25/89

SUPREME COURT OF VICTORIA

SWITZERLAND GENERAL INSURANCE CO LTD v TRESIZE

JH Phillips J

28 February, 3, 9 March 1989

LEGAL PROFESSIONAL PRIVILEGE – PROPERTY DAMAGED BY FIRE – INVESTIGATION CARRIED OUT – REPORTS COMPILED – PROCEEDINGS COMMENCED – REQUEST FOR INSPECTION OF REPORTS – CLAIM OF PRIVILEGE – TESTS TO BE APPLIED.

1. In considering a claim of privilege in respect of documents compiled by third parties (such as investigators) who are retained by solicitors on the explicit instructions of a client, a court should determine—
(a) when the documents were prepared whether litigation was in contemplation; and if it was
(b) whether the documents were prepared for the sole purpose of submission to legal advisers for advice or for use in legal proceedings.
***Nickmar Pty Ltd and Anor v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; (1985) 3 ANZ Insurance Cases 60-657, applied.**

2. Where an Insurance Company instructed a loss adjuster to investigate a house fire, and two days later the adjuster informed the Insurer's Solicitors of his suspicions concerning arson on the part of the insured and of grounds upon which the Insurer could avoid the Policy for non-disclosure, the claim of privilege attached to four written reports subsequently prepared by the loss adjuster on the ground that when the reports were prepared a defence of contemplated proceedings was reasonably anticipated.

JH PHILLIPS J: **[1]** On 22nd January 1986 an unoccupied house owned by the respondents was entirely consumed by fire. The applicant was the insurer of this property with cover of $25,000. On 5th August 1986 the applicant formally denied liability under the relevant policy, the respondents having, on 7th July 1986, commenced proceedings in the County Court No. 626 of 1986, claiming $25,000 damages. On 11th July, 1988 the respondents issued a chamber summons seeking an order, *inter alia*, that the applicant produce for inspection to them and/or their solicitors reports of Ensign Adjusters dated 29th January 1986, 21st February 1986, 3rd April 1986 and 7th April 1986.

[2] The summons was returnable before Master Patkin, and after a hearing which took in a number of occasions and at which privilege was claimed by the applicant with respect to the production for inspection of the abovenamed documents, the Master ordered, *inter alia*, that they be produced for inspection by the respondents and/or their solicitors. By notice of application dated 10th February 1989 the applicant seeks special leave to appeal against this order.

Mr North, who appeared for the applicant before me, stated that one of the grounds for this application was that the Master had acted upon inadmissible evidence, namely, a letter dated 9th May 1986 from the defendant to the plaintiffs' solicitors. As neither Mr North nor Mr Watts, who initially appeared for the respondents, could explain to me how it was this letter came to be before the Master, (it was plainly not an Exhibit to any affidavit), I adjourned these proceedings from 28th February 1989 to 3rd March 1989 and granted leave for explanatory affidavit material to be produced by both parties. On the adjourned date, due to an apparent misunderstanding on the part of Mr North, for which I can find no basis, the applicant adduced no such material, but the respondents filed an affidavit by Counsel who had appeared for them before the Master, Mr Santamaria, who deposed that he believed the document had been tendered by him with the consent of the applicant's then Counsel, Mr Corrigan. Mr North has argued that little weight should be given to Mr Santamaria's affidavit in the circumstances. I disagree with this submission. Its contents are not denied, **[3]** although I invited Mr North to apply for an adjournment to enable a further affidavit to be filed on behalf of the applicant. However, nothing turns on this point because I am quite satisfied, having read the Master's reasons for judgment on several occasions,

that the letter formed no part of the reasoning which led him to make the decision that he did. Accordingly, this ground of the application must fail.

Mr North further submitted that the Master, in seeking to apply the well known authorities of *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44; (1985) 3 ANZ Insurance Cases 60-657 and *Vardas v South British Insurance Co Ltd* (1984) 2 NSWLR 652, fell into error and that he also substantially underrated the probative force of the evidence tendered by the applicant in support of the claim of privilege.

It is now necessary that I summarise this evidence. Mr Ronald Lowe, an insurance loss adjuster, who conducted the business of Ensign Loss Adjusters, deposed that on 22nd January 1986 he received instructions from the applicant to investigate the fire. He visited the scene and on 24th January contacted the Gippsland manager for the applicant. By that date he was suspicious that the fire was an arson, and that the first-named respondent may have been involved, and so told Mr Coldbeck, the applicant's solicitor. He also told Mr Coldbeck that there were grounds upon which the insurer could avoid the policy for non-disclosure. Upon being told these things Mr Coldbeck believed the fire was an arson, and that there were suspicions that the first-named respondent may have been involved. On the same day the Gippsland manager of the applicant had been in touch with Mr Coldbeck's **[4]** partner about the fire. Mr Coldbeck advised Mr Lowe in some detail of matters he wished Mr Lowe to investigate. These advices were for the purpose of obtaining information to assist in his formulating advice to the applicant in connection with its defence of contemplated proceedings. On this date Mr Coldbeck had already formed the view that he would advise the applicant to deny liability under the policy. He expected, as a consequence of having acted for the applicant on previous occasions, that it would act on his advice and that when it did so, the respondents would issue proceedings against the applicant for indemnity under the policy. Mr Lowe then proceeded to make and furnish to the applicant's solicitors directly the four reports the subject of this application.

It is common ground between the parties that the authority *Nickmar Pty Ltd and Anor v Preservatrice Skandia Insurance Ltd* (*supra*) contains some of the propositions of law to be applied in the resolution of this application. Relevantly, those propositions are —

> 1. Documents prepared by agents or representatives of a party are subject to the "sole purpose test" in order to qualify for legal professional privilege, namely, was the confidential communication created or made solely for the purpose of submission to legal advisers for advice, or for use in legal proceedings.
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> 2. Legal professional privilege only attaches to documents prepared by third parties (not being servants or employees of the entity called upon to produce the documents) when they are prepared for or in contemplation **[5]** of litigation or for the purpose of giving advice or obtaining evidence with reference to such litigation. The question whether litigation was so contemplated at the material time is an objective one.
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> 3. Documents obtained from third parties, for example, investigators or experts who are retained by solicitors on the explicit instructions of a client, will be subject to legal professional privilege if the information can properly be regarded as collected and communicated confidentially on behalf of the client to its legal adviser, in the character and, for the purpose, of obtaining legal advice.

Further, Counsel have both submitted that the onus of establishing privilege is on the party who asserts it, in this case the applicant, and that, in considering whether I should grant special leave, I should enquire whether it appears the decision appealed from was clearly wrong or attended by substantial doubt, or brings about some substantial injustice. As to the requirements for special leave, of the relevant authorities I regard *Kulic v Ford Motor Co (Aust) Ltd* [1988] VicRp 20; (1988) VR 152 as being the most apposite.

In my opinion, a court in considering this type of claim for privilege should logically proceed, first, to consider whether at the relevant time litigation was in contemplation and, if it was, then consider whether the relevant documents were prepared for the sole purpose for submission to legal advisers for advice or for use in legal proceedings. This is in fact the sequence followed by Wood J in *Nickmar* (*supra*).

Mr North has contended that the Master followed the sequence of first deciding the **[6]**

"sole purpose test", and then gave consideration to whether litigation was in contemplation. But because, as I deduce from the Master's reasons, a great deal of the debate before him turned on when the applicant reasonably anticipated litigation, I am not persuaded that he did follow this alleged course.

However, this does not determine this application. Having carefully read the evidence proffered in support of the claim of privilege, together with the reports themselves (tendered by consent) and having considered the criticism of this material on behalf of the respondents, including that based upon the letter of 9th May 1986, I am satisfied that the submission that the Master seriously underrated its probative effect has been made out.

Accordingly, I should grant special leave to appeal; hear the appeal *de novo* and form my own views of the probative effect of this evidence. Performing that exercise, in my opinion the claim of privilege has been amply made out when the relevant evidence is considered in the light of the appropriate authorities. I will allow the appeal and set aside the Master's order insofar as it touches the four reports in question.

APPEARANCES: For the applicant Switzerland General Insurance: Mr T North, counsel. Hall & Wilcox, solicitors. For the respondents Tresize: Mr L Watts & Mr P Fox, counsel. R Hayes & Associates, solicitors.
