

**IN THE SUPREME COURT OF  
THE REPUBLIC OF VANUATU**  
(Civil Jurisdiction)

**CIVIL CASE No.06 OF 2008**

**BETWEEN:** Mr ROBERT M. BOHN  
Claimant

**AND:** THE GOVERNMENT OF THE  
REPUBLIC OF VANUATU  
Defendant

*Mr Robert Sugden for Claimant  
Mr Ari Jenshel and Ms Christine Lahua for the Defendant*

**REASONS OF THE RULING ON DEFENDANT'S  
APPLICATION FOR FURTHER AND BETTER  
DISCLOSURE – MADE 5 AUGUST 2009**

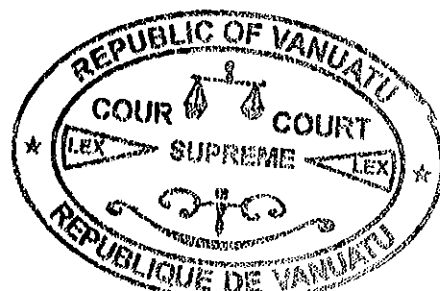
On 23 July 2009 the Defendant files an application for Further and Better Disclosure and seeks for the following Orders:

1. That the Claimant give disclosure of the undated document headed "CC 06 of 2008 Confidential Note" of which Ms Harders was given inspection and a copy on 25 June 2009.
2. The Claimant pay the costs of this application.

The application is made on the ground that:

The said document was not privileged or that the privilege has been lost. Ms Jennifer Harders of the State Law Office filed a sworn statement on 23 July 2009 in support of the application.

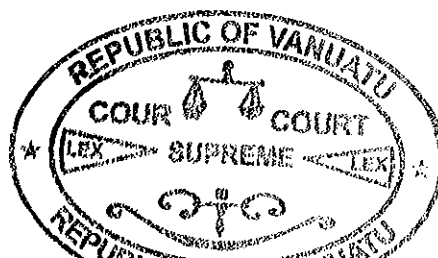
Mr Sugden makes submission opposing the disclosure of such a document as a privilege document. A sworn statement of Mrs Benard Chane sin Lin was filed on 31 July 2009 in response to Ms Harders' sworn statement.



I hear and consider the submissions from both counsel. The Defendant / Applicant submits as follows:

First, the Applicant/Defendant submits that the document is not (or is no longer) privileged. The document "Confidential Note CC 06 of 2008" is a communication with a solicitor evidencing a dishonest object. It falls within a well-established exception to legal professional privilege for the following reasons:

- (ii) They do not in truth fall within the professional relationship (i.e. the solicitor is not being consulted / instructed professionally) – **In Reynell v. Sprye** (1846) 10 Beav 51; 50 ER 501.
- (ii) Public Policy demands that the law not shield communications used for evading the law – **R v. Bell; Ex Parte Moage** (1980) 146 CLR at 154; **Williams v. Quebrada RWY** (1985) 2 Ch at 754 -5.
- (iii) It makes no difference that the dishonesty evidenced by the document is the dishonesty of the third party or that the solicitor was unaware of it.
  - **Francis & Francis v. Central Criminal Court** (1983) 3 ALL ER at 800;
  - **Bank Keyer Ullman v. Skandia** (1986 1 Lord's rep. at 337.
- (iv) It is not necessary that the document in question reveal an actual fraud. The privilege will not exist in a document which demonstrates prima facie dishonesty and the principle has even been extended to more "iniquity".
  - **Barclays Bank v. Eustice** (1995) 4 All Er at 525;
  - **The David Agmashenebdi** (2001) CLC at 947;
  - **In Gemini Personel v. Morgan and Banks** (2001) 1 NZLR 14 at 68.
- (v) It is not necessary that the document in question be the foundation of the Claimant's case – only that the document is relevant to the case.
  - **Budai Bank Ltd v. Galadari** (W06) the Times, 22 April 1991.



Second, the Defendant / Applicant submits that the sworn statement of Jennifer Harders (23 July 2009) establishes the necessary prima facie case of fraud / dishonesty / inequity.

- **ORourke v. Darbishire** (1920) AC 581 at 604;
- **Re Kanigsberg** (1989) 1 WLR 1257 at 1264).

Third, the Applicant further submits that the Court may inspect the document for the purpose of ascertaining whether the exception to the privilege applies.

- **R v. Governor of Pentonville Prison** (1990) 1 WLR 277 at 310.
- **R v. Gibbons** (2004) EWCA CRIM 311 at 42.

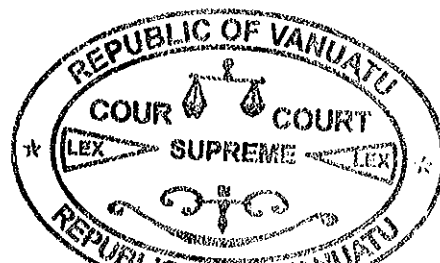
Finally, the Applicant submits that in the circumstances where a person (Ms Harders) can give secondary evidence of the contents of a document, the privilege is lost.

- **Re Briamore Manufacturing** (1986) 1 WLR 1429
- **Calcraft v. Guest** (1898) 1QB 759.

The Respondent / Claimant submitted in response that the document in question appears to be a communication between the lawyer (Mr Nigel) and the witness. It is said that Ms Harders must have realised that the document given by Mr Bohn is given by mistake. It is covered under legal professional privilege.

The sum statement of Mrs Benard Chane Sin Lin described a document which is at the time of submissions the Claimant's counsel had not seen and whether or not it is the same document as the document described in the sworn statement of Harders. It is said the sworn statements of Harders indicates that these important facts only appear to Ms Harders to be true and so, the Court should hardly give great weight to it.

It is said it has relatively minor relevance. It is a document that can be put to Mr Benard in cross-examination to challenge his evidence.



In any event, it is said the facts that have to be true about the said document before disclosure of it can be compelled, also establish it as a communication between a witness and a party's lawyer (the Claimant's) for the sole and only purpose of the litigation and therefore within the heartland of communications to which legal professional privilege applies.

Mr Sugden refer to Rule 8.6 of Civil Procedure Rules 2002 and submits that the document was clearly disclosed by mistake and the circumstances are clearly those in which any "lawyer would realise" this. It should not be used as covered by legal professional privilege.

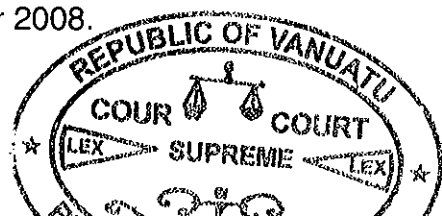
The Respondent's counsel, refers to the case of Baker v. Campbell (1983) 37 ALJR 749.

It is further submitted the said document is not within the exception of the legal professional privilege in any event.

It is further submitted to show that the said document is within the exception, the party seeking to displace the privilege, should demonstrate more than a mere allegation of fraud or crime. In the present case, it is said the evidence does not show this and Ms Harders evidence is extremely equivocal.

The followings are the Court considerations. Can the document described as "Confidential Note CC 06 of 2008" referred to in the sworn statement of Ms Harders filed 31 July 2009 be disclosed? The answer will depend whether or not it is within the exception of the legal professional privilege.

The facts of this case show that the Applicant/Defendant have a copy of the document "Confidential Note CC 06 of 2008" in their possession. The copy was given to them by the Claimant, Mr Robert Bohn by way of inspection on 30 June 2009. Ms Harders deposes that the document is not signed. The question is whose document is it. In essence, Ms Harders says that it appears that the document is written by Guy Benard which was then sent to the Claimant's counsel Mr Nighel Morrison (former counsel). Ms Harders says the document appears to be a communication from Guy Benard to Nigel Morrison commenting on the sworn statement of Mark Hurley dated 31 October 2008.



Ms Harders deposes further that at paragraph 9 of the sworn statement that there are many statements in the document about important issues in this case which appear to be contrary to statements sworn by Guy Benard, other statements sworn on behalf of the Claimant, and assertions contained in the Claimant's pleadings.

Mrs Benard Shane Sin Lin deposes in her sworn statement file 31 July 2009 that she has read the statement of Jennifer Harders sworn on 23 July 2009 and the sworn statement of her husband dated 29 July 2009. She confirmed that sometimes at the end of November or at the beginning of December 2008, she had typed a "confidential note" from a hand written document made by her husband in French language. She had addressed the "confidential note" in English to Mr Nigel Morrison under a sealed envelop she serve at the reception desk of the law firm Ridgway Blake.

There is a prima facie evidence that the document "Confidential Note CC 06 of 2008" and the comments made in the said document related to the present case CC 06 of 2008. Such a "Confidential Note CC 06 of 2008" is relevant to the present case. The sworn statement of Jennifer Harders (23 July 2009) establishes the necessary prima facie case of fraud or dishonesty or iniquity.

Rule 8.6 of the Civil Procedure Rules 2002 reflects the law's recognition of the legal professional privilege. The privilege will not exists in a document which demonstrates a prima facie dishonesty or iniquity as a matter of public policy considerations.

The interest of justice requires that such a document is disclosed so that the Court may inspect the document for the purpose of ascertaining whether the exception to the privilege applies.

In the circumstances of this case, the document under challenge, has been inspected, copied and read by Ms Harders. She can give a secondary evidence of the contents of such a documents, as such the privilege exited, is lost [Re. Briamore Manufacturing (1986) 1 WRL 1429; Clacraft v. Guest (1898) 1 QB 759].



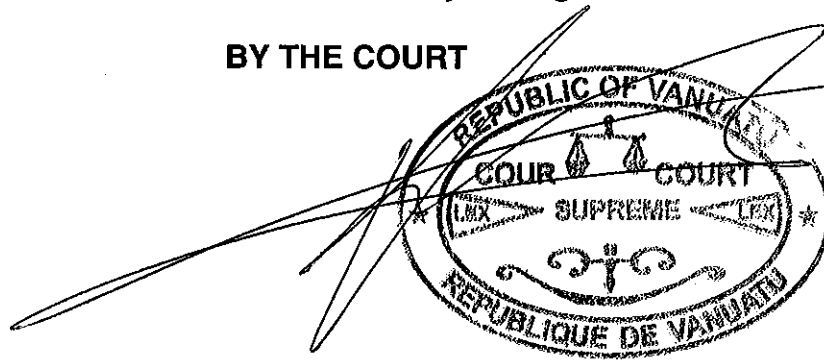
The case of Baker v. Campbell is not about the exception to the legal professional privilege which is on the point in this application.

In Baker Case, the High Court of Australia discussed about the interpretation of Section 10 of the Crimes Act 1914 to the effect that s.10 of the said Act does not evince any intention to exclude the application of the doctrine of legal professional privilege. The case of Baker is rejected as not on the point.

On the bases of the above considerations I make order on 5 August 2009 for the Claimant to disclose the document "CC 06 Confidential Note" in the terms sought in the application and order costs for the Defendant. These are the reasons of the Court Order dated 5 August 2009.

**DATED at Port-Vila this 5<sup>th</sup> day of August 2009**

**BY THE COURT**



**Vincent LUNABEK  
Chief Justice**