IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA637/2022
[2023] NZCA 61

BETWEEN	WATER USERS' GROUP (NZ) INCORPORATED Appellant
AND	MINISTER FOR LOCAL GOVERNMENT First Respondent
	THE ATTORNEY-GENERAL Second Respondent

Hearing:	15 February 2023
Court:	Cooper P, Brown and Wylie JJ
Counsel:	G J Judd KC and G M Illingworth KC for Appellant M G Colson KC and J B Watson for Respondents
Judgment:	14 March 2023 at 11.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Brown J)

Introduction

[1] The appellant appeals against a judgment of Associate Judge Johnston declining to order disclosure to it of legal advice provided to the respondents by the

Crown Law Office.[1] The Judge ruled that, notwithstanding the proactive publication to the public of Cabinet documents containing a summary of the legal advice, there had been no waiver in terms of s 65 of the Evidence Act 2006 of the legal professional privilege in the legal advice itself.

[2] The substantive proceeding has not progressed to the discovery phase. We consider it is premature to rule on the issue of waiver under s 65 in isolation from consideration of the process by which a court might make directions for the production of any documentation the subject of waived privilege. Hence for the reasons which follow we dismiss the appeal. However we record that the appellant will be at liberty to pursue a further appeal from the High Court judgment once the implications of the discovery process have been properly explored.

Relevant context

[3] In June 2021 the first respondent (the Minister) placed before Cabinet written proposals for a review of the delivery services for drinking water, wastewater and stormwater (known as the Three Waters reforms). One of the documents detailed what the respondents accepted was a high-level summary of legal advice provided by the Crown Law Office concerning the Crown's obligations to Māori in respect of the Three Waters reforms. On 30 June 2021 that paper was proactively released to the public via the website of the Department of Internal Affairs.[2]

[4] On 3 December 2021 the appellant commenced a proceeding against the respondents seeking numerous declarations, including that the Minister's advice to Cabinet was wrong in law and that there is no Treaty principle of partnership requiring the Crown to recognise iwi/Māori rights and interests in the three waters.[3] The pleading contained references to reliance by the Minister on the Crown Law Office legal advice summarised in the published documents.

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1 *Water Users' Group (NZ) Inc v Mahuta* [2022] NZHC 2311 [High Court judgment].

2 A further document referring to legal advice which the Minister provided to Cabinet on 18 October 2021 was also proactively released on 27 October 2021.

3 The heading of the statement of claim stated that the claim was brought under the Declaratory Judgments Act 1908, the common law, the Court's inherent jurisdiction and pt 30 of the High Court Rules 2016: see r 5.11(1)(c) of the High Court Rules.

[5] On realising in mid-December 2021 that the published documents recorded a summary of the legal advice received, the Department of Internal Affairs arranged for the original documents to be withdrawn from its website and replaced with redacted versions. The respondents then requested that the appellant delete from its claim the references to the recently-redacted material.

[6] The appellant declined that request. It filed an interlocutory application seeking, inter alia, declarations that the privilege in the relevant paragraphs of the two documents had been waived and an order that the respondents produce the legal advice which the previously-published documents had summarised.

[7] Contending that the disclosure that had occurred was not inconsistent with a claim of confidentiality, the respondents opposed the application on several grounds, including:

(a) The passages in the documents that referred to legal advice were involuntarily or mistakenly disclosed, without the consent of the person who holds the privilege, namely the second respondent. The Court's discretion under s 53(4) of the Evidence Act should be exercised to order that the legal advice not be disclosed in the proceeding.

(b) Discovery was not available as of right in the appellant's proceeding.

(c) The legal advice did not meet the test for disclosure under r 8.7 of the High Court Rules 2016 (the Rules). The Crown's legal advice could not advance or adversely affect either party's case.

(d) Any waiver was limited to the extent of disclosure in the previously published Cabinet documents and did not extend to the underlying Crown Law Office advice.

High Court judgment

[8] The focus of the waiver argument below was s 65 of the Evidence Act, which provides:

> **65 Waiver**
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> (1) A person who has a privilege conferred by any of sections 54 to 60 and 64 may waive that privilege either expressly or impliedly.
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> (2) A person who has a privilege waives the privilege if that person, or anyone with the authority of that person, voluntarily produces or discloses, or consents to the production or disclosure of, any significant part of the privileged communication, information, opinion, or document in circumstances that are inconsistent with a claim of confidentiality.
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> (3) A person who has a privilege waives the privilege if the person—
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> (a) acts so as to put the privileged communication, information, opinion, or document in issue in a proceeding; or
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> (b) institutes a civil proceeding against a person who is in possession of the privileged communication, information, opinion, or document the effect of which is to put the privileged matter in issue in the proceeding.
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> (4) A person who has a privilege in respect of a communication, information, opinion, or document that has been disclosed to another person does not waive the privilege if the disclosure occurred involuntarily or mistakenly or otherwise without the consent of the person who has the privilege.
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> (5) A privilege conferred by section 57 (which relates to settlement negotiations or mediation) may be waived only by all the persons who have that privilege.

[9] The Judge first ruled that the Minister must be taken to have had the necessary authority in terms of s 65(2) to waive the legal advice privilege, preferring the approach in *Carter v Coroner's Court at Wellington*[4] over the narrower view in *Bain v Minister of Justice*[5] that privilege in legal advice received by the Crown was capable of being waived only by the Attorney-General.[6]

[10] The Judge rejected the respondents' submission that s 65(4) applied, ruling that the documents were consciously released without proper consideration as to whether they contained privileged information. If there was a mistake it was simply as to the implications of disclosure.[7]

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4 *Carter v Coroner's Court at Wellington* [2015] NZHC 1467, [2016] 2 NZLR 133 at [68]–[70].
5 *Bain v Minister of Justice* [2013] NZHC 2123 at [157].
6 High Court judgment, above n 1, at [22]–[25].
7 At [31].

[11] Turning to the question whether in terms of s 65(2) the disclosure was of a significant part of the privileged communication, the Judge reasoned:

> [34] In this case, not only was the Crown's legal advice referred to, but substantive aspects of it were included in the Papers. The material disclosed is directly relevant to the core issue in the proceeding — that is to say the obligations owed by the Crown to Māori. This went beyond a mere reference to the existence of communications between the Minister's office and the Crown Law Office. It disclosed contents. There was a conscious disclosure of a complete copy of the [documents]. The inclusion of the legal advice within the [documents] appears to have been for the purpose of persuading Cabinet to a particular view. I am in no doubt that a significant part of the privileged material was disclosed.
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> (Footnotes omitted.)

[12] Having concluded that the public release of the documents and their accessibility for a period of months were entirely inconsistent with a continued claim to privilege, the Judge ruled that privilege in the published documents had been waived.[8] He made an order that the unredacted versions of the published documents be discovered.[9]

[13] The Judge turned to address the privileged status of the Crown Law Office advice by reference to the principle of collateral waiver. In considering whether as a matter of fairness the undisclosed advice should also be disclosed, the Judge preferred the approach that it was "only if [the] material is *deployed* by the disclosing party in advancing their case" that unfairness could arise if there was not also disclosure of the additional material.[10] The Judge considered there was no suggestion that the Crown was seeking to rely on the material in respect of which he had found that privilege had been waived. In the Judge's view, to succeed on a collateral waiver argument the appellant also needed to establish that the production of the legal advice was necessary to avoid "real injustice", a point which the appellant had not addressed in submissions.[11]

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8 At [36]–[37].

9 At [47(b)].

10 At [40]–[41], an approach which the Judge considered was illustrated in *McGuire v Wellington Standards Committee (No 1)* [2014] NZHC 1159 at [26]–[27] and which he had previously regarded as preferable in *Everest Serviced Apartments Ltd v Body Corporate 511909* [2022] NZHC 1925 at [50].

11 High Court judgment, above n 1, at [42].

[14] Finally, the Judge observed that the issues in the appellant's proceeding were fundamentally legal as opposed to factual and it was not at all obvious what factual proposition was in issue to which the legal advice would be relevant.[12] Being satisfied that in the circumstances it was very unlikely that the Crown Law Office advice would be deployed in the proceeding and that there was no reason for the Court to order its disclosure,[13] the Judge dismissed the application for an order that the respondents discover the Crown Law Office advice.[14]

[15] There was no discussion in the judgment of the jurisdictional footing for the orders for production sought by the appellant.

The ambit of the appeal

[16] The key ground of appeal was that because the Minister had disclosed a significant part of the advice received from the Crown Law Office it followed that privilege was waived in the entirety of the advice. The High Court was said to have erred in applying the doctrine of collateral waiver, which the appellant contended was no longer applicable following codification in the Evidence Act of the law governing legal professional privilege. The legal advice was said to be relevant to the basis upon which Cabinet had made decisions in respect of the Three Waters reforms, which the appellant contended were founded on errors of law. Hence the High Court should have ordered production of the Crown Law Office advice.

[17] The respondents did not file a cross-appeal or a r 33 memorandum[15] in respect of the High Court's rulings that the Minister had the authority to waive the privilege, that the privilege in the publicly-disclosed documents was waived, and that the disclosure in those documents was a significant part of the Crown Law Office advice. We are not called on to make any decision regarding those matters.

[18] The primary focus of the appellant's submissions was an attack on the Judge's adoption of the doctrine of collateral waiver to support the maintenance of the

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12 At [43].
13 At [44].
14 At [47(c)]. Leave to appeal was granted on 2 November 2022: *Water Users' Group (NZ) Inc v Mahuta* [2022] NZHC 2858.
15 Court of Appeal (Civil) Rules 2005, r 33.

privilege in the Crown Law Office advice. The appellant touched relatively lightly on the mechanics for production of the advice, submitting:

> Privilege having been waived, it inexorably flows from High Court Rules 8.7, 8.16(1)(b), 8.27(1) and 8.28(1) that the Crown must produce the documents for inspection.

With reference to the hearing below the appellant stated:[16]

> Cutting to the chase, what the applicant was seeking was an order under r 8.27, and the hearing in the High Court proceeded implicitly on that basis.

[19] However, the jurisdictional basis for the order for production was at the forefront of the respondents' submissions in opposition. Observing that the appellant's interlocutory application invoked rr 8.7 and 8.19 of the Rules, the respondents submitted neither seemed applicable: no order for general discovery had been sought (r 8.7) and the pre-requisites for particular discovery (r 8.19) were not present. Nor was r 8.27 (inspection of documents) engaged.[17]

[20] Furthermore the respondents took issue with the appellant's proposition that the High Court hearing "proceeded implicitly" on the basis that the appellant was seeking an order under r 8.27. They submitted that the appellant had failed to set out the jurisdictional basis on which the production order was sought and had simply assumed an entitlement to materials not truly relevant to the appellant's substantive claim.

[21] Emphasising that these were not simply technical points, the respondents submitted:

(a) An applicant seeking production of a document must point to the jurisdictional basis for its application.

(b) This is a public law proceeding (and one facing significant hurdles).

(c) The appellant has not engaged with basic discovery principles, such as:

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16 There was a footnote reference to the High Court judgment, above n 1, at [47(c)].

17 The respondents pointed out that there was no mention of r 8.27 in the High Court judgment.

(i) Judicial review/declaratory judgment proceedings are intended to be simple, untechnical, and prompt mechanisms to ensure public power is exercised lawfully.

(ii) The courts' approach to discovery in cases of this nature reflects that: discovery is not available as of right in judicial review proceedings, and is limited to the material necessary to enable the appellant to fairly argue its case.

(iii) The appellant already has that material. In any event, the respondents will be under a duty of candour to explain the decision-making processes under challenge in their evidence in the substantive proceeding.

Discussion

[22] As explained in *Mackenzie v Mackenzie*,[18] there is a distinction between procedural discovery under the Rules and other occasions (described by Associate Judge Bell as "substantive disclosure") on which the law requires disclosure.[19] Under substantive disclosure, so long as the documents are within the class of documents to be disclosed, questions of relevance and proportionality do not arise. By contrast procedural discovery arises only in the context of a court proceeding, absent which a party could otherwise resist disclosing documents to the other side. Documents discovered may be used only for that proceeding and the scope of procedural discovery will be limited by relevance and possibly proportionality.[20]

[23] When the documents in issue were publicly disclosed, notwithstanding the inclusion of the summary of the Crown Law Office advice, the respondents had no obligation, and could not be compelled, to provide the legal advice to other persons,

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18 *Mackenzie v Mackenzie* [2017] NZHC 2893, (2017) 4 NZTR 27-027 at [8].

19 At [8], giving examples of substantive disclosure which included shareholders' entitlement to inspect certain company records under s 216–218 of the Companies Act 1993 and partners' requirement to disclose accounts to each other under s 31 of the Partnership Act 1908.

20 At [8].

including the appellant. The potential avenue of procedural discovery only became available when the appellant's proceeding was commenced in December 2021.

[24] The appellant's interlocutory application acknowledged that discovery had not yet been given. However it stated that, as the respondents had signalled a claim to privilege and the issue would be before the Court, "as a matter of convenience for the Court and all parties" the appellant sought (in addition to declarations of waiver of privilege) the following orders:

> 1.3 Ordering the first respondent to file an affidavit stating whether a document or documents containing the advice are or have been in the first respondent's control; and if they have been but are no longer in the first respondent's control, the first respondent's best knowledge and belief as to when the documents ceased to be in the first respondent's control and who now has control of them;
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> 1.4 Ordering the first respondent to serve the affidavit on the applicant; and
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> 1.5 If the document or documents are in the first respondent's control, ordering the first respondent to make the document or documents available to the applicant for inspection, in accordance with rule 8.27;

We infer that it was in response to the request for such orders that grounds of opposition (b) and (c)[21] were primarily directed.

[25] However that aspect of the appellant's application was not addressed in the judgment. As earlier noted,[22] the specific mechanism for production of the documents in dispute was not the subject of analysis in the High Court judgment, which seems to have proceeded on the assumption that the Court had jurisdiction to make an order for disclosure of those documents.

[26] There are two stages to the discovery process: (a) obtaining a verified list of relevant documents in the control of the party concerned; and (b) inspecting the documents. Rule 8.27(1), upon which the appellant now relies, is part of the second stage. It states:

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21 At [7] above.
22 At [15] above.

8.27 Inspection of documents

(1) As soon as a party who is required to make discovery has filed and served an affidavit of documents, that party must, subject to rule 8.28, make the documents that are listed in the affidavit and that are in that party's control available for inspection by way of exchange.

[27] The requirement that the party "must" make the listed documents available for inspection is qualified by the saving for privileged documents in r 8.28. The appellant's contention here is that the asserted waiver of privilege in the Crown Law Office advice negates the application of r 8.28. However, the respondents' more fundamental jurisdictional objection is the absence of the prerequisite of a verified list. As a result the issue (if it proves to be an issue) of relevance has yet to be resolved. The consequence is that the rulings on waiver of legal professional privilege were made in a jurisdictional vacuum so far as concerns the mechanism for inspection and production of documents.

[28] This is an unsatisfactory and regrettable state of affairs. We do not consider that this Court should potentially compound the problem by continuing to engage with waiver arguments in the abstract. In *Attorney-General v Blake* Lord Steyn observed that asking the right questions in the right order reduces the risk of wrong decisions.[23] In our view that sentiment is apt in the present circumstances.

[29] For these reasons we consider that the discovery process should be pursued and the avenues for access to the Crown Law Office advice should be exhausted prior to a determination of the waiver of privilege contention, which we observe involves consideration of the scope of "circumstances" that are inconsistent with a claim of confidentiality.[24]

[30] As noted above the appellant did originally seek discovery orders, but they appear to have been lost sight of in the context of the several issues addressed in the judgment (namely further particulars, waiver of privilege and suppression). It is our perception that both sides have contributed to the current confusion. In those circumstances we make no order for costs.

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[23] *Attorney-General v Blake* [2001] 1 AC 268 (HL) at 290.

[24] Evidence Act 2006, s 65(2). See [8] above.

Result

[31] The appeal is dismissed.

[32] Costs will lie where they fall.

Solicitors:
Franks Ogilvie, Wellington for Appellant
Crown Law Office, Wellington for Respondents