one party's case to the opposing side:

> A court is bound, especially in its criminal jurisdiction, to reject evidence if its admission would damage the public interest. It would be damaging to the public interest to admit in evidence a document that has been brought into existence solely for use in litigation that is pending, intended or reasonably apprehended, or a copy of such document unless the consent of the person entitled to the privilege is given to the tender. The tender of such a document in evidence should be rejected not so much because it affects the interests of the person entitled to the privilege, but because it subverts the Court's procedure for conducting adversary litigation.[65]

With the greatest respect to Brennan, J., his Honour's reasoning in relation to the second postulated species of evidence is not altogether convincing. Most damagingly, Brennan, J. concedes that such evidence would be admissible under the rule in *Calcraft* v. *Guest*, although his Honour suggests that *Calcraft* v. *Guest* ought not be followed in Australia.[66] Moreover, to argue that the admission of certain classes of privileged documents tends to subvert the adversary system of litigation is an argument that can equally be used against the admission of any

---

[62] There are qualifications to the rule. The most significant of these is that if the privileged documents were obtained in breach of confidence, an injunction against their use in evidence may be granted in the exclusive jurisdiction of equity: *Lord Ashburton* v. *Pape* [1913] 2 Ch. 469; *Butler* v. *Board of Trade* [1971] 1 Ch. 680; *Bell* v. *David Jones Ltd.* (1948) 49 S.R. (N.S.W.) 223.

[63] *Supra* n. 1 at 771.

[64] Cross, *op. cit., supra* n. 35 at 422 *et seq.*; Phipson, *op. cit., supra* n. 35 at 553 *et seq.*

[65] *Supra* n. 1 at 772.

[66] *Id.* 773.

document that falls within the doctrine of legal professional privilege. Although it must be conceded that the judgment of Brennan, J. is a novel attempt to steer a middle course between the views of the majority and minority Justices, it is submitted that his Honour never really addresses the major conceptual issues of the case, and that his judgment is of only limited value outside the context of s. 10(b) of the Crimes Act 1914 (Cth.).

Conclusion

Baker v. *Campbell* has elevated legal professional privilege into a substantive rule of law. No longer is the privilege confined to judicial and quasi-judicial proceedings. Subject to express legislative restrictions and the test imposed by *Grant* v. *Downs*,[67] the privilege may now be raised against all forms of compulsory disclosure of information consisting of communications between a legal adviser and his client. For these reasons, the judgment not only constitutes a major extension of the law of legal professional privilege in Australia, but an equally major impediment upon the information-gathering capacities of all Australian administrative bodies. From the viewpoint of anyone who has ever disclosed potentially damaging information to his solicitor, the decision is surely one to be welcomed.

KEITH M. LUPTON, B.A.(Hons.)—Third Year Student.

[67] In other words, for the privilege to be claimed in respect of documents, there remains the proviso that the relevant documents must have been created for the sole purpose of submission to legal advisers for advice or for use in legal proceedings.