

FACV No. 23 of 2005

**IN THE COURT OF FINAL APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION**

**FINAL APPEAL NO. 23 OF 2005 (CIVIL)  
(ON APPEAL FROM CACV NO. 246 OF 2004)**

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Between:

**A SOLICITOR**

**Appellant**

**- and -**

**THE LAW SOCIETY OF HONG KONG**

**Respondent**

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Court: Mr Justice Bokhary PJ, Mr Justice Chan PJ,  
Mr Justice Ribeiro PJ, Sir Noel Power NPJ and  
Lord Woolf NPJ

Date of Hearing: 15 March 2006

Date of Judgment: 22 March 2006

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**J U D G M E N T**

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Mr Justice Bokhary PJ:

***Introduction***

1. There are two aspects to this appeal. One is a constitutional challenge to legislation attacked principally as incompatible with the right to confidential legal advice. The other, on which the appeal will turn if the constitutional challenge fails, concerns how certain statutory powers are to be

exercised. They arise in the following circumstances.

2. The appellant ("the Solicitor") is a practising solicitor. He faced a disciplinary charge. The charge was of conduct unbecoming of a solicitor. He had, the charge ran, breached s.8AA of the Legal Practitioners Ordinance, Cap. 159, by failing to produce certain documents required by inspectors whom the Council of the Law Society of Hong Kong ("the Council") had appointed under that section. The Solicitor sought to defend his failure to produce the documents concerned primarily, although not solely, on the basis that they are subject to legal professional privilege which he said that his client was unwilling to waive.
3. Following a disciplinary hearing, the Solicitors Disciplinary Tribunal convicted the Solicitor. By way of penalty it censured him, fined him \$100,000, ordered that he be suspended for four months or until he produced the documents concerned (whichever period proved shorter) and awarded costs against him.
4. Contending that he should not have been convicted, the Solicitor appealed to the Court of Appeal (Rogers VP, Le Pichon JA and Sakhrani J). They dismissed his appeal with costs. He now appeals to this Court.
5. Two grounds are put forward on the Solicitor's behalf with a view to justifying non-production. Shortly stated, the first ground, which is advanced by way of a constitutional challenge, runs thus. The documents concerned are covered by legal professional privilege. And s.8B(2) of the Legal Practitioners Ordinance, which provides for production or delivery of documents for inspection notwithstanding such privilege, is unconstitutional as being incompatible with the right to confidential legal advice guaranteed by

art. 35 of our constitution the Basic Law. Is the statutory encroachment justifiable as a proportionate limitation of the right, particularly taking into account the safeguard provided by s.8B(2) which limits the use of privileged documents produced thereunder to use for the purposes of an inquiry or investigation under the Legal Practitioners Ordinance? The Solicitor contends that the right is insufficiently safeguarded and the encroachment cannot be justified while the respondent the Law Society of Hong Kong (“the Law Society”) contends to the contrary.

6. As for the second ground, it concerns how the power to require the production or delivery of documents for inspection is to be exercised. Section 8AA(1) empowers the Council to appoint inspectors. And s.8AA(2)(b)(i) empowers the inspectors to require the production or delivery of documents if they reasonably suspect that the documents are relevant and the Council directs them to require such production or delivery. Shortly stated the second ground is that the Council acted beyond its powers because what it did amounted to appointing inspectors and at the same time requiring production. The Council says that production was required by the inspectors after they had reasonably formed a suspicion that the documents were relevant and had been duly directed to require production. So, the Council says, it had acted within its powers.

***Sections 8AA and 8B***

7. Although not every part of them is material, I should set out sections 8AA and 8B in their entirety so as to make the full context apparent.

8. Headed “Appointment and powers of inspector”, s.8AA deals with the powers of the Council and with the powers of inspectors appointed by the Council.

9. Dealing with the Council's powers, subsection (1) of s.8AA reads:

"The Council may appoint a person as an inspector to assist the Council--

- (a) in verifying compliance by a solicitor, a foreign lawyer, a trainee solicitor or an employee of a solicitor or foreign lawyer with the provisions of this Ordinance or any practice direction issued by the Society;
- (b) in determining for the purpose of section 9A whether the conduct of any solicitor, foreign lawyer, trainee solicitor or employee of a solicitor or foreign lawyer should be inquired into or investigated; or
- (c) in relation to an inquiry or investigation under section 9B."

10. Subsections (2) and (3) of s.8AA, dealing with the inspectors' powers, including the power exercisable only under the Council's direction to exercise it, read:

"(2) For the purposes of subsection (1), an inspector may

- (a) in relation to any person who acts or purports to act as an employee of a solicitor in the premises of any court or place of lawful detention--
  - (i) question there and then the person as to his name, identity card number, the identity of any client for whom he acts or purports to act on that occasion and the name of the firm of which he acts or purports to act as the employee; and
  - (ii) require the person to produce for inspection there and then all documents in his possession that the inspector reasonably suspects to be relevant to any matter referred to in subsection (1)(a), (b) or (c) and copy or seize any of the documents; and
- (b) (i) subject to subsection (3), require a solicitor, a foreign lawyer or an employee of a solicitor or foreign lawyer to produce or deliver to him for inspection, at a time and place specified by him, all documents in the possession of the solicitor, foreign lawyer or employee of a solicitor or foreign lawyer that the inspector reasonably suspects to be relevant to any matter referred to in subsection (1)(a), (b) or (c) and specifies particularly or generally; and
- (ii) copy or seize any of the documents produced or delivered under subparagraph (i).

(3) An inspector shall not exercise his power under subsection (2)(b)(i) except under a direction of the Council to do so."

11. Finally, subsections (4) and (5) of s.8AA read:

“(4) No liability shall be incurred by any person in respect of anything done or omitted to be done by him in good faith in the exercise of any power under this section.

(5) In this section, ‘identity card’ (身分證) means an identity card issued under the Registration of Persons Ordinance (Cap. 177).”

12. Headed “Document production and privilege”, s.8B reads:

“(1) For the purpose of enforcing the production of documents required by the Council under section 8A, section 11 applies and references in section 11 to the Solicitors Disciplinary Tribunal and to the Chairman of the Solicitors Disciplinary Tribunal shall be deemed to be references respectively to the Council and to the President of the Society.

(2) Documents required by the Council under section 8A or by an inspector under section 8AA shall be produced or delivered notwithstanding any claim of solicitor-client privilege but documents that are subject to a solicitor-client privilege may only be used for the purposes of an inquiry or investigation under this Ordinance.”

Since subsection (2) of this section refers to s.8A, I should mention that s.8A pertains to the position where the Council considers that a solicitor or a foreign lawyer may be unfit to practise. And it deals with the Council’s power to require a solicitor, a foreign lawyer or his firm to produce or deliver documents necessary for the purpose of investigating the matter.

13. Section 8B(2) makes the situation before us unlike the one before the Privy Council in *B v. Auckland District Law Society* [2003] 2 AC 736. That case concerned an attempt, which proved unsuccessful, to override legal professional privilege otherwise than by statute. The questions in the present case go to the constitutionality of the statutory provisions engaged and, if they are constitutional, how they work.

***Compatibility with the right to confidential legal advice***

14. It is obviously conducive to the due administration of justice that clients candidly reveal the unvarnished truth to their lawyers. And of course the law is not so naïve as to imagine that such candour can confidently be expected in practice if disclosure of the contents of client-lawyer

communications may be compelled, to a client's prejudice and contrary to his wishes. I borrow the formula "to a client's prejudice and contrary to his wishes" from the speech of Lord Nicholls of Birkenhead in *R v. Derby Magistrates' Court, ex parte B* [1996] AC 487 at p.510E. What is prohibited is not simply disclosure contrary to a client's wishes but disclosure to his prejudice as well as contrary to his wishes.

15. Legal professional privilege is the name given to the common law rule which protects client-lawyer communications from disclosure to a client's prejudice and contrary to his wishes. Although too well established to be abandoned lightly, this name is perhaps not a happy one, for it might conjure up the image of a questionable advantage enjoyed by lawyers. But in truth legal professional privilege, as Lord Denning MR emphasised in *Attorney General v. Mulholland* [1963] 2 QB 477 at p.489, "is not the privilege of the lawyer but of his client". And the rule constituted by this privilege is a rational and practical one which exists in the public interest and involves an important right belonging to the client. In Hong Kong this right is a constitutional one. It is contained in the confidential legal advice clause of art. 35 of the Basic Law. By this clause it is provided that "Hong Kong residents shall have the right to confidential legal advice" — a right which our courts will always be vigilant to accord proper protection.

16. The Solicitor seeks to buttress his constitutional challenge by relying also on the right to a fair hearing and freedom from unlawful interference with privacy provided for by arts 10 and 14 respectively of the Hong Kong Bill of Rights. That right and that freedom are entrenched (in the manner explained in many cases including *Shum Kwok Sher v. HKSAR* (2002) 5 HKCFAR 381 at p.400 D-H) by art. 39 of the Basic Law. But in circumstances like these neither that right nor that freedom, whether taken

separately or together, can result in, or contribute to, success for the Solicitor if the right to confidential legal advice cannot bring him success on its own. The client is not a party to the disciplinary hearing for which disclosure of the documents is sought. And, in circumstances like these, whether any interference with privacy resulting from such disclosure is lawful or unlawful depends on whether or not the disclosure is compatible with the right to confidential legal advice.

17. Not unnaturally the raising of legal professional privilege involved us in renewing our acquaintance with decisions like those of the House of Lords in *R (Morgan Grenfell & Co. Ltd) v. Special Commissioner of Income Tax* [2003] 1 AC 563 and *Three Rivers District Council v. Bank of England (No. 6)* [2005] 1 AC 610. Properly understood this privilege is indeed, as Lord Taylor of Gosforth CJ so memorably characterised it in the *Derby Magistrates' Court* case at p.507D, "a fundamental condition on which the administration of justice as a whole rests". It is of course not the *only* such condition. There are a number of others. Among them is the existence of a legal profession of efficiency and integrity. The Law Society has a very important role to play in maintaining standards within the solicitors' branch of the legal profession. Acting through its Council, the Law Society has frontline responsibility to ensure compliance by solicitors with the rules governing their conduct and activities. And it is necessary for the Council to have adequate powers to do that.

18. One such power is the Council's power under s.8AA to appoint inspectors to assist it in verifying such compliance and in determining whether conduct should be inquired into or investigated. Allied to that power of the Council's are the inspectors' powers under the same section. These include their power to require production or delivery to them of documents for inspection.

19. It can happen that the documents which the inspectors reasonably suspect are relevant to the performance of their task will include documents subject to solicitor-client privilege. In that sort of situation s.8B does two things. First, in aid of the inspectors' task, the section provides that documents "shall be produced or delivered notwithstanding any claim of solicitor-client privilege". Secondly, in protection of the client's interests, the section provides that "documents that are subject to a solicitor-client privilege may only be used for the purposes of an inquiry or investigation under [the Legal Practitioners] Ordinance".

20. Is that requirement of production or delivery incompatible with the confidential legal advice clause even though use is limited in that way? The cases cited on the Solicitor's behalf on this question include *Roemen and Schmit v. Luxembourg*, Application No. 51772 of 1999, 25 February 2003, concerning, among other things, a search of a lawyer's office. The European Court of Human Rights held that even where such a search was prescribed by law, in pursuance of a legitimate aim and necessary, it still had to be proportionate and attended by special procedural safeguards.

21. It is true that the privileged documents produced or delivered cannot be used against the client. But human nature being what it is, I am prepared to believe that a significant percentage of clients would nevertheless instinctively prefer that nobody sees the documents. So I feel unable to rule it out that the susceptibility of the documents to production or delivery, albeit not for use against the client, would in some instances and to some extent inhibit the candour of communications by the client to his solicitor. But I do not think that such instances would be many or such extent large.



22. It is submitted on the Solicitor's behalf that the client might suffer prejudice even though the documents cannot be used as evidence against him. Such prejudice, this submission runs, could flow from the information contained in the documents becoming known to, for example, a private complainant who might use such information to his own advantage and the client's disadvantage. In my view, that is adequately met by the strict confidentiality which the inspectors and all concerned should — and doubtless would — accord to the documents. The private complainant has no right to see privileged documents and, in the absence of a direction by the Solicitors Disciplinary Tribunal giving him access to the documents where such access is essential to the fairness of proceedings, they should not be shown to him. It is true that in *Delhaise v. Solicitors*, CACV No. 147 of 2004, 8 June 2005, the Solicitors Disciplinary Tribunal allowed a private complainant to act as the prosecutor in disciplinary proceedings against solicitors. But the error of that course was emphatically pointed out by the Court of Appeal in that case. And there is no danger of any repetition.

23. I would add a word on the Solicitors Disciplinary Tribunal Proceedings Rules. In any instance where it is feared that a party's right (under rule 10) to inspect and be furnished with documents included in any other party's rule 9 list of documents might result in inappropriate access to privileged information, such access can be avoided. It can be avoided by the Solicitors Disciplinary Tribunal directing (under rules 9 or 32) that no such list need be furnished.

24. Nor is it to be forgotten that the Council, without whose direction inspectors cannot require production or delivery, would never lightly so direct. Composed as it is, the Council will be fully aware of — and always act with due respect for — the great importance of legal professional privilege.

25. Section 8B(2) production or delivery serves a fundamentally important purpose, namely the maintenance of high standards within the solicitors' branch of the legal profession. With the safeguard built into s.8B(2), the need for the Council's direction and the strict confidentiality to be accorded to documents produced or delivered, I do not consider s.8B(2) disproportionate to what is needed in the service of that purpose. I am therefore of the view that s.8B(2) production or delivery is compatible with the confidential legal advice clause and that s.8B(2) is constitutional.

26. So, despite the skill with which the Solicitor's constitutional challenge has been prepared and presented on his behalf, it fails. With it fails the first of the two grounds put forward on his behalf with a view to justifying non-production, and I turn now to the second one.

***How the power to require production or delivery is to be exercised***

27. Under the second ground, the question is how the power under s.8AA to require production or delivery of documents for inspection is to be exercised. This is by no means an ordinary question of procedure. It goes importantly to how the powers under that section are distributed between, on the one hand, the Council and, on the other hand, inspectors appointed by the Council. I refer to inspectors in the plural because three inspectors were appointed in this case. If only one inspector had been appointed, then what I say about inspectors in the plural would apply to an inspector in the singular.

28. It is submitted on behalf of the Solicitor that the regime laid down by s.8AA for requiring the production or delivery of documents for inspection is as follows. The Council appoints inspectors. Then the inspectors form a view as to whether they reasonably suspect that the documents in question are

relevant. If they do not so suspect, then that is the end of the matter. But if they do so suspect, the Council comes into the picture again. And if the Council then directs the inspectors to require production or delivery of the documents for inspection, the inspectors will proceed to require such production or delivery.

29. Plainly no production or delivery can be required unless the inspectors reasonably suspect that the documents are relevant and the Council directs production or delivery. This is not disputed by the Law Society. What the Law Society disputes is the submission made on the Solicitor's behalf that the reasonable suspicion must precede the direction. In my view, the Law Society is right. Provided that both the reasonable suspicion and the direction are in place before production or delivery is required, it does not matter whether the reasonable suspicion precedes or comes after the direction. One course would be for the Council to direct the inspectors to require production or delivery if they reasonably suspect that the documents are relevant. Another course would be for the Council, having learned that the inspectors reasonably suspect that the documents are relevant, to direct them to require production or delivery. The Council may adopt either course. Both are permissible under s.8AA.

30. The course adopted in the present case is to be gathered by reading, fairly and in context, the Investigation Committee's report of 4 October 2002, the minutes of the Council's meeting of 18 October 2002 and the notice for inspection of 4 November 2002 signed by one of the inspectors. I say at once that despite the submission to the contrary made on the Solicitor's behalf, it is plain that the inspector who signed that notice did so on behalf of all three inspectors.

31. In *Hakansson and Sturesson v. Sweden* (1991) 13 EHRR 1 the European Court of Human Rights said (in para. 66) that a waiver of legal privilege could not be effective if it is equivocal. The same is true, it is submitted on the Solicitor's behalf and I accept, of any direction by the Council to require production or delivery of documents, especially privileged ones. But I see nothing equivocal in the direction in the present case.

32. Giving the 4 October report, the 18 October minutes and the 4 November notice the reading they deserve, it is plain that the course adopted in the present case — and lawfully so — was as follows. The Council directed the inspectors, in regard to documents identified with due specificity, to require production of those documents if they reasonably suspected that the same were relevant. So suspecting, the inspectors lawfully required production of the documents concerned.

33. So the second ground, too, fails.

### ***Conclusion***

34. Accordingly I would dismiss the appeal with costs, the parties having accepted at the hearing that costs should follow the event.

Mr Justice Chan PJ:

35. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Ribeiro PJ:

36. I agree with the judgment of Mr Justice Bokhary PJ.

Sir Noel Power NPJ:

37. I agree with the judgment of Mr Justice Bokhary PJ.

Lord Woolf NPJ:

38. I agree with the judgment of Mr Justice Bokhary PJ.

Mr Justice Bokhary PJ:

39. The Court unanimously dismisses the appeal with costs.

(Kemal Bokhary)  
Permanent Judge

(Patrick Chan)  
Permanent Judge

(R A V Ribeiro)  
Permanent Judge

(Noel Power)  
Non-Permanent Judge

(Lord Woolf)  
Non-Permanent Judge

Mr Philip Dykes SC, Mr Johannes Chan SC and Mr Stanely Ma (instructed by Messrs Solomon C Chong & Co.) for the appellant

Mr John Scott SC and Mr Paul Carolan (instructed by Messrs Boase Cohen & Collins) for the respondent