COMMENTS ON RECENT DEVELOPMENTS IN THE LAW

AUSTRALIAN NATIONAL AIRLINES COMMISSION v. COMMONWEALTH OF AUSTRALIA AND CANADIAN PACIFIC AIRLINES LTD.: CROWN PRIVILEGE — A WIDENING IMMUNITY?

In recent decisions there has been a wealth of judicial comment to the effect that the name "Crown privilege" is a misnomer and misleading.[1] The immunity is not a privilege, as the name would suggest, but a principle of evidence which the courts have a duty to apply should non-disclosure of documentary evidence be warranted in the public interest.[2]

The term "Crown privilege" also suggests that the immunity is peculiar to the Crown and in the past the courts have insisted upon there being a Crown or executive interest before the immunity could be invoked. In a recent decision, *Australian National Airlines Commission* v. *Commonwealth of Australia and Canadian Pacific Airlines Ltd.*,[3] the High Court of Australia recognised a relatively tenuous executive interest as sufficient to warrant the Court weighing the respective public interests in disclosure and non-disclosure. It therefore becomes important to ask whether the courts will in future refuse to order disclosure of documents, should such protection from disclosure be warranted in the public interest, irrespective of whether the executive has an interest in preserving the confidential nature of the documents in question.

The Facts

In January 1971 two aircraft collided on the runway at Sydney Airport. Both aircraft sustained damage, but there was no personal injury suffered. A claim and counter-claim for damages on the grounds of negligence caused the issue of Crown privilege to be raised.

It was argued by the second defendants (one of the airlines involved) that a tape recording made in the cockpit of the aircraft belonging to the plaintiff should have been before the court as relevant evidence. This application for inspection was resisted by the plaintiff

1 See *R.* v. *Lewes Justices, Ex parte Secretary of State for Home Department* [1973] A.C. 388, 400 per Lord Reid, 406 per Lord Pearson, 406-407 per Lord Simon of Glaisdale, 412 per Lord Salmon; *Konia* v. *Morley* [1976] 1 N.Z.L.R. 455, 457 per McCarthy P.

2 See *R.* v. *Lewes Justices* [1973] A.C. 388, 400, 402 per Lord Reid, 406 per Lord Pearson, 406-407 per Lord Simon of Glaisdale, 412 per Lord Salmon.

3 (1975) 6 A.L.R. 433.

airline. Support for their resistance came in an affidavit sworn by the Assistant Secretary of the Australian Department of Transport in charge of the Air Safety Investigation Branch, and a later affidavit sworn by the Minister for Transport in the Australian Federal Government.

The tape was recorded on a cockpit voice recorder device which was operating in the plaintiff's aircraft immediately before, and at the time of the collision. The CVR, as it is called, records everything said by the pilots between themselves, and any communications with the aircraft from outside, such as the communications with Aerodrome Control in this case.

The Australian Federation of Air Pilots (the Federation) had agreed with the Director-General of Civil Aviation in 1964 to allow the use of these devices, and thus the invasion of the pilots' privacy, on the condition that the CVRs were to be used only for the purposes of investigating the causes of accidents in the interests of accident prevention, and then only in the circumstances specified in the agreement. These specified circumstances included when a "flight crew member was killed in an accident or was injured to the extent that his recollection of events preceding and during the accident may be impaired". There were other specified circumstances in which the Federation agreed that use could be made of cockpit voice records, and also a general clause allowing use for accident investigation purposes when both the Federation and the flight crew agreed. However, the Federation had indicated, as a matter of policy, that its consent would never be given should an attempt be made to invoke the latter general clause. In these circumstances it was accepted that admitting the tape as evidence in the action for damages would constitute a breach of this agreement.

The Federation had made it clear that should this agreement be breached it would instruct its members to refuse to allow the continued use of these devices in the aircraft they flew. This action would have an obvious indirect effect on the safety of the public. The objection of the plaintiff and the Minister to the production and inspection of the tape as evidence was based upon the alleged likelihood of this damage to the public interest.

Should Such a "Document" be Protected from Disclosure in a Court?

The court was faced with deciding whether a tape such as this should be protected from disclosure, or made available as evidence to the court.[4] The tape was accepted without difficulty as being a "document" for the purposes of Crown privilege. No question of irrelevancy arose either. Mason J. was of the opinion that the contents of the tape would influence the outcome of the decision on damages.[5] Thus the argument of irrelevancy of contents was not available to support the plaintiff's claim of privilege.[6]

Traditionally two broad categories of documents have been protected from disclosure by Crown privilege. The first category consists of documents the disclosure of the specific contents of which would injure the public interest, usually the national interest. An obvious

4 Ibid., 444 per Mason J.
5 Ibid., 443.
6 Ibid., 438.

example is documents which would reveal the detailed construction of a submarine during a time of war.[7] In respect of the second broad category of document, non-disclosure is justified, not because of the contents of the particular documents in question, but because of the class into which the particular documents fall, and the overall detrimental effect to the public interest, should that class of document be disclosed. Mason J. pointed to obvious examples in Cabinet minutes,[8] and communications between heads of government departments and their respective ministers.[9] Such disclosure would destroy the vital candour which must exist between members of the executive.

Mason J. was of the opinion that the tape in question did not come within either of these broad categories of protected documents. The actual contents of the tape were not in any way directly important to the government. Mason J. concluded:[10]

> No harm will ensue to the nation if the citizenry becomes aware of what Captain James said as TJA [the plaintiff's aircraft] careered down the runway on 19 January 1971.

Similarly the tape did not fall within the class of documents which it is in the public interest to protect from disclosure in order to ensure the efficient functioning of government. The reason for seeking protection of the tape was peculiar to the circumstances—the possibility of industrial action indirectly affecting public safety.

Notwithstanding his conclusion that the tape did not fall within the existing classes of protected documents, Mason J. went on to state that these established categories should not be regarded as closed:[11]

> As time passes it is inevitable that new classes of documents *important to the working of government* will come into existence and that detriment to the public interest may occur in circumstances which presently cannot be foreseen.

From this statement and his Honour's willingness to proceed to weigh the competing public interests it can be inferred that the Court regarded the tape as potentially falling within such a new class. Although the tape was not made by, was not the property of, was not in the possession of (although the executive had later obtained a copy), and did not contain information which was supplied by or was vitally important to the executive government, it was still sufficiently connected with executive government to come potentially within the ambit of Crown privilege. This connection existed in the fact that the executive was a party to an informal agreement with the Federation against unrestricted disclosure of cockpit voice records. The executive entered this agreement to ensure that CVR devices would be used in the interests of public safety. The Department of Civil Aviation had a duty to ensure that the highest level of safety for the air travelling public was maintained and the Federation's threat to prevent the continued use of the safety device should the agreement be breached by disclosure was directly related to the performance of this duty.

This is obviously a more remote or tenuous connection with the executive than has justified Crown privilege in the past. Will future

7 See *Duncan* v. *Cammell Laird and Co. Ltd.* [1942] A.C. 624.
8 See *Attorney-General* v. *Jonathan Cape Ltd.* [1975] 3 W.L.R. 606.
9 (1975) 6 A.L.R. 433, 441.
10 Ibid., 441-442.
11 (1975) 6 A.L.R. 433, 442. (Emphasis added).

courts go further and uphold the immunity from disclosure where the public interest in its broadest sense justifies the non-disclosure but there is no direct or indirect connection with the interests of the executive?

A recent decision of the English Court of Appeal, *D.* v. *National Society for the Prevention of Cruelty to Children*[12] suggests that the doctrine does still require a connection with the interests of the executive government. In this case a mother alleged negligence on the part of one of the N.S.P.C.C.'s inspectors while that inspector was investigating an allegation that she had been maltreating her baby. In the alternative the plaintiff sought discovery of documents within the possession and control of the N.S.P.C.C. which would reveal the name of the complainant and thus enable proceedings to be commenced against that person as well. The Society refused this request stating that such a disclosure would be a breach of confidence and would not be in the public interest.

The Court of Appeal (Lord Denning M.R. dissenting)[13] thought that the concept of public interest justifying non-disclosure was not sufficiently wide to include the particular public interest in question. The Court was of the opinion that only the "state interest", a concept which encompasses a more limited range of interests than the "public interest", would justify non-disclosure. Here, even although there may have been a public interest in preserving the confidentiality of the names of those who made allegations of cruelty, there was no state or central governmental interest, and thus no possibility of Crown privilege being available.

The National Society for the Prevention of Cruelty to Children was a body incorporated by Royal Charter and not by statute. The Society was not required to perform any statutory duties. Section 1 (1) of the Children and Young Persons Act 1969 did recognise the Society as a person authorised to take care proceedings but this provision merely conferred a statutory right upon the Society and did not impose any statutory duty. The majority of the Court of Appeal concluded that the Society existed completely independently of central government and that there was no state, governmental, or executive interest which would be endangered by disclosure, so that the protection of Crown privilege should not be available in the circumstances.

The fact that the House of Lords had recently recognised the privilege as extending to confidential documents within the possession of the Gaming Board for Great Britain[14] did not persuade the majority of the Court of Appeal that the N.S.P.C.C. should enjoy similar protection. Their Lordships saw the Gaming Board as being part of central government because not only was the Board constituted by the Gaming Act 1968 and required to perform functions pursuant to that statute, but it was also subject to the overall control of the Home Department.

12 [1976] 3 W.L.R. 124.
13 The Court of Appeal consisted of Lord Denning M.R., Scarman L.J. and Sir John Pennycuick.
14 *R.* v. *Lewes Justices* [1973] A.C. 388. See also *R.* v. *Gaming Board for Great Britain, Ex parte Benaim and Khaida* [1970] 2 Q.B. 417.

So in the *N.S.P.C.C.* case the "public interest" for Crown privilege purposes was confined to circumstances where an executive interest in confidentiality exists.[15] In the *Australian National Airlines Commission* case Mason J. appeared to take a wider view of the concept of "public interest" although nowhere did he expressly say that no connection with the executive interest was necessary. His Honour, however, thought that the possibility of indirect injury to the executive interest in question warranted him proceeding to weigh the competing public interests against each other.

The Balancing of the Competing Public Interests

Whenever the application of Crown privilege is contemplated there are two or more competing public interests which must be weighed and balanced. On the one hand there is the obvious public interest in having all relevant evidence available to a court to ensure the best approximation to justice in the circumstances. The free availability of all possible evidence also helps to maintain public confidence in the impartiality and fairness of the judicial process. In the words of Mason J.:[16]

> The witholding from parties of relevant and material documents, unless justified by strongest considerations of public interest, is apt to undermine public confidence in the judicial process. This is of particular importance here where an industrial union, not a party to the proceedings, objects to the making of the order sought and to the admission in evidence of the tape and threatens by industrial action to terminate the use of CVRs, thus causing the detriment to the public interest now apprehended.

On the other hand there is the particular public interest being submitted as justification for preserving the confidentiality of the communication, in this case the indirect detrimental effect on the public safety discussed above. Mason J. deferred to the opinion of the Minister and accepted that the threatened industrial action was a serious possibility.[17]

His Honour found with little apparent difficulty that the scales tilted in favour of disclosure when the respective public interests were weighed against each other.[18]

> It would be quite intolerable if the court were to deprive a party of the ordinary incidents of a fair trial in the face of threatened action of this kind when it has appeared that the material sought to be excluded could have, as indeed it has had, a decisive influence on the outcome of this action.

Allowing the tape to be immune from disclosure in these circumstances would have established a dangerous precedent for the success of future threats from pressure groups. In short, a trade union threat was being used in an attempt to obstruct the proper functioning of the judicial process:[19]

> In essence the apprehended detriment would result from industrial action taken on the ground that the Federation objected to an order which this court might think fit to make in the exercise of its jurisdiction.

15 See also *Asiatic Petroleum Co. Ltd.* v. *Anglo-Persian Oil Co. Ltd.* [1916] 1 K.B. 822 and *Broome* v. *Broome (Edmundson cited)* [1955] P. 190 as examples of cases where the courts have insisted upon a connection with the executive government.

16 (1975) 6 A.L.R. 433, 442.

17 Id.

18 Ibid., 443.

19 Ibid., 442.

When one views the apparently competing public interests from this point of view one realises that the balance heavily favoured disclosure. This type of pressure for non-disclosure is radically different from the legitimate interest in preserving confidentiality in order to ensure the efficient functioning of government.

In reaching its conclusion the High Court was further influenced by the fact that the contents of the tape were not consistent with what had already been given in evidence by those who were well aware of the contents of the tape—the crew of the plaintiff's aircraft.[20] The fact that officers of the Crown (the first defendant), the crew of the plaintiff's aircraft, the plaintiff's solicitors and the President of the Federation had had the tape played to them before the trial also influenced the decision of the Court. To allow only one party to proceedings to have access to the contents of the tape was not in the interests of fairness. Thus an order for inspection was made which entitled the second defendant to have the tape played under supervision in the presence of the other parties to the action.

Who Should Balance the Competing Public Interests?

Obviously somebody has to decide which of the competing public interests is to prevail in any individual case. Originally the position in England was that the responsible minister filed a certificate seeking Crown privilege and this was accepted without question as obliging the court to refuse to order discovery.[21] It was accepted that the responsible minister rather than the court should balance the competing public interests. However, in 1968 this view was abandoned by the House of Lords in *Conway* v. *Rimmer*.[22]

The plaintiff had been a probationary police officer and had commenced an action for malicious prosecution against his former superintendent. The Home Secretary objected to the production of certain internal police documents. Departing from their earlier stand the House of Lords held that the documents should be produced for the Court's inspection and that the Court would be finally responsible for balancing the competing public interests. This principle that the court has the authority to view the documents and make the final determination was reaffirmed by the High Court of Australia in the *Australian National Airlines Commission* case.[23] The New Zealand courts have confirmed that it is also the law in New Zealand.[24]

In most cases the court will be a more appropriate body than the minister to make the determination. The minister usually has a vested interest in the outcome of the decision. It is natural that to him the public interest he represents will assume a greater importance than the public interest in having all relevant evidence available to a judicial body. The court, as an established impartial arbitrator, is far better suited to this function, although it could be argued that the court

20 Ibid., 443-444.

21 See *Duncan* v. *Cammell Laird and Co. Ltd.* [1942] A.C. 624. Cf. *Robinson* v. *State of New South Wales (No. 2)* [1931] A.C. 704 and *Corbett* v. *Social Security Commissioner* [1962] N.Z.L.R. 878.

22 [1968] A.C. 910.

23 (1975) 6 A.L.R. 433, 442 per Mason J.

24 *Konia* v. *Morley* [1976] 1 N.Z.L.R. 455; *Meates* v. *Attorney-General* (as yet unreported) Supreme Court, Wellington, 31 March 1976; *Pollock* v. *Pollock and Grey* [1970] N.Z.L.R. 771.

itself has a vested interest in the sense that it will be inclined to overstress the importance of all relevant evidence being available to a judicial body.

Although the court has the final right to determine which public interest will prevail in each individual case, principles have developed which allow a great degree of deference to be paid to the opinion of the relevant minister in certain circumstances. Where the safety of the state or diplomatic relations with foreign states is endangered by disclosure, the court is likely to accept the minister's claim without question.[25] In such cases the courts will normally accept that they do not have the political expertise and experience to make the evaluations of public interest required. Thus the more remote an evaluation of public interest is to the judicial experience, the heavier the reliance will be on the view expressed by the minister.

In the *Australian National Airlines Commission* case the minister's view as to the evidence of a certain factual situation was accepted, but no deference was paid to the way in which he thought the competing public interests should be balanced. The competing public interests were of a nature which the court felt competent to evaluate, whereas the minister could not fairly evaluate the detriment to the public interest in the administration of justice should the tape not be produced.

Conclusion

The *Australian National Airways Commission* case confirms and illustrates many of the principles which have already been established with respect to Crown privilege. More important, the High Court has, by suggesting that the immunity was potentially available in the novel fact situation before it, shown that the circumstances in which Crown privilege may be available could be extended in the future. Notwithstanding the decision in *D.* v. *National Society for the Prevention of Cruelty to Children,* the time is now ripe for a bold court to state quite definitely that Crown privilege is no longer an immunity peculiar to the executive, but a general principle of evidence preventing the disclosure of evidence where this is warranted in the public interest. Such a principle would allow legitimate interests in confidentiality of the kind raised in *D.* v. *National Society for the Prevention of Cruelty to Children* to be protected when this is in the public interest, and not only when it is in the more narrowly defined state interest.

B. V. HARRIS

25 *Konia* v. *Morley* [1976] 1 N.Z.L.R. 455, 461 per McCarthy P.; *R.* v. *Lewes Justices* [1973] A.C. 388, 412 per Lord Salmon.