

Case Note

Commissioner, Australian Federal Police v Propend Finance

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INTRODUCTION

The only certain aspect of the law on whether legal professional privilege can attach to copies of non-privileged documents is that, until fairly recently, the answer to that question has been entirely uncertain. Since it first arose in the late 19th century, judicial opinion on this issue has been divided in both England and Australia. However, in February last year, in its majority decision in *Commissioner, Australian Federal Police and Anor v Propend Finance Pty Ltd and Ors*¹ ('*Propend*'), the High Court appears to have finally put the matter to rest.²

Prior to *Propend*, the balance of authority in Australia narrowly favoured the view that if the original is not privileged neither is the copy, even if it is made for the sole purpose of legal advice or use in litigation.³ Similarly, in England in recent years the weight of opinion has been against the existence of privilege in these circumstances.⁴

The unequivocal finding by the High Court majority in *Propend* was that privilege attaches to a copy document which is provided by a client to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings. The decision may prove to be controversial in some circles. However, in the writer's view, it deals comprehensively and persuasively with the three principal areas of concern which have been raised

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¹ (1996) 141 ALR 545.

² Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ made up the majority; Dawson and Toohey JJ dissenting.

³ For cases rejecting the proposition that such copies can be privileged see, *Shaw v David Syme & Co* [1912] VLR 336; *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652; *Nickmar Pty Ltd v Preservatrice Skandia Insurance* (1985) 3 NSWLR 44; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577; *JN Taylor Holdings Ltd v Bond* (1991) 57 SASR 21; *Water Authority (WA) v AIL Holdings* (1991) 7 WAR 135; *Langworth Pty Ltd v Metway Bank Ltd* (1994) 53 FCR 556; and *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd*, unreported, New South Wales Supreme Court, 14 August 1996. Cases in which it has been accepted that privilege may attach to copy documents in these circumstances include *Wade v Jackson's Transport Services Pty Ltd* (1979) Tas R 215; *Kaye v Hulthen* [1981] Qd R 289; *McCaskill v Mirror Newspapers Ltd* [1984] 1 NSWLR 66; and *Davis v Lambert-Bain Pty Ltd* [1989] Tas R 274.

⁴ For cases rejecting the proposition that copies of non-privileged documents can be privileged see, *Chadwick v Bowman* (1886) 16 QBD 561; *Lambert v Home* [1914] 3 KB 86; *Buttes Gas and Oil v Hammer (No. 3)* [1981] QB 223; *R v King* [1983] 1 WLR 411; *Dubai Bank Ltd v Galadari* [1990] Ch 98; *Ventouris v Mountain* [1991] 1 WLR 607; and *Lubrizol Corp v Esso Petroleum Co Ltd* (1992) 1 WLR 957. Cases in which it has been accepted that privilege may attach to copy documents in such circumstances include *'The Palermo'* (1883) 9 P 6; *Watson v Cammell Laird* [1959] 1 WLR 702; *R v Board of Inland Revenue; Ex parte Goldberg* [1989] QB 267; and *R v Derby Magistrates Court; Ex parte B* (1995) 3 WLR 681.

in the cases whenever the issue of whether copies of non-privileged documents should themselves be privileged has arisen. These three areas are conveniently captured in a statement by Clarke J in *Vardas v South British Insurance Co*⁵ ('*Vardas*') in which his Honour expressed the view that:

A rule attaching privilege to copies of non-privileged documents is not within the rationale of the rule underlying the relevant privilege, conducive to expeditious and fair trials, nor consistent with the strict approach for which *Grant v Downs* speaks.⁶

The manner in which the High Court tackled each of these concerns and the extent to which it was successful in resolving the issues raised by a long line of conflicting authorities is examined below.

THE RATIONALE OF THE RULE UNDERLYING THE RELEVANT PRIVILEGE

In its broadest terms, the rationale underpinning the doctrine of legal professional privilege concerns the promotion of the administration of justice and an effective adversarial system of litigation. This rationale has two particular aspects to it. First, there is the more widely cited aspect of the rationale as being to maintain the confidentiality of communications between clients and their lawyers and thereby facilitate candid disclosure by clients to their lawyers of all relevant facts.⁷ The second aspect of the rationale has been identified as specifically relating to the protection of communications in preparation for actual or anticipated litigation, and stems from the adversarial nature of the trial itself. The ability of a party to prepare and conduct its case would be impaired, according to this aspect of the rationale, if it were obliged to disclose the fruits of its investigations or the substance of its case to its opponent.⁸

In most of the authorities in which privilege has been denied to copies of non-privileged documents⁹ it has been asserted that this must be so on the basis of 'logic and commonsense'¹⁰; that were it otherwise, the result would be

⁵ [1984] 2 NSWLR 652.

⁶ *Id.*, 661.

⁷ *Grant v Downs* (1976) 135 CLR 674, 685.

⁸ *Baker v Campbell* (1983) 49 ALR 385, 427. This aspect of the rationale is in fact equally consistent with a concern to preserve the confidentiality of the lawyer-client relationship. Knowledge by the client that any instructions or documents submitted to the lawyer for the purposes of litigation must be disclosed to the other side, would no doubt operate as a disincentive to full and frank disclosure by the client. Without such disclosure, the quality of lawyer-client communications and ultimately the quality of litigation outcomes and the administration of justice would be undermined: S McNicol, *Law of Privilege* (1992), 48-9.

⁹ See, for example, *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652; *Nickmar Pty Ltd v Preservatrice Skandia Insurance* (1985) 3 NSWLR 44; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577; *J N Taylor Holdings Ltd v Bond* (1991) 57 SASR 21; and *Water Authority (WA) v AIL Holdings* (1991) 7 WAR 135.

¹⁰ *Water Authority (WA) v AIL Holdings* (1991) 7 WAR 135, 138, per Acting Master Adams. See also Ligertwood, *Australian Evidence*, (2nd ed, 1993), 218; and Zuckerman, 'Legal Professional Privilege and the Ascertainment of Truth' (1990) 53 MLR 381.

'absurd and anomalous'.¹¹ It has not been common in these cases for the court to support this assertion by explicit reference to the underlying rationale of the privilege. Rather, it appears largely to have been assumed that the public policy which supports the existence of the privilege is satisfied if copy documents stand in the same position in relation to privilege as the original.¹² In *Vardas*, however, Clarke J did expressly mount the argument that, in his view, to attach privilege to copies of documents, the originals of which are not privileged, in no way advances the object of the privilege, that is to encourage candour by clients and to preserve the confidentiality of the lawyer-client relationship. There can be little point, it was asserted, in seeking to maintain secrecy in respect of copy documents when the originals themselves are not secret.¹³

Without exception, the majority judgments in *Propend* referred to the traditional rationale for the privilege as the logical starting point in and fundamental basis for the decision to accord protection to copies of non-privileged original documents.¹⁴ Each member of the majority stressed the fact that, since the decision *Baker v Campbell*¹⁵, the privilege has been recognised as a substantive principle in Australia and noted that it has now also been acknowledged in England, in the more recent case of *R v Derby Magistrates' Court; Ex Parte B*¹⁶, to be 'much more than an ordinary rule of evidence'.¹⁷ It was suggested that cases which pre-date these decisions may have proceeded on a false premise about the true nature of the privilege and must therefore be regarded as doubtful authority for the principle that copies of non-privileged documents cannot themselves be privileged.¹⁸

Reference was also made in several of the majority judgments to the renewed emphasis which has been given by the High Court to the privilege as

¹¹ *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652, 660, per Clarke J.

¹² This point was also made by Lindgren J in *Propend Finance Pty Ltd v Commissioner of Australian Federal Police* (1995) 58 FCR 224 and adopted by Moore J in *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (unreported, NSW Supreme Court, 14 August 1996), a decision which was made after the appeal in *Propend* had been argued before the High Court but before judgment had been handed down.

¹³ *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652, 660, per Clarke J. This line of reasoning was criticised by Hunt J in *McCaskill and Anor v Mirror Newspapers Ltd* [1984] 1 NSWLR 66 on the basis that the mere fact that a copy of a non-privileged document has been made and submitted to a client's legal advisers may be confidential in itself and hence, the attachment of privilege to such a document for this reason alone can be supported.

¹⁴ McHugh J, for example, opened his judgement with the statement that, given the conflicting precedents and the inconsistency of the reasoning which has been applied in this area, the court could only decide the question before it 'by reference to the fundamental principles and the rationale behind the doctrine of legal professional privilege': *Propend*, (1996) 141 ALR 545, 583.

¹⁵ (1983) 153 CLR 52.

¹⁶ [1996] 1 AC 487.

¹⁷ *Id.*, 507.

¹⁸ Gaudron J made this point about the Australian case of *Shaw v David Syme & Co* [1912] VLR 336, 576 and Gummow J expressed similar reservations about the English decisions in *Ventouris v Mountain* [1991] 1 WLR 607 and *Lubrizol Corp v Esso Petroleum Co Ltd* [1992] 1 WLR 593.

a 'practical guarantee . . . of fundamental constitutional or human rights'.¹⁹ As Gummow J pointed out in more colourful terms, 'the privilege alike protects the strong as well as the vulnerable, the shabby and discredited as well as the upright and virtuous, those whose cause is in public disfavour as much as those whose cause is held in public esteem.'²⁰ In a similar vein, Kirby J conceded that 'sometimes, hiding behind the privilege, are powerful wrongdoers'; but, 'the law protects them because the privilege is deeply embedded in our society's notions as to how the rule of law can best be achieved for all.'²¹ His Honour also drew attention to the fact that the privilege has been recognised as a basic civil right in New Zealand and Canada.²²

Some of the members of the majority in *Propend* specifically alluded to the practical impact which a rule refusing protection to copies of non-privileged documents might have on the purpose which the privilege is intended to serve. The Chief Justice expressed concern that such a rule would be inconsistent with the confidentiality of the lawyer-client relationship, that confidentiality being integral to the adversary system and the administration of justice.²³

Gaudron J pointed out that:

The prospect of search warrants being executed in solicitors' offices with a view to obtaining copies of a client's documents is a substantial disincentive to persons who might otherwise wish to put all the facts before a lawyer, and thus, also [acts] as an impediment to the provision of proper advice and effective representation.²⁴

According to Gummow J, a broad test of privilege in respect of copy documents where the originals are not privileged rests upon the practical con-

¹⁹ (1996) 141 ALR 545, 574 (per Gaudron J), 584 (per McHugh J), 593 (per Gummow J), 608 (per Kirby J). This 'rights' rationale was articulated in *Baker v Campbell* (1983) 49 ALR 385 and was given renewed emphasis by the High Court in *Goldberg v Ng* (1995) 132 ALR 57; *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121 and *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1996) 137 ALR 28.

²⁰ *Propend* (1996) 141 ALR 545, 594.

²¹ *Id.*, 612.

²² *Id.*, 608.

²³ *Id.*, 549. It should be noted that Brennan CJ specifically qualified the rule that copies of non-privileged documents can be privileged, in the context of search warrants. In judicial and quasi-judicial proceedings, his Honour pointed out, there is some safeguard against abuse of the rule in that the procedures of discovery allow for the contents of an unprivileged original document to be proved as against a party who has had the original in his possession or power, notwithstanding the copy of the original is protected from inspection by legal professional privilege. However, when this privilege is invoked in response to the exercise by a statutory authority of its search and seizure powers, some qualification of the rule is necessary to avoid the frustration of the relevant statute and impairment of the administration of justice. The qualification contemplated by the Chief Justice was stated in this way: 'if an original unprivileged document is not in existence or its location is not disclosed or is not accessible to the person seeking to execute the warrant and if no unprivileged copy or other admissible evidence is made available to prove the contents of the original, the privileged copy loses the privilege' (*Propend*, (1996) ALR 545, 551). These issues raised by Brennan CJ were not discussed by any other member of the majority, all of whom stated the rule that copies of non-privileged documents may themselves be privileged when submitted to a legal adviser for the sole purpose of legal advice or litigation in an unqualified way.

²⁴ *Propend*, (1996) 141 ALR 545, 576.

sideration that protection of the copies is 'essential to the proper functioning of the adversary system of adjudication . . . the denial of privilege in respect of copies of non-privileged documents, made for litigation, would impair the proper preparation of cases for trial.'²⁵ Kirby J gave a more detailed exposition on what he considered might be the practical effects on the integrity of the adversarial system of litigation flowing from a refusal to accord copy documents the protection of privilege. Such effects included the disincentive to counsel to conduct early and full investigations and the incentive to prosecutorial authorities to raid solicitors' offices for copies instead of going to the source to obtain the originals. In his Honour's view, 'such consequences would undermine not only the adversary system, but also the respect for the rule of law.'²⁶

The rationale for the privilege, and in particular that aspect of it based on preserving the adversarial nature of the trial process, has been relied on in a well-known series of cases to support a qualification on the assertion that copy documents can in no circumstances be privileged where the originals are not themselves privileged. This qualification can be traced to the decision in *Lyell v Kennedy (No. 3)*²⁷ in which it was held that a collection of copy documents, the originals of which are on the public record, will be privileged when it has been made or obtained by legal advisers exercising professional care and skill and disclosure of the documents might afford a clue to the view entertained by the advisers of their client's case. This reasoning is grounded in the principle that a party to litigation in an adversarial system should not be required to reveal to an opposing party the substance of their case. This gloss on the refusal to grant privilege to copies of non-privileged documents has been accepted and applied both in England²⁸ and Australia.²⁹

It is interesting to note that, while the principle established in *Lyell v Kennedy (No 3)*³⁰ was conceptualised initially as an exception to the rule, in more recent times it has developed into a positive statement of the principle to be applied in determining when copies of non-privileged documents will themselves be privileged. As noted by Toohey J in his dissenting judgment in *Propend*, the trend in the authorities has been to require that there be 'something in the circumstances in which a copy of a non-privileged document came into existence in order to attach privilege to the copy'³¹; it is not sufficient simply that the client has submitted the copy to his lawyer, albeit for a relevant sole purpose. The making of annotations on the copy or the exercise of professional foresight and skill in selecting and collating the copy were

²⁵ *Id.*, 598-9.

²⁶ *Id.*, 613.

²⁷ [1884] 27 Ch D 1.

²⁸ *Ventouris v Mountain* [1991] 1 WLR 607; *Dubai Bank Ltd v Galadari (No. 7)* [1992] 1 WLR 106.

²⁹ *JN Taylor Holdings Ltd v Bond* (1991) 57 SASR 21; *Nickmar Pty Ltd v Preservatrice Skandia Insurance* (1985) 3 NSWLR 44.

³⁰ [1884] 27 Ch D 1.

³¹ *Propend*, (1996) 141 ALR 545, 565.

examples given by Toohey J of that 'something more' which has been recognised as attracting the privilege for copy documents.³²

This approach is well-illustrated by the judgments of the members of the Full Court in *Propend Finance Pty Ltd & Ors v Commissioner, Australian Federal Police*.³³ Beaumont J was of the opinion that a copy of what is otherwise an unprivileged document is privileged if 'in the particular circumstances in which the copy document came into existence, [it] should . . . be treated as, in truth, part of the substantive process of the seeking or obtaining of legal advice or of preparing for litigation.'³⁴ Hill J considered that privilege attaches if but only if 'the copies are made for the sole purpose of obtaining advice upon matters contained in or concerning the original and in circumstances where to compel production of the copy would or could operate to reveal the subject matter upon which advice is sought.'³⁵ Lindgren J adopted a similar approach to that of Davies J at first instance and held that privilege does not attach unless 'inspection would reveal more than merely the content of the copy document'³⁶, for example, where the copy document is marked in a way as to reveal a line of thinking or is inextricably mixed with privileged original material.

The notion that 'by compelling disclosure, more than just the documents themselves might be handed over to an adversary'³⁷ was appreciated by members of the High Court majority in *Propend*. However, it was not considered to be relevant to the real issue before the court. McHugh J made the point that, notwithstanding the number of cases supporting the approach taken in *Lyell v Kennedy (No 3)*³⁸, it is purpose and not skill that is the criterion for determining the claim of privilege.³⁹ Gummow J made a similar argument, stating that the privilege does not exist to protect the labour of the legal adviser; the privilege is that of, and protects the interests of, the client, and is not limited to what in the United States has been called 'the attorney's work product'. Nor is the privilege concerned merely to protect disclosure of litigation strategy or the line of reasoning of the legal adviser.⁴⁰

EXPEDITIOUS AND FAIR TRIALS

The possibility that the attachment of privilege to copies of non-privileged documents might interfere with the litigious process, and cause unnecessary expense and delay, was first alluded to by Lord Denning MR in *Buttes Gas &*

³² *Ibid.*

³³ (1995) 128 ALR 657.

³⁴ *Id.*, 671.

³⁵ *Id.*, 690.

³⁶ *Id.*, 697.

³⁷ *Propend*, (1996) 141 ALR 545, 585.

³⁸ [1884] 27 Ch D 1.

³⁹ *Propend*, (1996) 141 ALR 545, 585.

⁴⁰ *Id.*, 598.

*Oil Co v Hammer*⁴¹ in what proved to be influential obiter.⁴² The Master of Rolls stated that 'if the original is not privileged, neither is a copy made by the solicitor privileged', that being for the 'simple reason that the original (not being privileged) can be brought into court under a *subpoena duces tecum* and put into evidence at trial'. Lord Denning MR added that 'by making the copy discoverable, we only give accelerated production to the document itself.'⁴³

Any concern that the principle established in *Propend* might hinder the timely and affordable dispensation of justice was refuted on both policy and practical grounds by various members of the High Court majority. Gaudron J strongly expressed the view that 'the fact that it may be easier to obtain a copy from a solicitor than it is to obtain the original by compulsory process is no reason to cut down or abrogate legal principle, especially one of such fundamental importance to the administration of justice as legal professional privilege.'⁴⁴ From a more practical perspective, McHugh J conceded that there is some force in the argument that requiring parties to obtain originals, by virtue of the privilege attaching to copies, may result in added delay and expense. However, as his Honour pointed out, if a copy had only a derivative privilege, lawyers would be forced to summarise the contents of original documents, such summaries attracting privilege, in order to protect their clients' confidences. Such a practice would add equally, if not more, to the expense of litigation.⁴⁵ Kirby J clearly shared this view, stating that:

It would be artificial, absurd and anomalous if a client were forced to seek advice by oral communications, rote learning of documents or summaries only, or mainly, to avoid the peril that the provision of actual copy documents . . . would be susceptible to compulsory process.⁴⁶

In terms of fairness in the trial process, the comment was frequently made in cases preceding *Propend* that attaching privilege to copies of non-privileged documents is no longer appropriate in the modern era in which 'trial by ambush' is 'no longer acceptable'.⁴⁷ Kirby J in *Propend* observed that the increasing trend in recent years towards pre-trial disclosure has been accompanied by calls for the application of legal professional privilege to be narrowed. His Honour recognised that 'a brake on the application of legal professional privilege' has been seen as necessary 'to prevent its operation

⁴¹ [1981] QB 223.

⁴² Lord Denning's comments were cited with approval in a number of subsequent cases in England (*Dubai Bank Ltd v Galadari* [1990] Ch 98; *Ventouris v Mountain* [1991] 1 WLR 607; *Lubrizol Corp v Esso Petroleum Co Ltd* [1992] 1 WLR 957) and in Australia (*Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 44; *Nickmar Pty Ltd v Preservatrice Skandia Insurance* (1985) 3 NSWLR 44; *Roux v Australian Broadcasting Commission* [1992] 2 VR 577).

⁴³ *Buttes Gas & Oil* [1981] QB 223, 244.

⁴⁴ *Propend*, (1996) 141 ALR 545, 577. Notwithstanding his dissent, Dawson J also expressed the view that any decision about whether copies of non-privileged documents can themselves be privileged, must be based on considerations of policy and principle and not on considerations of convenience (Id, 558).

⁴⁵ Id, 586.

⁴⁶ Id, 612.

⁴⁷ *Roux v Australian Broadcasting Commission* [1992] 2 VR 577, 599, per Byrne J.

bringing the law into disrepute, principally because it frustrates access to communications which would otherwise help courts to determine, with accuracy and efficiency, where the truth lies in disputed matters.⁴⁸

Concerns about the potential for the rule to obstruct the conduct of 'expeditious and fair trials' were dealt with in the majority judgments, and in particular by McHugh J, in *Propend*. First, it was pointed out that the privilege has no bearing on litigation where the original non-privileged document is in the hands of the party required to make discovery.⁴⁹ Secondly, McHugh J argued that where the copy has been created so as to enable the original to be destroyed but a record of the transaction retained by way of the copy, the sole purpose test will not be satisfied and hence, the privilege will not apply.⁵⁰ The possibility that a rule extending privilege to copies might lead to the destruction or disposal of originals had been the subject of strong comment in many of the earlier cases.⁵¹ However, it was stressed by Gummow J that to uphold the privilege in circumstances where there has been deliberate destruction of the originals would be to allow the privilege 'to be used for a purpose alien to its whole purpose and history'.⁵² And as Kirby J pointed out, if the destruction of the original were done in pursuance of a crime or fraud, the privilege would be lost.⁵³ Finally, where the party has placed both the original and the copy in the custody of the lawyer, the sole purpose test would in all likelihood prevent privilege being claimed for either document.⁵⁴

The *Propend* majority's rebuttal of the principal practical concerns which have been raised in deciding whether copies of non-privileged documents can be privileged is, in the writer's view, sufficiently persuasive. Admittedly, each of the scenarios discussed in the preceding paragraph raise practical issues surrounding the need to establish the true intentions of the party claiming privilege for the copy. However, these are not unfamiliar problems in the area of privilege; establishment of purpose has always been a prerequisite for the privilege to apply.

THE STRICT APPROACH FOR WHICH *GRANT V DOWNS* SPEAKS

It was established by the High Court in *Grant v Downs*⁵⁵ that legal professional privilege attaches to communications which are brought into existence for the

⁴⁸ *Propend* (1996) 141 ALR 545, 607. In his dissenting judgement Toohey J, while not disputing the importance of the privilege, echoed the concerns which have been expressed about 'widening the privilege lest the need for the courts to have access to all relevant documents should be unduly undermined.' (Id, 563).

⁴⁹ *Propend*, (1996) 141 ALR 545, 551 (per Brennan CJ) and 586 (per McHugh J).

⁵⁰ Id, 586.

⁵¹ One of the earliest cases in which this concern was expressed was *Chadwick v Bowman* [1886] 16 QBD 561. See Zuckerman, op cit (fn 10) 381.

⁵² *Propend*, (1996) 141 ALR 545, 598, citing *R v Bell; Ex parte Lees* (1980) 146 CLR 141, 154.

⁵³ *Propend* (1996) 141 ALR 545, 612.

⁵⁴ Id, 586.

⁵⁵ (1976) 135 CLR 764.

sole purpose of securing or furnishing legal advice or for use in actual or anticipated legal proceedings. This case set two fundamental limits on the application of the privilege; first, it applies only to *communications* and secondly, it applies only to communications brought into existence for the *sole purpose* of submission to legal advisers for advice or for use in legal proceedings. Both of these principles have been invoked in consideration of the question whether copies of non-privileged documents can by themselves be privileged.

Communications

In many of the authorities in which the attachment of privilege to copies of non-privileged documents has been opposed, courts have based their thinking on the form of the copy documents. In the early cases of *Shaw v David Syme & Co*⁵⁶ and *Lambert v Home*⁵⁷, in which it was decided that a transcript made verbatim of short-hand notes taken of evidence in legal proceedings could not be privileged, the copy (that is, the transcript) was described as a mere 'translation' of the original (that is, the notes) which was *publici juris*.⁵⁸

More recent decisions in which privileged status has been denied to copies of non-privileged originals have raised a similar argument but have tailored it to reflect the technological advances which have long since overtaken transcription of short-hand into long-hand. Since the advent of such technology, the copy, according to these authorities, can be viewed as no more than the mirror image of the original. As multiple production by photocopying and word processing has become commonplace, it is difficult to distinguish between an original and a copy and it is artificial to purport to do so. In *JN Taylor Holdings Ltd v Bond*⁵⁹ ('*Bond*'), DeBelle J said that, in general, 'it would be absurd for the copy to be privileged while the original is not'.⁶⁰ And, in *Lubrizol Corp v Esso Petroleum Co Ltd*⁶¹ ('*Lubrizol*'), Aldous J said that he found it 'incredible, in these days of the photocopier, the computer and the fax, that any distinction concerning privilege can be drawn between a copy and an original'.⁶²

The High Court majority in *Propend* was adamant that this concentration on the similarity in form between original and the copy misses the whole point of the privilege. The privilege protects communications and not documents per se. Thus, as McHugh J observed, provided the communication took place for a relevant sole purpose, the actual form of the communication is

⁵⁶ [1912] VLR 336.

⁵⁷ [1914] 3 KB 86.

⁵⁸ Dawson J harked back to these cases in his dissenting judgment in *Propend*, arguing that 'the communication constituted by the copy — the translation — was the same as it was in the case of the original. The information conveyed by the one was no more or less than the information conveyed by the other, so that the copy could be in no better position than the original so far as privilege was concerned.' (*Propend*, (1996) 141 ALR 545, 556).

⁵⁹ (1991) 57 SASR 21.

⁶⁰ *Id.*, 34.

⁶¹ [1992] 1 WLR 957.

⁶² *Id.*, 961.

irrelevant. Handing the copy to a lawyer is as much as part of the communication between lawyer and client as an oral summary of the original document would have been part of a communication between lawyer and client.⁶³ Gaudron J came to the same conclusion:

The consideration that the provision to a lawyer of a copy document is, itself, a communication different only in form from the oral communication of the contents of the original document leads me to conclude that privilege attaches to a copy document which is provided to a lawyer if the copy was made solely for the purpose of obtaining legal advice or solely for use in legal proceedings.⁶⁴

Gummow J also recognised the point of the privilege as being the protection of communications and observed that many of the authorities, in both Australia and other common law jurisdictions, which have opposed the attachment of privilege to copies proceeded from the false premise that what is involved is privilege for particular documents rather than for communications. Kirby J too stressed communications as the object of the privilege and it is worth noting his Honour's observation that advances in information technology require the application of the privilege to be flexible rather than being narrowed as was the approach taken in cases such as *Bond* and *Lubrizol*:

Because of advances in information technology, compulsory process will now increasingly, involve a multitude of material forms used in effecting communication: ranging from photocopies of original documents to audio/video tapes and computer software. Necessarily, the doctrine of legal professional privilege must adapt to a world in which these media are the stuff of disputes concerning criminal and civil obligations and the rights of clients.⁶⁵

Sole purpose

It was reinforced by Mason J in *National Employers' Mutual General Insurance Association Ltd v Waind*⁶⁶ (*Waind*) that legal professional privilege is concerned with the purpose for which the document in issue was brought into existence and not the purpose for which the information in the document was obtained.⁶⁷ This distinction has caused some confusion in the cases in which the question whether copies of non-privileged documents can be privileged has arisen.

In *Vardas*, Clarke J took the view that, in referring to the making or bringing into existence of a document, the courts in both *Grant* and *Waind* intended to refer to the compilation and recording of information in a document and it is the sole purpose of these activities which determines whether or not the document is privileged. Hence, copies of privileged documents obtain their

⁶³ *Propend*, (1996) 141 ALR 545, 584.

⁶⁴ *Id.*, 577.

⁶⁵ *Id.*, 610.

⁶⁶ (1979) 141 CLR 648, 654.

⁶⁷ The distinction was repeated in *O-Reilly v Commissioner of State Bank of Victoria* (1982) 44 ALR 27, 43 and *Baker v Campbell* (1983) 49 ALR 385, 388.

privileged status from the nature of the original which they reproduce; the original being a document which in its making, involved the compilation and recording of information solely for a privileged purpose. Copies of unprivileged documents, by contrast, while 'made', in a literal sense, in circumstances which would otherwise attract privilege, cannot be privileged because their contents do not represent information compiled and recorded solely for a privileged purpose.

However, in *McCaskill v Mirror Newspapers Ltd*⁶⁸ ('*McCaskill*'), Hunt J adopted a more literal interpretation of *Waind*, concluding that if a copy document is brought into existence solely for the purpose of submission to lawyers for advice or for use in litigation, then that document is privileged notwithstanding that its making involved the mere reproduction of a document the information in which is not privileged. In his criticism of Hunt J's judgement, Clarke J in *Vardas* pointed out that neither *Waind* nor *Grant v Downs* dealt with the purpose of mechanical reproduction or copying of a document and could not therefore be used in the manner in which Hunt J purported to use them. Clarke J took the view that 'the distinction between the collating and recording of information in a document and the mere reproduction of that document' was a distinction 'of substance'.⁶⁹

In *Propend* the majority approved the approach taken by Hunt J in *McCaskill*. The insuperable fact pointed to by the Chief Justice is that the purpose of bringing an original into existence may be quite different to the purpose of bringing the copy into existence. On a strictly logical application of the test established in *Grant v Downs* therefore, if a copy is made solely for the purpose of providing it to a legal adviser in order to obtain legal advice or for use in connection with litigation, the copy would be privileged.⁷⁰ Similarly, McHugh J noted that while it seems contrary to commonsense that the law should give privilege to a copy of a document when it does not give it to the original, commonsense turns out to be a 'misleading guide', and this is because:

Legal professional privilege turns on purpose, and no argument is needed to show that the purpose of a client or lawyer in making a copy document may be very different from the purpose of the person who created the original.⁷¹

Applying this logic, based on the doctrine established in *Grant v Downs* the conclusion to which the majority in *Propend* found themselves inexorably drawn was that, where a copy document is brought into existence for the sole

⁶⁸ [1984] 1 NSWLR 66.

⁶⁹ *Vardas* (1984) 2 NSWLR 652. It is interesting to note in this regard the point made by Dawson J in *Propend* that to rely on the distinction drawn by Mason J in *Waind* in the manner in which Hunt J did, may be misleading — 'the law is concerned with the purpose for which the information contained in the document was communicated, rather than the purpose for which the information was itself originally obtained. The former purpose remains unchanged upon the making of copies of the document.' Dawson J opined that that was what Clarke J had in mind when he made the statement which had been cited. (*Propend* 141 ALR 545, 557).

⁷⁰ *Propend*, (1996) 141 ALR 545, 548.

⁷¹ *Id.*, 584.

purpose of use by legal advisers in giving advice or conducting litigation, that document is privileged, notwithstanding no claim of privilege can be made in respect of the original.

CONCLUSION

The decision of the High Court majority in *Propend* is a victory for substance over form and for principle over convenience. It is consistent with, and arguably hardly surprising given the court's recent re-affirmation of the status of the privilege as a 'substantive general principle which plays an important role in the effective and efficient administration of justice by the courts'⁷², as 'a bulwark against tyranny and oppression'⁷³ and as a 'natural, if not necessary corollary of the rule of law.'⁷⁴

This is not to say that many of the practical concerns raised by earlier cases which rejected the proposition that copies of non-privileged documents may be privileged were not valid, or that those concerns have necessarily dissipated. Some members of the majority such as McHugh J pointed out that concerns relating to obstruction of the litigation process and potential abuses in the destruction of originals were either exaggerated, having regard to the alternative consequences of denying protection to copies, or unfounded, having regard to the restraints placed on the doctrine by the sole purpose test and the exception made for documents created in pursuance of a crime or fraud. Other members of the majority such as Kirby J made reference to practical considerations which positively support the application of privilege to copies despite the fact that the originals themselves are not privileged. Refusing to grant the protection, his Honour pointed out, would result in lazy prosecution practices, disruption to solicitors' offices and the orderly provision of advice and, perhaps most importantly, the loss of faith by clients in their supposed entitlement to consult legal advisers with copies of all documents relevant to their advice.

In the final analysis though, practical considerations aside, the majority arguably could not escape the fact that to deny privilege to copy documents submitted to lawyers solely for the purpose of legal advice or litigation would involve significantly compromising, if not totally undoing, the common law doctrine which has prevailed without question in Australia since the seminal cases of *Grant v Downs* and *Baker v Campbell*. To do so, the court would have effectively had to qualify the privilege's status as a basic civil right and, in light of its vigorous confirmation of that status in very recent times, this was something the court was never going to do.

⁷² *Goldberg v Ng* (1995) 185 CLR 83, 93-4.

⁷³ *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, 490.

⁷⁴ *Carter v Managing Partner, Northmore Hale Davy & Leake* (1995) 183 CLR 121, 161.