SUSAN HOSIERY LIMITED .....APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE .....RESPONDENT.

Toronto 1968 Oct. 15

Ottawa 1969 Feb. 19

Discovery—Evidence—Solicitor-client privilege—Communications between solicitor and client's accountant—Extent of privilege.

The privilege which protects from disclosure at trial or on discovery (1) confidential communications between a client and his legal adviser for the purpose of giving or obtaining legal advice, and (2) documents obtained for the lawyer's brief for litigation, covers communications between a legal adviser and an accountant used as the client's representative. The privilege, moreover, applies to any questions on discovery as to the contents of such communications and documents.

Lyell v. Kennedy No. 2 (1883) 9 App. Cas. 81; *Wheeler v. Le Marchant* (1881) 17 Ch.D. 675, applied.

[10] [1967] 2 Ex. C. R. 308.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

MOTION.

Benzion Sischy for appellant.

G. V. Anderson for respondent.

JACKETT P.:—This is a motion on behalf of the respondent for an order.

> (*a*) requiring the Appellant to produce for inspection the memorandum prepared by the Appellant's solicitor, and referred to in question number 163 of the Examination for Discovery of Alexander Slomo Strasser;
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> (*b*) requiring the Appellant to produce for inspection the letter from its auditor, Mr. A. Pal to its solicitor, W. Goodman, dated the 1st day of December 1964, and referred to in question number 175 of the Examination for Discovery of Alexander Slomo Strasser;
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> (*c*) requiring the Appellant to produce the letter of the 2nd day of December 1964 from W. Goodman to Spenser, Pal & Co., and the memorandum of the 4th day of December 1964, both of which are referred to in the answer given to question number 189 of the Examination for Discovery of Alexander Slomo Strasser;
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> (*d*) requiring that Alexander Slomo Strasser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

The motion came on for hearing before me at Toronto on October 15, 1968, at which time I rejected the motion in so far as paragraph (*a*), *supra,* was concerned and gave the parties leave to file further material and to make written submissions concerning the remainder of the motion. Since the parties indicated, by letter dated January 20 last, that they had completed their submissions, I have read the decisions cited by them and have considered their arguments.

I shall consider first the problem raised concerning the documents referred to in paragraph (*b*) and (*c*) of the portion of the notice of motion quoted above. Two affidavits have been filed on behalf of the appellant from which the nature of these documents may be determined. The first is an affidavit of a Marshall A. Cohen, sworn October 21, 1968, and reading as follows:

> 1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

2. I have inspected the four documents referred to in the Notice of Motion, brought by the Respondent, returnable on the 15th day of October, 1968, and dated the 19th day of September, 1968. The said documents can be briefly described as follows

(*a*) Typewritten memorandum of three pages dated the 10th day of November, 1964, and being a memorandum of a meeting between Mr. W. D. Goodman, Mr. Harry Wolfe and Mr. Andrew Pal.

(*b*) Typewritten letter of three pages dated December 1st, 1964, from Mr. Andrew Pal to Mr. W. D. Goodman.

(*c*) Typewritten copy of a letter of one page dated December 2nd, 1964, from Mr. W. D. Goodman to Mr. Andrew Pal.

(*d*) Typewritten memorandum of one page dated December 4th, 1964, relating to a telephone conversation of December 3rd, 1964, between Mr. Andrew Pal and Mr. W. D. Goodman.

3 From advice received from Mr. W. D. Goodman, Mr. Andrew Pal and Mr Harry Wolfe, from my own knowledge including therein my inspection of the aforesaid documents I verily believe the following statements set out in paragraphs 4 to 8 inclusive to be true.

4. At all material times at which such documents aforesaid came into existence, Mr. W. D. Goodman was a member of the law firm of Goodman, Cooper, Cohen & Farano, and the said law firm and in particular Mr. W. D. Goodman was retained to give specific advice to the Appellant herein and the principal shareholders thereof.

5. At all material times at which such documents aforesaid came into existence, Mr. Harry Wolfe was a member of the law firm of Lorenzetti, Mariani and Wolfe and the said law firm and Mr. Harry Wolfe in particular were the general solicitors to the Appellant herein and it was with the concurrence of and at the suggestion of the said Mr Harry Wolfe that Mr. W. D. Goodman was consulted as aforesaid to give specific advice to the Appellant herein and to consult with Mr. Harry Wolfe with respect to the legal problem, for which such legal advice was sought.

6 Mr. Andrew Pal is a member of the Institute of Chartered Accountants of Ontario, and at that time and now was a member of a firm of Chartered Accountants bearing the name Spencer, Pal and Company.

7. At all material times at which such documents aforesaid came into existence Mr. Andrew Pal was retained by the Appellant herein as its agent for the purpose of communicating to Mr. Wolfe and to Mr Goodman, certain information concerning the Appellant and for the further purpose of receiving from Mr. Wolfe and Mr. Goodman certain advice and opinion for transmission by him to the Appellant herein.

8 The aforesaid documents consist solely of professional communications of a confidential character or the later written recording of oral professional communications of a confidential character between the Appellant or the Appellant's agent and its solicitors and counsel for the purpose of obtaining or giving legal advice and assistance and confidential communications or the later written recording of oral confidential communications at the instance and at the request and for the use of the Appellant's solicitors and counsel for the aforesaid purposes.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

The second is a further affidavit of Mr. Cohen sworn on November 20, 1968, and reading as follows:

1. I am a partner in the law firm of Goodman and Carr, Solicitors for the Appellant herein.

2 This Affidavit is made in supplement to my Affidavit filed in this action and sworn to on the 21st day of October, 1968.

3. I am informed by Mr. Pal and verily believe the following facts set out hereunder.

4. That for some years prior to the meeting of November 10th, 1964, from which the typewritten memorandum referred to in paragraph 2(*a*) of my Affidavit sworn to on the 21st day of October, 1968, arises Mr. Pal, in addition to his other duties as a public accountant to Susan Hosiery Limited, the Appellant herein, had been acting as financial adviser to the said Appellant and its principals.

5. That on the instructions of the principals of Susan Hosiery Limited, Mr. Pal was instructed to meet with Mr. Goodman and Mr. Harry Wolfe to discuss certain matters pertaining to the business affairs including future business affairs and "activities" of the Appellant and of the principals thereof and to obtain the advice of Mr. Goodman thereon.

6. That such meeting took place on November 10th, 1964, and that such discussion was had at such meeting and certain advice was obtained from Mr. Goodman on that day and that by reason of such advice it was decided by Mr. Pal, Mr. Wolfe and Mr. Goodman that further suggestions as to how the Appellant and its principals might wish to conduct their business affairs, including certain legal steps to be taken on their behalf should be given Mr. Goodman to enable him to advise thereon.

7. Mr. Pal thereafter and prior to December 1st, 1964, communicated to the Appellant through its principals and to the said principals the gist of the advice of Mr. Goodman and after discussion with such principals wrote on their behalf and on behalf of the Appellant to Mr. Goodman setting out suggested courses of action and giving Mr. Goodman certain instructions thereon. The said writing to Mr. Goodman is contained in the typewritten letter referred to in paragraph 2(*b*) of my Affidavit sworn to on the 21st day of October, 1968.

8. Mr. Goodman on receipt thereof wrote to Mr. Pal, firstly commenting upon the letter of December 1st, 1964, and asking Mr. Pal to speak to him, Mr. Goodman, about one aspect of the matters dealt with in the letter of December 1st, 1964. The said letter of Mr. Goodman is that referred to in paragraph 2(*c*) of my Affidavit sworn to on the 21st day of October, 1968.

9. Mr. Pal on receipt of such letter telephoned Mr. Goodman to give Mr. Goodman certain additional information required and answering the request to Mr. Goodman to speak to him as set out above. Such telephone conversation occurred on the 4th day of December, 1964, and is referred to in paragraph 2(*d*) of my Affidavit sworn to on the 21st day of October, 1968.

10 I verily believe that to describe the subject matter of the communications and advice above in other than general terms of "business affairs", "courses of action" and other similar terms would disclose the privilege hereby sought to be maintained.

The basic principles on which the appellant relies for his objection to the production of these documents are, in effect, as I understand them, unchanged from the time when they were authoritatively enunciated by Lord Blackburn in *Lyell v. Kennedy* (No. 2)[1], where he said:

> . . . the law of England, for the purpose of public policy and protection, has from very early times said that a client may consult a solicitor (I mean a legal agent) for the purposes of his cause, and of litigation which is pending, and that the policy of the law says that in order to encourage free intercourse between him and his solicitor, the client has the privilege of preventing his solicitor from disclosing anything which he gets when so employed, and of preventing its being used against him, although it might otherwise be evidence against him.
>
> This further rule has been established, that the other side is not entitled, on discovery, to require the opponent to produce as a document those papers which the solicitor or attorney has prepared in the course of the case, and has sent to his client. . . . He may shew it if he pleases; but it is a good answer to a discovery to say, "It was prepared for me by my legal adviser, my attorney, confidentially, and it is my privilege to say that you shall not read it;" and I think that it is hardly disputed that on a discovery of documents you could not discover that brief.

The principles had been discussed in an illuminating way in an earlier decision of the Court of Appeal in *Wheeler v. Le Marchant.*[2] In that case, it was accepted as clear

(*a*) that confidential communication between a client and his legal adviser were privileged, and

(*b*) that documents obtained by a legal adviser for the purpose of preparing for litigation, actual or anticipated, were privileged;

but an attempt to extend the privilege concerning documents obtained by a legal adviser to documents obtained in situations where litigation was not contemplated was rejected. In that case Jessel, M. R. said at page 682:

> . . . The actual communication to the solicitor by the client is . . . protected, and it is equally protected whether it is made by the client in person or is made by an agent on behalf of the client, and whether it is made to the solicitor in person or to a clerk or subordinate of the solicitor who acts in his place and under his direction. Again, the evidence obtained by the solicitor, or by his direction, or at his instance, even if obtained by the client, is protected if obtained after litigation has been commenced or threatened, or with a view to the defence or prosecution of such litigation. So, again, a communication with a solicitor for the purpose of obtaining legal advice is protected though it relates to a dealing which is not the subject of

[1] (1883) 9 App. Cas. 81

[2] (1881) 17 Ch. D. 675.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

litigation, provided it be a communication made to the solicitor in that character and for that purpose. But what we are asked to protect here is this. The solicitor, being consulted in a matter as to which no dispute has arisen, thinks he would like to know some further facts before giving his advice, and applies to a surveyor to tell him what the state of a given property is, and it is said that the information given ought to be protected because it is desired or required by the solicitor in order to enable him the better to give legal advice. It appears to me that to give such protection would not only extend the rule beyond what has been previously laid down, but beyond what necessity warrants.

and Cotton L.J. said at pages 684 and 685:

> Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives". If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents comes to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents. Hitherto such communications have only been protected when they have been in contemplation of some litigation, or for the purpose of giving advice or obtaining evidence with reference to it And that is reasonable, because then the solicitor is preparing for the defence or for bringing the action, and all communications he makes for that purpose, and the communications made to him for the purpose of giving him the information, are, in fact, the brief in the action, and ought to be protected. But here we are asked to extend the principle to a very different class of cases, and it is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these.

None of the decisions concerning solicitor and client privilege to which I have been referred seem to me to have changed or added to the law, in so far as it is relevant to what I have to decide on this motion, as I find it laid down in the two leading decisions from which I have quoted.

In an attempt to avoid misunderstanding as to the effect of the decision that I propose to deliver, it may be well for me to attempt to put in my own words the law, as I understand it, on the understanding that, except in so far as is necessary for the decision of this case, I reserve the right to reconsider the precise extent of the doctrines that I am attempting to describe.

As it seems to me, there are really two quite different principles usually referred to as solicitor and client privilege, *viz*:

(a) all communications, verbal or written, of a confidential character, between a client and a legal adviser directly related to the seeking, formulating or giving of legal advice or legal assistance (including the legal adviser's working papers, directly related thereto) are privileged; and

(b) all papers and materials created or obtained specially for the lawyer's "brief" for litigation, whether existing or contemplated, are privileged.

In considering the ambit of these principles, it is well to bear in mind the reasons for them.

In so far as the solicitor-client communications are concerned, the reason for the rule, as I understand it, is that, if a member of the public is to receive the real benefit of legal assistance that the law contemplates that he should, he and his legal adviser must be able to communicate quite freely without the inhibiting influence that would exist if what they said could be used in evidence against him so that bits and pieces of their communications could be taken out of context and used unfairly to his detriment unless their communications were at all times framed so as not only to convey their thoughts to each other but so as not to be capable of being misconstrued by others. The reason for the rule, and the rule itself, extends to the communications for the purpose of getting legal advice, to incidental materials that would tend to reveal such communications, and to the legal advice itself. It is immaterial whether they are verbal or in writing.

Turning to the "lawyer's brief" rule, the reason for the rule is, obviously, that, under our adversary system of litigation, a lawyer's preparation of his client's case must not be inhibited by the possibility that the materials that he prepares can be taken out of his file and presented to the

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

court in a manner other than that contemplated when they were prepared. What would aid in determining the truth when presented in the manner contemplated by the solicitor who directed its preparation might well be used to create a distortion of the truth to the prejudice of the client when presented by someone adverse in interest who did not understand what gave rise to its preparation. If lawyers were entitled to dip into each other's briefs by means of the discovery process, the straightforward preparation of cases for trial would develop into a most unsatisfactory travesty of our present system.

What is important to note about both of these rules is that they do not afford a privilege against the discovery of facts that are or may be relevant to the determination of the facts in issue. What is privileged is the communications or working papers that came into existence by reason of the desire to obtain a legal opinion or legal assistance in the one case and the materials created for the lawyer's brief in the other case. The facts or documents that happen to be reflected in such communications or materials are not privileged from discovery if, otherwise, the party would be bound to give discovery of them. This appears clearly from the following passage in the judgment of Lord Blackburn in *Lyell v. Kennedy* (No. 2) *supra,* where he said at pages 86 and 87:

> But then it is argued that though that is so you may, as has been repeatedly said, search the conscience of the party by inquiring as to his information and belief from whencesoever derived, and that it consequently follows from that (this I think was the argument which was put) that although a brief has been refused, and it has been said, "You must not inspect that brief," you are nevertheless entitled to ask the party himself, "Did not you read the brief, and when you had read it what was your belief derived from reading that brief?" That, I think, was the position which was taken; and it was argued in support of it, if I understood and followed the argument rightly, that inasmuch as nobody had ever actually raised the point, and inasmuch as in all the different books of pleading and other things, where they very frequently do discuss what is the extent of discovery, nobody had hitherto discussed this point either one way or the other, the silence of people implied that it should be so, and that you ought to be able to put that question. Now as to that I believe that there is no authority, and I think that Cotton L J. says that there is no authority; but as it seems to me the plain reason and sense of the thing is that as soon as you say that the particular premises are privileged and protected, it follows that the mere opinion and belief of the party from those premises should be privileged and protected also I do not mean to state (and I mention it in case I should be misunderstood) that a man has a privilege to say, "I have

> a deed, which you are entitled to see in the ordinary course of things, but I claim a privilege for that deed, because it was obtained for me by my attorney in getting up a defence to an action," or "in the course of litigation" That would be no privilege at all. So again with regard to another fact, such as a man being told by an attorney's brief that there is ground for thinking that there is a tombstone or a pedigree in a particular place—if the man went there and looked at it and saw the thing itself I do not think that he would be privileged at all in that case: because it is no answer to say, "I know the thing which you want to discover, but I first got possession of the knowledge in consequence of previous information" That is not within the meaning of privilege But when the interrogatory is simply "what is the belief which you have formed from reading that brief?" it seems to me (and I think that that is the effect of what Cotton L J. says at the end of his judgment (23 Ch D at p 408)) to follow that you cannot ask that question. It is a new point; it has never been raised before; but it seems to me that that is right.

In my view, it follows that, whether we are thinking of a letter to a lawyer for the purpose of obtaining a legal opinion or of a statement of facts in a particular form requested by a lawyer for use in litigation, the letter or statement itself is privileged but the facts contained therein or the documents from which those facts were drawn are not privileged from discovery if, apart from the facts having been reflected in the privileged documents, they would have been subject to discovery. For example, the financial facts of a business would not fall within the privilege merely because they had been set out in a particular way as requested by a solicitor for purposes of litigation, but the statement so prepared would be privileged.

Applying these principles, as I understand them, to materials prepared by accountants, in a general way, it seems to me

(a) that no communication, statement or other material made or prepared by an accountant as such for a business man falls within the privilege unless it was prepared by the accountant as a result of a request by the business man's lawyer to be used in connection with litigation, existing or apprehended; and

(b) that, where an accountant is used as a representative, or one of a group of representatives, for the purpose of placing a factual situation or a problem before a lawyer to obtain legal advice or legal assistance, the fact that he is an accountant, or that he uses his knowledge and skill as an account-

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P

ant in carrying out such task, does not make the communications that he makes, or participates in making, as such a representative, any the less communications from the principal, who is the client, to the lawyer; and similarly, communications received by such a representative from a lawyer whose advice has been so sought are none the less communications from the lawyer to the client.

Turning to the application of these views to the facts here, and reading the allegations of fact in the notice of appeal in the light of the allegations in the reply together with what is said in Mr. Cohen's affidavits, I have no difficulty in concluding that the balance of probability is that Mr. Pal and Mr. Wolfe were acting as representatives of the appellant for the purpose of obtaining legal advice on behalf of the appellant from Mr. Goodman concerning the setting up of some arrangement such as that, according to the allegations referred to, the appellant in fact entered into. I think the court may take judicial knowledge of the fact that corporations of all kinds are continuously faced with problems as to what arrangements are advisable or expedient having regard to the intricacies of the tax laws and that, while huge corporations have staffs of lawyers and accountants of their own through whom they seek advice of counsel learned in such special areas of practice, smaller corporations employ lawyers and accountants in general practice to act for them in obtaining special advice in connection with such matters. I have no doubt as to the inherent probability of Mr. Cohen's statements that Mr. Wolfe and Mr. Pal were so acting for the appellant in obtaining Mr. Goodman's advice. While, therefore, I should have had some doubt as to whether Mr. Cohen's affidavits, based only on information and belief, would have been acceptable evidence if they had been objected to, as they have not been objected to, I reject the motion in so far as paragraphs (*b*) and (*c*) of the notice of motion are concerned.

I turn now to the order sought by the motion for an order

> (*d*) requiring that Alexander Slomo Strasser reattend the examination for discovery and answer questions numbered 164, 165, 175 and 176, and such further questions as may arise from the answers given.

To appreciate what is being sought here, it is necessary to refer to more of the examination for discovery of Alexander Slomo Strasser (who was examined as an officer of the appellant company) than the questions mentioned. The following portions seem to be relevant to the order sought:

BY MR. AINSLIE:

155 Q. There was a meeting held then on the 10th of December, 1964?
A. Yes.

156 Q. And am I correct that at that meeting was Mr. W. Goodman?
A. No.
MR. GOODMAN: Yes.

BY MR. AINSLIE:

157 Q. Mr W. Goodman, Mr. Pal, and Mr. H. Wolfe?
A. Yes.

158 Q. And am I correct that Mr Pal is your auditor and accountant?
A. Yes.

159 Q. And that Mr. Wolfe is your general solicitor?
A. Yes.

160 Q. And that Mr. Goodman was also your solicitor?
A. That is correct.

161 Q. And at that meeting am I correct that a memorandum was prepared as to the purport of the discussion by Mr. Goodman?
A. Yes.

162 Q. And that a copy was sent to the appellant?
A. Yes.

163 Q I would ask you to produce the memorandum setting forth the meeting of the 10th of December, 1964.

MR. GOODMAN: No, I think it is privileged

MR. AINSLIE: Mr. Goodman, my position is that it is not a privileged document.

MR. GOODMAN: I appreciate you take that position.

MR. AINSLIE: Well, for the purpose of the record—

MR. GOODMAN: And your department would be very quick to claim a similar privilege in connection with memoranda passing between a lawyer and his client in a matter your department was interested in.

MR. AINSLIE Let me just speak for the purpose of the record, my position is the document is not privileged, it is not a document for which privilege has been claimed in the affidavit on production and therefore I am demanding production of the document.

MR. GOODMAN: No. That is not so. There is a reference in part II of the affidavit on production to various communications in respect to which privilege is claimed and this is one of them.

BY MR. AINSLIE:

164 Q. In other words, am I correct that on the 10th of November, 1964, you were seeking legal advice in anticipation that difficulty would arise from this plan?

MR. GOODMAN: I do not think you are obliged to answer that question.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P

MR. AINSLIE: The witness is instructed not to answer that question—is that correct?

MR. GOODMAN: The witness is instructed not to answer that question.

BY MR. AINSLIE:

165 Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:

"Since the Ontario Pension Benefit Act will come into force January 1st, 1965, there are decided advantages in having lump sums past service contributions made before that date into a new pension plan for benefit of key executives. Payments made after that date may not be withdrawn as freely by reason of the Act; however, payments made into a pension plan will now be subject to rigid statutory rules regarding investments whereas the parties would prefer that the monies simply be re-invested in the business. Accordingly I have suggested that any lump sum payments into the new pension plan before December 31st, 1964, be withdrawn before that date by the beneficiaries and immediately transferred by the beneficiaries into a deferred profit-sharing plan which will immediately be set up for their benefit."

MR AINSLIE I wonder if you could just read the introductory part back.

THE REPORTER:

"Q. Now, would you direct your attention to the memorandum of the 10th of November, 1964, Mr. Strasser, and would you confirm that the memorandum reads in part as follows:"

MR. GOODMAN: The answer is "no".

Q. The answer is no because in fact—

MR. GOODMAN: No.

* * *

BY MR. AINSLIE

171 Q. Mr. Strasser, after the 10th of November did the officers of the appellant have any further discussions with their auditor as to the advisability of entering into the pension plan?

A. It is possible

172 Q. And am I correct that the auditor in December wrote to your solicitor setting forth certain recommendations that should be taken in regard to the financial affairs of the appellant and its tax position?

MR. GOODMAN: No, he made certain suggestions for consideration and they are considered to be of a confidential nature.

BY MR. AINSLIE:

173 Q. And those suggestions were contained in a letter which was sent to your solicitor?

A. Yes.

174 Q. And that letter is dated—could you tell me the date of the letter, please?

A. December 1st.

175 Q. I wonder if you would produce that letter, please?

MR. GOODMAN: No, we consider that it is privileged.

MR AINSLIE: Again, Mr. Goodman, I would say that it is not privileged because in my submission it is not a letter between a solicitor and client and it is not a letter in respect of which privilege has been claimed in the affidavit on production and I ask the witness to produce it.

MR. GOODMAN: The witness declines to produce it on advice of counsel.

MR. AINSLIE: Very well. I will adjourn the discovery on this portion and also on the portion of the memorandum of the 10th of November until after we have had an opportunity of having this matter decided by the courts.

BY MR. AINSLIE:

176 Q. And, Mr Strasser, am I correct that one of the suggestions that the accountant, that your accountant made to your solicitor, was that the appellant should wind up the pension plan and transfer to a deferred profit-sharing plan the assets in the plan?

MR. GOODMAN: Decline to answer.

THE DEPONENT: I refuse to answer.

The respondent's position, in so far as Questions 164 and 165 are concerned, is clearly set out in that part of the submission of counsel for the respondent filed October 25, 1968, which reads as follows:

3 By Notice of Motion dated September 19, 1968, the Respondent made an application to this Honourable Court requesting, *inter alia*, that Alexander Slomo Strasser be required to reattend the examination for discovery and answer Question No. 165 and such further questions as may arise from the answer given. Question No. 165 pertains to an extract of a certain memorandum, the said extract being marked Exhibit "A" for identification on the examination for discovery and found at page 94 of the Booklet being Exhibit "A" to the Affidavit of Murray Alexander Mogan filed in support of this application.

4. The extract was obtained by the Respondent in the following manner (see Affidavit of Raymond Sim, filed):

(*a*) Mr Raymond Sim, employed as an assessor with the Department of National Revenue in its Toronto District Office, did in the year 1964, attend at the office of the Appellant, Susan Hosiery Limited, and was given permission by a Mr. Alexander Strasser to look at a number of documents contained in a filing cabinet.

(*b*) Mr Raymond Sim found among the documents contained in the filing cabinet what appeared to be a memorandum dated November 10, 1964, relating to a meeting between Mr. W. Goodman, Mr. A Pal and Mr. H. Wolfe.

(*c*) Mr. Raymond Sim made a handwritten copy of certain portions of this memorandum and has subsequently had the handwritten copy typed and placed in the Department of National Revenue, Toronto District Office, file relating to the Appellant.

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

5 On examination for discovery of Mr. Alexander Slomo Strasser, as an officer of the Appellant, Mr Strasser was asked by counsel for the Respondent to confirm the accuracy of a portion of the said typewritten extract and Mr. Strasser, through his solicitor, refused to answer

See Examination for Discovery, p. 51, Q. 165 and pp. 52-53, Q. 166.

6. Mr. Pal is the auditor and accountant for the Appellant.

Examination for Discovery, p. 49, Q. 158.

Mr Wolfe is the general solicitor for the Appellant.

Examination for Discovery, p. 49, Q. 159.

Mr Goodman is also the solicitor for the Appellant.

Examination for Discovery, p. 49, Q. 160.

RESPONDENT'S POSITION·

The respondent submits that secondary evidence as to the contents of a privileged document is admissible at trial; accordingly, the Respondent can use the extract from the memorandum as evidence at trial The Respondent therefore submits that he is entitled on examination for discovery to verify the accuracy of the extract from the memorandum.

REASONS:

1. While the original memorandum of November 10, 1964 may be privileged from production on the basis of solicitor-client privilege, privilege does not encompass the extract from that memorandum which is in the possession of the Respondent.

Calcraft v. Guest [1898] 1 Q.B. 759 at 764 per Lindley M.R.:

> "'. . . Where an attorney intrusted confidentially with a document communicates the contents of it, or suffers another to take a copy, surely the secondary evidence so obtained may be produced Suppose the instrument were even stolen, and a correct copy taken, would it not be reasonable to admit it?' The matter dropped there; but the other members of the Court (Lord Abinger, Gurney B., and Rolfe B.) all concurred in that, which I take it is a distinct authority that secondary evidence in a case of this kind may be received."

Delap v Canadian Pacific R.W. Co. (1914) 5 O.W.N. p. 667 at 669 per Middleton, J.·

> "It is suggested that the correspondence contains matter going to shew that the claim is not made in good faith. . . . In *Calcraft v. Guest,* [1898] 1 Q.B. 759, it was held that the use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented even by fraud in the obtaining of the copies—a much stronger case than this, where the copies were not obtained fraudulently, but by the mere inadvertence of the solicitor."

Richard C.W. Rolka v M.N.R. [1963] Ex.C.R. 138 at pp. 154-155 per Cameron, J.·

> ". . . The fact is that the originals did come into the hands of the Minister's representative by the voluntary act of the solicitor and such privilege as may have previously existed

in regard thereto has been lost. Reference may be made to *Phipson on Evidence,* 9th ed, at p. 202, where on the authority of *Calcraft v. Guest,* [1898] 1 Q B. 759 (C.A.), the principle is stated thus:

> 'But, unlike the rule as to affairs of State, if the privileged document, or secondary evidence of it, has been obtained by the opposite party independently, even through the default of the legal adviser, or by illegal means, either will be admissible, for it has been said that the Court will not inquire into the methods by which the parties have obtained their evidence.' "

Holmested & Langton's Ontario Judicature Act 5th Edition, at p. 1032·

> *"Secondary Evidence.* In *Calcraft v. Guest* [1898] 1 Q B. 759, it was held, in effect, that though documents are privileged from production, secondary evidence of them may be given And see per Cozens-Hardy, M.R., in *Ashburton v. Pape* [1913] 2 Ch. 469, at 473; *Delap v. C.P.R.* (1914) 5 O.W.N. 667, at 669. But the actual decision in the *Calcraft* case seems to go no further than that a copy of a privileged document, obtained by accidental transfer of possession, may be admitted; see the principle stated by Wigmore, Evid., sec 2325(3); and see the general principle, stated by Ferguson, J A, in *Re United States of America v. Mammoth Oil Co.* (1925) 56 O L.R. 635, at 646, that the privilege of communications between solicitor and client is one which the Court must enforce unless its enforcement is waived by the client."

Canadian Encyclopedic Digest (Ontario) 2nd Edition, Vol. 6, at pp. 16-17:

> "The use of copies of privileged documents, where the production of the original cannot be compelled by reason of privilege, is not prevented"

The Annual Practice 1966, Vol. 1 at p 526:

> *"Secondary evidence or copies of privileged document.*— Secondary evidence as to the contents of a privileged document is admissible as against the party resisting its production (*Calcraft v. Guest,* [1898] 1 Q B 759, C.A.). Thus if a party has an opportunity of taking or getting a copy of such a document he can use it as secondary evidence (ibid.)."

Wigmore on Evidence, 3rd Edition, Vol. VIII at p. 629:

> "S. 2326. Third Persons Overhearing. The law provides subjective freedom for the client by assuring him of exemption from its processes of disclosure against himself or the attorney or their agents of communication. This much, but not a whit more, is necessary for the maintenance of the privilege. Since the means of preserving secrecy of communication are entirely in the client's hands, and since the privilege is a derogation from the general testimonial duty and should be strictly construed, it would be improper to extend its prohibition to third persons who obtain knowledge of the communications. One who overhears the communication, whether with or without the client's knowledge, is

1968

SUSAN HOSIERY LTD. v. MINISTER OF NATIONAL REVENUE

Jackett P.

not within the protection of the privilege. The same rule ought to apply to one who surreptitiously reads or obtains possession of a document in original or copy."

Halsbury's Laws of England, 3rd Edition, Vol. 12 at p. 41:

"Particulars may be ordered of a privileged document referred to in a pleading, and secondary evidence may be given of a privileged document despite the privilege attaching to the original, although, if a copy is obtained improperly, an injunction may be granted restraining the use of that copy."

Whether an injunction may be obtained by the Appellant restraining the use of the extract is not relevant to this application since the Appellant has not commenced proceedings for an injunction.

Assuming that the respondent may (and I am not to be taken as expressing any doubt with regard thereto) adduce evidence as to the communications that took place between the appellant and its solicitors if it has such evidence available at the trial and it is relevant to the material facts, the appellant is none the less entitled to rely on its privilege not to disclose such communications either by itself or its solicitors either on discovery, or at trial, or otherwise. Having come to the conclusion that the balance of probability is that the meeting between Mr. Pal, Mr. Wolfe and Mr. Goodman on December 10, 1964, was part of the process whereby Mr. Pal and Mr. Wolfe, as representatives of the appellant, were obtaining legal advice for the appellant from Mr. Goodman, and that the appellant is therefore entitled to a privilege against producing a memorandum of what occurred at that meeting, it seems clear to me that the same privilege extends to answering any questions as to what was or is contained in that memorandum.

Finally, with regard to Questions 175 and 176, it follows from my conclusion that Mr. Pal was one of the representatives of the appellant for obtaining legal advice that the appellant is privileged from producing, or giving evidence as to the contents of, a letter written by Mr. Pal as part of the process of obtaining such advice.

The application is dismissed with costs payable by the respondent to the appellant in any event of the cause, which costs are hereby fixed at $300.