JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 42/87

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Downer, J.A. (Ag.)

BETWEEN	MERIDIAN INVESTMENT CORPORATION LIMITED	PLAINTIFFS/APPELLANTS
AND	ALCRON DEVELOPMENT LIMITED	
AND	JAMINCORP INTERNATIONAL MERCHANT BANK LIMITED	
AND	ANTILLEAN FOOD PROCESSORS LIMITED (acting on the authority of the Board of Directors)	
AND	JAMAICA EXPORT CREDIT INSURANCE CORPORATION (now NATIONAL EXPORT IMPORT BANK OF JAMAICA)	1ST DEFENDANT/RESPONDENT
AND	BANK OF JAMAICA	DEFENDANTS
AND	LEON ROBERTSON (as Receiver ANTILLEAN FOOD processors limited (in Receivership)	
AND	THE MINISTER OF FINANCE	
AND	THE MINISTER OF INDUSTRY & COMMERCE	
AND	JAMAICA COMMODITY TRADING COMPANY LIMITED	
AND	THE ATTORNEY GENERAL OF JAMAICA	

Carl Rattray Q.C., & Miss Hilary Phillips for Appellants

R.N.A. Henriques Q.C., & Allan Wood for Respondents

June 25, 26; July 31 & October 9, 1987

KERR, J.A.:

I have had the benefit of reading the draft reasons for judgment of Carberry, J.A., and Downer, J.A., (Ag.) and I agree that the appeal should be allowed on the grounds that the documents are not privileged and do not fall within the mantle of legal professional privilege.

CARBERRY J.A.

I have had the opportunity of reading in draft the judgment of Downer J.A. (Ag.) and I agree with the conclusions to which he has come. However, the novelty of the situation in terms of Jamaican legal experience, and the tremendous development which has taken place in this area of the law in England (see Lord Hailsham in D. v. National Society for the Prevention of Cruelty to Children (1977) 1 All E.R. 589 at page 602 c; (1978) A.C. 171 at page 226) have moved me into adding something of my own.

This is an appeal from a judgment of Bingham J., on an interlocutory matter which has arisen in the main case.

The context of the application is as follows: A company called Antillean Food Processors Ltd, and henceforth referred to as Antillean, was established in 1978 to operate a fish processing plant in the Kingston Export Free Zone. Some 90% of its shares were held by a company, Meridian Investment Corporation Ltd., henceforth referred to as Meridian; the remaining 10% of its shares being held by a company known as Trio Fabrikker A/S, a Norwegian company. Meridian is the major shareholder in two other related companies, Alcron Development Ltd., a company described as engaged in the business of property development, and Jamincorp International Merchant Bank Ltd., a company described as engaged in the business of merchant investment banking. The four Jamaican companies, Meridian, Alcron, Jamincorp and Antillean are the four Plaintiffs in the main action.

It appears from the pleadings and affidavits that have been filed that Antillean, despite some technical assistance from Norway, did not do well. It was expected to buy fish from various world sources, and then to process the same into commodities that the consumer would buy, for example into

sardines. This meant that much of its raw material would have to be bought abroad on the world market, and that so far as its sales went it seems to have been required to sell on the world market. When started Antillean had the blessing of the then government and was assured of being able to sell on the local market with some protection; however during the course of construction there occurred a change of government, and also of policy, with the new government being of the view that what was needed was a free market, which meant that it did not give Antillean the protection that it had hoped for or access to the local market on terms that would have enabled it to compete effectively with imported products, but required it to stand on its own feet on the world market. This Antillean apparently was unable to do, or to do effectively, without a home based market. Antillean blamed the Government for its failures, while the Government apparently blamed Antillean for mismanagement and inefficiency.

It appears from the pleadings and affidavits that Antillean not only did badly but was heavily in debt. The first defendant, Jamaica Export Credit Insurance Corporation (now the National Export Import Bank of Jamaica) hereinafter called JECIC was or is a public company, a subsidiary of the Bank of Jamaica hereinafter called B.O.J. It appears to have been entrusted with arranging loans to local enterprises from funds made available by the Bank of Jamaica from foreign loans or lines of credit, and in doing so it lent substantial sums of money to Antillean totalling U.S.$7.394 million This money was secured by a bill of sale and a guarantee from Meridian. Antillean also secured from JECIC short term loans for working capital running to some U.S. $3.904 million and this was not secured.

It should also be noted that the plant from which Antillean operated was on land leased by Alcron, and the plant was erected by Alcron and that Antillean was supposed to pay a monthly rental of U.S. $75,000.00 per month. This plant and building had been erected by Alcron on a mortgage loan from Jamaica Development Bank, which was also guaranteed by Antillean.

In May to June 1985 JECIC became dissatisfied with the performance of Antillean; Antillean was behind on its debt payments to that body, and the JECIC board decided to appoint a receiver to take over the affairs of Antillean. The receiver is the third defendant Mr. Leon Robertson. JECIC and B.O.J. are the 1st and 2nd defendants. As to subsequent events JECIC having ascribed the failure of Antillean to bad management and sent in a receiver, took steps both locally and abroad to see if they could find a purchaser or at least an operator of what they regarded as proven ability to take over Antillean, their declared aim being to protect their loan and see if they could still recover it. They also called in the guarantee by Meridian, and the Alcron Mortgage.

There are four other defendants: the Minister of Finance, the Minister of Industry and Commerce, Jamaica Commodity Trading Company Ltd and the Attorney General of Jamaica.

In short, to put it broadly, JECIC in their attempt to recover the money lent resolved to use all the various means which they could find to put pressure not only on Antillean, but on all the Plaintiffs, they being an interlocking group.

On the other hand the Plaintiffs blaming the powers that be for their failure, saw the efforts of JECIC as being a conspiracy to attack their group and to take over their enterprises. They blamed the Jamaica Commodity Trading (J.C.T.C.) Company, a government agency or corporation responsible for the importation of most food staples, for not buying their product but preferring to import (perhaps more cheaply) from abroad.

The Plaintiffs also blamed the Ministers involved as joining with JECIC efforts to put them out of business and to take away from them what was a potentially most profitable enterprise, given a chance to find a local market for its home base. Their principal complaint appears to have been that they were denied access to the local market to sell their products, while J.C.T.C., the island's principal importer, supplied that market with fish and fish products bought abroad from foreign companies. The Plaintiffs perceived the events that took place as a conspiracy deliberately aimed at injuring their interests. For example they complain that the receiver, the third defendant, has by his bad management increased their indebtedness and also failed to realized such assets as there were and also failed to reasonably operate the plant at Antillean.

In paragraphs 19 to 21 of the Statement of Claim the Plaintiffs allege that on the 23rd October, 1985, the JECIC and B.O.J. by its officers met certain creditors and the minority shareholder Trio Fabrikker in London and attempted to formulate plans for putting in new management into Antillean, and replacing the Plaintiffs. In paragraph 21 the Plaintiffs pursue this theme by referring to three documents specified as:

(1) A Status Report issuing from JECIC to the Minister of Finance; (dated 24th September, 1985);

(2) The Aide Memoire (a minute of) the meeting in London of 23rd October, 1985; (it is dated the 11th November, 1985); and

(3) A memorandum to the Governor of the Bank of Jamaica from Mrs. Mordecai, also dated 11th November, 1985.

It is these three documents that lie at the heart of this particular appeal.

The statement of Claim concludes with prayers for:

(1) a. An injunction restraining the first, second, third and sixth defendant from 'interfering' or attempting to interfere with the Plaintiffs' business .....

b. The Plaintiffs also seek a declaration against the fourth, fifth and seventh defendants (i.e. the two ministers and the Attorney General) that 'the Plaintiffs are entitled to carry on their business without interference in the lawful conduct thereof. ....

(2) The Plaintiffs seek damages interest and costs.

It is not necessary at this stage to express any view as to the viability of the proposed action and the relief sought. It does not appear to deal with the alleged indebtedness of the Plaintiffs, nor specify what is meant by 'interfering with the Plaintiffs' business'.

Be that as it may, the Statement of Claim filed on 6th January, 1987, was followed by a Summons for an interlocutory injunction dated 16th January for hearing on the 12th February, 1987.

This summons was supported by an affidavit by Mr. E.A.E. Williams, Chairman of the Board that ran Antillean, and a director of the first, second and third Plaintiff companies. By and large the affidavit supported the allegations made in the statement of claim, and referred to above, but in greater detail. Unlike the statement of claim it does refer to the indebtedness of the Plaintiff companies. It lays stress on the denial of Antillean's access to the local market, and alleges that unusual and discriminatory currency restrictions were imposed by the Minister of Industry and Commerce, the Jamaica Commodity Trading Company and the Bank of Jamaica acting in concert. These factors caused loss to Antillean, and resulted in it not being able to meet its financial commitments to JECIC who wrongly put it into receivership and appointed a receiver, whose authority is being challenged in another action. The affidavit sets out the allegations of conspiracy to injure, and in paragraph 20 refers to and exhibits the three documents referred to above. The affidavit then refers to other matters which are alleged to have injured the Plaintiffs in pursuance of the conspiracy of the Defendants.

On the 11th February, 1987 the first named Defendant, JECIC took out a summons, for hearing on the 12th February (when the Plaintiffs' summons for an interlocutory injunction was due to be heard) seeking:

(1) An injunction to restrain the Plaintiffs 'from disclosing or making use of confidential information' contained in the three documents already mentioned;

(2) an order for delivery up of copies of the documents;

(3) an Order that para. 19 of the Statement of Claim and

(4) Paragraph 20 of the Williams' affidavit be struck out.

The defendant's summons was supported by an affidavit from Mrs. Deborah Omphroy-Mordecai (hereinafter called Mrs. Mordecai). Mrs. Mordecai was in fact the author of the three disputed documents, and describes herself as "an attorney-at-law and the Secretary and Legal Officer of the JECIC". Her affidavit refers to the indebtedness of Antillean to the JECIC, the appointment of a receiver by the corporation, and to the indebtedness of Meridian on their guarantee of Antillean's debt. She asserts:

> "That all or any action taken herein on behalf of the first named defendant was done honestly and bona fide in pursuit of taking steps as are necessary to protect its own interest and in an endeavour to recover the amount due and owing to it."

She denied the allegations of conspiracy. Paragraph 15 of her affidavit contains the gravamen of the Defendant's case on this application. It reads as follows:

> "15. That I am the Legal Officer of the first named Defendant and by virtue of this capacity from time to time I have to render legal and professional advice, and confidential reports to the first named Defendant or to the Bank of Jamaica which is the parent company, and in particular to the Governor of the Bank of Jamaica and sometimes to the Honourable Prime Minister and Minister of Finance under whose portfolio the Bank of Jamaica and the first named Defendant falls.
>
> 16. That such advice, opinion or report given is entitled to legal professional privilege and confidentiality."

Mrs. Mordecai's affidavit then refers to the paragraphs in the Statement of Claim and Williams' affidavit which mention the three documents, and asserts that she did not divulge them to the Plaintiffs, and:

> "That neither the first named Defendant, nor any of the parties to whom the documents were delivered, either gave permission for same to be disseminated to the Plaintiff or their servants or agents or gave permission for the Plaintiffs or their servants and/or agents to make use of the said documents or any of them."

Mrs. Mordecai concludes:

> "That the said documents were unlawfully obtained."

This may or may not be so. There is no attempt to specify to whom the documents were circulated, or who had access to them. Paragraph 15 of an affidavit by Mr. Williams, dated the 16th March, 1987, asserts that the documents are not entitled to legal professional privilege and asserts that they were lawfully obtained by the Plaintiffs and are relevant to the claim of the Plaintiffs herein. Mr. Williams does not specify by whom or how the Plaintiffs came to be in possession of the documents, but it is not unreasonable to point out that in their search for successors to take over the management of Antillean JECIC approached several firms and even minority stockholders. It is not possible on this state of the evidence to assume that the documents were unlawfully obtained. The significance of this will be discussed later.

There are a number of further affidavits and counter affidavits with which it is unnecessary to deal: they support or deny the plaintiffs' allegations of discrimination and unfair dealing by the Defendants.

The Defendants' summons seems to have taken precedence over the Plaintiffs' application for an interlocutory injunction, and after two days of hearing on the 14th and 15th April, 1987, Bingham J., made the order sought by the JECIC restraining the Plaintiffs from disclosing or using the "confidential information" contained in the three documents, requiring that copies of the documents be delivered up to the first named Defendant, and that paragraph 19 (but not paragraph 21?) of the Statement of Claim and paragraph 20 of the Williams affidavit of 5th February be struck out. There are no notes of the reasons for his judgment. The matter has been argued before us de novo so to speak.

A few preliminary observations may be made. The attack made on the use of the three documents indicates that they are relevant to the Plaintiffs' claims. I find a useful starting point in the discussion of the problems posed in an observation made by Lord Hailsham in D v. N.S.P.C.C. (1977) 1 All E.R. 589 at page 599 (1978) A.C. 171 at page 225D;

> "I start with the assumption that every court of law must begin with a determination not as a general rule to permit either party to deliberately withhold relevant and admissible evidence about the matters in dispute. Every exception to this rule must run the risk that because of the withholding of relevant facts, justice between the parties may not be achieved. Any attempt to withhold relevant evidence therefore must be justified and requires to be jealously scrutinized. It is in this frame of mind that I approach the question at issue.
>
> At the same time I utter a word of caution. The facts, disclosure of which is required, must be required for the purpose of deciding the dispute. A collateral purpose is not justified and must be disregarded."

There are a great many other observations to like effect, and I mention only a few. In the leading case of Conway v. Rimmer (1968) 1 All E.R. 874; (1968) A.C. 910; Lord Reid at page 879 cited Lord Simon in Duncan v. Cammell Laird (1942) 1 All E.R. 587 (1942) A.C. 624, as quoting with approval the view of Rigby L.J.:

> "That documents are not to be withheld 'unless there be some plain over ruling principle of public interest concerned which can not be disregarded'."

and at page 880 Lord Reid observed:

> ".... there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done."

It is of interest to note that our own provisions with regard to discovery of documents contained in paragraph 284 et seq of the Civil Procedure Code correspond to provisions in the U.K. Supreme Court Rules prior to 1962. The U.K. Rules now provide for automatic discovery and inspection of documents at the close of the pleadings.

See Order 24 of the White Book: Discovery and Inspection of documents. The modern emphasis in litigation lies in the complete discovery of all relevant documents by each side, subject to well recognized exceptions. So far as the exception of privilege claimed in this case is concerned, legal professional privilege, it owes its origin to the contest or adversary system of litigation: see Lord Simon of Glaisdale in the leading case of Waugh v. British Railways Board (1979) 2 All E.R. 1169 at 1176-1177; (1980) A.C. 521.

It is also important to realize that "confidentiality" is not per se a ground for according privilege or withholding documents otherwise relevant to the dispute in issue: see Lord Morris in Conway v. Rimmer supra tat page 891 e:

> "It has been clearly laid down that the mere fact that a document is private or confidential does not necessarily produce the result that its production can be withheld."

and see Lord Cross in Alfred Crompton Amusement Machines Ltd v. Customs & Excise Commissioners (No. 2) (1974) A.C. 405 at page 433:

> "Confidentially is not a separate head of privilege, but it may be a very material consideration to bear in mind when privilege is claimed on the ground of public interest."

I turn now to examine the claim for legal professional privilege in this case. It has one unique feature. The Court here is not dealing with a case in which it may be necessary to decide to inspect or examine the documents for which privilege is claimed. The documents have been exhibited and are available for examination and discussion. The privilege claimed is legal professional privilege. The privilege is of two sorts:

> "(a) It protects communications made to enable the client to get or the legal adviser to give legal advise. For this head the privilege obtains whether or not litigation was pending or anticipated;
>
> (b) privilege also attaches to communications between the legal adviser and third parties made when litigation or legal proceedings were/are pending or reasonably anticipated and made for the perusal of the legal advisers acting in it.

I think it is clearly necessary that there must be a client and also a professional legal adviser. Mrs. Mordecai is described as "an attorney-at-law and the secretary and legal officer of the JECIC". To be recognized as an "attorney-at-law" entitled to the privileges and rights of that status, there must be compliance with Section 5 of the Legal Profession Act, which requires a practising certificate issued annually. Section 7 of the Act exempts from those requirements a law officer of the Crown and "every legal officer of Government." It is not clear whether Mrs. Mordecai qualifies under Section 5 or Section 7, and whether the "legal officer" of the JECIC is a legal officer of Government. However the question as to Mrs. Mordecai's status was not raised or argued, and it must be assumed that she was an attorney-at-law qualified to give legal advice to clients. Further it is now clear legal advisers for the purposes of the rules with respect to privilege include salaried legal advisers, or what are sometimes termed "in-house lawyers." In the Alfred Crompton Amusement Machines case (supra) Forbes J., at first instance (1972) 2 All E.R. 353 at 364 said:

> "The rule so far as the authorities go is one which protects communications between a client and his professional legal adviser. It does not, in my view, protect communications inside an organization which has or may have an internal legal branch or department. By no stretch of the imagination can the commissioners in this case be regarded as the lay clients of their own legal branch."

This view was rejected by the Court of Appeal, see Lord Denning M.R. at page 376 under the caption "Salaried legal advisers"

> "They are, no doubt, servants or agents of the employer. For that reason the judge thought that they were in a different position from other legal advisers who are in private practice. I do not think this is correct. They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privilege."

Lord Denning however went on to add, and it is most apt for the present case:

> "I speak, of course, of their communications in the capacity of legal advisers. It does sometimes happen that such a legal adviser does work for his employer in another capacity, perhaps of an executive nature. Their communications in that capacity would not be the subject of legal professional privilege. So the legal adviser must be scrupulous to make the distinction. Being a servant or agent too, he may be under more pressure from his client. So he must be careful to resist it ...."

It may be useful to point out that Lord Denning's remarks on the in-house lawyer were endorsed by the other members of the Court of Appeal. Karminski L.J. at page 382 said:

> "On the issue of legal professional privilege I have come to the clear conclusion that there can be no difference between the position of a full time salaried solicitor employed by a government department or by an industrial or commercial board, on the one hand, and that of a solicitor who practises his profession independently and is rewarded for his services by fees. In both cases the solicitor is consulted as a legal adviser by the lay client and the purpose of being consulted is to enable him to advise the lay client on legal matters."

and see Orr L.J. at page 384 d. The decision of the Court of Appeal with regard to the salaried legal adviser attracting professional legal privilege was not challenged in the House of Lords, and was accepted there: see (1974) A.C. 405 at page 430/431.

In the present case Mrs. Mordecai is also secretary to the JECIC and the documents must be examined to see whether she was acting as a legal adviser or as secretary when she wrote them.

But who was her client? The significance of that question lies in this: if the recipients of the letter were her client, then the communication would be privileged whether or not litigation was then anticipated or not. If the recipients were not her client, then it would be necessary to show that the document was a communication with a third party made for the purposes of litigation contemplated or pending.

It seems clear to me that so far as she had had a client, that client was the JECIC. This corporation was in law separate and distinct from the Bank of Jamaica and the Ministry or Minister of Finance and the Prime Minister. It is of course possible that an organization or person might consult the legal officer of the JECIC to obtain legal advice. There is however no letter addressed to Mrs. Mordecai which would indicate this. The first document, the "status report" of the 24th September, 1985 merely states in the opening lines:

> "In accordance with your request for a comprehensive report on Antillean Food Processors Limited, we advise as follows."

The third document shows it was submitted to the Prime Minister, and later to the Governor of the Bank of Jamaica. It is signed simply Deborah Omphroy-Mordecai.

The second document, the Aide Memoire, is a minute or report of a meeting held at the Jamaican High Commission, London, on October 23, 1985. It is not clear to whom this was circulated, nor that it was in response to any request for legal advice. It is signed in the dual capacity "Secretary/Legal Officer." The third document, a memorandum to the Governor of the Bank of Jamaica simply comes from Mrs. D. Mordecai, and there is no indication that this was by way of legal advice.

It is necessary however to examine the three documents themselves, to glean from their contents whether they can fairly be regarded as falling under Legal professional privilege, bearing in mind the observations of Lord Denning referred to earlier.

One of the perennial problems in the area of legal professional privilege has been whether and in what circumstances reports of accidents or incidents made by employees in the normal course of their duties are to be regarded as having been made for contemplated litigation or for their lawyer to see if it became necessary. The normal rule is that such reports are not entitled to privilege and must be discovered. One of the earlier cases, still cited, is Anderson v. Bank of British Columbia (1876) 2 Ch. D. 644. Some quotations may be helpful. Jessell M.R. at page 648:

> "Now, there is not a syllable there which shews that any communication, direct or indirect, expressed or implied, was made to the agent to the effect that his communication was to be a confidential one for the purpose of being submitted to the professional man - that is the solicitor - for advice. .....
>
> This communication, then, as regards the sender, was not made or sent for the purpose of being laid before a professional adviser, nor was there any intimation of such purpose sent by the person who required the communication."

At page 649 there is a long passage in which Jessell M.R. explains the rationale of the rule of legal professional privilege.

In the Court of Appeal there are echoes of Jessell's remarks suggesting that the communication should have been regarded as "confidential," but this element seems to have disappeared from later cases. What however is still required is that it should have been made for the purpose of being submitted to the legal adviser.

In Wheeler v. Le Marchant (1881) 17 Ch. D. 675 at page 681. Jessell remarked:

> "The cases, no doubt, establish that such documents are protected where they have come into existence after litigation commenced or in contemplation, and when they have been made with a view to such litigation, either for the purpose of obtaining advice as to such litigation, or of obtaining evidence to be used in such litigation, or of obtaining information which might lead to the obtaining of such evidence, but it has never hitherto been decided that documents are protected merely because they are produced by a third person in answer to an inquiry made by the solicitor."

In short not everything written to or by the legal adviser is entitled to privilege: Smith - Bird v. Blower (1939) 2 All E.R. 406. Letter written to solicitor not to obtain legal advice but to inform him of a fact.

To be protected the communication must be made to or by the legal adviser in that capacity, and while the relationship of client and legal adviser subsists: Halsbury, 4th Edition Volume 13, paragraph 72: Cases in which privilege arises.

See also Jones v. Great Central Railway Co. (1910) A.C. 4 letter written by a trade union member to his union for them to consider whether they would refer it to their solicitors to advise whether his case was worth pursuing: held not privileged.

Further, the most recent development in this field has established that:

> "A document was only to be accorded privilege from production on the ground of legal professional privilege if the dominant purpose for which it was prepared was that of submitting it to a legal adviser for advice and use in litigation. Since the purpose of preparing the internal enquiry report for advice and use in anticipated litigation was merely one of the purposes and not the dominant purpose for which it was prepared, the board's claim of privilege failed and the report would have to be disclosed."

See the headnote in the report of Waugh v. British Railways Board (1979) 2 All E.R. 1169; (1980) A.C. 521.

In that case the report of a railway accident in a document that stated on the face of it that it was eventually to be sent to the solicitor for the purpose of enabling him to advise the Board, was held not entitled to privilege from production because it had clearly been made for other purposes also i.e. for consideration of the safety and operation of the railway system.

Approaching the claims to legal professional privilege in respect of each of these three documents it was argued for the defendant/respondent that the documents were from an attorney-at-law to persons with whom she had a professional relationship. This relates to the earlier question raised, who were the clients of Mrs. Mordecai?

In my view her only client was the JECIC. There is nothing in the documents which shows that her legal advice was sought by any other person or institution.

The first document, the "status report" was simply an answer to a request for information made by the Minister of Finance. It reports on the status of Antillean, the extent of their indebtedness, the likelihood of recovery of the money lent, and the steps being taken to recover it and to find new management. There is no suggestion that the Minister of Finance was asking for any legal advice and none was given: this was a report in effect from the secretary of the JECIC on the affairs of one of its debtors.

Nor can I accept the argument that this document was prepared in anticipation of legal proceedings being taken by JECIC against Antillean: and that certainly was not the dominant or main purpose for its preparation. This was in my view a case where the legal adviser also did work in another capacity, that of secretary to the JECIC and her communications in that capacity would not be privileged: see Lord Denning M.R. in the Alfred Crompton Case (above)

The second document, the Aide Memoire, appears to me to be a no doubt useful minute or account of what transpired at the meeting held at the Jamaican High Commission in London on 23rd October, 1985, when Mrs. Mordecai (Secretary/Legal Officer JECIC) and the Governor of the Bank of Jamaica met with some of its creditors, unsecured, and its minority shareholder (Norwegian) to discuss what could be done with Antillean as a business venture. It was a business meeting, and no doubt Mrs. Mordecai's account of why JECIC had sent in a receiver and the options then available were welcome, but what was at stake in essence was whether any of those present could be persuaded to throw more good money after bad. This report was esentially the report of the Secretary of JECIC on a meeting discussing the problem of what could be done with regard to one of its principal debtors. This document is not in my opinion entitled to the protection of legal professional privilege.

The third document is a simple memorandum from Mrs. Mordecai to the Governor of the Bank of Jamaica, dealing with the indebtedness of Antillean. It records the results of commercial discussions with other firms in the effort to find some competent person or organization to take over the management of Antillean. It tenders no legal advice; it is simply the momorandum of a good secretary reporting to the governor of the parent company on the state of affairs of one of the subsidiary company's main debtors. This document is not in my opinion entitled to the protection of legal professional privilege.

There is however another dimension to the arguments in this case. Mr. Rattray for the Plaintiff/Appellants argues that whether or not the documents are privileged his clients have got copies of them and are entitled to put them in evidence, however the copies were obtained. He maintains however that they were lawfully obtained and that the contrary has not been proved. He relies on Calcraft v. Guest (1898) ! Q.B. 759 C.A. a case which itself depended on Lloyd v. Mostyn (1842) 10 M & W 478.

As against this Mr. Henriques for the Defendant/Respondents argues that these documents are privileged, they belong to the JECIC (or the recipients) who have given no permission for them to be divulged or used, and that they are entitled to an injunction forbidding the plaintiff from using them, and an order that all copies be returned to them. He relies on Lord Ashburton v. Pape (1913) 2 Ch. 469; (1911-1913) All E.R. 708; 29 T.L.R. 623 C.A.

The two Court of Appeal cases are in conflict though attempts have been made in subsequent cases to attempt to reconcile them.

Calcraft v. Guest is clear authority that even though the documents are in fact privileged, if the other party gets copies of them he can put them in. In that case the documents found their way accidentally into the hands of the other side. The privilege claimed for them was legal professional privilege. The Court of Appeal, in a single judgment delivered by Lindley M.R., held that the other party could put into evidence the copies made of the privileged documents. This is also the rule in criminal cases, see Kuruma v. R. (1955) 1 All E.R. 236 (P.C.), the headnote of which reads:

> "In considering whether evidence is admissible, the test is whether it is relevant to the matters in issue, and, if it is relevant, the court is not concerned with the method by which it was obtained."

Kuruma's case was one of the discovery of prohibited ammunition during the course of an illegal search. Though the search was illegal, evidence of the discovery of the ammunition was held admissible. Lord Goddard C.J., in delivering the Privy Council judgment cited Calcraft v. Guest (supra)

In Butler v. Board of Trade (1971) Ch. 680; (1970) 3 All E.R. 593 Kuruma's case was followed with regard to the admissibility of a copy of a letter written to the accused by his own solicitor which fell accidentally into the hands of the Official Receiver who took over the papers of a company in compulsory liquidation. The accused brought an action to recover the letter from the Board of Trade, claiming that it was his and privileged. He relied on Lord Ashburton v. Pape (supra). Goff J., distinguished Ashburton's case, saying at page 690:

> "In my judgment it would not be a right or permissible exercise of the equitable jurisdiction in confidence to make a declaration at the suit of an accused in a public prosecution in effect restraining the Crown from adducing admissible evidence relevant to the crime with which he is charged."

See too R. v. Tompkins (1977) 67 Cr. App. R. 181 (Crown allowed to put in a note written by accused to his counsel during the trial, which accidentally fell on the floor and was picked up and handed to Crown Counsel.

In Lord Ashburton v. Pape the Defendant by something very like a trick got possession of some letters written by the Plaintiff to his solicitor who had died. The Plaintiff was given an order which allowed him to recover these letters

(which were subject to legal professional privilege), and restrained the defendant from using copies of them in litigation then pending between them.

In the court of first instance, following Calcraft's case, Neville J., had exempted from the order those items of the correspondence being used by the Defendant in the other pending litigation. Lord Ashburton appealed against this reservation and asked that the restraint on the use of the letters be made absolute and without exception, distinguishing Calcraft's case on the ground that the documents here had been obtained by a trick. The Court of Appeal accepted this argument. (The defendant Pape did not appear). Cozens-Hardy M.R. in his judgment acknowledged Calcraft's case, termed it a rule of evidence, but regarded the action by Lord Ashburton as asserting a proprietary right in the documents and copies and made the injunction absolute. Kennedy L.J., saw it as the assertion of a right against a person who had wrongly become possessed of the documents, and that if before they had been put in evidence the true owner brought his action to recover them, he could succeed. Swinfen Eady L.J. saw the case thus at page 475:

> "The principle upon which the Court of Chancery has acted for many years has been to restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged. Injunctions have been granted to give effectual relief, that is not only to restrain the disclosure of confidential information, but to prevent copies being made of any record of that information, and, if copies have already been made, to restrain them from being further copied, and to restrain persons into whose possession that confidential information has come from themselves in turn divulging or propogating it ..."

At page 476 Swinfen Eady L.J. in effect said he saw no conflict with Calcraft's case. He distinguished:

> "Between the right to restrain a person from divulging confidential information and the right to give secondary evidence of documents where the originals are privileged from production, if the party has no such secondary evidence in his possession. The cases are entirely separate and distinct."

He went on to add:

> "The fact, however, that a document, whether original or copy, is admissible in evidence is no answer to the demand of the lawful owner for the delivery up of the document, and no answer to an application by the lawful owner of confidential information to restrain it from being published or copied."

With respect, it does not seem to me that Ashburton's case adequately dealt with Calcraft's case, and that there is a conflict between them which has not been resolved. The rules with respect to confidential information seem in part to have been taken over by the development of the law with regard to copyright, patents and trade marks. There are not many cases on the restraining of publication of confidential information, though Argyll (Duchess) v. Argyll Duke (1967) Ch. 302 (1965) 1 All E.R. 611 was one of them. (restraining of publishing matrimonial secrets)

Somewhat closer to the present case is Rogers v. Secretary of State for the Home Department: (1973) A.C. 388; 2 All E.R. 1057. In this case the Plaintiff had applied to the Gaming Board for a licence. The Board had asked the police for a report on the character of the applicant. The police had reported, and the Board had turned down the application. In some way the applicant seems to have obtained a copy of the police report. He proposed to sue the police (actually he brought an information for criminal libel) and had issued subpoenas to the Gaming Board and to the police to produce copies of the police report on him. Both the Gaming

Board and the Home Secretary applied to quash the subpoenas, and set up that the police report was protected by public interest privilege.

The argument turned principally on whether public interest privilege applied, and it was held that it did. It is true that in the course of the argument the Plaintiff pointed out that he is fact had a copy of the statement (p. 393/4) and sought discovery of the original. Both the Police and the Gaming Board relied on public interest privilege, and the Board cited Lord Ashburton's case.

Lord Reid regarded this as a case where the copy letter which the Plaintiff had had been abstracted by improper means from the files of the Board or of the police. (See p. 400B). Here it was necessary to prove not only the content of the letter, but that it had been sent, hence the subpoenas to the Gaming Board and the Police. His conclusion was, at p. 402:"

> "In my judgment on balance the public interest clearly requires that documents of this kind should not be disclosed, and that public interest is not affected by the fact that by some wrongful means a copy of such a document has been obtained and published by some person."

The other judgments or opinions were in the same vein. It was stressed that "confidentiality" alone was not a source of privilege but that public interest required that information of this sort and its sources should not be revealed. Because the Plaintiff's case would have required not only proof of the contents of the letter from the police, but proof that it had been in fact sent, the Court did not have to deal with the problem of whether the letter could be put into evidence, as the earlier hurdle had not been crossed. In the result, apart from Lord Reid's remark cited above, there was no attempt to resolve the difference between Calcraft's case and Ashburton's case.

However in I.T.C. Film Distributors v. Video Exchange Ltd. (1982) 2 All E.R. 241; (1982) Ch. 431, the grey area between the two Court of Appeal decisions again emerged. In this case motions in a copyright case were being heard in court, when one of the defendants improperly took certain documents from a box of documents which the Plaintiffs' solicitors had brought to court. He refused to return them and the Plaintiffs applied by notice of motion for an order that the defendant be restrained from making copies of any of the plaintiffs' documents which he had removed, and that he deliver up all the documents he had removed and copies which he had made of any of them. In this case the Defendant had immediately used copies of some of the documents by exhibiting them to an affidavit he had put in in the main action. Warner J., made an Order that the documents be returned, but pending further argument he reserved the question of those which had been already used and put into evidence by The Defendant in the affidavit he had filed.

After hearing further argument he deleted the proviso and made the order absolute. At page 244 Warner J., put the matter thus:

> "Mr. Chappell relies on the general rule that in civil, as distinct from criminal, proceedings the court has no power to exclude relevant evidence, even though that evidence has been unlawfully or improperly obtained; and on the cognate rule that if the original of a document is privileged, secondary evidence of its contents, such as a copy of it, may if available be adduced. He relies in particular on Calcraft v. Guest (1898) 1 Q.B. 759 and Helliwell v. Piggott-Sims (1980) F.S.R. 356.
>
> Counsel for the Plaintiffs puts his case in two ways:
> First, he relies on Lord Ashburton v. Pape, (1913) 2 Ch. 469. He submits, and I agree, that that was not an isolated decision but is illustrative of the general rule that, where A has improperly obtained possession of a document belonging to B, the court will, at the suit of B, order A to

> return the document to B and to deliver up any copies of it that A has made, and will restrain A from making any use of any such copies or of the information contained in the document. ....."

Warner J., however observed that in point of fact the defendant had already put some of the documents in evidence before the motion for the injunction had been brought, with the result that:

> "There seems to me to be difficulties in the way of my granting the Plaintiffs such relief on the basis of Lord Ashburton v. Pape now."

Warner J., pointed out that counsel for the Plaintiffs had put an alternative submission:

> "That submission is in a nutshell that, in the circumstances of this case, I must balance the public interest that the truth should be ascertained, which is the reason for the rule in Calcraft v. Guest ... against the public interest that litigants should be able to bring their documents into court without fear that they may be filched by their opponents, whether by stealth or by a trick, and then used by them in evidence."

Warner J., accepted this second argument, observing that for a party to do what the defendant had done in this case amounted to a contempt of court.

The report does not clearly indicate what was the ultimate result. It appears that Warner J., had in fact seen some of the exhibits attached to the affidavit but not all. Those he had in fact seen he felt he could not exclude, but he did so with regard to the others.

In the result, this case seems to establish three propositions:

> (a) that if the application to recover the privileged documents comes on before the other side has put them in evidence, the owner of the documents may recover them and get relief in accordance with Ashburton's case;

(b) if the other side have in fact put the documents into evidence by exhibiting them to an affidavit before the motion to recover them is brought, then the rule in Calcraft's case will prevail;

(c) if it be shown that the party has obtained the other side's documents by a trick, e.g. stealing them in court, then by way of punishment (?) they will be enjoined from using them, and Ashburton's case will prevail.

The problem came before the Court of Appeal again in Universal City Studios Inc. v. Hubbard (1983) Ch. 241; (1983) 2 All E.R. 596; (Falconer J.) (1984) 1 All E.R. 661 (C.A.) Falconer J. referred to the judgment of Warner J., in I.T.C. Film Distributors Ltd. v. Video Exchange Ltd. (supra), but the case turned ultimately on the interpretation of s. 72 (5) of the Supreme Court Act, 1981, and the Court of Appeal expressly reserved their opinion on the Calcraft-Ashburton point.

The most recent case dealing with this problem appears to be Goddard et al v. Nationwide Building Society (1986) 3 W.L.R. 734 (C.A.). In this case the Plaintiffs brought a house with the aid of a mortgage from the Defendants. The solicitor acting for the Plaintiff also acted for the Defendants. The Plaintiffs sued the defendants for breach of contract or negligence in respect of some defect in the house. Hearing this the Solicitor sent to the Defendant a copy of a note he had made with respect to a conversation between the plaintiffs and a representative of the defendants. The defendants used the information to put in a defence of contributory negligence and referred to the note. The Plaintiffs applied:

(i) to strike out of the defence all references to the solicitor's note,

(ii) for an order restraining the defendants from using the note and requiring them to deliver up all copies of it. Plaintiffs claimed that the note was privileged, and that they were entitled to the privileged and that the solicitor had acted improperly in giving the defendants a copy of the note.

Having failed to get an order the Plaintiffs appealed to the Court of Appeal and argued that the note and the conversation which it recorded were both privileged, that the solicitor had been acting for the Plaintiffs, and the privilege was theirs and that they were entitled to restrain the Defendants from using the same. The defendants argued that the solicitor had been acting for both parties, and they were entitled to have and use the note in question.

The Plaintiffs relied on Lord Ashburton v. Pape (1913) 2 Ch. 469, while the Defendants relied on Calcraft v. Guest (1898) 1 Q.B. 759.

May L.J. at page 743 resolved the conflict in this way:

> "I confess that I do not find the decision in Lord Ashburton v. Pape logically satisfactory, depending as it does upon the order in which applications are made in litigation. Nevertheless I think that it and Calcraft v. Guest are good authority for the following proposition:
>
> If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation; however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them."

May L.J., on this basis found that the Plaintiffs were entitled to the order which they sought.

May L.J.'s observation in effect leaves everything to a race between the contestants: it assumes that putting the documents as exhibits to an affidavit in the suit amounts to putting them in evidence, and that if the person entitled to the documents discovers his loss, or the other side's gain, before the opponents has done so he may successfully bring his motion, otherwise he will be too late. This reconciliation appears not to address the question of how did the opponent obtain the disputed documents. Warner J., in the I.T.C. Film Distributors case had been prepared to hold that where the opponent had stolen the documents the owner of the privilege could still get his order, but not in respect of those that had been put in evidence.

Nourse L.J., in Goddard's case agreed with May L.J., that the party who desired the protection of Ashburton's case must seek it before the other party has adduced the confidential communication in evidence or otherwise relied on it at trial. He added however that the equitable jurisdiction in /Ashburton's case could prevail over the rule of evidence (Calcraft's case) only in cases where privilege can be claimed:

> "It can not be the function of equity to accord a de facto privilege to communications in respect of which no privilege can be claimed. Equity follows the law."

Nourse L.J., added a number of other propositions, most notably that equitable relief as in Ashburton's case could be granted even against a defendant who innocently acquired the privileged documents, and in cases where the acquisition was not innocent, as in the I.T.C. Film Distributors case, the equitable relief could be granted even if the other side had in fact already put the documents in evidence. Nourse L.J., also expressed regret that the rule was not the same in both civil and criminal cases.

Applying these views to the facts in the case before us, the Plaintiffs, Antillean etc., have already put these documents in evidence in the shape of exhibits to the affidavit of Mr. Williams, before the present application by the Defendants was brought to recover them. The application therefore comes too late. Further, unlike the case of I.T.C. Film Distributors Ltd v. Video Exchange Ltd., it has not been established that Antillean stole these documents or even improperly received them. All that we have/are assertions on both sides. In any event I have already expressed the view that the documents are not privileged and do not seem to me to fall within the mantle of legal professional privilege. According to the view of Nourse L.J., the equitable rule in Ashburton's case can prevail over the common law evidential rule in Calcraft's case only in cases where the privilege can be claimed.

For these reasons it seems to me that the decision of Bingham J., was wrong, and that the order that he made should be set aside, with costs to the appellants here and below, to be taxed or agreed.

DOWNER J.A. (Ag.):

The important issue to be decided in this appeal is whether three documents prepared by the Secretary and Legal Officer to Jamaica Export Credit Insurance Corporation a wholly owned subsidiary of the Bank of Jamaica can be used by the appellants as the basis for a conspiracy charge against the respondents in a pending action in the Supreme Court. Mr. Rattray for the appellants contended that they ought not to be restrained from seeking to tender relevant evidence in their custody at the forthcoming trial, if such a trial is to be a fair one. Mr. Henriques on the other hand relied on the protection from disclosure the common law has always accorded to professional advice of legal advisers to their clients concerning their rights or in anticipation of proceedings in courts. The object of this protection, he contended, was to ensure that there was the utmost confidence between legal advisers and their clients and this was also a guarantee for a fair trial.

A procedural point to note is that in the court below proceedings for the injunction was instituted by way of summons and this mode was approved in Goddard and another v. Nationwide Building Society [1986] 3 W.L.R. 734 at 739 by May, L.J. thus:

> "Before dealing with the substantive arguments which were addressed to us on the hearing of this appeal, I should just record that with a view to saving time and costs the defendant accepted that an application for an injunction made in the existing proceedings could be regarded in the same way as one made in separate proceedings."

Additionally Nourse L.J. at pages 744-745 in sanctioning the procedure said:

> "First, it is desirable to emphasise that the proceedings in which the rule of evidence denies protection to the confidential communication are not proceedings whose purpose is to seek that protection. The

> "question is an incidental one which arises when the party who desires the protection asserts a right to it as if he were the plaintiff in an action seeking to invoke the equitable jurisdiction. When Lord Ashburton v. Pape was decided, the practice and procedures of our courts were no doubt such that it was first necessary to issue fresh proceedings. Nowadays I think that we would at the most require an undertaking to issue a pro forma writ, perhaps not even that, a consideration which no doubt explains the agreement not to require fresh proceedings in the present case. The crucial point is that the party who desires the protection must seek it before the other party had adduced the confidential communication in evidence or otherwise relied on it at trial."

It is necessary to say a word about the parties. The appellants are Meridian Investment Corporation Limited which is the holding company of the group. Jamincorp is the merchant banking arm, and is the majority share-holder in Alcron which concentrates on real estate and development. Antillean are food processors and they are now in receivership. I shall refer to them collectively as the associated companies. Ranged against them are Jamaica Export Credit Insurance Corporation an arm of the Bank of Jamaica which secures loans from overseas governments and institutions and lends to local investors. The others, apart from the Receiver of Antillean are government ministries, the Attorney General as well as the trading arm of the government - Jamaica Commodity Trading Company. I shall refer to them collectively as the public authorities.

The order appealed from is that of Bingham J., and it embodied his ruling that the associated companies were to be restrained from using the confidential information in the three disputed documents and that they should deliver up the said documents in their custody. With regard to the pending proceedings it was also ordered that paragraph 19 of the Statement of Claim be struck out as well as paragraph 20 of the Affidavit of E. A. E. Williams. It should also be noted

that the pending action charges the public authorities for conspiring together with intent to injure Antillean and Meridian, as a result of which both companies suffered loss. The decision in this action is important because there is no doubt, that the disputed documents form an important part of the case for the associated companies in the Supreme Court.

It is now necessary to examine the three documents namely the Status Report which was submitted to the Minister of Finance, who is also Prime Minister, in September 1985; the Aide Memoire which concerns a meeting of Creditors of Antillean held in London October 23, 1985 and a memorandum to the Governor of the Bank of Jamaica dated 11th November, 1985. All three documents were prepared by Mrs. D. Omphroy-Mordecai, an Attorney-at-law who is the Secretary and Legal Officer to the first respondent who was the only respondent represented on this appeal.

Why is the Minister of Finance involved? The Bank of Jamaica is responsible for the monetary policy of the country under the superintendence of the Ministry of Finance so it is appropriate for that Minister to request a comprehensive report from the Secretary of a subsidiary of the Bank, as public funds were deployed in the operation of Antillean. The report indicates the financial problems of Antillean in that as a result of its declining fortunes as of May 28, 1985 the respondent owed U.S.$3,904,000 which was due under the Norwegian Line of Credit. The Minister was also informed that a Receiver was appointed to protect the respondent's position.

Further information was forwarded concerning negotiations for a consortium for managing Antillean and the proposal for selling it was noted. The Secretary in her report gave information about a guarantee from Meridian being called

in and that a failure to pay would result in Meridian being wound-up. She also added that the Bill of Sale held by her company in respect of Antillean would be upstamped to J$44 million and that in further protection of her company she had purchased the mortgage on Antillean's plant.

The comprehensiveness of her report was further emphasised when she stated that Alcron had retained counsel to collect rental from the Receiver of Antillean and further gave an account of the stock on hand as well as a progress report on the work of the Auditors.

In concluding, the Secretary informed the Prime Minister of what she proposed to do with regards to the operations of Antillean. The plans included persuading Alcron by financial measures of the unwisdom of suing the Receiver of Antillean for rental owed and she was attempting to secure the building for a nominal rental. She also spoke of plans to visit Norway to speak to the creditors who were becoming restive and stated that it was prudent to prevent suits at that time.

It is clear that she was not writing to the Prime Minister as a legal adviser, she was informing him of the state of affairs because he requested it. It is true that there was included in this report some legal information but not legal advice. The dominant aspect of the report was the financial one and how that problem was to be resolved. There is mention of suits to be prevented, but this was the possibility of suits by the creditors against the Receiver. In any event no legal advice was offered on that score nor was there a trace of any preparation for that anticipated litigation. In so far as there were proposals they were of a financial nature.

The second document is the Aide Memoire and it is really the minutes of a meeting held at the Jamaica High Commission in London on October 23, 1983. This document is

dated November 11,1985. Three features stand out: the first was that the Secretary gave an excellent summary of the financial crisis at Antillean and why it was put into receivership. The second was the contributions of the Governor of the Bank and the representatives of the shareholders and creditors as to how the company ought to be financed to ensure survival and prosperity. In this regard, access to the Jamaica market was discussed and how the company could meet competition from Canadian sardines and Japanese mackerel,taking into consideration the policy of the Jamaican government to make available a cheap supply of protein. The third feature was the proposed new management structure which would involve Grace and I.C.D. The only explicit legal issue raised was how the Bank of Jamaica would cope with eighty percent shareholding in Antillean which was owned by Mr. Williams and it was the Governor of the Bank who replied that the matter would be investigated and further felt it could be resolved by negotiation. The Secretary's function at this important meeting was to inform and record, and from the report it is clear that the dominant theme was finance. There was no legal advice given, or preparation for any anticipated litigation. The meeting was certainly confidential because men of business would anticipate that such discussions would be between themselves and the four walls of the conference room especially as the dominant shareholder of Antillean was not invited and plans were being made which would affect his interests.

The third document in issue is a memorandum to the Governor of the Bank of Jamaica to which the Status Report to the Prime Minister was attached. Further the memorandum indicated what had been done since the Status Report. It is clear that this report was made in her capacity as Secretary. It is a classic case of information being supplied to a

superior officer. One may even add that in all three instances the documents were confidential reports about serious matters of business, but in no instance is there any indication of anticipated litigation when these documents were prepared as Mr. Henriques contended.

It is against this factual background that we must examine the authorities on the doctrine of privilege which protects communication between lawyer and client from disclosures in legal proceedings. Because the common law has always favoured full disclosure of relevant material in court in the interests of justice, the categories protected from disclosure are few although new categories are still being created to meet changing social relations. One of the earliest categories protected was legal professional privilege as the law recognised that if full confidence was not accorded to that relationship, litigants would refrain from telling the whole story to their advisers. Two important cases in this branch of law are Calcraft v. Guest (1895-9) All E.R. Rep. 346 and Lord Ashburton v. Pape [1911-13] All E.R. 708. The combined effect of both cases has been admirably summarised by May L.J. in Goddard v. Nationwide Building Society (supra) at 743, it reads as follows:

> "I confess that I do not find the decision in Lord Ashburton v. Pape logically satisfactory, depending as it does upon the order in which applications are made in litigation. Nevertheless I think that it and Calcraft v. Guest [1898] 1 Q.B. 759 are good authority for the following proposition. If a litigant has in his possession copies of documents to which legal professional privilege attaches he may nevertheless use such copies as secondary evidence in his litigation: however, if he has not yet used the documents in that way, the mere fact that he intends to do so is no answer to a claim against him by the person in whom the privilege is vested for delivery up of the copies or to restrain him from disclosing or making any use of any information contained in them."

In order to determine whether this doctrine assists the respondents, as was found by the learned judge so that the injunction granted remains in force, it must be determined whether there was a relationship of lawyer and client between the Secretary and the Prime Minister, and the Secretary and the first respondent and the Governor of the Bank of Jamaica. So far as the Prime Minister was concerned the clear inference was that he requested a comprehensive report in his capacity as Minister of Finance and as such no lawyer/client relationship existed. It is true to say that as between Legal Officer and the first respondent, a lawyer and client relationship could exist, but in relation to any advice she gave in London, it was in her administrative capacity and not as a lawyer. What she did there was part of the regular duties of a secretary and did not give rise to a lawyer/client relationship although it was a confidential one. Illustrative of this type of relationship is where the Commissioners of Custom and Excise required their solicitors to "hold their hands" in the early stages, while preparing for their statutory duty to give their opinion on the value of goods, it was held no lawyer/client relationship then arose. However, after the opinion was given and litigation was anticipated then such a relationship was recognized as privileged see A. Crompton v. Customs and Excise [1974] A.C. 405. The following passage at page 432 from the speech of Lord Cross highlights the situation.

> "Here the two purposes for which the documents in question were obtained or came into existence were parts of a single wider purpose - namely, the ascertainment of the wholesale value in the manner prescribed by the Act. — The first, and the sole immediate, purpose was to help the commissioners to fix what in their opinion was the true value; the second purpose was to help the solicitor, if the commissioners' opinion was challenged, to prepare their case for the arbitration. It was not - and hardly could have been - suggested

> "that the mere fact that the commissioners would know in every case that their opinion might be challenged would itself enable them to claim that such documents as are in question here would be the subject of legal professional privilege whenever in fact their opinion was challenged. What is said to make them privileged in this case is the fact that the commissioners happened to expect that there would be an arbitration and called in the solicitor to "hold their hands" in the early stages. But, even so, in this case just as much as in cases in which no arbitration was in fact anticipated the commissioners had to form their own opinion as to value on the evidence available to them, including these documents, before any arbitration could take place."

There was no challenge to the Court of Appeal's decision, see A. Crompton v. Customs and Excise [1972] 2 All E.R. 353, that the opinion obtained by the Commissioners from their salaried solicitors on legal advice or in anticipation of legal proceedings when an opinion was formed was privileged, so that part of the decision of the Court of Appeal stands. As for the routine report to the Governor of the Bank this was clearly given in her capacity as a Secretary and not as a lawyer and so could not be privileged.

Another approach to test whether the documents were privileged as the learned judge found, was to examine whether the dominant purpose was to tender legal advice. Waugh v. British Railways Board [1979] 2 All E.R. 1169 makes it clear that if the dominant purpose of the report was not for anticipated litigation or advice then privilege would not be attached to it, and disclosure would be ordered. The whole matter was admirably summed-up in the speech of Lord Edmund-Davies at page 1183 thus:

> "After considerable deliberation, I have finally come down in favour of the test propounded by Barwick C.J. in Grant v. Downs [1976] 135 C.L.R. 674 at 677 in the following words:
>
> 'Having considered the decisions, the writings and the various

> 'aspects of the public interest which claim attention, I have come to the conclusion that the Court should state the relevant principle as follows: a document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection'.
>
> Dominant purpose, then in my judgment should now be declared by this House to be the touchstone."

In the instant case the whole purpose of all three documents was to inform the recipients of the financial state of Antillean and they do not come into the category of documents that would be protected by the test laid down in Waugh.

There is another aspect of this case to note that the only professional relationship which attracts privilege is the one of lawyer/client. It is true that equity does accord its protection to confidential documents and that the relationship between the Secretary and her employer was based on confidence. Moreover the courts have recognised such confidential employer/employee relationship and have ordered delivery up of such documents as in British Steel Corp. v. Grenada Television Ltd. [1981] 1 All E.R. 417. But the protection given to confidential documents does not extend to barring them from legal proceedings unless the confidentiality arose during a lawyer/client relationship. Ncurse L.J. was at pains to point this out in Goddard v. Nationwise Building Society (supra) in the passage on 745 which reads:

> "Second, although the equitable jurisdiction is of much wider application, I have little doubt that it can prevail over the rule of evidence only in cases where privilege can be claimed. The equitable

> "jurisdiction is well able to extend, for example, to the grant of an injunction to restrain an unauthorised disclosure of confidential communications between priest and penitent or doctor and patient. But those communications are not privileged in legal proceedings and I do not believe that equity would restrain a litigant who already had a record of such a communication in his possession from using it for the purposes of his litigation. It cannot be the function of equity to accord a de facto privilege to communications in respect of which no privilege can be claimed. Equity follows the law."

Quite apart from restraining the use of the three documents the order granted by Bingham J also directed that paragraph 19 of the Statement of Claim be struck out. That paragraph is now 21 of the Amended Statement of Claim and it reads as follows:

> "21. The Plaintiffs will further say that the actions aforesaid were calculated to bring pressure to bear on the Plaintiffs to dissuade Alcron from suing for the rental due as aforesaid or to force Alcron to renegotiate the rental agreement. At the trial hereof the Plaintiffs will refer to and rely on the Status Report issuing from the JECIC to the Minister of Finance dated 24th September, 1985; the Aide Memoire prepared by the Secretary/Legal Officer of the JECIC dated the 11th November, 1985 and a Memorandum issuing from the said Secretary/Legal Officer of the JECIC to the Governor of the BOJ dated 11th November, 1985 for their full terms and effect."

If the restraint on the use of the documents is removed then the basis for ordering this paragraph to be struck out goes. What of the order directing that paragraph 20 of the Affidavit of E. A. E. Williams dated 5th February be struck out? That paragraph relies on the three documents which were freed from restraint, and it is proposed to rely on them not only at the forthcoming trial, but also to obtain an interlocutory injunction against the respondents. The learned judge's order is set aside on that aspect also.

The upshot is that I find that Bingham J applied the wrong principles of law in deciding that the documents were privileged and I therefore allowed the appeal, with costs both here and in the court below.