

## CASE COMMENT

EXCEPTION CLAUSES AND LIABILITY IN CONTRACT AND TORT: *PETERS (ESTATE OF) v. WORMALD VIGILANT LIMITED* (High Court, Wellington, 16 August 1982, A. 562/77, Davison, C. J.)

Two interesting and important points of law are raised by this action for breach of contract and negligent mis-statement. The first is the construction of exception clauses after the decision of the House of Lords in *Photo Production Limited v. Securicor Transport Limited* ([1980] A.C. 827), and the second is the question of joint liability in contract and in tort. In addition, the problems involved in raising the defence of contributory negligence in a contract action were considered, but the defence was found to fail on the facts even if it was applicable.

The plaintiffs were dealers in antique jewellery and had for some years hired a vigilant security alarm system from the defendant. On Christmas Day in 1976, an intruder attempted to break into the shop but was scared off by the alarm system which was activated when he tried to drill into the rear door of the shop. The defendant's serviceman repaired the alarm system in the door that day. This he did by placing tape, normally used only on windows, over the door and he assured the plaintiffs that this would be perfectly safe. However, this repair was more temporary in nature than permanent and some three months later, no further repairs having been taken, the shop was again burgled and jewellery to a value of \$98,000 was stolen. The burglar had entered by cutting a hole in the bottom 15-17 inches of the door which was not covered by the tape; this could be seen by looking from the interior of the shop through an open curtain to a door at the rear.

The plaintiffs brought their action to recover from the defendants the value of the jewellery stolen.

### *The Contract Claims and the Function of Exception Clauses*

The plaintiff's claim in contract is significant for it provided an opportunity for the High Court to reconsider the nature of exception clauses and their effect on contractual obligation after the House of Lords decision in *Photo Production v. Securicor*. The alleged breaches of contract on the part of the defendant were twofold: first,

of clause 5 of the original agreement; and second, of an alleged implied term of that contract that work carried out be done so with reasonable care. The relevant clauses of the contract provided as follows:

Clause 5. The owner . . . will in addition . . . at any other time upon notice in writing being given to the owner by the hirer that the system is not in good working order with all reasonable speed put the same into good running order and working condition (subject to clauses 7 and 12 hereof).

Clause 12. The owner shall not be liable in any manner whatsoever for any loss or damage suffered by the hirer by reason of any failure in the operation of the said system or by reason of any act or omission on the part of the owner or its servants or agents in respect of the system or the operation thereof or in consequence of or following any signal or alarm.

Clause 13. This agreement shall constitute the sole evidence of the contract between the parties hereto to the exclusion of all conditions and warranties statutory and otherwise and not expressly incorporated herein and the hirer hereby admits and declares that he enters into this agreement solely and exclusively in reliance upon his own judgment and not upon any representation condition or warranty made or alleged to have been made by any owner or agent of the owner.

The alleged implied term provided:

That any maintenance and servicing work carried out by the defendant on such security system would be performed in a proper and workmanlike manner and with reasonable care.

The defendants denied the existence of the implied term in the statement of defence though did not dispute it in their submissions. The Chief Justice observed that in any case the defendant could hardly have argued successfully to the contrary; a recent Australian High Court decision, *Reg. Glass Pty Ltd. v. Rivers Locking Systems Pty Ltd.* ([1968] 120 C.L.R. 516, 521) gives support for the inclusion of such an implied term in a contract for the installation of a security system. What is important here is that the obligation contained in clause 5 is, the exception clauses aside, an absolute one. The duty to put the system "in good running order and working condition" is not qualified by the duty being satisfied if reasonable care has been taken; mere reasonable care may not be enough to discharge the duty. To the extent that the obligation contained in the clause exceeds the duty to take reasonable care, the duty to take care can be implied as it is a lesser duty and part of the greater (absolute) duty described.

Having accepted that it was implied by clause 5 that the defendant was obligated to take reasonable care, His Honour had no trouble at all in finding a breach, both of the implied term in first effecting repair, and of clause 5 in failing to put the system into "good running order and working condition". His Honour then proceeded to consider the question of causation, finding that the break-in and consequent loss to the plaintiff was due to the defendant's breaches, before finally turning to the exception clause contained in clause 12.

This being his approach, to look at the obligations created by the contract without regard to the exception clause to establish whether or not breach had occurred, it is not surprising that the Chief Justice held

the clause to be inconsistent with the very substance of the contract and hence ineffective. His Honour said to hold otherwise would be to render the contract worthless from the plaintiff's point of view. Further, the fact that the exception clause was contained in a printed form contract where the plaintiff had little bargaining opportunity seems to have influenced the Chief Justice in construing the clause *contra proferentem*. After considering the language of the clause His Honour concluded that the wording of the clause was not sufficiently clear to force him to read it as excluding the obligations created by clause 5.

In the face of the clear wording of clause 12 and the extreme finding as to its effect, it is perhaps worthwhile to take time to consider the proper treatment of exception clauses in commercial contracts.

Whether an exception clause has substantive or merely procedural effect has been the subject of much debate in recent years (see especially Coote, *Exception Clauses*, 1964). In the latter treatment, exception clauses act merely as a shield or defence to a claim for damages and do not themselves affect the extent of the obligations undertaken by the promisor. In the former treatment, exception clauses impose substantive limitations upon the obligations assumed by contracting parties so that acts which might, without the exception clause, give rise to liability for a breach of contract, with the exception clause do not amount to breach at all. In the decision of the House of Lords in *Photo Production v. Securicor* only Lord Diplock adverted to the function of exception clauses which he considered to be definitive of obligation and hence substantive in effect (*supra*, p.850). As one would expect, it was to the treatment of exception clauses contained in Lord Diplock's judgment that Davison C. J. turned for assistance in the present case. What is surprising is that though purporting to be in agreement with His Lordship's statement of the law, the Chief Justice treated clause 12 as creating a defence to an obligation already defined (in clause 5) and not as modifying that obligation. This is even more surprising when one notes that clause 5 is expressly stated as being subject to clause 12.

Looking at clause 12 itself, the first sentence begins by stating that "the owner shall not be liable in *any manner whatsoever* for loss or damage suffered by the hirer" (emphasis mine). The effect of the word "whatsoever", the learned Chief Justice holds, is to constitute an agreement in express terms that the owner should not be liable, certainly in the contract, if the circumstances as detailed in the remainder of the clause were found to exist. Three different circumstances are given in which liability is excluded though only the second of these is relevant for our purposes: ". . . any loss or damage suffered by the hirer . . . by reason of any act or omission on the part of the owner or its servants or agents in respect of the system or the operation thereof . . .". What is important is that the clause does not specifically refer to negligent acts or omissions, merely acts or omissions generally. At least three types of acts or omission are possible causing

loss—inadvertent acts or omissions, negligent ones, and intentional ones. Where the party pleading an exception clause is liable for more than one of these categories then it will require very strict words to exclude liability for all three (*Hollier v. Rambler Motors Limited* [1972] 2 Q.B. 71). The Chief Justice seems to have assumed that if the clause applied then it applied to all three types of acts and refused to give effect to it at all because to do so would be to negate the contract itself. It is submitted however that such a clause as here need not, upon strict construction, have a blanket application, and that even if it does exclude liability for negligence, this cannot entitle the court to ignore the exception clause. The contract would continue to have substantive effect; the clause would merely narrow or define the obligation that is the content of the contract : i.e., it would remove from the contract the obligation to take reasonable care leaving an obligation not intentionally to fail to put the system in good running order.

This leaves the question of whether or not the exception clause *does* exclude liability for negligence. It is well established that if the only type of act which can lead to liability of the party pleading the exception clause is a negligent act then the exception clause will more readily operate to exempt him (*Hollier v. Rambler Motors Limited (supra)*, per Salmon L. J. 78). In the present case, if the defendants were only ever liable for failure to take reasonable care then there would be good reasons for arguing that liability for a failure to take reasonable care is excluded. If one adopts the view that exception clauses are substantive in effect then there would never have been an obligation to take reasonable care (as was found to be implied by Davison C. J.) as this would be inconsistent with an express term of the contract (the exception clause). However, as has been pointed out, the obligation created by clause 5 is an absolute one, the defendant being liable for more than failure to take reasonable care. Consequently, it is possible to construe clause 12 as removing from the defendant liability for loss caused where there is no fault on his part, leaving him liable for loss or damage suffered by the hirer by reason of negligent or intentional acts or omissions of the defendant.

Though the clause *may* be construed as excluding liability for negligence the question remains whether it *should* be so read. As Professor Coote has pointed out (*supra*, p.30): "If the exclusion of negligence were restricted to cases where it was literally the only liability of the promisor, the rule would be very oppressive indeed. It would mean that in no relationship containing absolute contractual terms could negligence be excluded by general words". The distinction to be drawn is between the common carriers, who are liable both for fault and as insurers, and ordinary carriers, whose liability is only for fault; in the common callings since negligence is not the only liability of the promisor, it is not excluded. Whether such a distinction ought be

made in the present case where the contract is between two commercial parties, and where to do so would appear to impose disproportionate risks on the defendant in relation to the \$1.42/week rental, is another question entirely.

What is clear, however, is that these are not the questions asked by Chief Justice Davison. His Honour adopted the principle that exception clauses will not be construed in such a way as to be inconsistent with the main objects of the contract (see 9 Halsbury, *Laws of England* (4th ed.), para. 376). Though shrouded as a rule of construction, the application of this principle was as a substantive rule of law, for, as we have seen, upon construction of the contract the exception clause does not have the effect of "depriving one party's stipulation of all contracting force" and is not inconsistent with the object of the contract, as the object of the contract is expressly subject to the exception clause. Indeed, what His Honour has achieved in applying this principle that exception clauses must be construed to serve the main object of the contract is a new method of rejecting exception clauses formerly achieved by the doctrine of fundamental breach (see 9 Halsbury, *Laws of England* (4th ed.), para. 376). It is ironical that the Chief Justice sought support for his approach in the judgment of Lord Diplock in the *Securicor* case for his Lordship there denied that the Court was entitled so to reject an exception clause and deprive it of any effect.

#### *Concurrent Liability in Contract and in Tort*

The tort claim arose out of certain representations made by one of the defendant's servicemen to the effect that the repair to the system afforded a reasonable measure of protection against burglary. The cause of action was founded upon the *Hedley Burne* principle (*Hedley Burne & Co. Limited v. Heller & Partners Limited* [1964] A.C. 465) and the elements required to establish the tort were all found to exist; viz., a special relationship existed as it was the company's business to give advice; the defendant was well aware that his advice was being relied on so a duty of care existed; this duty was breached by the failure to warn of the inadequate repairs; and the loss that occurred on the burglary was foreseeable.

Though the Court of Appeal has indicated that it might be prepared to reconsider this area in the future (see *Rowe v. Turner Hopkins & Partners* [1980] 2 N.Z.L.R. 550), concurrent liability in contract and tort is prevented by an earlier decision of the Court of Appeal in *McLaren Maycroft & Co. v. Fletcher Development Co. Limited* ([1973] 2 N.Z.L.R. 100) adopting the decision of Diplock L.J. in *Bagot v. Stevens Scanalan & Co. Limited* ([1966] 1 Q.B. 197) where His Lordship said:

It seems to me that, in this case, the relationship which created the duty of exercising reasonable skill and care . . . arose out of the contract and not otherwise. The complaint that is made against them is of a failure to do the very thing which they contracted to do. That was the relationship which gave rise to the duty which was broken. It was a contractual relationship, and a contractual duty, and any action brought for failure to comply with that duty is, in my view, an action on contract. It is also, in my view, an action founded upon contract alone. (p.204)

The present case is significant because although there was a contract between the parties the tort claim is not concurrent. It arises out of a misrepresentation that performance of the repairs left the premises reasonable secure, and might, if not excluded, give rise to liability in tort if it were given negligently even if there were no duty under the contract to perform the repair with reasonable care. The Chief Justice was clearly of the opinion that the exception clause did not extend to liability for negligence, stating that the word "whatsoever" was to be regarded as no more than a word of emphasis and not to be regarded as if it were a specific reference to negligence. His reason for so interpreting the clause is that to hold it as being wide enough to exclude liability for negligence would be contrary to the defendant's obligation under clause 5. This finding is difficult to rationalise because the action for tort does not arise from the contractual obligation in clause 5 but from the duty imposed on a person making representations by the law of tort. Moreover, as has been explained, clause 12 cannot be read as contrary to clause 5, as clause 5 is expressed to be subject to clause 12. The difficulty again relates back to the view of exception clauses as merely procedural defences rather than being of substantive effect.

In any case His Honour construed the exception clause as applying only to "*acts or omissions . . . in respect of the system or the operation thereof*" (emphasis mine) which he held clearly did not cover *advice* in respect of the system and for this reason the clause did not apply to the tort action.

As a result, even if the exception clause were construed as excluding liability for negligent performance of the contract, the defendant would have remained liable in tort. Though probably not significant in the present case, this would limit the damages recoverable by the plaintiff to the lesser measure in tort.

THE DEFENCE OF SELF—INCRIMINATION IN “ANTON PILLER” CASES: *THORN E.M.I. VIDEO PROGRAMMES LTD. V. KITCHING* (High Court, Wellington, 24 March 1983, A. 155/83, Davison, C. J.)

*THORN E.M.I. VIDEO PROGRAMMES LTD v. BUSBY* (High Court, Wellington, 24 March 1983, A. 173/83, Davison, C. J.)

This cases provides the first major challenge in New Zealand to threaten the efficacy of the “Anton Piller” order since it was first recognised in *Anton Piller K.G. v. Manufacturing Processes Ltd.* ([1976] 1 All E.R. 799).

The plaintiffs were a conglomeration of large film-related companies and owners of copyright in certain cinematograph films. They discovered a piracy operation carried on in an Auckland suburb, by the defendants, in which their films were copied on to video tapes for sale to the general public. In order to protect their property from unlawful use, the plaintiffs initiated actions for breach of copyright against each defendant. Fearing that vital evidence might be concealed, suppressed, or destroyed, if notice was given before an inter partes application, the plaintiffs obtained “Anton Piller” orders against each defendant. The orders, both in the same form, were served on the defendants by agents of the plaintiffs, who took certain goods and documents into custody.

The defendants obtained court orders to stay operation of parts of the orders, pending further order of the court, and contended they were protected against discovery by the privilege against self-incrimination. The paragraphs objected to fell into three categories: (1) requiring that the plaintiffs’ agents be permitted access to premises to take into custody certain documents and things; (2) requiring the defendant to disclose certain information; and (3) requiring the defendants to make affidavits of all information required in the order. These, the defendants submitted, would enable the plaintiffs to seize documents and things passing between third parties and them, and such information could be used as evidence of a charge of conspiracy to defraud under section 257 of the Crimes Act 1961.

As both actions were in the same form, the Court heard them together.

The defendants’ claim is significant as it is the first opportunity a New Zealand Court has had to examine the effectiveness of a claim of privilege to avoid parts of an “Anton Piller” order after the House of Lords decision in *Rank Film Distributors Ltd v. Video Information Centre* ([1981] 2 All E.R. 76).

While reasserting that the privilege against self-incrimination exists in New Zealand, Davison C. J. recognised that protecting a defendant had to be reconciled with doing justice to the plaintiff.

In order to balance these opposing objectives, the Chief Justice sought guidance from the *Rank* case and its interpretation by the courts in the United Kingdom. Davison C. J. considered the *Rank* case allowed a claim to privilege, in the face of judicial mandate, where there was a *real risk* of criminal prosecution. If the risk was remote, fanciful, or contrived, privilege would not attach. This was because it was unreasonable to deprive a plaintiff of information relevant to his civil claim when the criminal offence or penalty available was trivial or unlikely.

Reconciliation of these objectives was obtained by the court making a "realistic assessment of the likelihood of a criminal prosecution" (p.17). In each case "it is a matter of degree . . . as to how much weight must be given to the likelihood or otherwise of criminal proceedings in fact being brought having regard to the likely result of the making of that particular "Anton Piller" order (*Snugcoat Ltd. v. Chaudhry* [1980] F.S.R. 286, 287).

In applying this test, Davison C. J. found that no realistic chance of criminal prosecution existed in the present case. The theft provisions of the Crimes Act 1961 did not appear to encompass copyright property in their subject matter. Section 28 of the Copyright Act 1962 did provide penalties for infringement, but they were comparatively trivial and only ancillary remedies for breach of copyright. Finally, the likelihood of prosecution under section 257 of the Crimes Act 1961, for conspiracy to defraud, was remote. The Chief Justice was aware of no prosecution under that section for a copyright action in New Zealand. Further, it was unlikely in this case for, as the plaintiffs submitted, there were no other persons apparently implicated with whom it could be said the defendants conspired.

In following the lead of the United Kingdom, the law relating to "Anton Piller" orders suffers the same problem from which the English courts required statutory relief in 1981. Where an offence is serious there is an increased likelihood of prosecution and a diminished chance of obtaining an order. Paradoxically, when the test of a "realistic chance of prosecution" is applied, the plaintiff is left with a remedy which is less effective the more criminal the activity of the defendant. Also, a plaintiff who has obtained an order must, in the face of a claim to privilege, wait for judicial assessment of the likelihood of prosecution. This can give a defendant the opportunity to dispose of evidence and defeat the purpose of the order. Davison C. J. considered it was not for the courts to abrogate the firmly en-



trenched common law principle in any way, as to do so would be to legislate and “. . . this court cannot legislate. It must apply the law as it is” (p.22).

In view of the unsatisfactory state of the law the Chief Justice called for a legislative remedy and envisaged reform along the same lines as the Supreme Court Act 1981 (U.K.). This statute abolishes privilege in certain intellectual property actions while protecting the defendant against related actions and penalties. The Chief Justice, however, need not have followed this direction. In the *Rank* case the court based its decision partly on the fact that it could not protect a defendant from the consequences of self-incrimination. Any express restriction imposed by the court on the use of disclosed information would not bind anyone bringing a criminal prosecution, nor would it bind a criminal court to exclude information as inadmissible evidence. The plaintiffs in the present case submitted an argument not raised before the House of Lords. Relying on the Privy Council decision in *R. v. Coote* ([1873] L.R. 4 PC 599) they argued that adequate protection was available to the defendants. That case decided that where a witness giving depositions on oath was “improperly compelled to answer” (*supra*, p.599) in the face of an objection on the ground of self-incrimination, information disclosed was not admissible as evidence in a subsequent criminal charge. The principle, they argued, was equally applicable to “Anton Piller” cases where the defendant raises a claim to privilege on oath.

Davison C. J. considered “improper compulsion to answer” as requiring answers to be given in civil proceedings in the face of a claim to privilege. The Chief Justice said this appeared to provide protection and that “if in *Rank*’s case their Lordships had been able to follow the opinion expressed in *Coote* then there would appear to have been no cause for their concern to protect the respondents by disallowing parts of the ‘Anton Piller’ orders” (p.15). While recognising the attractiveness of the plaintiffs’ submission, Davison C. J. approached the argument with caution and was not prepared to pre-empt a trial judge’s decision on the admissibility of evidence. He concluded it was just another factor to be taken into account when deciding the *risk* faced by a defendant in complying with an order.

In New Zealand, reform of the law can occur in two ways. First, change could be effected by judicial decision; if the issue of admissibility of evidence is raised by a future defendant, Davison C. J.’s tentative interpretation of *Coote*’s could prevail. Secondly, Parliament could provide a remedy along the same lines as the English Act. It is submitted that the second of these remedies is preferable as protection to the defendant would arise automatically not on the defendant’s objection on oath.

Rapid legislative change may be unlikely in view of recent comments by the Minister of Justice:

[A]mending our law along the same lines adopted by the English(sic) Parliament would be a serious matter. The privilege against self-incrimination is an ancient common law right. . . In this country it is no less than "sacred". . . I have some personal reservations about the nature and extent of "Anton Piller" orders. They do appear to be a rather draconian device for use in a civil case. ([1983] 6 No.10 Capital Letter 2).

In the meantime for the more serious *Rank*-type cases, a plaintiff may be deprived of the full usefulness of the "Anton Piller" order.\*

H. M. D.

\**Ed. Note:* This case is presently on appeal to the New Zealand Court of Appeal.

**PROFESSIONAL PRIVILEGE AND SEARCH WARRANTS:**  
*ROSENBERG v. JAINE and ATTORNEY-GENERAL* (High Court, Wellington, 7 February 1983, A.322/81, Davison, C. J.)

This case has clarified a solicitor's responsibility when confronted with a search warrant authorising a search of his premises for evidence as to the commission of an offence by a client.

The facts were that two of the applicant Rosenberg's business cards, complete with written appointment times and dates, were discovered near a stolen car. Rosenberg, a solicitor, refused a police request to reveal the names in his appointment book which corresponded to the times on the cards. The police revealed neither the dates nor the times to Rosenberg.

The police obtained a search warrant pursuant to section 198 of the Summary Proceedings Act 1957. The warrant stated, in essence, that there were reasonable grounds to believe that the premises contained an appointment book and/or correspondence relating to appointments, which it was believed, again on reasonable grounds, was evidence as to the commission of an offence.

The police visited Rosenberg's offices with the intention of seizing the appointment record. Rosenberg refused to allow the warrant's execution and an arrangement was made to defer its execution until such time as Rosenberg was satisfied that the police were entitled to take such action, or such time as the High Court had adjudicated on the warrant's validity.

Rosenberg then brought this application under Part I of the Judicature Amendment Act 1972. Davison C.J. held that the warrant was invalid.

The main submissions made on behalf of the Applicant were as follows: (i) The warrant was not sufficiently specific and therefore invalid. It did not indicate specifically which entries in the appointment book, or which correspondence was subject to search and

seizure; and (ii) the warrant was invalid because in the circumstances, it wrongfully authorised the search and seizure of privileged material and was in such a form that made it impossible to know whether the true object of the search was privileged or not.

In relation to the first ground, Davison C. J. held that the warrant was not sufficiently specific. There was no limitation as to the period of time the appointment book sought to cover; neither was there any indication as to the client by name; nor was the client identified by linking him with the date and time of the appointment. The police were able to do this, but they refused to disclose the dates and times on the appointment cards.

In relation to the second submission, Davison C. J. stated that if the police had disclosed the dates and times, Rosenberg would have been able to ascertain the name of his client from the appointment book, and he would have been able to form a view as to whether those communications were or were not matters to which legal professional privilege attached.

It was unlikely that mere disclosure of a name would be a breach of privilege, although disclosure of a name given to a solicitor in confidence would be a breach. More importantly, in the circumstances of the present case there could have been recorded against the name of the client, reasons for the need for advice, which could well be subject to privilege. Furthermore, because of the general terms of the warrant, the police were entitled to examine the whole of the appointment book, which was likely to contain privileged information relating to other clients. Davison C. J. noted that the warrant may well have been valid if it had been limited to the search of entries in the appointment book or books relating to the particular dates and times.

The acceptance of the Applicant's submissions in relation to the general invalidity of the warrant was sufficient to dispose of the case. Nevertheless, Davison C. J. continued to examine the issue of privilege generally.

The case of *C.I.R. v. West Walker* ([1954] N.Z.L.R. 191) was accepted as having firmly established the existence of a solicitor/client privilege in New Zealand as a substantive rule of law. Davison C. J. examined some of the main features of that privilege. First, the privilege belongs to the client who may waive it if he so desires, but unless it is waived, the legal adviser must uphold it. Secondly, the privilege prohibits from disclosure communications, oral, written and now mechanical or electronically recorded, between a client and his legal adviser for the purpose of obtaining legal advice or assistance. It is important to note that the relationship of solicitor and client must first exist. The client must have consulted the legal adviser in his professional capacity, not, for example, as a friend. Also, where the

privilege relates to documents, the documents must have been brought into existence "for the purposes or in some course of professional communications between solicitor and client, but it does not extend to documents which are already in existence". Thirdly, although the privilege exists at common law, it can be taken away or abrogated only by a statute which clearly expresses such to have been the intention of the Legislature. Fourthly, the privilege does not depend for its application upon the existence of judicial or quasi-judicial proceedings, nor upon a contractual term in the relationship of solicitor and client, but it exists on the grounds of public policy.

Davison C. J. followed the New Zealand Court of Appeal's decision in *C.I.R. v. West Walker* (*supra*, 205, 207, 218, 219) in reaching the conclusion that privilege exists on the grounds of public policy.

The Court noted that some recent English and Australian decisions indicated a different approach as to the basis of privilege from that of our New Zealand Court of Appeal. In *Parry-Jones v. Law Society* ([1969] 1 Ch.1,6) Lord Denning stated:

We all know that, as between solicitor and client, there are two privileges. The first is the privilege relating to legal proceedings, commonly called legal professional privilege. A solicitor must not produce or disclose in any legal proceedings any of the communications between himself and his client without the client's consent. The second privilege arises out of the confidence subsisting between solicitor and client similar to the confidence which applies between doctor and patient, banker and customer, accountant and client, and the like. The law implies a term into the contract hereby a professional man is to keep his client's affairs secret and not to disclose them to anyone without just cause.

In *Crowley v. Murphy* ([1981] 34 A.L.R. 496) Franki J. observed the apparent conflict between *Parry-Jones v. Law Society* (*supra*) and *C.I.R. v. West Walker* (*supra*), and after careful consideration of the judgments he preferred the view taken in *Parry-Jones* that there is a clear distinction to be drawn between legal professional privilege relating to legal proceedings and the solicitor/client privilege arising out of a contractual term as against the view taken in *West Walker* that solicitor/client privilege is also based on public policy grounds, rather than a contractual relationship.

*Crowley v. Murphy* (*supra*) also involved a search warrant and it was held that legal professional privilege did not prevent the applicant from withholding from the respondent files relating to affairs of clients, nor did it prevent the respondent from searching files, if they fell within the terms of the warrant, and seizing them.

Davison C. J. felt bound by the Court of Appeal decision in *West Walker* so far as the basis of the privilege was concerned and was pleased to discover that a decision in the Supreme Court of Canada *Des Coteaux v. Mierzwinski* ([1982] 28 C.R. (3rd) 289), a decision arrived at quite independently of any reference to the conflicting views between English and Australian authorities and the New Zealand

Court of Appeal, supported the decision in *West Walker (supra)*. Consequently, Davison C. J. concluded that privilege rests on a matter of public policy and not on the alleged privileged communications being dependent on their being related to judicial proceedings or upon any contractual duty created by a solicitor/client relationship. The onus rests on those seeking the search warrant to provide sufficient particulars of the documents sought, to enable the solicitor and the Court to decide whether the documents sought are privileged. Such an onus had clearly not been discharged in this case.

Following the decision of *West Walker*, Davison C. J. stated that a statute cannot abrogate the privilege in an indirect way, so that it may only be over-ridden by clear statutory provisions. Section 198 of the Summary Proceedings Act 1957 is in general terms. It makes no reference to a warrant issued under the section specifically abrogating the long-established principle of privilege.

In *R. v. Uljee* (C.A. 204/82, 10.12.82), Cooke J. noted that the Legislature is well-aware of the existence of legal professional privilege. He referred to section 27 of the Misuse of Drugs Amendment Act 1978 which makes specific reference to preserving the privilege where evidence is obtained by the interception of private communications by means of intercepting devices. Therefore, Davison C. J. concluded that section 198 of the Summary Proceedings Act 1957 did not authorise the issue of a search warrant abrogating the common law privilege in relation to solicitor/client relationships.

Finally, Davison C. J. noted the following matters in relation to the issue of search warrants: (i) any warrant issued should clearly identify the client and the material sought to be seized; and (ii) a warrant cannot be issued in relation to documents covered by the privilege of confidentiality; and (iii) the person issuing the warrant should attach methods to its execution which safeguard the right to confidentiality. In particular the solicitor should be given the opportunity to claim the privilege and if necessary, test his claim before an appropriate court.