IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. HCV 2328 OF 2008

BETWEEN	HON. GORDON "BUTCH" STEWART	CLAIMANT
AND	JOHN ISSA	1st DEFENDANT
AND	RAYMOND CLOUGH	2nd DEFENDANT

IN CHAMBERS

Gordon Robinson and Jerome Spencer instructed by Linda Mair of Patterson Mair Hamilton
Abraham Dabdoub and Franz Jobson instructed by Clough Long and Company
Raymond Clough present

January 12 and 16, 2009

APPLICATION TO STRIKE OUT CLAIM - DEFAMATION - LIBEL - LEGAL PROFESSIONAL PRIVILEGE - LEGAL ADVICE PRIVILEGE - LITIGATION PRIVILEGE - WHETHER LEGAL PROFESSIONAL PRIVILEGE DEFENCE TO DEFAMATION - BOUNDARIES OF LEGAL PROFESSIONAL PRIVILEGE - PROPORTIONALITY UNDER THE CIVIL PROCEDURE RULES - ABUSE OF PROCESS

SYKES J.

1. These are the reasons for deciding in favour of Mr. John Issa who, by way of a notice of application for court orders dated June 2, 2008, applied for the following orders:

    1. That the claim filed herein by the claimant be struck out as being disclosing (sic) no cause of action and being frivolous, vexatious and an abuse of the process of the court and judgment entered for the defendant with costs to be taxed if not agreed, or alternatively

2. That summary judgment be entered for the defendant with costs to be taxed if not agreed.

2. There are four applications. Two have been disposed of. This one for which these are the reasons and another in which Mr. Stewart and Mr. Issa, by consent, agreed that mediation should be dispensed with. The other applications have been set for May 13, 2009.

3. In respect of paragraph 2 of the notice of application for court orders, it should be noted that summary judgment is not permissible in a defamation action (see rule 15.3 (d) (iii) of the Civil Procedure Rules ("CPR")).

4. I comment on the formulation of paragraph one of the notice. The wording is a carry over from the old Civil Procedure Code. It would be helpful if this formulation is left behind and the wording of rule 26.3 (c) of the CPR is used. That rule permits the court to strike out a claim if there is no reasonable ground for bringing the claim. This formulation encompasses paragraph one of this application and other grounds as well.

The pleadings

5. I should indicate that by the time the matter came before me, it was certainly the case that as between Mr. Stewart and Mr. Issa there was hardly any contested issue of fact and although the matter was not originally presented in this way it certainly can be said that the real issue between the parties is (since each party has accepted the pleadings of the other, subject to Mr. Issa relying on legal professional privilege) whether Mr. Stewart has a real prospect of succeeding in his claim against Mr. John Issa. This is another way of saying that there is no reasonable ground for bringing the claim if legal professional privilege applies here. On the vital facts surrounding Mr. Issa's consultation with Mr. Clough, no issue is taken by Mr. Stewart. His point is that what Mr. Issa has said does not permit him to rely on legal professional privilege. This is how I have approached this application.

6. It is common ground that the contents of the email in question are undoubtedly defamatory of the claimant. Whether Mr. Stewart can succeed depends on the resolution of these two sub-issues: (a) whether the defence of legal professional privilege is a defence to libel and if so, is it established in this case?, and (b) assuming that what Mr. Issa did was libellous and legal professional privilege is not a defence, whether this claim should proceed to trial. Mr. Dabdoub presented his submission on each sub-issue as alternative submissions but each leads to the same outcome - striking out of the claim against Mr. Issa.

7. I shall not be reproducing the libellous email but I still need to give a sense of what the libel is. The essence of the email is that (a) Mr. Stewart schemed and plotted to have placed in important positions in government persons who were previously employed to his companies so that he could have advance information about government's intentions and so he was able to take advantage of this information for his own benefit; (b) drugs were found on Mr. Stewart's yacht and (c) while Mr. Stewart was chairman of Air Jamaica he caused a plane to be flown at a time when it was declared defective by the relevant regulatory agency of the United States of America.

8. This case has its origins in an email which arrived at the email addresses of Mr. Issa and his daughter, Miss Muna Issa. At the time the email arrived, Mr. John Issa had already launched a number of libel actions against the Jamaica Observer newspaper, a daily publication, which is said to be owned by Gorstew, a company allegedly controlled by Mr. Stewart. Mr. Stewart, for his part, has sued Miss Muna Issa for libel. Miss Issa, in turn has added a number of ancillary defendants including Mrs. Jaime McConnell, Mr. Stewart's daughter. It is common ground that Mr. Raymond Clough is counsel for Miss Issa in the claim in which she is a defendant and he is also counsel for Mr. Issa in his libel actions.

9. On receipt of this email, Mr. Issa and Miss Issa consulted Mr. Clough about the contents of the email. Mr. Issa wanted to know what impact the email may have on his daughter's case. Miss Issa also consulted Mr. Clough for the same reason. Therefore, on the face of it, two

persons are entitled to the benefit of legal professional privilege, assuming it attached to this consultation. Miss Issa provided Mr. Clough with a copy of the mail. Mr. Issa is relying on legal professional privilege as a bar to the claim. He has pleaded that "[t]he first defendant states that any "publication" to his attorney at law was privileged communication, was not libelous (sic) and is not actionable in law" (see para. 8 of amended defence of Mr. Issa).

10. I should just complete the narrative in order to facilitate understanding how Mr. Stewart was able to launch this claim given that Mr. Issa communicated only with his attorney and there is no allegation that Miss Issa showed the email to or discussed its contents with anyone else but her father and Mr. Clough.

11. Mr. Clough alleges in his pleadings that he showed the email to the Honourable Mr. Daryl Vaz M.P. on the basis that Mr. Vaz was his client (an allegation refuted by Mr. Vaz in a sworn affidavit) because he felt that it was his duty to bring this matter to the attention of Mr. Vaz since it libelled him. Mr. Vaz in turn showed the email to Mr. Stewart who then sued Mr. Issa and Mr. Clough.

12. There is no allegation that Mr. or Miss Issa was in any way involved in the preparation of the contents of the email. There is no allegation that either Mr. Issa or Miss Issa sent the email by any means whether electronically or otherwise to anyone after they received it. It is not alleged that either Mr. Issa or Miss Issa communicated or published its contents to anyone but Mr. Clough.

13. I now turn to examine Mr. Dabdoub's first submission on legal professional privilege. Mr. Dabdoub submitted that the circumstance of the communication of the contents of the email to Mr. Clough is covered by legal professional privilege.

Legal Professional Privilege

14. Anyone researching the law on legal professional privilege would be overwhelmed by the volume of decisions on this area from superior courts over the last forty years. The issue has been litigated in a variety of legal contexts. For example, in Australia an issue arose over

whether documents subject to legal professional privilege could be taken under a search warrant (***Baker v Campbell*** 153 C.L.R. 52); in New Zealand, legal professional privilege was litigated in the context of a statute authorizing the requisition of documents (***B v Auckland District Law Society*** [2003] 3 W.L.R. 859); in England, the House of Lords considered whether a defendant in a criminal case could secure information subject to legal professional privilege in order to exonerate him from the offence with which he was charged (***R v Derby Magistrates, ex. P B*** [1996] A.C. 487); the House also had to decide whether a tax inspector could secure documents subject to legal professional privilege to use in a tax investigation (***R (An The Application of Morgan Grenfell) v Special Commissioner of Income Tax*** [2002] W.L.R. 1299); the House returned to the question as recently as 2004 in the case of ***Three Rivers District Council v Governor and Company of the Bank of England (No. 6)*** [2004] 3 W.L.R. 1274 where the issue was whether advice given to the Bank of England when preparing for an inquiry into the collapse of the Bank of Commerce Credit International was subject to legal professional privilege.

15. From all these cases a number of principles has emerged. I accept that not every statement in each case (not just those cited in paragraph 14) is capable of easy reconciliation with each other but it is not necessary to attempt any reconciliation of dicta for the present case. Before making stating the principles, I should point out that it appears that the modern law on legal professional privilege is now spoken of under two heads: legal advice privilege and litigation privilege. I am aware that there is controversy over whether these two heads are separate and distinct or whether they overlap. In my view, they are two rooms in the same house with a connecting door between. It is not profitable to try to insist on a clear line of demarcation between the two. Some factual circumstance will reveal an overlap in that a client may consult an attorney when he is not contemplating litigation and it may well be that the very matter on which he consulted has become the subject matter of legal proceedings. The distinction certainly aids analysis but at the end of the day it is my view that the law is best served by keeping our eyes on the policy behind legal professional privilege and determining the

issue of legal professional privilege when it arises, in a common sense way, particularly in border line cases. There is no denying the fact that the issue of legal professional privilege is compounded by the fact that lawyers provide more than just legal services.

16. It is not the fact of being a lawyer that makes any communication with him privileged. What makes the communication privileged is the fact that the lawyer is consulted qua lawyer. It would also be helpful if it is bourne in mind that legal professional privilege protects communication and not documents per se unless the documents are part of the communication between the client and his lawyer. The fact that the communication is not reduced to permanent form does not make it any less privileged if indeed privilege attaches. The fact that the communication has been reduced to some permanent or tangible or digital form does not enhance its claim to protection under the doctrine of legal professional privilege. The focus of the law is on the communication as well as the capacity in which the lawyer was consulted and not the form in which the communication takes place. Now to the principles.

17. First, legal professional privilege is the outcome of the meeting of two important public policies. The first consideration is that a court should have all relevant material that is available in order to decide the matter of controversy between the parties. The second is that a person should be able to seek legal advice in relation to his rights, duties and obligations without fear of the communication being revealed. Legal professional privilege, by its very nature, withdraws from the court information that would otherwise be available to decide the issue between the parties. Thus the court necessarily acts on less than complete information.

18. It may well be that had the privileged communication been presented to the court, the ultimate decision that the court makes might have been otherwise. In other words, legal professional privilege increases the risk of erroneous decisions. A reading of a representative sample of the cases going back two hundred years reveals that this was one of the main concerns of judges. This concern led, even up to the twentieth century, to a formulation of the privilege in very restrictive

terms. For example, in Australia until reversed by a later case, the position was that a document was privileged under the head of litigation privilege only if the ***sole*** purpose for its existence was for litigation (see ***Grant v Downs*** 135 C.L.R. 674 which was reversed by ***Esso Australian Resources Ltd v Commissioner of Taxation of the Commonwealth*** 201 C.L.R. 49 and confirmed in ***Daniels Corporation International Party v Australian Competition Consumer Commission*** 213 C.L.R. 543). The Australians eventually accepted the House of Lords decision of ***Waugh v. British Railways Board*** [1980] A.C. 521 which settled the law in England that the correct test to be applied in order to determine when legal professional privilege under the head of litigation privilege arises was the dominant purpose test. ***Waugh*** brought to an end, in England, the same debate that was occurring in Australia.

19. In England, it now appears that the line of demarcation between legal advice privilege and litigation privilege is fairly brightly drawn. It is perhaps a fair summing up to say that the litigation over the last few years has been to determine the precise boundaries of legal advice privilege since the boundaries of litigation privilege are fairly well defined. This process is still going on. For example, the House of Lords in ***Three Rivers (No. 6)*** felt that the Court of Appeal took too narrow a view of the scope of legal advice privilege and held that it included taking advice on preparing for a Commission of Inquiry.

20. Thus even though legal professional privilege has been universally accepted as having a vital public policy function, the scope of its operation is still vigourously debated. This is understandable because the courts do not wish to appear to be giving the legal profession any special dispensation to withhold information from the courts when there are other important confidential relationships that do not enjoy similar protection.

21. This explains why the courts, when called upon to determine whether legal professional privilege arises in any context, go to extraordinary lengths to indicate that the privilege is not that of the lawyer but the client's. The courts have consistently explained that legal professional privilege exists not only because the relationship between lawyer and

client is confidential but because it is desirable, in the public interest that the prince, the pauper, the pastor and the scoundrel should be able to seek legal advice secure in the knowledge that his confidence will never be breached. This is seen as a fundamental right which a person has so that he can order his affairs. He can tell his legal adviser the full and complete truth without fear of it being revealed. This is seen as a public good that is vital to any society that subscribes to the rule of law.

22. Second, if privilege is established it exists for all times and can only be broken by the client himself or by legislation that does so expressly or by necessary and inescapable implication arising from the words of the legislation. The removal of legal professional privilege by legislation would seem to me to be possible only in England and Australia where there is no bill of rights. I do not think that this is possible in Jamaica where not only is there a written constitution with a bill of rights but the Constitution guarantees the right to legal representation (at least in criminal matters), a right that now does not depend on common law notions of fairness but has an independent and secure footing in the Jamaican Constitution. Legal professional privilege is an indispensable and intrinsic part of that right if the litigant is to enjoy the full benefit conferred by the Constitution.

23. Third, it is the courts that determine the existence and scope of legal professional privilege in any given case. It does so by looking at the matter objectively. A claim to legal professional privilege does not establish the claimed privileged, and neither does its denial mean that it does not exist. If necessary, the court examines the communication and makes a determination.

24. Fourth, the burden of proof is on the party claiming privilege. He must claim it and establish it.

25. Fifth, legal professional privilege cannot be restricted to advice on the client's rights and obligations because the modern world is now so complex that a client may need advice even though he is not the subject of any claim made against him and neither is he seeking to assert or vindicate any right, whether in private or public law. As Lord

Roger pointed out in ***Three Rivers (No. 6)***, a client may wish to consult about someone else's legal position in order to know how he may be affected.

26. Sixth, the existence of legal advice privilege cannot be predetermined; it all depends on the context.

27. Seventh, it is unwise to speak of exceptions to legal professional privilege because the so called exceptions are not exceptions. Privilege does not attach to advice being sought to commit a criminal or civil offence or perpetrate some fraud. Privilege does not attach in these situations because the advice is sought to advance an illegal or unlawful purpose. It was not intended to be a cloak for ongoing criminal or unlawful activity but rather for the person who may have committed a crime or a civil wrong to seek legal advice on how best to deal with his predicament.

28. Eighth, in determining whether or not privilege attaches, the important question is the capacity in which the lawyer was consulted and not the content of the consultation.

29. There has been some discussion of the expression "relevant legal context," an expression found in the judgment of Taylor L.J. (as he then was) in ***Balabel v Air India*** [1988] Ch 317. In this regard, I prefer the formulation of Lord Roger of Earlsferry in ***Three Rivers (No. 6)*** to that of Lord Scott of Foscote in the same case who approved Taylor's L.J.'s statement in ***Balabel v Air India***. Lord Justice Taylor said, "legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context" (see page 330). The speech of Lord Scott then goes on to suggest that unless there is a "relevant legal context" then privilege does not attach (see para. 38). I am not sure that Lord Scott and Taylor L.J. were using the expression to mean the same thing.

30. It seems to me that Taylor L.J. meant that the advice to the client is not restricted to telling the client, "The law is this or that," but extends to advising the client how to navigate his way in light of what

the lawyer has told him what the law is. This is what I understand Taylor L.J. to mean by the relevant legal context. Lord Scott's use of the phrase suggest that there must be a pre-existing "legal context" that precipitates the seeking of the legal advice and without that pre-existing context legal professional privilege does not arise. Lord Scott seems to be suggesting that unless some specific legal problem has arisen then legal professional privilege cannot arise. This seems too restrictive. Surely, a person ought to be able to consult an attorney about a situation that has not yet occurred but may take place. In short, a client may seek advice in anticipation that a particular set of events may come to pass.

31. For this reason I prefer Lord Roger's approach. His Lordship states at paragraph 56 in ***Three Rivers (No. 6)***:

> *More often than not the lawyer will be advising his client on legal matters that relate to his own position-whether his public law or private law rights and obligations. Legal advice privilege also applies to advice on criminal matters, which it may not always be easy to characterise as relating, strictly speaking, to rights and obligations of the client. ... In other cases, such as that of an objector at a public inquiry, the advice sought may relate partly to the client's own legal position and partly to the position of someone else, such as the developer. But clients may also legitimately consult their lawyers simply about someone else's legal position. Most obviously, a concerned parent may consult a lawyer about the potential repercussions for their adult child of some step which that child is contemplating. In all these cases the client would be inhibited in obtaining proper advice from his lawyer if there were any risk that either of them might require to reveal what had passed between them. So legal advice privilege applies.*

32. In the examples given by Lord Roger there is no necessity for the client himself to have any specific legal context in the manner suggested by Lord Scott. He may simply wish to know what may happen in the event that a particular event occurs and order his affairs accordingly. Once the client consults with the lawyer as a lawyer legal professional privilege attaches and remains unless the client waives it.

33. In addition to the principles gleaned from the cases, a very useful case that proved to be of great assistance in resolving this aspect of the application is ***Minter v Priest*** [1930] A.C. 558. There, the solicitor, a Mr. Priest, who was sued for slander, relied on legal professional privilege (what would now be called legal advice privilege). The facts were that the appellant, Mr. Minter, bought a house on a mortgage and ran into difficulties in servicing the debt. He decided to sell the property to reduce his exposure. He engaged the services of one Taylor to find a purchaser. Taylor identified Simpson as a potential purchaser. Simpson went to a firm of solicitors in order to borrow money to pay the deposit. Those solicitors referred him to the respondent, Priest, who sought to ingratiate himself and become part of the deal. It was during this attempt at ingratiation that Priest made disparaging remarks about Minter. Minter sued for slander. Taylor provided the vital evidence that grounded the slander. Priest sought to say that what was said to Taylor was privileged, that is to say, the lawyer, not the client, was claiming legal professional privilege. In discussing whether privilege could be relied on Lord Buckmaster examined the law with care.

34. His Lordship, in responding to the submission that that privilege did not arise because Priest's retainer was conditional on his lending the money to Simpson and since he did not lend the money then the lawyer/client privilege did not arise, said at page 567 - 568:

> *I have gone into this matter in some detail, because it is contended that the relationship of solicitor and client never existed between the parties at this interview, since the employment of the respondent was conditional on his lending the*

deposit.

Such a conclusion is, in my opinion, indefensible. I agree with the Court of Appeal upon this point. From one solicitor the parties were sent to another to see if he could do what the first would not, and the idea that it was possible to split the interview into two parts, treating the first as a proposal to lend money personally and the second, contingent on this, to act as a solicitor is, to my mind, outside the bounds of reasonable inference.

I am not prepared to assent to a rigid definition of what must be the subject of discussion between a solicitor and his client in order to secure the protection of professional privilege. That merely to lend money, apart from the existence or contemplation of professional help, is outside the ordinary scope of a solicitor's business is shown by the case of Hagart and Burn-Murdoch v. Inland Revenue Commissioners. But it does not follow that, where a personal loan is asked for, discussions concerning it may not be of a privileged nature.

In this case the contemplated relationship was that of solicitor and client, and this was sufficient.

There is much to be said in favour of the view that, so far as Taylor was concerned, this privilege was waived, but it does not follow that this enabled the conversation to be disclosed. Simpson was also present as a possible client and no authority has been quoted to establish that in these circumstances it was possible for Taylor to waive a privilege which was as much Simpson's as his own.

The relationship of solicitor and client being once

established, it is not a necessary conclusion that whatever conversation ensued was protected from disclosure. The conversation to secure this privilege must be such as, within a very wide and generous ambit of interpretation, must be fairly referable to the relationship, but outside that boundary the mere fact that a person speaking is a solicitor, and the person to whom he speaks is his client affords no protection.

35. This passage shows the common sense that needs to be applied. Here, Lord Buckmaster is establishing the point that one cannot decide from the fact that Simpson was seeking a loan from Priest that legal professional privilege could not arise. However, he was prepared to accept that if all that was sought was a loan, then legal professional privilege would not arise because in such a situation, Priest would be no more, in relation to Simpson, than a money lender. Significantly, Lord Buckmaster was not prepared to lay down what the contents of communication between lawyer and client must be before privilege can attach. Lord Buckmaster's analysis noted that it would not be accurate to say that once the lawyer/client relationship arose then everything said is privileged.

36. Viscount Dunedin, in the same case, at page 573 added this significant passage:

Now, if a man goes to a solicitor, as a solicitor, to consult and does consult him, though the end of the interview may lead to the conclusion that he does not engage him as his solicitor or expect that he should act as his solicitor, nevertheless the interview is held as a privileged occasion. This follows I consider from the judgment of this House in the case of Browne v. Dunn reported only in a not very well known set of reports, but I have read the judgments in the Journals of the House. The real question was, therefore, not as put, but was: Were the statements made when the

defendant was no longer giving advice as a solicitor, but was introducing a proposal of his own as a speculator?

37. Viscount Dunedin accepted that legal professional privilege would cover a situation in which a man went to see a lawyer in order to consult even if the consultation resulted in the lawyer declining to represent the man. Hence, the ultimate question for Viscount Dunedin was, in what capacity did the lawyer stand in relation to the man when the slanderous words were uttered?

38. Lord Atkin, in the same case and with characteristic clarity, examines the issue in this way. Lord Atkin stated at page 581:

It is I think apparent that if the communication passes for the purpose of getting legal advice it must be deemed confidential. The protection of course attaches to the communications made by the solicitor as well as by the client. If therefore the phrase is expanded to professional communications passing for the purpose of getting or giving professional advice, and it is understood that the profession is the legal profession, the nature of the protection is I think correctly defined. One exception to this protection is established. If communications which otherwise would be protected pass for the purpose of enabling either party to commit a crime or a fraud the protection will be withheld. It is further desirable to point out, not by way of exception but as a result of the rule, that communications between solicitor and client which do not pass for the purpose of giving or receiving professional advice are not protected. It follows that client and solicitor may meet for the purpose of legal advice and exchange protected communications, and may yet in the course of the same interview make statements to each other not for the purpose of

giving or receiving professional advice but for some other purpose. Such statements are not within the rule: see per Lord Wrenbury O'Rourke v. Darbishire.

39. Lord Atkin is making the same point as Lord Buckmaster. It is not the content of the communication that determines whether legal professional privilege applies but whether the client was seeking advice at the time the defamatory words were passed. If the purpose of the communication was to ask for and receive advice and not for the purposes of gossip then legal professional privilege attaches and no defamation action arises.

40. The ***Minter*** case reveals an additional issue that is relevant to this case. Where two parties consult an attorney qua attorney, the privilege is for both and Lord Buckmaster suggested that one of them could not by revealing what was said deprive the other of the privilege. On the pleadings, Miss Issa also consulted with Mr. Clough in his capacity as an attorney-at-law in relation to her case. It is possible that if she makes a claim to privilege it may be upheld but that will have to wait another day.

41. It is against these principles that Mr. Issa's contact with Mr. Clough is to be examined. Mr. Issa has claimed legal professional privilege. No issue is joined regarding the circumstances which led to Mr. Issa consulting Mr. Clough. I make this point because it is important to appreciate that the fact that Mr. Issa has given details about how he came to consult Mr. Clough, he is not to be taken as waiving the privilege. The disclosure is necessary if the court is to be able to assess properly the claim to privilege.

42. I, like Lord Buckmaster, would not attempt to say what must comprise the consultation between attorney and client before privilege attaches. No court should attempt to do this. There is really no limit to what a person may legitimately consult a lawyer about. Once it is accepted that it is legitimate for a person to seek advice about the legal position of another person then it seems to me that it is quite legitimate for Mr. Issa to find out from Mr. Clough what impact, if

any, the email may have on his daughter's case. Mr. Issa was seeking legal advice from Mr. Clough. That information may be important to Mr. Issa and influence how he organises his affairs. Mr. Issa was clearly and unambiguously engaging Mr. Clough in his character as a lawyer. In fact, at the time of the consultation, Mr. Issa had already engaged Mr. Clough in relation to other matters. In respect of this consultation, even if Mr. Issa was only seeking to retain Mr. Clough in relation to obtaining the specific advice on the email and the retainer had not been concluded, those preliminary discussions, with a view to concluding a retainer, would be protected by legal professional privilege and would remain so protected even if Mr. Clough declined to accept the retainer (see ***Minter v Priest***). If this were the case, even if Mr. Issa had disclosed the contents of the email to Mr. Clough and Mr. Clough declined to act for Mr. Issa, all that consultation would be protected by legal professional privilege.

43. On the pleadings of Mr. Issa's case, Mr. Clough accepted and agreed to the consultation in his capacity as a lawyer and it is during that process the publication occurred. At all material times, Mr. Clough was acting in his capacity as a lawyer. This is what legal professional privilege is designed to do: permit a client to make the fullest and frankest disclosure so he will get accurate legal advice so that he will know what to do. How else could Mr. Issa obtain proper and sound legal advice from Mr. Clough without also telling him about or showing him the actual contents of the email?

44. The fact that Mr. Issa was not consulting with Mr. Clough about his own cases is beside the point. Once it is agreed that legal advice privilege is not and cannot be restricted to advice about the client's own rights and liabilities, it becomes clear that Mr. Robinson's contention that what Mr. Issa did cannot attract legal advice privilege is hard to sustain. It is the capacity in which Mr. Clough was consulted that is important not the subject matter of the consultation. I therefore conclude that Mr. Issa's consultation with Mr. Clough qua lawyer attracts legal professional privilege. The privilege is Mr. Issa's and he has not waived it.

45. The necessary and inevitable conclusion from this is that Mr. Issa's publication to Mr. Clough cannot be used to ground a libel action. Publication by Mr. Issa in this context does not give rise to a cause of action. If a defamation action could flow from seeking legal advice, then who could consult an attorney with any degree of confidence? To permit this claim to go forward would undermine the policy reasons behind legal professional privilege. This is not a ***Minter v Priest*** situation where it was the client who told what had happened (apparently without objection from the other person who could have claimed privilege) and so there was evidence to determine what took place and so decide that privilege did not attach. Priest's statements were slanderous because he was not acting qua solicitor but qua businessman when he made them. Here, the client is claiming privilege and he has not waived it and there is no power in Mr. Clough to waive it in relation to Mr. Issa, or I might add, Miss Issa. I therefore hold that legal professional privilege, where the client has not waived it, is an absolute bar to a defamation action. There is no rule of law that I am aware of that makes it possible to use privileged communication to ground a cause of action unless that privilege was waived by the client. I now turn to the second ground of the submission.

Abuse of Process

46. The abuse of process relied on here is an unusual one. There are two decisions of the Court of Appeal of England and Wales that have been placed before me for consideration.

47. The first is the case of ***Wallis v Valentine*** [2003] E.M.L.R. 8. The claimant and the defendants had had a long series of legal battles. The libel action launched by the claimant was another salvo in an acrimonious relationship. The libel was said to arise from a letter sent by the defendant to the claimant and his girlfriend. The claimant also alleged that he was libelled by the defendant in an affidavit sworn by the defendant in an earlier legal skirmish with the claimant. There was no allegation that the letter was published to anyone else but the girlfriend. The defendant applied for summary judgment on the following grounds (which are taken verbatim from the headnote): "(1) the claimant was pursuing a vendetta against the defendants rather than vindication of his reputation, as evidenced by a letter he had

written; (2) publication was only to G who was privy to all the previous complaints against the claimant and party to some of the litigation; (3) even if the claimant were successful, the damages would be very modest and perhaps nominal, which could not justify a trial estimated at 14 days when the claimant had repeatedly made it clear that he had no income and no assets; and (4) one of the claimant's objects in the proceedings was to stave off his bankruptcy. The judge granted summary judgment on the publication issue and struck out the action. The claimant appealed."

48. The trial judge's decision was upheld. What is important about this case is the reasoning to this conclusion. The entire proceeding was conducted on the basis that the letter was indeed defamatory. It was accepted that there was publication to the girlfriend and it was also accepted that the cause of action was established. However, the court went on to consider whether it was worth committing the court's resources to a trial that would last at least 14 days to recover what would be, at best, very minimal damages because the publication was so limited in number that the claimant would be hard pressed to prove damage to his reputation. The significant legal principle emerging from this case is the importance of the concept of proportionality. The court has to take account of the cost of the litigation as well as the likely quantum of damages recoverable. In effect, the Court of Appeal prevented the claimant from pursuing a properly pleaded claim because the cost of pursuing the claim was grossly disproportionate to recoverable damages.

49. Mr. Robinson sought to say that ***Wallis'*** case was unique in that the person to whom the publication was made was the girlfriend of the claimant and the court's decision in that case was quite understandable. I do not agree and the reasons for this will be stated after I refer to the second case.

50. The second case is that of ***Dow Jones v Jameel*** [2005] Q.B. 946. The claimant (Jameel) sued in English courts on the basis that a United States newspaper publisher (Dow Jones) published in its internet edition material suggesting that he was a member of a terrorist organisation. Dow Jones pleaded that only five persons had read the

article in England and further that the claimant had suffered no damage to his reputation, and if he had, it was quite minimal. Three of those persons were connected with the claimant in such a way that his reputation would be unlikely to suffer in their eyes (see para. 17 of the judgment). Dow Jones also argued that article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, as scheduled to the Human Rights Act 1998 precluded Jameel from relying on the presumption of damage. Taking this latter point first, the Court of Appeal held that the article had not changed English law on this point and so the presumption of damage on publication of defamatory material was still the law of England. I would simply say that the presumption of damage is the law in Jamaica. My analysis will now focus on the first point made by Dow Jones because Mr. Robinson sought to persuade me that I should not apply the case for the reason that it turned on the enactment of the Human Rights Act and the English Civil Procedure Rules which have created an environment conducive to submissions as were made by Dow Jones. Jamaica, he submitted, does not have such fertile ground.

51. Mr. Robinson's submission gains some traction from this passage in the judgment at paragraph 55:

> *There have been two recent developments which have rendered the court more ready to entertain a submission that pursuit of a libel action is an abuse of process. The first is the introduction of the new Civil Procedure Rules. Pursuit of the overriding objective requires an approach by the court to litigation that is both more flexible and more proactive. The second is the coming into effect of the Human Rights Act 1998. Section 6 requires the court, as a public authority, to administer the law in a manner which is compatible with Convention rights, in so far as it is possible to do so. Keeping a proper balance between the article 10 right of freedom of expression and the protection of individual reputation must, so it seems to us, require the court to bring to a stop as an abuse of*

process defamation proceedings that are not serving the legitimate purpose of protecting the claimant's reputation, which includes compensating the claimant only if that reputation has been unlawfully damaged.

52. I would say that a court in Jamaica is under an identical obligation to apply the CPR in a proactive and flexible manner while giving effect to the overriding objective against the backdrop of a written constitution which guarantees (and so stronger than the Human Rights Act) certain fundamental rights and freedom, such as freedom of expression and the right of access to the courts. Whereas courts in the United Kingdom can only issue a declaration of incompatibility, the courts in Jamaica can strike out legislation if it infringes the fundamental rights of the constitution. The CPR explicitly recognises that managing cases through the court system is a multidimensional task; a task that demands that the courts take a holistic view and not focus just on the parties before the court (see rule 1.1).

53. Rule 1.1 states that in managing cases justly, the courts are to take into account (i) the need to save expense; (ii) the importance of the case; (iii) the amount of money involved; and (iv) the financial position of each party. The court is required to allocate a fair share of the courts' resources to the case. The balancing required by the court is obvious.

54. The matters mentioned in rule 1.1 of the CPR have to be balanced against the fact that courts exist to resolve disputes and under the Constitution of Jamaica, a litigant has the right to approach to the court to determine what his rights and obligations are (see section 20 (2)). Thus a litigant should not be lightly turned away from the court. Nonetheless, the court ought not to be a source of profligacy and waste. The Constitution, which is the supreme law, must always be upheld in the application of procedural rules and substantive law. The courts in Jamaica also have the duty to see that litigation is pursued for legitimate purposes and in the case of defamation proceedings, for the protection of and vindication of the claimant's reputation that has been unlawfully damaged. I see no difference between the role of

the courts in England and Jamaica save that the presence of a written constitution have placed the fundamental rights in an almost impregnable position.

55. In the ***Jameel*** case one of the issues that arose was whether success in England, a country in which there was minimum publication (five persons), would vindicate the claimant in a situation where there was world wide publication. On this score, the evidence was that the article was placed on Dow Jones' severs in New Jersey in the United States of America and so the publication was to a global audience so that a victory in England where there was minimal publication (the assumed five persons) would not properly vindicate the claimant in the eyes of other persons outside of England. The court observed that English law did not permit the court to grant a declaration of falsity, and so if Jameel's aim was to vindicate himself in publications outside of England then that could not be achieved by litigating in England and therefore there would be no legitimate objective requiring the trial to go forward. Additionally, the defence of Dow Jones pleaded qualified privilege on a number of bases. The Court of Appeal observed that a trial of this nature would be expensive and if the publication was only to five persons, three of whom were connected with the claimant in the way outlined above, then the damages awarded would be very minimal. It could certainly be said, the court observed, that while his reputation was vindicated [in the eyes of the other two readers], the question is, is it worth the expense? The court concluded, on the basis of minimum publication in England and a world wide publication outside of England coupled with an inability to grant a declaration of falsity, that it would be an abuse of process to allow the trial to continue when so little was at stake in the United Kingdom. I should add that by the time of the hearing in the Court of Appeal, the offending article had been removed from the website and removed from the newspaper's archive. This is a clear demonstration of the balancing exercise required.

56. It should be noted that in ***Jameel***, the bona fides of the claimant was not in issue. It was accepted that he was pursuing a legitimate claim and he had no improper motive. This would seem to suggest that a very disproportionate cost of litigation in relation to any damages

recoverable can amount to an abuse of process even if the claim is properly constituted and the claimant is not malicious in circumstances where the goal of the litigant is unlikely to be achieved by the litigation.

57. The court next considered whether an injunction would be granted to restrain publication of the offending article. The court reasoned that had it been the case that publication in England was minimal and there was a real risk of republication then an injunction may be appropriate but the fact that the offending article was removed from the website and the archive meant that an injunction was not a likely remedy to be granted.

58. What has been said so far does indeed make the ***Jameel*** case unique but does that mean that there is no principle emerging from it and the ***Wallis*** case that can be applied to the instant case? The principle that has emerged (and I am mindful of the swallow and the summer objection) is that in a libel case, even if the written words are in fact defamatory and there was indeed publication, if there is evidence that the publication by the named defendant was very limited such that the damage resulting is at best minimal, it may amount to an abuse of process to bring the claim. The application of this principle has to be considered quite anxiously, having regard to the constitutional right of access to the courts and all that that entails. It should be obvious that an abuse of process in these circumstances should rarely succeed.

59. In the case before me, it is common ground that Mr. Issa did not create the email. It is not pleaded that Mr. Issa forwarded the email to anyone, not even to Mr. Clough or to Miss Issa. There is no allegation that he brought the contents of the email to the attention of anyone but Mr. Clough. Therefore there is only one person to whom it can be said Mr. Issa published the email. It follows that the allegation that the email was sent via the internet and that it is notorious that the internet is comprised of connected computers, thereby making it likely that the offending email was circulated all over the world, has nothing to do with Mr. Issa (see para. 6A of particulars of claim). It cannot be said that Mr. Issa personally did or

encouraged "world wide publication" of the email. Thus even if the allegation of publication via the internet is accepted as true (which for the purposes of this application it is so accepted), that cannot advance the case against Mr. Issa - he did not publish by way of the internet. This distinction between the ***Jameel*** case where there was indeed world wide publication by the defendant in that case, makes the argument stronger for finding abuse of process in the instant case. It is not readily apparent that Mr. Stewart will recover anything but minimal damages against Mr. Issa, assuming he is successful in the case. Success against Mr. Issa will not prevent the circulation of the email around the globe if that is the fear of Mr. Stewart because the email was circulated by person or persons who still have it within their power to do so should they wish and may still be doing so since they have not been identified in this claim and as far as I am aware, there is no injunction restraining anyone from circulating the email.

60. I am not aware that the Jamaican courts can grant a declaration of falsity that Mr. Stewart would be able to use to his advantage. An injunction against Mr. Issa is out of the question since there is no evidence that he intends or might send the email to anyone. Thus, the question is, can the claim against Mr. Issa justify the expense of a libel trial having regard to the overriding objective in the context of a written constitution where right of access to the courts is guaranteed? I say there can be very little justification in all the circumstance of this case for bringing the claim against Mr. Issa. The likely cost of this case is more than disproportionate to any damages recoverable. I am not of the view that the resources of the court should be expended on this matter in the circumstance of this case as I understand them to be.

61. I am hard pressed to see how in the specific context of this case, where legal professional privilege has been claimed and established, that there is any legally admissible evidence to prove that Mr. Issa was (i) motivated by express malice (see paragraph 9 of the particulars of claim); (ii) "intended to anonymously disparage and denigrate the claimant by having the defamatory material republished with reckless disregard to the damage caused" (see para. 9 (ii) of the particulars of claim). It is difficult to see how the sole publication to

Mr. Clough, on an occasion protected by legal professional privilege, brought Mr. Stewart into "**public** scandal odium and contempt" (my emphasis) (see paragraph 10 of the particulars of claim).

62. I therefore grant the order in terms of paragraph one of the notice of application for court orders dated June 2, 2008 on the grounds of (i) there being no reasonable ground for bringing the claim because legal professional privilege is an absolute bar to a libel action and (ii) abuse of process. Costs to Mr. John Issa to be agreed or taxed.