

Brennan & Shaw [2011] FamCAFC 11

(2 February 2011)

Background

This matter was an appeal against two interlocutory decisions of Fowler J, by which his Honour granted access to a solicitor's file and admitted documents gleaned from that file into evidence.

Proceedings in the Family Court between the appellant (the 'husband') and the respondent (the 'wife') were decided in favour of the husband. The wife was represented by the second respondent (the 'solicitor'). The solicitor put on an affidavit that said, at paragraph 3:

I have obtained the First Respondent's consent to waive her privilege in respect of my evidence in this affidavit.

In paragraph 11 he said:

At all times in the proceedings I acted on the instructions of the First Respondent. At no time did I take any significant step in the proceedings without her instructions. She was copied in to all correspondence and given written court reports by my staff.

On the basis of these depositions, the husband claimed that the wife had waived privilege over the solicitor's file, and applied for access to the file.

Justice Fowler did not inform the wife that the husband had claimed that privilege was waived, and he did not inform her of her rights regarding privilege, nor indicate to her that she should, perhaps, obtain some advice about the nature of the privilege and the consequences to her of any waiver. After email correspondence between the husband and the trial Judge's associate, the matter was listed for a hearing, on 22 April, of the application for access to the solicitor's file. The wife was copied in on this correspondence, but she appears not to have appreciated the import of the re-listing, and did not attend.

At the hearing of the application on 22 April, Fowler J held that privilege was waived with respect to the file, and that the solicitor should make the file available to the husband for inspection. His Honour set aside any questions of the relevance of the material, saying that those matters could be determined at the trial stage.

His Honour had previously indicated to the wife that she need not appear at the hearing on the 23 April 2009 – the date set down for hearing the costs argument as between the husband and the solicitor. It was at that hearing that the Judge admitted documents from the solicitor's file into evidence.

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Procedural fairness

In a joint judgment Coleman, Thackray and Ainslie-Wallace JJ determined, at [57]-[60], that the wife had been denied procedural fairness because the trial Judge failed to fulfil his obligation under s 132 of the Evidence Act, which says:

If it appears to the court that a witness or a party may have grounds for making an application or objection under a provision of this Part, the court must satisfy itself ... that the witness or party is aware of the effect of that provision.

After considering all the relevant correspondence, the Court rejected the husband's contention that the wife had been put on notice of his intention to seek access to her solicitor's file and chose not to attend the hearing to contest the asserted waiver of privilege ([54]-[56]).

It was further held, at [57], that even if the wife had sufficient knowledge to understand what was proposed for the hearings on 22 and 23 April 2009, this would not absolve his Honour from the positive obligation imposed by s 132 of the Evidence Act.

According to the judgment at [58], this duty was enlivened as soon as it became clear that counsel for the husband asserted the wife had waived her privilege and was going to seek access to the solicitor's file, despite the fact that no application had yet been made.

Waiver of Privilege

The Court held that since there was no issue raised during the proceedings that the solicitor had acted outside instructions, the mere deposition by the solicitor that he had acted upon instructions did not make it an issue and 'nor does it entitle the husband to trawl through the solicitor's file in the hope that something may arise to contradict the solicitor's assertion that he was acting on instructions' ([69]).

The Court also noted that the privilege belongs to the client, and only the client may waive it. The solicitor had no authority to waive privilege on behalf of the wife at the time he filed his affidavit, because he was no longer acting for her ([72]). And the wife herself did not waive privilege in the documents - she made no claim that the solicitor had acted outside of instructions, and did not use her privilege as a shield or a sword against the husband's claim for costs ([73]).

Conclusion

The appeal against the orders of the trial Judge was made out, and their Honours made orders preventing the use and dissemination of the material obtained under the orders of the trial Judge.

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The Court further ordered that documents obtained under the orders of the trial Judge be delivered up.

The full text of this decision can be found here:

<http://www.austlii.edu.au/au/cases/cth/FamCAFC/2011/11.html>

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