

Advocacy - Preparation for cross-examination

Continued from page 17

When dealing with topics that are sensitive in a personal sense to the witness or vital to the outcome of the case you should take great care in formulating your questions. Think about the precise formulation in advance and determine a form of words most likely to achieve your desired result. This does not mean that you should script the whole of your cross-examination. You should not. It should follow a form dictated by the dynamics of the occasion. However for those few pivotal questions it is prudent to have a clear and considered plan of attack in place.

Having determined your goals and the method by which you propose to achieve those goals it is important to remember that when you have achieved the desired result you should stop. Do not ask further questions designed to drive home any point you have made or are able to make in your address. Do not allow yourself to be carried away by the triumph of the moment and seek to prolong it by asking further questions. The risk of asking further questions is that you will undo all of your good work.

Mock Trials

The Interschool Mock Trial Competition for 2000 begins on march 8.

Adjudicators are needed.

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CASE NOTES

by Mark Hunter

Esso Australia Resources Ltd v
Commissioner of Taxation

High Court No. M53/1999

Judgment of Gleeson CJ, Gaudron,
McHugh, Gummow, Kirby and Callinan
JJ - delivered 21 December 1999.

PRACTICE AND PROCEDURE -
DISCOVERY - LEGAL PROFESSIONAL
PRIVILEGE



Mark Hunter

The appellant in 1996 commenced proceedings in the Federal Court by way of appeal against amended income tax assessments for the years 1987 to 1992. The respondent sought from Foster J orders for the appellant to produce for inspection some of the 577 documents subject to a claim of legal professional privilege ("privilege") on the basis that they were alleged to be lawyer/client communications made for the "dominant purpose" of providing legal advice.

Foster J determined that the correct test for claiming privilege was the "sole purpose" test formulated by the High Court in *Grant v Downs* (1976) 135 CLR 674 rather than the "dominant purpose" test as set out in s118 and s119 of the Evidence Act (Cth). On appeal, the Full Court of the Federal Court by majority upheld the decision of Foster J.

The appellant urged the High Court to adopt as the common law the dominant purpose test as proposed by Barwick CJ in *Grant* and subsequently adopted in England, Ireland, Canada and New Zealand.

HELD (per Gleeson CJ, Gaudron, Gummow and Callinan JJ)

1. Appeal allowed with costs.
2. The sole purpose test should be replaced at common law by the dominant purpose test.

Per Gleeson CJ, Gaudron and Gummow JJ - The majority judgment in *Grant* does not indicate that the dominant purpose test was considered as an alternate possible test. The respondent (in *Esso*) suggested a non literal formulation of

the sole purpose test. "...If the only way to avoid the apparently extreme consequences of the sole purpose test is to say that it should not be taken literally, then it loses its supposed virtue of clarity". The dominant purpose test "... strikes a just balance...and brings the common law of Australia into conformity with other common law jurisdictions".

Per McHugh (dissenting) - The Court should resist a change in the law which would restrict the volume of information available to decision makers. The disclosure of otherwise discoverable documents may lead to a train of inquiry which advances the case of the party seeking access or damages the case of the party resisting disclosure.

Per Kirby J (dissenting) - Human motivation is rarely linear. The dominant purpose test would be harder to apply and would lead to an increase in pre trial litigation.

Appearances

Appellant

Counsel - Shaw QC and deWijn QC

Solicitors - Clayton Utz

Respondent

Counsel - Bennett QC, Maxwell QC and Gordon

Solicitors - Australian Government Solicitor.

Commentary

The High Court has broadened the scope of legal professional privilege. This decision will assist corporations in protecting privileged information.