

81/80; [1980] HCA 26

HIGH COURT OF AUSTRALIA

Re BELL: ex parte LEES

Gibbs, Stephen, Murphy, Aickin and Wilson JJ

5 August 1980

(1980) 146 CLR 141; 54 ALJR 412; 30 ALR 489; 6 Fam LR 208; [1980] FLC 75,354 (¶ 90-850)

PRACTICE – DISCOVERY – LEGAL PROFESSIONAL PRIVILEGE APPLIES – COMMUNICATION OF ADDRESS BY CLIENT TO SOLICITOR – WHETHER PRIVILEGED.

In the reported decision of *McJarrow* (1979) FLC ¶90-721; MC17/1980, Bell J ordered a solicitor to disclose to the husband's solicitors the address of the wife at the date of the last communication by her with him. The solicitor applied to the High Court for a writ of prohibition. The High Court unanimously refused the application.

Gibbs, Stephen and Murphy JJ held that the general principle that communications made confidentially between a client and his legal adviser for the purpose of obtaining legal advice or assistance are privileged from disclosure, is subject to exceptions, and particularly is subject to an exception in matters affecting the welfare of a child. In that case a higher public interest may arise, namely the public interest in securing the welfare of the child and in ensuring that an order made for the securing of that welfare is not flouted, that is to say that the welfare of the child is paramount to the professional privilege of the father or mother.

Stephen, Aickin and Wilson JJ held that privilege for an address cannot be claimed when its confidentiality was sought in order to frustrate the processes of law or to enable the continuance of a contempt of Court.

Gibbs and Stephen JJ held that there was no distinction here between a ward of court and a child the subject of a custody order under the *Family Law Act*, and accordingly the rule that a solicitor is obliged to give the Court any information (including his client's address) which will enable the Court to discover the whereabouts of its ward would apply, notwithstanding professional privilege.

Gibbs J held that it did not appear that the client had communicated her address for any illegal object, and that the power to order the solicitor to make the disclosure arose from the inherent power of the Court. The Court was evenly divided on the issues whether either s114(3), or s70(5) and 70(6)(d) provide the power. In his judgment, Gibbs J made the following comments about privileged communications between client and legal adviser:

"It is a well settled principle, based on public policy, that communications made confidentially between a client and his legal adviser for the purpose of obtaining or giving legal advice or assistance are privileged from disclosure. In accordance with this principle, a solicitor may not, without the consent of his client, disclose his client's address if that was communicated to him confidentially for the purpose mentioned, although it will not be enough to attract the privilege that the address came to the solicitor's knowledge in consequence of his professional employment if it was not confidentially communicated to him: *Ex parte Campbell*. In *re Cathcart* (1870) 5 LRCh App 703, at p705; *Re Arnott*; *Ex parte Chief Official Receiver* (1888) 60 LT 109; 37 WR 223. In the present case it is clear that the address of the wife was communicated confidentially to Mr Lees for the purpose of obtaining legal assistance from him, and that, if nothing more appeared, the general principle would apply and the disclosure of the address would be privileged.

However, there are exceptions to the general rule – cases in which the privilege will not exist even though the communication was made confidentially for the purpose of obtaining professional

assistance. The privilege will not apply where the communication was part of a criminal or unlawful proceeding, or was made in furtherance of an illegal object, e.g., where the client sought legal assistance as a step in, or preparatory to, the commission of a crime or fraud, even though the solicitor was unaware of the purpose of the communication at the time it was made: *Varawa v Howard Smith & Co Ltd* [1910] HCA 11; (1910) 10 CLR 382, at pp385, 386, 390; 16 ALR 526. I doubt whether the present case comes within that exception. The wife did not communicate her address to Mr Lees for any illegal or improper purpose; she had already disobeyed the order of the court and concealed herself and the child, and the assistance that she sought from Mr Lees was for the entirely proper purpose of protecting her interest in the matrimonial home."
