

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2006-404-203710**

BETWEEN                      BODY CORPORATE 203710  
   First Plaintiff

AND                              ALBERTINE CONSTANCE TUBMAN &  
   OTHERS  
   Second Plaintiff

AND                              AUCKLAND CITY COUNCIL  
   Defendant

Appearances: D J Powell for First and Second Plaintiffs  
   No Appearance on behalf of Melview Developments Ltd

Judgment:    9 October 2009

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**JUDGMENT OF ASSOCIATE JUDGE ROBINSON**

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This judgment was delivered by me on 13 October 2009 at 4 pm,  
Pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date.....

Solicitors:                      Kensington Swan, Private Bag 92101, Auckland  
   Grimshaw & Co, PO Box 6646, Auckland

[1] On 11 June 2008 the plaintiff's obtained a non-party discovery order against Melview Developments Ltd. Following service of that order on Melview an affidavit of documents was filed and served by John Charles Stringer who is the General Manager of Melview. In that affidavit Mr Stringer claimed litigation privilege on behalf of Melview in respect of a number of documents.

[2] The plaintiffs dispute Melview's claim to privilege and on 10 December 2008 filed an application challenging Melview's claim of privilege. Melview has failed to formally oppose the plaintiff's application. However, when the plaintiff's sought orders in terms of their interlocutory application by memorandum dated 10 July 2009 Melview filed a memorandum in response indicating it opposed the plaintiff's application.

[3] In that memorandum Mr Robertson, counsel for Melview suggested the following timetable:

- a) Within five working days Melview writes to the plaintiffs setting out the background to this matter.
- b) Within five working days of receipt of that letter the plaintiffs are to advise whether they wish to continue with their application; and if so
- c) Melview is to file and serve its notice of opposition and any affidavits in support within ten working days thereafter.
- d) A one hour hearing is to be allocated for the plaintiff's application.

[4] As the plaintiffs wish to proceed with the application challenging Melview's claim to privilege, I made the following directions on 3 September 2009 :

- a) Within ten working days of delivery of this minute Melview is to file and serve its notice of opposition and any affidavits in support.

- b) If Melview is in default then the file is to be referred to me and I will consider making the orders in terms of the application on an unopposed basis.

[5] The ten working day period stipulated in my minute expired on 17 September 2009. Melview has not filed or served a notice of opposition to the plaintiffs application challenging Melview's claim to privilege.

[6] In his affidavit of 28 July 2008 in support of Melview's claim to privilege. Mr Stringer advances the following grounds in support of the claim that the documents are privileged.

Promanco, Domain and Melview object to production of the documents listed in this Part on the grounds that they are privileged in that –

- i The documents classified as A consist of professional communications of a confidential nature between Promanco, Domain and Melview and its solicitors for the purpose of obtaining and giving legal advice.
- ii. The documents classified as B consist of communications between Promanco, Domain and Melview and its solicitors and between Promanco, Domain and Melview and third parties for reference to its solicitors and between its solicitors and third parties after this proceeding was in contemplation or had been commenced with reference to the matters the subject of this proceeding for the purpose of enabling the solicitors to advise and act in relation to those matters and to conduct this proceeding.
- iii. The documents classified as C comprise counsel's brief and include the names and statements of persons who may be witnesses at the trial, all of which were prepared after this proceeding was in contemplation and for the purposes thereof.

Document Number	Date	Description	Parties	Nature of the Privilege Claimed
46 001	08/05	Draft Report	Cove Kinloch/Melview	B
46 002	19/09/05 - 27/09/05	Various email correspondence	Cove Kinloch/Hanover/ Melview	B
46 003	11/10/05	Letter	Auckland City Council/Cove Kinloch	B
46 004	25/05/06	Letter	Domain/Cove Kinloch	B
46 005	25/05/06	Letter	Domain/Cove Kinloch	B
46 006	06/06	Report	Domain/Cove Kinloch	B
46 007	13/07/06	File note	Melview	B
46 008	08/06	Report Volume 1	Domain/Cove Kinloch	B

Document Number	Date	Description	Parties	Nature of the Privilege Claimed
46 009	08/06	Report Volume 2	Domain/Cove Kinloch	B
46 010	08/06	Report Volume 3	Domain/Cove Kinloch	B
46 011	1/09/06	Letter	Domain/Cove Kinloch	B
46 012	11/09/06 - 3/10/06	Various email correspondence	Cove Kinloch/Melview	B
46 013	25/09/06	Letter	Rawlinsons/Cove Kinloch	B
46 014	15/05/07	Letter	Melview/Kensington Swan	A

[7] These proceedings were issued in December 2006. All but the last document being a letter from Melview to Melview's solicitors Kensington Swan dated 15 May 2007 being document 46014 predate the issue of these proceedings.

[8] In challenging Melview's claim to privilege the plaintiffs maintain that all the documents other than the last document of 15 May 2007 were prepared prior to the commencement of litigation and prior to the contemplation or apprehension of litigation.

[9] According to Mr Kortegast, who is a member of the Parks of Domain owners committee and the owner of one of the units and one of the plaintiffs:

- a) Not long after purchasing the unit he received a notice to rectify from the Auckland City Council. In his capacity as secretary of the owners committee he was involved with the Axis Property Group, Melview and the Hanover Group for nearly two years in attempting to deal with the notice to rectify.
- b) Over this period Axis, Melview, Hanover, the owners committee and various other entities were working together to deal with the notice to rectify that had been served by the Auckland City Council.
- c) Melview together with Axis and Hanover were undertaking to address the items in the list that had been fixed prior to the council issuing code compliance certificates for the Parks on Domain units.

- d) From late March 2005 until October 2006 he was involved in ongoing discussions with Nigel Hughes of Axis Property Group and a representative of Melview usually Mr John Stringer. Axis advised that it would address the issues raised by Auckland City Council in its notice to rectify so that a final code compliance certificate could be issued.
- e) On the basis of assurances given to the Parks on Domain owners committee and upon the understanding that all reports would be provided, the owners fully co-operated with the Axis advisors and allowed invasive and destructive testing in the units by Cove Kinloch so that the report could be prepared.
- f) The documents for which privilege is being claimed were all created prior to the issue of proceedings by the plaintiffs. None of the documents for which privilege is claimed other than document 46014 are communications between Melview and its solicitors. One of the documents is a memorandum on Melview's letterhead dated 25 May 2006. The memorandum commences:

As you know we (Nigel Hughes – Hanover and myself) have been working with Cove Kinloch, council and the residents in an effort to resolve the non-issue of the final code of compliance. Council's view was on that on the basis that we could satisfy them that the units did not leak and that we had suitable early warning detection systems in place for monitoring on an ongoing basis (ie probes) then they would agree to issuing a code of compliance.

Towards the end of the memo the following is stated:

The residents have to be prepared to meet at least fifty percent of the cost ie \$50k per unit. I would of thought that that was worth it from their point of view to get the matter resolved, particularly when you consider the value of their homes. That is why it is now time to get Stuart Robertson involved as I think he would be great in minimising our contribution and managing the process.

- g) It was his understanding that the purpose of having Cove Kinloch prepare a report was to establish what was wrong at the Parks on

Domain, how it would be rectified and that the report would form the basis for reaching an agreement with the Auckland City Council.

- h) During the course of a meeting on 13 July 2006 Nigel Hughes of the Axis Group confirmed that the Cove Kinloch report would be made available to the owners at Parks on Domain.

[10] Included in the documents for which privilege is claimed is a report from Cove Kinloch of June 2006 being document 46006.

[11] The plaintiffs application seeks orders that the claim for privilege by Melview with regard to documents 46001 to 46013 be set aside. In support of that application it is submitted that none of the documents consist of communication between Melview and its solicitors and even if litigation was contemplated when the documents were prepared it was not this particular litigation or proceeding that was in contemplation. Furthermore, it is submitted that the dominant purpose for preparation of the documents was to persuade the Auckland City Council to withdraw or modify the notices to rectify it had issued in respect of the units.

[12] S 54 Evidence Act 2006 provides for a privilege in respect of certain communications between a person and that person's legal advisors. As none of the documents which are the subject of the application are communications between Melview and its solicitors, s 54 cannot be relied upon in support of Melview's claim for privilege.

[13] Section 56, Evidence Act 2006 provides that privilege attaches to documents where Melview has reasonable grounds to contemplate becoming a party to the proceeding if the communication or information is made, received, compiled or prepared for the dominant purpose of preparing for the proceeding.

[14] In the circumstances outlined above where no proceedings were in contemplation and where the documents involved attempts to persuade the Auckland City Council to issue a code compliance certificate it can hardly be claimed that the dominant purpose for preparing such documents was for the purpose of preparing for

a proceeding. Consequently, the test set forth in s 56 cannot apply to the documents and the plaintiffs application must be granted. As the plaintiff has been successful, the plaintiffs are entitled to costs on a 2B basis with disbursements as fixed by the registrar.

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**Associate Judge Robinson**