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THE ATTORNEY/ CLIENT PRIVILEGE

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In a decision delivered on May 19 this year, the Privy Council addressed the perennial question of the extent of the privilege attaching to communications between an attorney and client. This decision was the result of an appeal from New Zealand.

In that case, the Law Society of New Zealand brought proceedings against a New Zealand law firm under a statutory requirement in the New Zealand Law Practitioners Act that a lawyer against whom a complaint was being investigated should produce for inspection any books, documents, papers, accounts or records in his possession or control relating to the subject matter of the inquiry.

The law firm handed over documents for investigation under an arrangement where their use was to be limited and any privilege therein was not to be waived.

The Law Society then made a formal requisition for the documents submitted and other documents arguing that any privilege was over-ridden by the statute.

At first instance, the Judge held that the statute did not override the privilege but declined to order the return of the documents supplied on the ground that the Law Society was entitled to use them for the limited purpose agreed.

The matter was taken to the New Zealand Court of Appeal which held that the statute overrode the privilege so that the question of waiver did not arise. The law firm appealed to the Privy Council.

Lord Millet in delivering the judgment of the Privy Council stated that the legal professional privilege was a fundamental condition on which the administration of justice rested.

Under English Law, the privilege could not be excluded by any common law right to compel production but it could be abrogated by statute. The Law Practitioners Act did not expressly over-ride the privilege. The New Zealand Court of Appeal had held that it did so by necessary implication. The Privy Council Lords disagreed. The big question was whether such an implication necessarily followed from the express provisions of the statute construed in their context.

Their Lordships thought that a useful test was to add to the statutory provision the words “not being privileged documents” and ask, not “does that produce a reasonable result” or “does it impede the statutory purpose for which production may be required?” but “does that produce an inconsistency?” or “does it stultify the statutory process?” The circumstances in which such a question would receive an affirmative answer would be rare.

In their Lordships view, legal professional privilege was a good answer to a request under the Law Practitioners Act.

As to the question of waiver, the Law Society had argued that once documents had been disclosed the “cat was out” and therefore the privilege could not put it back. Their Lordships said that it did not follow that privilege was waived generally because a privileged document had been disclosed for a limited purpose.

If they were produced voluntarily, the right to withhold production no longer attached to them, but they were the same documents and it was not inappropriate to describe them as privileged. The cat was still a cat and could be put back in the bag.

The arrangement made with the Law Society imposed limitations on its use of the documents, not on the extent of the waiver of privilege, which was expressly reserved. Whether the law firm's claim to recover the documents and to prevent their further use by the Law Society was based on a common law equitable right, the policy considerations which gave rise to the privilege precluded the court from conducting a balancing exercise based on some countervailing public interest. Privilege between lawyer and client is still fundamental and strong.

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