

IN THE SUPREME COURT)
OF NEW SOUTH WALES)
COMMON LAW DIVISION)
COMMERCIAL LIST)

No. 17241 of 1982

CORAM: CLARKE J.

Wednesday, 11 May, 1983.

MARKUS V PROVINCIAL INSURANCE COMPANY LIMITED

JUDGMENT

(Re Production Of Documents For Inspection)

HIS HONOUR: In this matter the plaintiffs seek production for inspection of a number of documents in respect of which the defendant insurer has claimed privilege. Whether or not those documents are properly itemised in the affidavit of discovery, I make it plain now that the documents in question are in fact three reports from a loss assessor retained by the defendant at it is said, the request of the defendant's solicitor.

There are annexed to some of the reports a statement made by the male plaintiff and a letter from Globe Gems Pty. Limited of 3rd August, 1981. I have already indicated that I do not think that privilege exists in respect of those documents and the defendant has either already produced the documents for inspection or has undertaken it will do so. My comments following relate only to the investigator's reports.

The first of these reports is dated 6th May and it is said by the defendant that the evidence supports the conclusion that the sole purpose for which this document was requested or brought into existence was for the purpose of the defendant's legal adviser giving advice as to the acceptance or rejection of the plaintiff's claim. In the light of the somewhat unsatisfactory state of the evidence of Mr. Lusted and the apparent discrepancies between what he said in his affidavit and what he said in oral evidence, I am not satisfied that this claim has been made out. I think there is a lot to be said for the submissions by the plaintiffs that there was a dual purpose for which this document was brought into existence and I reject the claim of privilege in respect of this document.

The two later reports, those dated 4th August and 27th August, came into existence consequent upon a letter from the solicitor to the loss assessor on 18th May. It seems to me upon a fair reading of that letter that the only inference available is that the sole purpose for which those documents were sought and brought into existence was to enable the solicitor to understand better the earlier report and to collate or obtain evidence for what was then a clearly anticipated legal proceeding. I think that the better view is that the defendant has made out the claim for privilege in respect of those two documents.

I return then to the question whether I should order production for inspection of the first document. The defendant has submitted the interests of justice would not be served by producing the document because it contains material which does not advance the plaintiffs' case but which on the other hand would, if the plaintiffs are not genuine, put the plaintiffs on notice of some allegedly suspicious circumstances and enable them then to tailor or endeavour to tailor their evidence to meet the circumstances.

The plaintiffs have been hampered in seeking to answer the submission by the inability to inspect the documents before making his submissions. It accordingly falls on me to endeavour to ensure that I exercise a discretion, which I undoubtedly have (see *Kimberley Mineral Holdings Ltd (in liq) v McEwan* [1980] 1 NSWLR 210), fairly in favour of one or other of the parties.

In my opinion the document, which contains in the main results of discussions with police officers and other persons together with hypotheses based on those discussions, is of such a nature that its material would not enable the plaintiff to be in a better position from the point of view of presentation of the case at trial. On the other hand it is clear that the only purpose in my view to be served by letting the plaintiffs see this documentation would be to put them on notice of the allegedly suspicious circumstances.

Subject to one matter, I am of the view that the interests of justice are against the requirement that there be production.

The one matter which has been urged by counsel for the plaintiff is that in facilitation of settlement. It is said that, if the plaintiffs could assess these matters which are advanced as reasons in part, at least, why the claim is rejected, then the prospect of settlement might be stronger. Bearing in mind the view I have that the ultimate question is going to be as to the genuineness or otherwise of the plaintiffs, and again in the interests of justice that they may be put on notice at an earlier date of the allegedly suspicious circumstances, I think this factor, to the extent to which it is entitled to consideration, is outweighed by the greater interest of ensuring that the Court gives justice between the parties.

In conclusion I think the interests of justice are better served by my declining to make an order for production of that document.

I reserve the question of costs to the hearing, to a degree there has been some success on both sides.