46/87

SUPREME COURT OF VICTORIA

POLLARD v ASIO and COMMONWEALTH of AUSTRALIA

Nathan J

19 August 1987

PRACTICE AND PROCEDURE – EVIDENCE – PRIVILEGE – PUBLIC INTEREST IMMUNITY – DOCUMENT COMPILED BY SECURITY AGENCY – WHETHER DOCUMENT PRIVILEGED – WHETHER COURT MAY INSPECT DOCUMENT.

1. Where a claim of public interest immunity is made in respect of a document, the court may inspect the document in order to adjudicate upon the claim. However, the court should act more cautiously when deciding whether to inspect a document claimed as privileged by ASIO or similar security agencies.

2. In such cases, the court should assess whether access to the document is necessary, and whether it is likely to support the cause of action.

NATHAN J: **[1]** The plaintiff (Pollard) was summarily dismissed from his employment as an agent by the Australian Security Intelligence Organization (Asio) on 12th March 1986. He now sues the defendants, Wrigley, the present Director-General of Asio and the Commonwealth for damages for wrongful dismissal and breaches of his contract of employment. The defendants may be treated as one. Asio was ordered by this Court, subject to strict provision as to their confidentiality, to deliver Particulars of the allegations of Pollard's improper conduct pleaded in its Defence. It did so, and with the consent of the parties I read them. Asio has also filed an affidavit of documents sworn by Wrigley. It objects, on the basis of privilege, to the production of a document noted as "Record of Conversation between the Director-General **[2]** (T.H. Barnett) and the Attorney-General for the Commonwealth of Australia on 15 February 1985" (the document). Barnett was Wrigley's predecessor. Pollard has issued a Summons seeking an order that the document be produced for inspection. Thus the matter has come before me.

Asio's privilege is claimed upon the basis that the document belongs to a class which the public interest demands should not be disclosed. It is put that the document records a significant discussion occurring between the then Director-General of Security and the Commonwealth Attorney-General concerning a matter of national security and high sensitivity, and the formulation of policy relating to the matter and functioning of Asio. This is also the "public interest immunity" argument. It also contends that if the document was discovered, it would prejudice free and frank discussion and reportage by the Director to the Attorney. This contention I refer to as the "candour argument". Additionally, Wrigley has sworn that he did not know of or rely upon the document to come to his decision to summarily dismiss Pollard. This I refer to as the "non-reliance" argument.

Asio's arguments were put in response to those of Mr Young, who appeared for Pollard. He contended, most lucidly and forcefully, the fair administration of justice should over-ride the public interest immunity argument to permit a person, particularly a dismissed employee, access to a document admitted, by virtue of being discovered to be relevant. At the very least, he contends I should examine the document to see if it does fall within the class of **[3]** immune material. He contends the "candour argument" is now without much legal support or should be dismissed. The non-reliance argument should not be persevered with, at least until I have examined the document, because its contents may be relevant so far as damages are concerned, establish the *mala fides* he pleads, or refer to other relevant material.

Pollard's counsel did not persist with an application to cross-examine Mr Wrigley about the grounds upon which public interest immunity was claimed. A supplementary affidavit spelt them out in full, and it is only in the most exceptional circumstances that cross-examination would be relevant or permitted. *Young v Quin* (1985) 4 FCR 483; (1985) 59 ALR 225 at 226, 231 and 237;

Hilton v Wells [1985] HCA 16; (1985) 157 CLR 57; 59 ALR 281 at 288; (1985) 59 ALJR 396; 15 A Crim R 394 and *Conway v Rimmer* [1968] UKHL 2; (1968) AC 910 per Lord Morris at 911; [1968] 1 All ER 874; [1968] 2 WLR 998. However, it is now clear that an Australian Court may inspect, at its own option, a document for which public interest immunity is claimed in order to assess and adjudicate upon that claim. It is equally as clear that before doing so the Court must weigh the competing interests of securing the national interest on the one hand against the interests of the administration of justice, and in particular, the right of a party to have access to a relevant document on the other. Inspection is an important process designed to clarify the issues at trial. It should not lightly be abridged. The current of judicial authority could be seen to be moving in the direction of enlarging the scope of inspection, rather than restricting it. See *Sankey v Whitlam* [1978] HCA 43; (1978) 142 CLR 1; 21 ALR 505; 53 ALJR 11; 37 ALT 122 through the cases already referred to and *A & Ors v Hayden & Ors* [1984] HCA 67; (1984) 156 CLR 532; (1984) 56 ALR 82; (1984) 59 ALJR 6.

[4] I accept the substantial authorities which support the proposition that a Court should be predisposed toward upholding the integrity of its interlocutory processes, such as inspection. That disposition should only be displaced when matters of the general national interest as opposed to the advancement of a limited national purpose, such as the protection of an agricultural or economic policy are concerned. (see the cases referred to and also *Burmah Oil Co. v Bank of England* [1979] UKHL 4; (1980) AC 1090 per Lord Keith p1132 and Lord Scarman p1145.) It is therefore relevant to acknowledge that Asio and like security services fall into a particular class of governmental agency or department. The very matters with which Asio and like departments deal inextricably involve issues of national security. Asio and these departments are not akin to the departments and instrumentalities of State which deal with commodities or services.

Therefore, the predisposition to which I have referred should be adopted more cautiously when dealing with Asio and similar security agencies. To that extent, the cases which deal with government instrumentalities, such as Banks, Airport authorities and welfare bodies, e.g. the *Burmah Oil Case, Air Canada v Secretary of State for Trade* (1983) 2 AC 394; [1983] 1 All ER 161; [1983] 2 WLR 494, *D. v National Society for Prevention of Cruelty to Children* [1977] UKHL 1; [1978] AC 171; [1977] 1 All ER 589; [1977] 2 WLR 201; (1977) 76 LGR 5, should be distinguished from those which dealt with the security agencies, see *Alister & Ors v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97; and *A. & Ors v Hayden & Ors (No.2)* [1984] HCA 67; (1984) 156 CLR 532; (1984) 56 ALR 82; (1984) 59 ALJR 6. It is a matter of interest to note that in many cases where the Court has decided to inspect the **[5]** documents for which privilege was claimed, and especially so in civil cases, it has not usually been sustained, for example *Conway v Rimmer*.

Public interest immunity is less likely to be attracted in a criminal matter involving the liberty of the subject than it is in a civil claim where the plaintiff need merely establish his claim on the balance of probabilities. This is in accordance with accepted standards of fairness. In many criminal matters it would not be possible for a defendant to establish a defence unless access to documents for which privilege was claimed was made. In civil matters, there may be many ways and often many collateral strands which the plaintiff can use to establish its case. For an example of the former approach see *Alister and Ors v R* [1984] HCA 85; (1984) 154 CLR 404; (1983) 50 ALR 41; (1984) 58 ALJR 97;, and for the latter see *Haj-Ismail and Ors v Maddigan & Ors* [1982] FCA 231; (1982) 45 ALR 379; (1982) 64 FLR 112 and *R v Lewes JJ, Ex Parte Home Secretary* (1973) AC 388 at 407; [1972] 2 All ER 1057.

I also take into account the 1986 Amendments to the *Australian Security Intelligence Organization Act* (Act No. 122, 1986). The authority of the Minister is now paramount. The organization is accountable to him and he exercises control via the Director-General. The decisions made by the Director-General upon the advice of his subordinates may very well become subject to ministerial scrutiny, or at the very least, of reportage by the Director-General to the Minister. Ultimately the Minister must account to Parliament. Therefore, the matter of Mr Pollard's dismissal could not be accomplished and disposed of in a subterranean manner. As is proper and appropriate, that matter may be canvassed elsewhere **[6]** as well as in this Court (but not at the same time). I am entitled to assume the document is the record of a conversation concerning Mr Pollard's dismissal, that the Director-General was reporting to the Minister about it.

Pollard has already had access and inspection of all the documents giving rise to the

Director's decision to dismiss him and the Particulars reveal this. Therefore, this is not a case in which the plaintiff is blindfolded in bringing his claim for wrongful dismissal. Access to the document is not necessary, nor likely to support Pollard's cause of action. This matter is an important consideration when weighing the issue as to whether I should examine the document myself. Of course the Court does not surrender its function to make the threshold assessment, and the mere claim for immunity does not establish it. Here the document relates to a conversation at the apex of Asio's structure, a record of a conversation between its Director and the responsible Minister. It is not of a character such as an inter-departmental memo or a report prepared for notation or action, or a recommendation by an operative to a superior officer. It is a record of a conversation relating to a decision already made by the Director in the exercise of his functions as the agency's chief executive to the Minister to whom he is responsible.

There would need to be very substantial reasons and a ready and apparent fear that the plaintiff would be significantly disadvantaged in the presentation of his case to warrant the displacement of the public interest in securing unfettered conversational exchanges between the Minister and Director. As to the **[7]** particular sensitivity of free dialogue between a head of Department and Minister see *Lewes Justices ibid* and *Australian National Airlines Commission v The Commonwealth of Australia & Ors* [1975] HCA 33; (1975) 132 CLR 582; (1975) 6 ALR 433; (1975) 49 ALJR 338.

I am satisfied after weighing the considerations referred to above, and in particular having come to the view the plaintiff will not in any way be thwarted in his claim against the defendants, that I should not and do not need to examine the document prior to a ruling that the claim for privilege should be upheld. I add these following considerations, although only the second is relevant. The candour argument is not persuasive. The fact that documents may become available for inspection ensures that greater effort will be made to ensure accuracy, fairness and a proper presentation of all relevant considerations. The procedure is more likely to exclude caprice, bias and irrelevancies: Documents need not be less frank and candid, but the preparation of them will probably require more care. If this is so, then inspection in litigious matters is to he welcomed rather than hindered, although the candour argument has judicial foundation. See *Sankey v Whitlam* (*supra*) per Gibbs ACJ p40.

The final matter is the "non-reliance" argument. I am satisfied, for the reasons already given, that the grounds for his dismissal and the reasons upon which they were based have already been made known to the plaintiff. The particulars which I have read are explicit and full. The documents already discovered relate to them. The document sought to be discovered can be no more than a mere resume of **[8]** the material already available to Pollard. The Director-General has sworn that he did not rely upon his conversation with the Minister to support or establish his grounds for Pollard's dismissal. That decision had already been made. Pollard was dismissed more than a year after that conversation. Despite that fact, the document can only be of the most marginal significance to Pollard's claim. Despite Pollard being prepared to accept inspection in the most limited and constrained circumstances, ensuring non-disclosure in the same way as he has with the particulars, I am satisfied it would not be appropriate for me to examine the document. Accordingly, the summons should be dismissed. I will hear counsel as to costs.
