HIGH COURT OF AUSTRALIA

KIEFEL CJ,
BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ

GLENCORE INTERNATIONAL AG & ORS PLAINTIFFS

AND

COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA & ORS DEFENDANTS

Glencore International AG v Commissioner of Taxation
[2019] HCA 26
14 August 2019
S256/2018

ORDER

1. The demurrer be upheld.

2. The proceeding be dismissed with costs.

Representation

I M Jackman SC with T L Phillips for the plaintiffs (instructed by King & Wood Mallesons)

S P Donaghue QC, Solicitor-General of the Commonwealth, with M J O'Meara for the defendants (instructed by Australian Government Solicitor)

CATCHWORDS

Glencore International AG v Commissioner of Taxation

Privilege – Legal professional privilege – Where documents identified by plaintiffs as having been created by law practice for sole or dominant purpose of provision of legal advice to plaintiffs – Where privileged documents stolen from electronic file management system of law practice and disseminated – Where documents obtained by defendants – Where defendants refused to return documents to plaintiffs and provide undertaking not to refer to or rely upon documents – Where plaintiffs sought injunctive relief in equity's auxiliary jurisdiction solely on basis of legal professional privilege – Where plaintiffs did not seek injunctive relief on basis of confidentiality or other area of law – Where defendants demurred on basis that no cause of action disclosed – Whether legal professional privilege operates only as immunity or is also actionable legal right – Whether policy considerations justify creation of new actionable right in respect of documents subject to legal professional privilege.

Words and phrases – "actionable legal right", "basis for relief", "breach of confidence", "cause of action", "common law right", "confidentiality", "development of the law", "immunity", "injunction", "legal professional privilege", "policy of the law", "public interest", "remedy".

1 KIEFEL CJ, BELL, GAGELER, KEANE, NETTLE, GORDON AND EDELMAN JJ. The plaintiffs are companies within the global Glencore plc group ("the Glencore group"). In these proceedings, brought in the original jurisdiction of this Court, they seek an injunction restraining the defendants – the Commissioner, the Second Commissioner and the Deputy Commissioner of Taxation – and any other officer of the Australian Taxation Office from making any use of documents described as "the Glencore documents" or any information contained in or which may be derived from those documents. The plaintiffs also seek an order for the delivery up of the Glencore documents.

2 In the plaintiffs' amended statement of claim the Glencore documents are identified as documents which were created for the sole or dominant purpose of the provision by Appleby (Bermuda) Limited ("Appleby"), an incorporated law practice in Bermuda, of legal advice to the plaintiffs with respect to the corporate restructure of Australian entities within the Glencore group. The Managing Partner of Appleby says that the Glencore documents are amongst documents colloquially described as the "Paradise Papers" which were stolen from Appleby's electronic file management systems and provided to the International Consortium of Investigative Journalists. It may be assumed that the documents have been further disseminated. The existence and content of the Paradise Papers has received global media coverage.

3 The plaintiffs say that the defendants have obtained copies of the Paradise Papers. The plaintiffs have asserted that the Glencore documents are subject to legal professional privilege and have asked the defendants to return them and to provide an undertaking that they will not be referred to or relied upon. The defendants have not acceded to those requests.

4 The defendants demur to the plaintiffs' amended statement of claim. The principal ground for the demurrer is that no cause of action is disclosed by which the plaintiffs are entitled to the relief sought. Alternatively, the defendants contend that they are entitled and obliged to retain and use the documents in question by reason of and for the purposes of s 166 of the *Income Tax Assessment Act 1936* (Cth) ("the ITAA"). That section relevantly provides that the Commissioner must make an assessment of a taxpayer's taxable income from the taxpayer's returns "and from any other information in the Commissioner's possession".

5 There is no issue about the Glencore documents being the subject of legal professional privilege. Decisions of this Court hold that documents which are

subject to legal professional privilege are exempt from production by court process or statutory compulsion[1]. A declaration to this effect would not assist the plaintiffs. The Glencore documents are in the possession of the defendants and may be used in connection with the exercise of their statutory powers unless the plaintiffs are able to identify a juridical basis on which the Court can restrain that use.

6 It is well known that equity will restrain an apprehended breach of confidential information and will do so with respect to documents which are the subject of legal professional privilege and which are confidential[2]. Equity will restrain third parties if their conscience is relevantly affected[3].

7 There may be difficulties for the plaintiffs in meeting the requirements for such relief, given that the Glencore documents are in the public domain and there being no allegation concerning the defendants' conduct or knowledge. The defendants point to s 166 of the ITAA as a bar to relief in this respect. It is not necessary to give this question further consideration. The plaintiffs do not seek an injunction on the ground of confidentiality. They do not seek to expand any area of the law such as any tort of unjustified invasion of privacy[4]. They claim that legal professional privilege is itself sufficient for the grant of the injunction sought.

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1 *Grant v Downs* (1976) 135 CLR 674; [1976] HCA 63; *Baker v Campbell* (1983) 153 CLR 52; [1983] HCA 39; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; [1986] HCA 80; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; [1995] HCA 33; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; [1997] HCA 3; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543; [2002] HCA 49.

2 *Lord Ashburton v Pape* [1913] 2 Ch 469.

3 *Johns v Australian Securities Commission* (1993) 178 CLR 408; [1993] HCA 56; *Lord Ashburton v Pape* [1913] 2 Ch 469.

4 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199; [2001] HCA 63.

The plaintiffs' case

8 The plaintiffs take as their starting point that legal professional privilege has been recognised by decisions of this Court as a fundamental common law right[5]. They seek an injunction in equity's auxiliary jurisdiction and accept that this requires that they have an actionable legal right.

9 In *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*[6], legal professional privilege was described as "an important common law immunity". This description may be thought to detract somewhat from the plaintiffs' claim to a legal right which entitles them to an injunction. But the plaintiffs contend that those words were expressed tentatively and are explicable by reference to the facts of that case. They contend that *Daniels Corporation* is not to be understood as confining the scope of the privilege, and that no decision of this Court has held that the privilege operates only as an immunity.

10 The plaintiffs submit that the scope of the privilege should reflect the policy of the law upon which it is based. The rationale for legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client. It should be understood to have its basis in the rule of law[7]. The recognition of an actionable right to restrain the use of and recover privileged documents advances this policy, the plaintiffs contend.

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5 *Baker v Campbell* (1983) 153 CLR 52; *Goldberg v Ng* (1995) 185 CLR 83; [1995] HCA 39; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543.

6 (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; see also at 552-553 [9]-[10] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 563 [44] per McHugh J ("*Daniels Corporation*").

7 *Three Rivers District Council v Governor and Company of the Bank of England [No 6]* [2005] 1 AC 610 at 649-650 [34] per Lord Scott of Foscote, referring to Zuckerman, *Civil Procedure* (2003) at [15.8]-[15.10].

11 The plaintiffs contend that the provision of a remedy may also be seen as necessary because it is unsound for the privilege to be recognised as a fundamental right but for confidentiality to provide the only basis for its enforcement. If *Lord Ashburton v Pape*[8] is to be understood to hold that an injunction will be granted on the basis that documents are confidential rather than privileged, there is a gap in the law. The plaintiffs submit that decisions of courts in other common law jurisdictions have recognised the existence of general law rights which may support an injunction[9]. They reinforce the recognition by the law of the importance of protecting privileged communications obtained by impropriety.

The demurrer must be upheld

12 The plaintiffs' argument cannot be accepted. Fundamentally it rests upon an incorrect premise, namely that legal professional privilege is a legal right which is capable of being enforced, which is to say that it may found a cause of action[10]. The privilege is only an immunity from the exercise of powers which would otherwise compel the disclosure of privileged communications, as *Daniels Corporation* holds.

13 It is not sufficient to warrant a new remedy to say that the public interest which supports the privilege is furthered because communications between client and lawyer will be perceived to be even more secure. The development of the law can only proceed from settled principles and be conformable with them[11]. The plaintiffs' case seeks to do more than that. It seeks to transform the nature of the privilege from an immunity into an ill-defined cause of action which may be brought against anyone with respect to documents which may be in the public domain.

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8 [1913] 2 Ch 469.

9 *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327; *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94.

10 Heydon, Leeming and Turner, *Meagher, Gummow & Lehane's Equity: Doctrines & Remedies*, 5th ed (2015) at [21-025]-[21-035].

11 *Breen v Williams* (1996) 186 CLR 71 at 99 per Dawson and Toohey JJ; [1996] HCA 57.

14 The demurrer should be upheld on the first ground. There is no need to consider the alternative ground concerning s 166 of the ITAA.

The historical operation of the privilege

15 Holdsworth[12] regarded the privilege as belonging to the same order of ideas as the privilege to refuse to answer questions the answer to which could expose a witness to injury. The view of Holdsworth and of Wigmore[13] that legal professional privilege arose as a response to the *Statute of Elizabeth 1562-1563*[14] appears now to be contested[15]. It is suggested that it may have arisen gradually as part of the larger body of law relating to testimonial compulsion[16]. Whatever its exact origin, there does not seem to be any dispute that it was a response to the exercise of powers by the State to compel disclosure of confidential communications between lawyer and client[17].

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12 Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 202.

13 Brereton, "Legal Professional Privilege", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law* (2013), vol 2, 127 at 130, referring to Wigmore, *Evidence in Trials at Common Law*, McNaughton rev (1961), vol 8, §2290 and Holdsworth, *A History of English Law*, 3rd ed (1944), vol 9 at 201. See also *Baker v Campbell* (1983) 153 CLR 52 at 60 per Gibbs CJ, 93-94 per Wilson J, 113-114 per Deane J, 126-127 per Dawson J.

14 5 Eliz c 9.

15 Auburn, *Legal Professional Privilege: Law and Theory* (2000) at 2-8; Brereton, "Legal Professional Privilege", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law* (2013), vol 2, 127 at 130.

16 Auburn, *Legal Professional Privilege: Law and Theory* (2000) at 7-8.

17 Brereton, "Legal Professional Privilege", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law* (2013), vol 2, 127 at 128-129; see also Auburn, *Legal Professional Privilege: Law and Theory* (2000) at 7.

16 The description of the doctrine as a privilege did not emerge until some hundreds of years after cases concerning it were first decided[18]. Nevertheless, the nature of the privilege could generally be deduced from its operation. It permitted a witness not to answer questions in court; it provided a lawyer or client with an excuse not to comply with court processes and protected them from liability for contempt[19]. The privilege was granted by the law to render a person immune from powers of compulsion. When it applied, laws or rules which contained such powers might not be effective. That is to say, the client or lawyer was immunised from such powers.

17 In Australia, in the late twentieth century, questions of legal professional privilege commonly arose in the course of litigation and its boundaries were redefined, as they had been over preceding centuries. In *Grant v Downs*[20], the conditions upon which objection could be taken to the production of documents brought into existence for the purpose of advice or litigation were stated, although they were subsequently modified[21]. *Attorney-General (NT) v Maurice*[22] also concerned the privilege from production of documents in the course of discovery. In *Carter v Northmore Hale Davy & Leake*[23] it was held that persons

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18 Brereton, "Legal Professional Privilege", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law* (2013), vol 2, 127 at 132; and see *Bulstrod v Letchmere* (1676) 2 Freeman 5 [22 ER 1019], referred to in Brereton, "Legal Professional Privilege", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law* (2013), vol 2, 127 at 133; and *Wilson v Rastall* (1792) 4 TR 753 [100 ER 1283], referred to in *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487 at 504 per Lord Taylor of Gosforth.

19 Brereton, "Legal Professional Privilege", in Gleeson, Watson and Peden (eds), *Historical Foundations of Australian Law* (2013), vol 2, 127 at 133.

20 (1976) 135 CLR 674 at 687-688 per Stephen, Mason and Murphy JJ; see also *Goldberg v Ng* (1995) 185 CLR 83.

21 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 71-73 [56]-[61] per Gleeson CJ, Gaudron and Gummow JJ, 107 [173] per Callinan J; [1999] HCA 67.

22 (1986) 161 CLR 475.

23 (1995) 183 CLR 121.

and entities to whom a subpoena had been directed to produce documents said to be relevant to an accused's defence could not be compelled to produce those documents because they were subject to the privilege.

18 At the same time there was a proliferation of statutes containing compulsive powers with respect to information. In *Baker v Campbell*[24] and in *Commissioner of Australian Federal Police v Propend Finance Pty Ltd*[25] the privilege was extended beyond curial processes to search warrants authorised by statute. And in *Daniels Corporation*[26] it was declared that a provision of the *Trade Practices Act 1974* (Cth) which gave power to require the production of documents did not abrogate legal professional privilege.

The privilege and admissibility

19 The cases do not suggest as possible any further relief beyond that which ensured that privileged documents need not be produced. Nor do they suggest that effect was being given to an enforceable legal right. Where documents were withheld from disclosure no question of restraining persons from accessing them could arise. If they had come into the possession of another person in circumstances which raised an equity, an injunction could be granted in order to protect their confidential nature[27].

20 It is true that at the time *Calcraft v Guest*[28] was decided the law did not concern itself with the source of a document when it was tendered in evidence[29]

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24 (1983) 153 CLR 52.

25 (1997) 188 CLR 501.

26 (2002) 213 CLR 543.

27 *Lord Ashburton v Pape* [1913] 2 Ch 469.

28 [1898] 1 QB 759.

29 *Goddard v Nationwide Building Society* [1987] QB 670; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 566 per Gummow J, referring to Zuckerman, "Legal Professional Privilege and the Ascertainment of Truth" (1990) 53 *Modern Law Review* 381 at 383.

and it permitted that course even when a document was privileged. As the parties point out, that decision pre-dates decisions of this Court[30] and provisions of the *Evidence Act 1995* (Cth)[31] which deal with questions of admissibility, including in circumstances where documents are obtained by improper means. In any event the plaintiffs' case does not depend on questions of admissibility. It is therefore unnecessary to further consider that case or whether it can properly be reconciled with *Lord Ashburton v Pape*.

An immunity

21 Legal professional privilege has been described as a right which is fundamental to persons and to our legal system[32]. It has also been described as "a practical guarantee of fundamental, constitutional or human rights"[33]. Such descriptions point up the importance of the privilege. They serve to show that it is not merely an aspect of curial procedure or a mere rule of evidence but a substantive right founded upon a matter of public interest[34]. The same distinction has been drawn in New Zealand[35] and the United Kingdom[36].

22 What cannot be discerned from these cases is that the "right" spoken of in connection with the privilege is an actionable right. If one asks what this "right"

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30 *Bunning v Cross* (1978) 141 CLR 54; [1978] HCA 22.

31 Sections 118, 119, 138.

32 See *Baker v Campbell* (1983) 153 CLR 52 at 64 per Gibbs CJ, 106 per Brennan J, 113 per Deane J, 122 per Dawson J.

33 *A M & S Europe Ltd v Commission of the European Communities* [1983] QB 878 at 941, referred to in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J.

34 *Baker v Campbell* (1983) 153 CLR 52.

35 *Commissioner of Inland Revenue v West-Walker* [1954] NZLR 191 at 206-207 per Fair J.

36 *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 612 [31] per Lord Hoffmann.

gives to a person, the answer could be stated as "a right to resist the compulsory disclosure of information" or "the right to decline to disclose or to allow to be disclosed the confidential communication or document in question", as the Privy Council[37] and the House of Lords[38] respectively have held. So understood it is a freedom from the exercise of legal power or control, which is to say an immunity[39], and that is what *Daniels Corporation* held its true character to be.

23 In *Daniels Corporation*[40] Gleeson CJ, Gaudron, Gummow and Hayne JJ, having observed that it is now settled that legal professional privilege is a rule of substantive law and not merely a rule of evidence, made the statement referred to earlier in these reasons that:

> "It is an important common law right or, perhaps more accurately, an important common law immunity."

24 McHugh J[41] likewise described it as "a person's immunity from compulsion to produce documents that evidence confidential communications about legal matters" between lawyers and clients.

25 Contrary to the plaintiffs' submissions, there is nothing tentative in their Honours' characterisation of the privilege as an immunity provided by the common law. In the manner stated it is a considered correction of a possible misunderstanding arising from the description of it as a common law right. There can be little doubt that the joint judgment was drawing a clear distinction, for the context of the statement was the application of the principle of legality to the construction of statutes which may have the effect of abrogating "important

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37 *B v Auckland District Law Society* [2003] 2 AC 736 at 761 [67].

38 *Three Rivers District Council v Governor and Company of the Bank of England [No 6]* [2005] 1 AC 610 at 646 [26] per Lord Scott of Foscote.

39 Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16; Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1917) 26 *Yale Law Journal* 710.

40 (2002) 213 CLR 543 at 552-553 [9]-[11].

41 *Daniels Corporation* (2002) 213 CLR 543 at 563 [44].

common law rights, privileges and immunities"[42]. Their Honours' characterisation of the privilege as an immunity is consistent with its history.

26 The statements in *Daniels Corporation* accord with what Gummow J had said in *Propend*[43]. His Honour described legal professional privilege as "a bar to compulsory process for the obtaining of evidence". In his Honour's view, the privilege is "not to be characterised as a rule of law conferring individual rights, breach of which gives rise to an action on the case for damages, or an apprehended or continued breach of which may be restrained by injunction". And they accord with the view expressed by Brennan J in *Carter*[44], that the justification for the privilege is not to be found in the enforcement of some private right, but rather in the public interest.

The policy of the privilege – the public interest

27 The rationale for the rule was stated in *Grant v Downs*[45]. It is that the rule promotes the public interest because it "assists and enhances the administration of justice by facilitating the representation of clients by legal advisers". By keeping secret their communications, the client is encouraged to retain a lawyer and to make full and frank disclosure of all relevant circumstances to the lawyer. This would appear to accord with the explanation given by Blackstone[46] and, later, in the nineteenth century[47]. A similar rationale for the privilege has been

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42 *Daniels Corporation* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

43 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 565, 566.

44 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 127.

45 (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ; see also *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 per Mason and Brennan JJ.

46 Blackstone, *Commentaries on the Laws of England* (1768), bk 3 at 370.

47 See *R v Derby Magistrates' Court; Ex parte B* [1996] AC 487 at 505 per Lord Taylor of Gosforth.

accepted by the Privy Council[48] and the House of Lords[49] where the descriptor "the rule of law rationale" was accepted.

28 Common law courts are not alone in their concern to protect the confidentiality of lawyer-client communications. In *A M & S Europe Ltd v Commission of the European Communities*[50], the European Court of Justice noted a submission that the protection of legal confidence is a characteristic function of democratic systems and observed that all member states afford some protection to confidential relations between lawyer and client. But of course the manner and extent of that protection may differ.

29 It was recognised in *Grant v Downs* that there was another, more general, public interest which legal professional privilege did not promote. That public interest lies in the fair conduct of litigation, which requires that all relevant documentary evidence be available. But the public interest which supports the privilege is paramount to the more general public interest[51]. In the provision of the privilege the law has struck the balance between two competing public interests[52]. Consequently, once the privilege is found to exist, no more is

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48 *B v Auckland District Law Society* [2003] 2 AC 736 at 754 [37].

49 *Three Rivers District Council v Governor and Company of the Bank of England [No 6]* [2005] 1 AC 610 at 649-650 [34] per Lord Scott of Foscote.

50 [1983] QB 878 at 941, 949-950.

51 *Grant v Downs* (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.

52 *Waterford v The Commonwealth* (1987) 163 CLR 54 at 64-65 per Mason and Wilson JJ; [1987] HCA 25; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 126-127 per Brennan J, 161 per McHugh J; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 563-564 per Gummow J; see also *R (Morgan Grenfell & Co Ltd) v Special Commissioner of Income Tax* [2003] 1 AC 563 at 615 [43] per Lord Hobhouse of Woodborough; *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at 273 [93] per Lawrence Collins J; *Three Rivers District Council v Governor and Company of the Bank of England [No 6]* [2005] 1 AC 610 at 646 [25] per Lord Scott of Foscote; *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at 114 [62].

required for effect to be given to it. In that sense it may be described as absolute[53].

30 The paramountcy afforded to the public interest which the privilege supports can have serious consequences. By way of example, an accused person can be denied access to documents which might assist his or her defence[54]. Because of the significance of the effect of the privilege on the conduct of litigation, and the other considerations identified in *Grant v Downs*[55], it was there said that the privilege "should be confined within strict limits". That note of caution was to be repeated in subsequent cases[56].

Other relief?

31 In striking the balance between the two competing public interests, the law was not concerned to further a client's personal interest in preventing the use which might be made by others of the client's communications if they obtained them. In providing an immunity, the law's purpose was to enhance the administration of justice. And in settling the conditions which must be present for the privilege to operate, it defined the boundaries of the privilege.

32 It is the policy of the law that the public interest in the administration of justice is sufficiently secured by the grant of an immunity from disclosure. That has been the policy of the law for a very long time. *Grant v Downs*[57] gave examples of difficulties which would arise in litigation if the balance struck by the privilege was not maintained as such. What was said in *Grant v Downs* and in later cases strongly implies that there is unlikely to be a warrant for providing anything more than an immunity from disclosure.

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53 *Goddard v Nationwide Building Society* [1987] QB 670 at 685 per Nourse LJ.

54 *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121.

55 (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.

56 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487 per Mason and Brennan JJ; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 127 per Brennan J, 145, 157 per Toohey J.

57 (1976) 135 CLR 674 at 685-686 per Stephen, Mason and Murphy JJ.

33 The relief sought by the plaintiffs points to further difficulties. Some were mentioned earlier in these reasons: the nature of the cause of action which is to found the relief, and the fact that the information the subject of the claimed privilege is now in the public domain. In the latter respect the circumstances of this case identify a particular problem were an injunction to be granted. It is that the defendants would be required to assess Australian entities within the Glencore group to income tax on a basis which may be known to bear no real relationship to the true facts.

34 On the present state of the law, once privileged communications have been disclosed, resort must be had to equity for protection respecting the use of that material. Although the policy upon which legal professional privilege is founded is not irrelevant to the exercise of that jurisdiction, the juridical basis for relief in equity is confidentiality[58].

35 The plaintiffs' contention that *Lord Ashburton v Pape*[59] might be understood not to confine actions for the recovery of privileged material to situations where there may be a breach of confidence has no substance. It is true that there has been discussion about the differences in reporting of a passage in that case[60], but the difference concerns whether the injunction made is intended to prevent the privileged material being adduced in future proceedings. Depending upon the reporting, *Lord Ashburton v Pape* may be read as departing from what was held in *Calcraft v Guest*[61]. But the difference in reporting does not affect the basis upon which the injunction was granted, namely the confidentiality of the privileged material. That was what was said in that case[62] ("You shall not produce these documents which you have acquired from the plaintiff surreptitiously, or from his solicitor, who plainly stood to him in a

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58 *B v Auckland District Law Society* [2003] 2 AC 736 at 762 [71].

59 [1913] 2 Ch 469.

60 *Goddard v Nationwide Building Society* [1987] QB 670 at 679-680 per May LJ, referring to *Lord Ashburton v Pape* [1913] 2 Ch 469 at 473 per Cozens-Hardy MR; (1913) 109 LT 381 at 382; (1913) 82 LJ Ch 527 at 529.

61 [1898] 1 QB 759.

62 *Lord Ashburton v Pape* [1913] 2 Ch 469 at 473 per Cozens-Hardy MR.

confidential relation") and that is how that decision has always been understood[63].

36 The plaintiffs seek to draw from the decision of this Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*[64] a general approach with respect to privileged documents, one which does not necessitate recourse to equity for an injunction based on breach of confidence. In that case documents were mistakenly provided to the other parties' solicitors in the course of discovery and the solicitors refused to return them. The Court held that it was not necessary for the holder of the privilege to seek an injunction because the court's case management powers were sufficient to make the necessary orders. Contrary to what the plaintiffs contend, the case does not stand for any broader proposition which would allow the privilege to be asserted in order for relief in the nature of an injunction to be granted.

37 The plaintiffs' submission that common law courts elsewhere have granted injunctions on a basis other than breach of confidential information is incorrect. The plaintiffs refer in this regard to *Lachaux v Independent Print Ltd*[65] and *Wee Shuo Woon v HT SRL*[66]. Each of these cases concerned whether there was a loss of the necessary quality of confidentiality to found an injunction. In *Lachaux*, the Court of Appeal upheld the trial judge's decision that the documents in question remained confidential despite the wife's evidence that they had been provided to media outlets[67]. It is notable that the trial judge applied the law as

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63 *Goddard v Nationwide Building Society* [1987] QB 670 at 679-680 per May LJ; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 565 per Gummow J; *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at 269 [74] per Lawrence Collins J; cf *Richards v Kadian by his Tutor Kadian* (2005) 64 NSWLR 204 at 224 [83] per Beazley JA.

64 (2013) 250 CLR 303; [2013] HCA 46.

65 [2017] EWCA Civ 1327.

66 [2017] 2 SLR 94.

67 *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327.

stated by Lawrence Collins J in *ISTIL Group Inc v Zahoor*[68]. His Honour[69] accepted the statements in *ISTIL Group Inc v Zahoor* which indicated that the Court of Appeal in *Lord Ashburton v Pape* was applying the law of confidentiality in order to prevent disclosure of documents which would otherwise have been privileged and which remained confidential. Whether the court should intervene where the document had been seen by others depended upon the circumstances[70]. That is to say, it was a question of fact and of discretion in each case.

38 *Wee Shuo Woon*[71] concerned emails containing privileged information which were hacked and then uploaded onto the internet. The appellant accessed them and sought to rely upon them in defending the respondent's claim against him. Accepting that information which was in the public domain has lost its confidential character, the Court of Appeal of Singapore nevertheless made orders on the basis that the documents retained that character. It held that the mere fact that information had been made technically accessible to the public at large did not affect this. The emails were only potentially accessible and contained only a minute portion of the data pilfered[72]. The appellant must have known they were confidential and privileged when he worked his way through the mass of hacked materials to locate the emails in question[73].

39 In no way do these cases support the notion that common law courts elsewhere are granting injunctions with respect to privileged material on the basis only of the wrongfulness associated with its taking. Certainly, it is necessary for an equity to arise that the person to be restrained must have an obligation of

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68 [2003] 2 All ER 252.

69 *Lachaux v Independent Print Ltd* [2015] EWHC 3677 (QB) at [17]-[18].

70 *ISTIL Group Inc v Zahoor* [2003] 2 All ER 252 at 269 [74] per Lawrence Collins J.

71 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94.

72 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at 108 [41].

73 *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94 at 108 [40]-[43], 111 [53].

conscience[74], but the basis for an injunction is the need to protect the confidentiality of the privileged document.

40 The plaintiffs' case for the grant of relief on a basis other than confidentiality is simply this: that any furtherance of the public interest which supports the privilege is sufficient to warrant the creation of a new, actionable right respecting privileged documents. This is not how the common law develops. The law develops by applying settled principles to new circumstances, by reasoning from settled principles to new conclusions, or determining that a category is not closed[75]. Even then the law as developed must cohere with the body of law to which it relates.

41 Policy considerations may influence the development of the law but only where that development is available having regard to the state of settled principles. Policy considerations cannot justify an abrupt change which abrogates principle in favour of a result seen to be desirable in a particular case[76].

42 In the absence of further facts it is not possible to say whether the plaintiffs are without any possibility of a remedy. But if there is a gap in the law, legal professional privilege is not the area which might be developed in order to provide the remedy sought.

Orders

43 The demurrer should be upheld and the plaintiffs' proceeding should be dismissed with costs.

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74 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 427-428 per Brennan J, 459-460 per Gaudron J.

75 *PGA v The Queen* (2012) 245 CLR 355 at 373 [29] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; [2012] HCA 21, referring to Dixon, "Concerning Judicial Method" (1956) 29 *Australian Law Journal* 468 at 472.

76 *Breen v Williams* (1996) 186 CLR 71 at 99 per Dawson and Toohey JJ.