HIGH COURT OF AUSTRALIA

GLEESON CJ,
KIRBY, HAYNE, CALLINAN AND CRENNAN JJ

Z APPELLANT

AND

NEW SOUTH WALES CRIME COMMISSION RESPONDENT

Z v New South Wales Crime Commission [2007] HCA 7
28 February 2007
S229/2006

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

D F Jackson QC with B A Arste for the appellant (instructed by Bolzan & Dimitri)

M G Sexton SC, Solicitor-General for the State of New South Wales with P F Singleton and M T England for the respondent (instructed by New South Wales Crime Commission)

CATCHWORDS

Z v New South Wales Crime Commission

Practice and procedure – Legal professional privilege – Solicitor summonsed to give evidence before the New South Wales Crime Commission ("the Commission") – Whether the communication of a client's name or the communication of the client's contact details was a privileged communication.

Legal practitioners – Solicitor and client – Legal professional privilege –Whether the communication of a client's name or the communication of the client's contact details was a privileged communication.

Statutes – Interpretation – *New South Wales Crime Commission Act* 1985 (NSW) ("the Act") – Section 18B(4) of the Act – Entitlement of legal practitioner appearing as a witness before the Commission to refuse to answer a question if the answer would disclose a privileged communication – Whether disclosing a client's name and address would disclose a privileged communication.

Statutes – Interpretation – Section 18B(4) of the Act – Entitlement of legal practitioner appearing as a witness before the Commission to refuse to answer a question if the answer would disclose a privileged communication – Whether s 18B(4) of the Act qualifies this entitlement by providing that the legal practitioner must, if required, "furnish to the Commission the name and address of the person to whom or by whom the communication was made".

Words and phrases – "confidential communication", "dominant purpose", "legal professional privilege", "privileged communication".

New South Wales Crime Commission Act 1985 (NSW), ss 3, 5, 6(1), 13(1), 13(8), 18(2), 18B(1), 18B(4).

1 GLEESON CJ. This appeal was said to raise two issues concerning the operation of s 18B of the *New South Wales Crime Commission Act* 1985 (NSW) ("the Act"). The facts, and the relevant legislation, appear from the reasons of Hayne and Crennan JJ. The first issue is whether a requirement that the appellant answer a certain question was one with which the appellant could refuse to comply on the ground that the answer would disclose a privileged communication passing between the appellant, a legal practitioner, in his capacity as a legal practitioner, and X, a client. The second issue is whether, even if the first issue were otherwise resolved in favour of the appellant, the appellant's claim to be entitled to refuse must fail because of the concluding words, or proviso, in s 18B(4).

2 Grove J resolved both issues adversely to the appellant. In the Court of Appeal, Mason P, with whom Wood CJ at CL agreed, considered it unnecessary and undesirable to decide the first issue because of "factual uncertainties", but held that the second issue should be resolved against the appellant. I agree.

3 As Grove J pointed out in his reasons, assuming the existence of a solicitor-client relationship between the appellant and X, most of what X communicated to the appellant was for the express purpose of being passed on by the appellant to third parties (the police). To that extent, X's communications with the appellant were not privileged. They were not confidential, and they were not made for the dominant purpose of obtaining legal advice.

4 The Commission, some years later, for the purposes of a certain investigation, asked the appellant to identify X. The appellant claims that, in the special circumstances of this case, to answer that question would be to disclose a privileged communication. In the ordinary case, as the appellant accepts, "a retainer is not a confidential communication"[1]. As a general rule, a requirement that a lawyer disclose the identity of a client will not necessitate disclosure of a confidential communication. There are, however, exceptional circumstances in which there is such a connection between a confidential communication and a retainer that disclosure by a lawyer of the identity of a client will disclose that confidential communication. As Mason P indicated, the problem about deciding whether the present case falls within the general rule, or the exception, is that the evidence is insufficient for the purpose. From the limited material before the Court, it is difficult to identify a confidential communication, made for the dominant purpose of obtaining legal advice, that would be disclosed by the revelation of X's name and address.

5 It is unnecessary to pursue that matter because s 18B(4) of the Act qualifies a legal practitioner's entitlement to refuse to answer a question on the

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1 *United States v Pape* 144 F 2d 778 at 782 (1944).

ground that the answer would disclose a privileged communication by providing that the legal practitioner must, if required, "furnish to the Commission the name and address of the person to whom or by whom the communication was made". No doubt the practical effect of the concluding words of s 18B(4), in many cases, is that, by examining the client, and exercising powers of compulsion, the Commission may make irrelevant the privilege attaching to communications between client and lawyer[2]. In many cases, having learned the identity of the client, the Commission will be less interested in what the client told the lawyer than in what the client can (and must) tell the Commission. On any view, however, the direct and immediate purpose of the concluding words of s 18B(4) is to qualify the entitlement conferred or accepted by the preceding words.

6 Section 18(2) obliges a witness, unless that witness has reasonable excuse, or except as provided by ss 18A or 18B, to answer a question as required by a member presiding at a hearing. Section 18B(1) reinforces that requirement. In this appeal, we are not concerned with the question of reasonable excuse. Section 18B(4) provides that a legal practitioner may refuse to comply with a requirement to answer if the answer would disclose a privileged communication. That, however, is qualified immediately by an obligation, if required, to furnish the name and address of the person to or by whom the (privileged) communication was made. If the furnishing of the name and address would not disclose a privileged communication then there is in any event no entitlement to refuse. It is only in those cases where to furnish the name and address of a client would be to disclose a privileged communication that the proviso to s 18B(4) is relevant. The purpose of the proviso is to remove an entitlement to refuse to answer a question that would otherwise exist. It would defeat the purpose of the proviso to conclude, as the appellant contends, that it does not apply to a case where to furnish a name and address would be to disclose a privileged communication. To what other case might it apply?

7 In the present case, if (as is far from clear on the evidence) to furnish X's name and address would be to disclose a confidential communication made for the dominant purpose of obtaining legal advice, then the appellant is nevertheless required by the concluding words of s 18B(4) to furnish that information.

8 The appeal should be dismissed with costs.

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2 cf *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 324.

9 KIRBY AND CALLINAN JJ. The facts, the legislative provisions and the circumstances of this appeal are stated in the reasons of Hayne and Crennan JJ[3]. In the courts below the respondent was identified by the initial "N". However, during the hearing in this Court, the Solicitor-General for New South Wales agreed that the anonymity of the respondent was not required[4]. In our view it is not feasible or desirable. The Solicitor-General applied to substitute the name of the New South Wales Crime Commission ("the Commission") as the respondent party[5]. By consent[6], the name of the respondent should be so substituted.

10 Although the appellant invoked the privilege of his client, X, there was more than a hint of concern (understandably, in the circumstances disclosed by the evidence) that disclosure of X's name and address to the Commission might indirectly occasion violent retaliation against X, the appellant, or their respective families.

11 That possibility cannot be put entirely out of account in this appeal. It cannot be treated as a trivial or insubstantial concern. In our view, that potential risk sharpens the search for the resolution of the issues in the appeal in a way that does not needlessly confine the ambit of legal professional privilege or impose on the appellant a duty to breach any requirements of that privilege.

12 We are inclined to accept the appellant's argument that, in light of the peculiar circumstances of his retainer and its dominant purposes in this case, legal professional privilege attached to disclosure of his client's name and address[7]. In terms of principle, it appears to us to be a strongly arguable proposition. Some of the legal authority in the United States, mentioned by Hayne and Crennan JJ[8], lends support to that contention. Thus, as Butzner J

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3 Reasons of Hayne and Crennan JJ at [19]-[31].

4 [2006] HCATrans 653 at 1580-1600.

5 [2006] HCATrans 653 at 1600.

6 The parties filed a consent to the amendment of the Notice of Appeal on 23 November 2006.

7 See *Commissioner of Taxation v Coombes* (1999) 92 FCR 240 at 252 [31]; *Hamdan v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 211 ALR 642 at 645-646 [19] per Finn J. The issue was not considered on appeal; cf *Minister for Immigration and Multicultural and Indigenous Affairs v Hamdan* (2005) 143 FCR 398.

8 Reasons of Hayne and Crennan JJ at [43]. See also *United States v Pribble* 79 AFTR 2d (RIA) 1084 (1997).

stated in *National Labor Relations Board v Harvey*[9], "[t]he privilege may be recognized when … identification of the client amounts to disclosure of a confidential communication". For these reasons, in *In re Kaplan*[10], the Court of Appeals of New York upheld a claim for privilege where "the client's name … deserved and needed protection". Canadian authority referred to by the appellant also lends support to this conclusion. Thus, in *Lavallee, Rackel and Heintz v Canada (Attorney General)*[11], Veit J in the Alberta Court of Queen's Bench stated that whilst "some old authorities have held that there is no privilege in a client's identity … contemporary authorities recognize that, in some situations, it may be critically important". We are inclined to favour these conclusions. We are also inclined to agree that the appellant's client did not waive the privilege.

13 However, allowing this to be the case, s 18B(4) of the *New South Wales Crime Commission Act* 1985 (NSW) ("the Act") presents an insuperable obstacle to the maintenance of the privilege. That sub-section could not be clearer or more explicit. The legal practitioner "must, if so required … furnish to the Commission the name and address of the person to whom or by whom the communication was made".

14 Four features of this provision indicate that it is applicable even to circumstances such as the present. The first is the emphatic language in which the obligation of disclosure is stated ("must"). Secondly, that obligation is stated in a context that is otherwise designed to afford a measure of protection for legal professional privilege (s 18B(4))[12]. The closing words of s 18B(4) would be otiose if they did not operate to override any privilege attaching to the name and address of the person concerned. As the respondent argued, the proviso only has work to do in respect of names and addresses that are privileged. Indeed, in this respect, the Act appears to be written on the assumption that the client's privilege does extend to the disclosure of the client's name and address. Read in context, s 18B(4) contains a specific statutory abrogation of legal professional privilege applicable only to circumstances in which the disclosure of the client's name and address is required.

15 Thirdly, the sub-section interposes a requirement on the part of the member presiding at a hearing of the Commission which is addressed to the legal practitioner. By the postulate of the Act of Parliament, the member is a person of

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9 349 F 2d 900 at 905 (1965).

10 203 NYS 2d 836 at 838-839 (1960).

11 (1998) 160 DLR (4th) 508 at 525 [39].

12 See reasons of Hayne and Crennan JJ at [39]-[42].

high responsibility whose duties necessarily expose him or her to highly confidential and even secret and dangerous information concerning the subjects of the inquiries before the Commission. It must be presumed that the member will only make the requirement in a hearing of the Commission when satisfied that it is necessary to fulfil the objects of the Act – a decision that may be debated at the hearing and reviewed for error of law or jurisdiction, as has occurred in this case. It must also be postulated that the Commission would take proper precautions for the subsequent security of such information and for the observance of restrictions on those having access to such materials[13].

16 Fourthly, there is the consideration of the high public interest in the discharge by the Commission of its important public duties[14], including the investigation of criminal activities that have inferentially been judged to be insusceptible to adequate resolution by the ordinary processes employed by police and other official bodies[15].

17 In these circumstances, the language of s 18B(4) of the Act cannot, in our view, be read down. If, as it was put, that conclusion has the effect of "gobbling up" the legal professional privilege that the legislature has taken steps to protect, the answer is plain. The protection for the privilege is subject at least to this exception – that the name and address of the client must be provided to the Commission if so required. Disclosure pursuant to such a requirement absolves the legal practitioner of any legal responsibility for disclosing that part of the client's privilege. However, it does not prevent the Commission from fulfilling the important and exceptional functions entrusted to it, in the public interest, by the New South Wales legislature.

18 It is on this basis, of mandatory disclosure as required by s 18B(4) of the Act, that we would uphold the orders of the Court of Appeal. For these reasons, and not for a want of a relevant privilege, the appeal should be dismissed with costs.

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13 See, for example, s 13(9) of the Act.

14 cf *Grant v Downs* (1976) 135 CLR 674 at 685.

15 According to the Act's objects, those criminal activities are drug trafficking and organised crime: the Act, s 3A.

19 HAYNE AND CRENNAN JJ. The New South Wales Crime Commission ("the Commission") was constituted as a corporation by s 5 of the *New South Wales Crime Commission Act* 1985 (NSW) ("the Act"). The Commission's principal functions[16] included investigating matters relating to a "relevant criminal activity" referred to the Commission by the New South Wales Crime Commission Management Committee, a body constituted by the Act[17]. "[R]elevant criminal activity" was defined[18] as "any circumstances implying, or any allegations, that a relevant offence may have been, or may be being, or may be about to be, committed". A "relevant offence" included certain offences for which the Management Committee was satisfied that "the investigation of the offence by the Commission [was] in the public interest" and that "the use of the Commission's functions may be necessary to fully investigate the offence"[19].

20 The Commission was empowered to hold hearings[20] and take evidence[21]. Subject to some exceptions, a person appearing as a witness at a hearing before the Commission was obliged[22] not to refuse or fail to answer a question that the person was required to answer by the member of the Commission presiding at the hearing. It is one of the exceptions to that obligation to answer questions which is at the centre of the present appeal.

21 The exception in issue relates to legal professional privilege. Was the appellant, a solicitor, bound to answer questions at a Commission hearing asking for the name of the appellant's client, and the means by which the client could be contacted?

22 These reasons will show that the appellant was bound to answer the questions he was asked and thus disclose the name of his client and the means by which the client could be contacted. Neither the communication of the client's name to the solicitor, nor the communication of the client's contact details, was a privileged communication. To explain why that was so, it is necessary to begin

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16 s 6(1).

17 s 24.

18 s 3.

19 s 3.

20 s 13(1).

21 s 13(8).

22 s 18(2).

with the applicable statutory provisions and then say something about the facts and the history of the present proceedings.

The Act

23 Two provisions of the Act are of immediate importance: s 18(2), which prescribed the obligations of a person appearing as a witness to answer questions, and s 18B(1) and (4), which made provision for when a witness appearing before the Commission was excused from answering a question.

24 Section 18(2) provided:

> "A person appearing as a witness at a hearing before the Commission shall not, without reasonable excuse or except as provided by section 18A or 18B:
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> (a) when required pursuant to section 16 either to take an oath or make an affirmation—refuse or fail to comply with the requirement,
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> (b) refuse or fail to answer a question that the person is required to answer by the member presiding at the hearing, or
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> (c) refuse or fail to produce a document or thing that the person was required to produce by a summons under this Act served as prescribed."

Section 18B provided:

> "(1) A witness summoned to attend or appearing before the Commission at a hearing is not (except as provided by section 18A) excused from answering any question or producing any document or thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.
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> ...
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> (4) If:
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> (a) a legal practitioner or other person is required to answer a question or produce a document or thing at a hearing before the Commission, and
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> (b) the answer to the question would disclose, or the document or thing contains, a privileged communication passing

> between a legal practitioner (in his or her capacity as a legal practitioner) and a person,
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> the legal practitioner or other person is entitled to refuse to comply with the requirement, unless the privilege is waived by a person having authority to do so. However, the legal practitioner must, if so required by the member presiding at the hearing, furnish to the Commission the name and address of the person to whom or by whom the communication was made.
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> ..."

The facts

25 In September 2003, the appellant was summonsed to attend the Commission and give evidence in relation to an investigation the Commission was conducting into an attempted murder. It is convenient to refer to the victim of that attempted murder as M. The appellant was asked by the Commission to disclose the name and address of a person, referred to in the present proceedings as X. X had twice given the appellant certain information about M and on each occasion the appellant had passed on that information to police. The attack on M was made in 2002, some years after X had consulted the appellant, and the appellant had passed on the information provided. When asked, in a hearing conducted by a member of the Commission, who it was who had provided the information he had passed on to police, and where that person could be contacted, the appellant declined to answer, on the ground that the communications conveying that information to the appellant were the subject of legal professional privilege. The member of the Commission who was conducting the hearing ruled that the communications were not privileged and directed the appellant to answer the questions. The appellant refused to do so and made application to the Supreme Court of New South Wales, under s 19(2) of the Act, for an order of review in respect of the decisions to direct him to answer the questions.

26 In support of the application for an order of review, the appellant filed and swore an affidavit giving evidence about his dealings with X. The description of those dealings was very spare.

27 In 1998, the appellant was practising as a solicitor, "mostly in the area of criminal law". In about October 1998, he was approached by X who said that he, X, had found out from a mutual friend that the appellant was a lawyer. X made an appointment to see the appellant. In his affidavit the appellant said that to the best of his recollection, he had seen X "once or twice around this time at functions organised by the mutual friend" and that X "was an acquaintance rather than a friend".

28 When X kept the appointment he had made with the appellant, X told the appellant that he "had witnessed certain things of concern" relating to M. X asked the appellant "for [his] legal advice on the issue of passing on certain information to the police in relation to" M. The appellant's affidavit continued:

> "[X] communicated information to me on this same issue so that I could give [X] legal advice. In the course of those same conversations with [X] I communicated to [X] the options available to [X], their legal consequences (if any) and legal advice as to the information [X] supplied to me for the purposes of passing that information on to police".

X then "authorised and instructed" the appellant to telephone the police and tell the police the information X had given the appellant. X instructed the appellant that he "was not to disclose [X's] identity or to provide any information which" in the appellant's opinion "and with [the appellant's] knowledge of the law and of the operations of the police, could lead the police to obtaining [X's] identity".

The proceedings below

29 The appellant's application to the Supreme Court for an order of review raised a number of issues. It is necessary to deal now with only one: the appellant's claim that the Commission's conclusions about legal professional privilege were wrong.

30 At first instance, Grove J held that the communication by X to the appellant of X's name, and the means by which to contact him, was not a privileged communication. Rather, Grove J characterised the communications between X and the appellant as "not communication by X for the purpose of advice, but communication by X to the [appellant] for the purpose of the [appellant] passing the content of the communication to the police". That is, "the very purpose of communication was publication of what X communicated to the [appellant] to law enforcement authority". The request for, or condition of, anonymity sought by X did not, and in the opinion of Grove J could not, "extend the area of privilege available to him". Other issues raised by the appellant's application for an order of review were resolved against the appellant and the application was dismissed.

31 The appellant appealed to the Court of Appeal against those orders. That Court concluded that no appeal lay as of right[23], but treated the proceedings that had been instituted as an application for leave to appeal, and heard full argument

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23 *Z v N* [2004] NSWCA 445.

on the substantive issues. The Court directed particular attention to the concluding words of s 18B(4): "However, the legal practitioner must, if so required ... furnish to the Commission the name and address of the person ... by whom the communication was made." The Court of Appeal held that even if the communication of X's name and contact details to the appellant would otherwise be subject to legal professional privilege, the concluding words of s 18B(4) gave the Commission power to require the disclosure of the client's name and address. Leave to appeal was refused. The appeal that had been instituted was dismissed. By special leave the appellant now appeals to this Court.

The appellant's argument

32 The appellant accepted that the communication to a lawyer of the client's name and address is not, without more, privileged. The appellant also accepted that the client's name does not become privileged merely because the client instructs the lawyer not to disclose it. But the appellant contended that, in this case, the privileged communications passing between the appellant and X were to be identified as communicating not only some information about M, that was conveyed to the appellant for the dominant purpose[24] of obtaining legal advice, but also the client's name and means of contact. The appellant submitted that the relevant privileged communications were to be understood as having conveyed three matters to the appellant: (a) X's name and contact details; (b) certain information about M which X wished to have given to police; and (c) the fact that X knew the information about M from personal observation. All three of these matters were said to have been conveyed to the appellant for the dominant purpose of obtaining legal advice.

33 It will be recalled that the evidence of what was said by X to the appellant, in the course of the meeting appointed for X to seek legal advice from the appellant, was exiguous. The appellant's submissions about how those communications should be understood assigned a particular content or effect to them. In particular, the appellant's submissions turned, at least in part, upon connecting X's disclosure to the appellant of name and contact details with the subject on which legal advice was sought. The subject on which legal advice was sought was how to pass certain information to police anonymously. The appellant sought to connect the disclosure of X's name and contact details with that subject by the third of the elements described earlier: that X knew the information that was to be passed on to police from personal observation.

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24 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

34 In order to consider these arguments it is necessary to examine why a client's communication to a lawyer of the client's name and address is not ordinarily privileged.

Privilege in the client's name and address?

35 Legal professional privilege is, of course, the client's privilege. It is not the lawyer's privilege. It attaches to confidential communications between a lawyer and client made for the dominant purpose of seeking and obtaining legal advice. (Other aspects of the privilege that arise, for example, in connection with actual or anticipated litigation may be left aside from consideration.) The relevant "communications" include, but may not always be confined to, verbal communications between lawyer and client[25]. But recognising the possibility that some non-verbal communications may attract legal professional privilege, it remains right to say that the privilege does not attach to facts which the lawyer observes while acting in the course of the retainer[26].

36 This distinction between facts and communications is not directly engaged, however, in considering why the client's name and address are ordinarily not privileged. Rather, it is consideration of the purpose of the communication of this information that is important. In most cases the communication of those details is not for the purpose of seeking or giving legal advice. As Lord Esher MR said in *Bursill v Tanner*[27], "The client does not consult the solicitor with a view to obtaining his professional advice as to whether he shall be his solicitor or not."

37 What was said to set the present case apart is that the very subject of the legal advice that was sought and given concerned the preservation of the anonymity of the client as the source of the information ultimately given to police. And because the client, X, claimed to have personal knowledge of the information, it was said that, as noted earlier, X's communication of name and contact details was so bound up with the information he communicated to the appellant that the communication to the appellant of X's name and contact details also had the necessary dominant purpose.

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25 Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed (1940), vol 8, §2306.

26 *Brown v Foster* (1857) 1 H & N 736 [156 ER 1397].

27 (1885) 16 QBD 1 at 4.

38 The evidence led in the Supreme Court, about the communications passing between X and the appellant, did no more than describe the substance of the information that was conveyed by those communications. No attempt was made in that evidence to reproduce what had been said, or to give any detail about how the information was conveyed. And because the evidence took this form, it is far from clear that it provided a sufficient foundation for characterising the effect of the communications that did pass between X and the appellant in the way the appellant submitted they should be understood. It is not necessary, however, to decide whether that is so. Even if the relevant communications were to be understood in the way the appellant contended they should, X's communication to the appellant of name and contact details was not shown to be for the dominant purpose of X seeking legal advice.

39 Section 18B(4) of the Act could be engaged only if "the answer to the question [the appellant was required to answer] would disclose ... a privileged communication passing between [the appellant] (in his ... capacity as a legal practitioner)" and X. The particular questions put to the appellant in the Commission were expressed in various ways. He was asked who was the source of the information he passed to police, and who was with him when he called police, before the Commission directed him to disclose his client's name and contact details. But nothing was said to turn on the differences between the various questions that were put to the appellant. The questions were treated, in the Commission, and in the proceedings both in this Court and the courts below, as questions asking the appellant to name his client and to reveal how the client could be contacted. Would the answers to *those* questions disclose a privileged communication?

40 As noted earlier, the appellant's argument depended upon linking the three pieces of information that had been conveyed by X to the appellant (X's name and contact details; the information about M which X wished to have given to police; and the fact that X knew the information about M from personal observation). And it may readily be accepted that those three pieces of information were conveyed to the appellant in the course of and in connection with seeking and obtaining legal advice from the appellant. In that sense, each piece of information was linked to each other piece. But analysing the matter by reference to the separate subject-matters of several communications, coupled with an overall attribution of purpose to the meeting within which the communications occurred and the information was conveyed, obscures the need to consider each communication separately, and to ask what was the purpose of *that* communication. It is the particular communication that is privileged and the privilege attaches only if the dominant purpose of the communication was giving or receiving legal advice. That is why a client's communication of name and address, even if made in a meeting the evident purpose of which is the seeking and obtaining of legal advice, is ordinarily not privileged. *That* communication does not have the requisite purpose.

41 The appellant contended that the answers to the questions asked of him would disclose a privileged communication because the answers would disclose who it was who had personal knowledge of the matters communicated to police, and that who had this personal knowledge had been communicated in confidence to the appellant. But even if X's initial communication to the appellant, of the information X had to impart, was made in confidence, and was made for the dominant purpose of obtaining legal advice, the appellant's subsequent passing on of that information to police (in accordance with X's instructions) ended the privilege that X once may have had against compelled disclosure of that particular communication. And to require the appellant to answer who was his client would require disclosure of only the particular communication by which *that* information was imparted. It would not directly or indirectly reveal *any* communication that X had made to the appellant for the dominant purpose of obtaining legal advice and which remained confidential. That is, the appellant's assertion that the name and contact details were privileged depended, in the end, upon the propositions first, that to reveal X's identity would reveal that X claimed personal knowledge of matters relating to M, and second, that X's claim of knowledge had been communicated in confidence. But once the fact of the claim to know matters relating to M (as distinct from the identity of who made that claim) was revealed to police, the appellant's argument for privilege in respect of X's name and contact details became circular.

42 To require the appellant to answer the questions asked of him would not directly reveal anything of what had passed between client and lawyer (other than X's giving the appellant X's name and contact details). It would not indirectly reveal anything about what was the subject or content of the requested advice beyond what had already been disclosed to police. Requiring the appellant to answer the questions would not disclose a privileged communication passing between the appellant and X. Section 18B(4) was therefore not engaged.

United States decisions

43 In the course of argument, reference was made to a number of federal and State decisions of courts of the United States of America. The appellant placed particular emphasis on the decisions of the Court of Appeals of New York in *In re Kaplan*[28] and the United States Court of Appeals, 9th Circuit, in *Baird v*

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28 203 NYS 2d 836 (1960).

Koerner[29], *In re Horn*[30] and *Ralls v United States*[31]. Those decisions were said to demonstrate circumstances in which disclosure of the identity of a lawyer's client was subject to legal professional privilege because to disclose the identity of the lawyer's client would reveal either a confidential communication or the client's motive for seeking legal advice. As explained earlier in these reasons, disclosure of the identity of the appellant's client would not, in the circumstances of this case, reveal any confidential communication made for the dominant purpose of seeking or obtaining legal advice; nor would it disclose the client's motive for seeking legal advice. It is, therefore, not necessary to consider whether the decisions in those cases represented some development of, or departure from, principles earlier stated by Judge Clark (with whose opinion, on this point, Judge Learned Hand and Judge Swan agreed) in the decision of the Court of Appeals, 2nd Circuit, in *United States v Pape*[32] or the generally similar principles stated by Shientag J of the Supreme Court of New York in *People ex rel Vogelstein v Warden of County Jail of New York County*[33]. Nor is it necessary to consider whether the principle for which the appellant contended the later American cases stand is, or should be adopted as, part of the common law of Australia.

Limits to compulsory disclosure under s 18B(4)?

44 Nor is it necessary to consider in this Court the application to this case of the last sentence of s 18B(4) – "However, the legal practitioner must, if so required ... furnish to the Commission the name and address of the person ... by whom the communication was made". The appellant contended that if communication of the name and address of a client was privileged it would be incongruous to read s 18B(4) as requiring the disclosure of that privileged information. It is by no means evident that there is any textual foundation for the appellant's contention that the last sentence of s 18B(4) could and should be given the confined operation that would be required to exclude that provision's engagement in the present matter. It is not necessary, however, to decide that question.

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29 279 F 2d 623 (1960).

30 976 F 2d 1314 (1992).

31 52 F 3d 223 (1995).

32 144 F 2d 778 (1944).

33 270 NYS 362 (1934); affd 271 NYS 1059 (1934).

Conclusion and orders

45 The orders made by the Court of Appeal should be upheld on the footing described in these reasons. The appeal to this Court should be dismissed with costs.

Hayne J
Crennan J