

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. C.L.A113 of 1999

BETWEEN	JUNIOR ANDERSON	CLAIMANT
AND	MARITIME TOWING COMPANY LIMITED	1 <sup>ST</sup> DEFENDANT
AND	HYLTON MAXWELL	2 <sup>ND</sup> DEFENDANT
AND	MICHAEL CAMPBELL	3 <sup>RD</sup> DEFENDANT

Mr. Richard Reitzin instructed by Reitzin & Hernandez for the Claimant.

Mr. Jeffrey Daley, instructed by Rattray Patterson Rattray for the Defendants.

**Heard 8<sup>th</sup> September, 6<sup>th</sup> and 10<sup>th</sup> October, 5<sup>th</sup> and 9<sup>th</sup> December 2003**

**Mangatal J (Ag).**

Junior Anderson was on the 7<sup>th</sup> March 1996 employed to Maritime Towing Company Limited. On that date, Hylton Maxwell was the Captain, and Michael Campbell was the Trainee Captain working aboard the tugboat "Port Maria", a vessel owned by the Port Authority of Jamaica Limited and operated by Maritime Towing.

Mr. Anderson claims to have suffered injuries whilst working on the "Port Maria" as a result of the negligence of the Defendants while the tugboat was underway in the Kingston Harbour. There have been numerous interlocutory applications made herein.

The application that now falls for consideration is an application on behalf of Mr. Anderson for further and better specific discovery.

On the 8<sup>th</sup> September 2003, during a case management conference, Mr. Anderson's Counsel Mr. Reitzin sought and obtained an order that Maritime Towing produce to the Court "originals and all copies of all incident reports, whether contained in letters or otherwise, concerning the accident which befell the Claimant whilst working as an employee of the First Defendant aboard the tugboat "Port Maria" on 7<sup>th</sup> March 1996, together with the originals and all copies of all documents referred to in such incident reports or from which the information therein was gleaned."

Although originally Counsel for the Claimant had indicated an interest in cross-examining Mr. Hylton Clarke, Managing Director of Maritime Towing in respect of the Affidavit of Documents which he swore to on 4<sup>th</sup> March 2002, he abandoned that course in favour of asking for the production of the documents to the Court.

In any event, the authorities do not appear to support such a course. See **Birmingham and Midland Motor Omnibus Co. Ltd. V. London & North Western Railway Co.** [1913] 3 K.B. 850, 855, and 858. I am in any event advised that Mr. Hylton Clarke is now deceased.

The purpose of that order for production was to enable the Court to look at the documents claimed privileged in the Affidavit of Hylton Clarke. It is for the Court to determine whether the documents are properly

the subject of privilege or not. As recently as October 30 2003, the Jamaican Constitutional Court confirmed that in appropriate cases it is for the Courts to determine after examining the documents, whether or not legal professional privilege properly attaches, and that the mere claim does not make the document privileged.

See the Judgment of Hibbert, J in **The Jamaican Bar Association et al, v. The Attorney General, and the Director of Public Prosecutions**, HCV Claims 207, 238, and 213 of 2003 page 49. In the leading case of **Buttes Gas and Oil Co. v. Hammer** [1980] 3 All E.R. 475, at page 485, Lord Denning M.R. described the practice of judges calling for and looking at the documents themselves "as (something) we often do nowadays."

Countless authorities were cited. Whilst I admire the industry of both Counsel, and am grateful for their assistance, I find it unnecessary to refer to all of the cases cited.

In one of Mr. Reitzin's submissions, he argues that in so far as one of the documents, letter dated January 9, 1998, produced to the Court has attachments, and those attachments are not identified in the Affidavits, the Court should either order the First Defendant to furnish the Claimant with a general description of the documents produced to the Court, or the Court should inform the Claimant of the general description of each document produced. At page 8 of the Claimant's submission headed " Claimant's Skeleton Argument in Opposition to First Defendant's Claim for Privilege", the Claimant's Attorney says that he reserves the right to make further submissions upon being informed of the general description of the documents.

On the 8<sup>th</sup> of September 2003, Maritime Towing's Counsel handed over to me letter of January 9 1998 from Maritime Towing to the Port Authority, and letter of June 25 2003 from the Port Authority to Maritime Towing's Attorneys-at-Law Rattray Patterson Rattray. The letter of January 9 1998 had attachments but those were not handed over on the 8<sup>th</sup> of September. On the 6<sup>th</sup> October 2003, Counsel also handed over attachments to the letter, i.e. 2 Statements of Hylton Maxwell dated 3<sup>rd</sup> April 1996 and 1<sup>st</sup> September 1997. Counsel indicated that the first enclosure to the said letter had not been found. I was in addition handed copies of three letters from the Port Authority to Maritime Towing, the first of which is written in response to the letter of January 9<sup>th</sup> 1998, i.e. letter dated May 11 1998, followed by letters dated July 14 1998, and September 30 1998. At paragraph 38 of his submission's Mr. Reitzin indicates that he has no interest in obtaining discovery of these three letters.

In fairness to Mr. Anderson and his Counsel, it seems appropriate to indicate that other than the two letters January 9 1998 and June 25 2003, the two statements of Hylton Maxwell, and the three Port Authority letters, all of which have been handed to me, the letter of January 9 1998 refers to the following attachments:

1. Copy accident report.
2. Copy Junior Anderson's report (which Mr. Anderson's Counsel already has).
3. Copy letters from Dr. Dundas dated November 28 1996 and October 31 1997 and
4. Copy of Maritime Towing's letters to Doctor Dundas dated November 22 1996, and January 3<sup>rd</sup> 1997.

It is attachment Number one, i.e. "the Accident Report" that Maritime's Counsel says they have not been able to find, although I will return to that briefly shortly. The letters at attachment Number three and the letter of November 22 1996 at attachment Number four, are all listed in Maritime Towing's Affidavit of documents, as documents which Maritime Towing have no objection to disclosing. I have now received a copy of the letter of January 3 1997, at attachment Number four, although I have not traced a reference to this letter in the Affidavit of Documents of either the Claimant or the First Defendant. However, it seems to me that like other letters from Maritime Towing to Dr. Dundas, the copy of letter dated January 3, 1997 ought to be disclosed. The letter of June 23 2003 is simply a two line letter from the Port Authority to Maritime Towing's Attorneys enclosing a copy of the letter dated January 9 1998.

What is clear is that the real contest concerns the letter of January 9 1998 and the two statements of Hylton Maxwell. I do not think that justice requires that I allow Mr. Reitzin to make any further submissions now that I have indicated the nature of the attachments to him. These documents have been the subject of many submissions and I hardly think that any stone could properly be said to remain unturned in respect of them.

In paragraph seven of the Further Affidavit of Hylton Clarke, sworn to on the 12<sup>th</sup> September 2003, Mr. Clarke stated that " the dominant purpose for which statements of the Second Defendant and the said report and attachments were made as stated therein was to seek legal guidance in anticipation of any litigation which may

arise from this incident.”

In paragraphs 4-7 of her Affidavit sworn to on the 17<sup>th</sup> September 2003, Miss Carol Pickersgill, Vice President of Legal Affairs, employed to the Port Authority, states that the Port Authority has a Management Agreement with Maritime Towing for Maritime Towing to manage and operate the tugs on behalf of the Port Authority of Jamaica. Under the said Management Agreement, Maritime Towing is required to report to the Port Authority any accidents which occur on any of the tugboats. Such a report was made to the Port Authority by Maritime Towing by letter dated January 9<sup>th</sup> 1998. Subsequent to the report several correspondence were sent from the legal department of the Port Authority to Maritime Towing. Miss Pickersgill states that the report from Maritime Towing and all the correspondence from the Port Authority Legal Department came into existence for the dominant purpose of Maritime Towing seeking legal advice in anticipation of litigation being commenced by the Claimant.

Pages 21-23 of the Bundle filed in respect of this application contain a Management Agreement between Maritime Towing and the Port Authority. Whilst both parties appear to agree that this Agreement embodies the terms of the Management Agreement extant between the parties at the relevant time, I note that the Agreement is dated February 2000 and by Clause three, comes into operation 1<sup>st</sup> July 1999. I have therefore taken it that the parties are agreed that an earlier Management Agreement in existence at the date of the accident i.e. 7<sup>th</sup> March, 1996 was in the same terms.

Clause (IV) of the Agreement bears the sub-heading "Insurance". Clause (IV) (a) states that Maritime Towing is required to maintain employer's liability, personal accident, and public liability insurance. It is important to note that clause (IV) (b) states that in respect of such insurance cover, the policy shall (by way of endorsement or otherwise) (i) name the Port Authority as additional insured, and provide that the insurers shall waive all rights of subrogation against the Port Authority.

Sub-clause (c) provides that Maritime Towing must provide the Port Authority with certified copies of all policies of such insurance. Sub-clause(d) reads as follows:

"(d). Premium Payment. The premiums in respect of the above policies, Insurance on the tugs and for any equipment and machinery shall be paid by the operator when due and shall be treated as part of the direct operating costs of the tugs."

Sub-clause(f) contains the reporting requirement:

"Reporting of incidents. The Operator shall advise the Authority of all incidents occasioning any damage, loss, injury or death within 48 hours of the occurrence of such incidents."

All of the foregoing paragraphs appear under the sub-heading "insurance".

Sub-clause 5 (iii) Residual Earnings, under the sub-heading "Financial Matters" sets out the financial interaction between the parties. It states that the Operator Maritime Towing must pay over to the Port Authority the residue of the total earnings from the operations of the Tugs after deducting from the total earnings during any accounting period, a number of expenses attributable to that accounting period, including insurance premiums for the tugs.

Clause 14 of the Agreement provides that Maritime Towing must indemnify and keep the Port Authority indemnified against all claims, costs, proceedings, damages and expenses which may be made against or incurred by the Port Authority as a result of the negligent act, omission or breach on the part of Maritime Towing in respect of or in connection with its management and/ or operation of the tugs during the period of the Agreement.

Clause 18, sub-headed "No Partnership", states that nothing in the Agreement shall constitute a partnership between the parties nor constitute any of them the agent of the other.

At paragraph 74 of the submissions advanced on behalf of Mr. Anderson, it is stated that (although the report letter was produced or brought into existence pursuant to the general direction of the Port Authority), Miss Pickersgill fails to state that the reasons why the Port Authority required the incident reports was to enable it to, for example, determine how the accident happened, to review safety procedures, to aid in the formulation of enhanced safety procedures, and generally to ensure that that type of accident does not happen again.

According to Mr. Reitzin that these were, in truth, some of the reasons is a necessary implication from the Port Authority's role as defined by the Port Authority Act.

Section 6 of the Act provides that the Port Authority has the duty to-

"(a) to regulate the use of all port facilities in a port;

(b) to provide and operate such port facilities and other services as the Minister may



require;

© to recommend to the Minister from time to time such measures as the Authority considers necessary or desirable to maintain or improve the port facilities;

(d) to operate such facilities as may be vested in the Authority or to lease them on such terms as may be approved by the Minister;

(e) to maintain and improve, where practicable, such port facilities as are vested in the Authority.

Section 7 of the Act provides that the Authority shall have power to-

“(a) regulate the berths and stations to be occupied by vessels in a port and the removal of vessels from one berth, station or anchorage, and the time within which such removal shall be effected;

(b) carry on such activities as appear to it to be advantageous, necessary or convenient for or in connection with its duties under section 6.

In **Birmingham** (supra) Hamilton L.J. stated at page 860,

*“ Claiming privilege in an Affidavit of documents is not like pronouncing a spell, which, once uttered, makes all the documents taboo. The draftsman should draw each affidavit with reference to the actual facts of the case and bearing them in mind. The selection of well-trying formulae from a precedent book only lends to that inconsiderate swearing which is the bane of the practice as to discovery .”*

To some extent I agree with Mr. Reitzin’s criticism of the affidavit evidence put forward in this case by Maritime Towing in that, for the most part, the Affidavits merely regurgitate the standard words which have “passed muster” for claiming legal professional privilege, without very detailed reference to the facts of the instant case.

However, as in **Birmingham** I have the documents themselves to look at.

In **Birmingham** their Lordships of the English Court of Appeal allowed the appeal. They held, having inspected the documents, that privilege had appropriately been claimed in respect of all the documents so claimed, disagreeing with the Judge in Chambers that some should be disclosed. Their Lordships so held despite their criticisms of the affidavit evidence.

At page 856 Buckley L.J. stated:

Having inspected the documents, as I think we are entitled to do, I am satisfied that this affidavit has not been made with a view to sheltering under a form of words, which in itself covers the ground, documents which ought to be produced. Were I of a contrary opinion I should not hesitate to make an order to defeat that intention. For I concur in the opinion which Hamilton L.J. has expressed at greater length that no particular formula of words can be conclusive against evidence furnished by the documents themselves or inferences to be drawn from their contents and from a reasonable view of the circumstances under which documents of their class come into existence.

At page 858 Hamilton L.J. provided some guidance as to the approach to be taken by the judge in examining the documents. He stated:

*I think in so far as the documents themselves and their contents throw light on the validity of the claim (of privilege) the judge can consider them. I think, further, that in doing so he can bring to bear on them the ordinary knowledge of life and business which he possesses. He could not well do otherwise. He is not bound to regard them as documents of the nature of which he can know nothing. I think that he can test the accuracy of the affidavit and the terms in which it claims the privilege by means of the documents themselves.*

It is clear from the authorities that the label put on the purpose itself is also not conclusive. In **Waugh** – see the headnote, per curiam, and page 530 –G-H, Lord Wilberforce in his judgment quoted from one of the documents under consideration

to make that point. Thus, although in this case the letter dated January 9, 1998, closes with the words. "It is against this background, that we write to seek guidance, - legal and otherwise", these words are not conclusive.

At paragraphs 125-129 of his submissions Mr. Reitzin advances an argument which I find untenable. He argues that since Maritime Towing is relying on the contents of the letter of January 9, 1998 to argue its case on privilege, then Mr. Anderson is entitled to see the letter. This should occur, he submits, either on the basis of fairness, or on the basis that the reference and reliance has waived any privilege which might otherwise have attached to the document. In my view this argument is misconceived, and wholly and fundamentally misses the role that the court plays when it takes the documents in hand to decide whether they are properly the subject of a claim for privilege.

I now turn to look at the surrounding circumstances before looking at the documents themselves. In that regard, I will first deal with Mr. Reitzin's submission that the inference should be drawn that the reports of incidents were required by the Port Authority for safety purposes. In my view, although an inference could be drawn from the duties and powers of the Port Authority as spelled out in the Act, that the reports of incidents required of Maritime Authority could be utilized by the Port Authority's with regard to its role concerning safety, there is really no hard evidence of that. Further, looking closely at the Management Agreement, it is clear to me that the requirement for reporting is principally, if not solely concerned, with the issue of liability and of insurance in respect of anticipated claims or litigation.

I do not share Mr. Reitzin's view that (page 18 of his submissions) the required Report to the Port Authority was quite independent of the Port Authority's concern about litigation being brought against the Port Authority. It seems clear to me that the Port Authority did not, having required Maritime Towing to maintain certain insurance policies, simply wash its hands of any incidents which occurred on its property, the tugboats. On the contrary, although Maritime Towing would seem to be an independent contractor, and not the servant or agent of the Port Authority, there is a presumption that the operator of a vessel, or motor vehicle is the servant or agent of the owner of the vessel. This presumption can be rebutted upon proof that the vessel is being used not for the purposes of the owner, but solely for the purposes of the operator. It may well be that because they had such principles in mind, and the fact that on the face of it, a third party may seek (at least initially), to fix the Port Authority with liability, that the Port Authority required that it be named as an **additional insured**. The fact that the insurer in respect of the policies taken out by Maritime Towing was required to waive all rights to subrogation can only mean that the Port Authority was ensuring that the Authority itself, or attorneys of its choice, could retain conduct of any litigation filed against the Port Authority. This is a far cry from having no interest in incidents and potential liability to be attached thereto. Further, in so far as the insurance premiums were considered a direct operating cost, and fell to be deducted from the total earnings before the Port Authority received residual earnings, this clearly means that the expense of insurance by Maritime Towing was reimbursable by the Port Authority, or, at the very least, it was borne jointly. The Agreement suggests an

acknowledgment by the Port Authority that themselves and Maritime Towing could be regarded by outside parties as jointly liable, irrespective of the contractual or legal relationship actually existing between them. In addition, the fact that the Port Maria was a tug vessel, may also have had its own insurance implications for its owner the Port Authority separate and apart from employer's liability and public liability policies maintained by the operator, particularly once the vessel is underway in the harbour. It does happen that when certain circumstances occur there may be an overlap in insurance coverage carried by interacting parties in a transaction, or situation.

In **Buttes** (supra) it was held, inter alia, that legal professional privilege applied where two persons had a common interest in anticipated litigation and a common solicitor and exchanged information for the dominant purpose of informing each other of the facts or issues or of advice received in respect of the litigation. Documents exchanged in such circumstances were privileged from production in the hands of either person even though only one of them was a part of the litigation. It is interesting to note that in the instant case one of the interlocutory applications made on behalf of Mr. Anderson, (and which I understand from Mr. Reitzin was not pursued once he had sight of the Management Agreement), was an application to add the Port Authority as a Defendant. Unlike Mr. Reitzin, I do not consider it without significance that prior to the filing by Rattray, Patterson, Rattray of a Notice of Change of Attorneys on behalf of Maritime Towing, Legal Counsel for the Port Authority entered an appearance on behalf of Maritime Towing. In my view the Port Authority and Maritime Towing had a common interest in anticipated

litigation. The Port Authority has in house Legal Counsel who, as a result of the report of January 1998, wrote a number of letters to Maritime Towing offering legal advice.

Lord Denning, at p. 483 H elucidates the privilege:-

*There is a privilege which may be called a 'common interest' privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him who have the self-same interest as he, but who have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinion. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation because it affects each as much as it does the others.*

Having so stated Lord Denning with typical clarity expanded at p. 484 as follows:-

*Privilege in aid of litigation can be divided into distinct classes. The first is legal professional privilege so called. It extends to all communications between the client and his legal advisers for the purposes of obtaining advice. It exists whether litigation is anticipated or not.*

*The second only attaches to communications which at their inception come into existence with the dominant purposes of being used in aid of pending or contemplated litigation. That was settled by the House of Lords in **Waugh v. British Railway Board** [1979] 2 All E.R. 1169, [1980] A.C. 521. It is not necessary that they should have come into existence at the instance of the party himself with the dominant purpose of being used in the anticipated litigation. The House approved of the short statement by James L.J. in **Anderson v. Bank of British Columbia** (1876) 2 Ch. D. 644 at 656, [1874-89] All E.R. 396 at 399: 'as you have no right to see your adversary's brief, you have no right to see that which comes into existence merely as the materials for that brief.'*

The instant case is to be distinguished from the **Waugh** case where it was held that the purpose of obtaining legal advice in anticipation of litigation was no more than

of equal rank and weight with the purpose of railway operation and safety. The Railway Board's claim for privilege failed and the report was ordered to be disclosed. In the instant case, I hold that the dominant purpose of the letter of January 9, 1998 was for the purpose of Maritime Towing keeping the Port Authority informed and for the purpose of obtaining legal advice in aid of anticipated litigation in which the parties had a common interest.

I now refer to **Guinness Peat Properties Limited and others v. Fitzroy Robinson Partnership (a firm)** [1987] 2 All E.R. 716. In that case it was held, amongst other things, that the dominant purpose for which a document was written was not necessarily to be determined by reference to the person who actually composed it. Since the genesis of the letter was the insurers' need to receive immediate notification of possible claims so that they could obtain legal advice or to conduct or provide assistance in the conduct of litigation which was at the time of its production in reasonable prospect, the letter privileged.

At pages 721-724, Slade L.J. discusses the fact that great difficulties have arisen (a) in determining the status of documents coming into existence for more than one purpose and (b) in deciding at what stage it can fairly be said that any such purpose is obtaining advice in anticipated litigation, as contrasted with obtaining information as to an occurrence which may lead to litigation.

At page 724 Slade L.J. refers to **Re Highgate Traders Limited** [1984] B.C.L.C. 151 as authority for the proposition that the privilege does not only come into existence when a decision to instruct a solicitor to make or resist a claim has been

made. The important thing is that at the time of the document being brought into existence litigation was reasonably in prospect.

In my view, litigation was as much in prospect in the instant case as it was in **Guinness Peat**. In that regard I find the following statement of Hamilton L.J. in **Birmingham** instructive (page 861):

*He (the judge in chambers) has drawn his distinguishing line by the date at which the defendants first received a letter of claim from the plaintiffs, a test which, though often unexceptionable, ... is inappropriate in a case such as the present, where ..., at the very moment when the accident occurs the ordinary employee can anticipate that litigation in respect of it will probably ensue.*

I also refer to Heaven J's judgment in **Seabrook v. British Transport Commission** [1959] 2 All E.R. 15, a case to which I will return later.

At pages 31-32 he stated:

*These documents did come into existence for the purpose of being put before the solicitor, and for the purpose of being used not necessarily in existing litigation, but in anticipated litigation. I think that in these days the .... Commission are entitled to say that whenever a man is fatally injured in the course of his work on the railway line, there is at least a possibility that litigation will ensue. In those circumstances, there is no material on which I can come to the conclusion that there is any ground for challenging the correctness or conclusions of the Affidavit.*

I now turn to the remaining documents, i.e. the Statements of April 1996, and 1<sup>st</sup> September, 1997. I agree with a number of Mr. Reitzin's criticisms of the Affidavit evidence filed on behalf of Maritime Towing, and indeed, as he rightly says at paragraph 49 of his submissions, Mr. Maxwell, the author of the statements



has not adverted to his purposes in producing his statements or in bringing them into existence.

Also (paragraphs 53, 54, 55 and 56 of the submissions), there is no evidence from Maritime Towing in the affidavits that these documents were produced at their request, and there is no evidence from the Port Authority about these statements. Reference was made by Mr. Reitzin to a long line of cases which deal with the circumstances in which a report or communication by a servant or agent, in the ordinary course of their duty to their principals, are considered privileged, and circumstances in which they are ordered disclosed. A leading case in this area is **Seabrook**. In **Seabrook** the documents in respect of which privilege was claimed were described as "correspondence between and reports made by the [British Transport Commission's] officers and servants." It was held that the documents were privileged because they had *bona fide* been obtained for the purpose of taking professional advice from the commission's solicitor in view of anticipated proceedings, and the fact that these documents also served other purposes did not place them outside the scope of privilege.

I am satisfied, based on the terms of the letter of January 9, 1998, statements themselves, and from a reasonable view of the circumstances in which they both came into existence, that the statements of Hylton Maxwell came into existence at their inception for the dominant purpose of being used in aid of pending or anticipated litigation. In fact, when the letter of January 9, 1998 is read closely along with the enclosures, and their proper context, the reference to attachment number one, the Accident Report, appears to have been a reference to Hylton

Maxwell's first statement, dated 3<sup>rd</sup> April 1996, written less than a month after the accident, and which is not specifically mentioned in the letter. I so draw that inference. Indeed, counsel for Maritime Towing has indicated that his instructions are that Maxwell's first statement was attachment number one. Taking a reasonable view of the circumstances, and looking at the matter in a practical manner, with a view to utilizing the ordinary knowledge of life and business that I possess, the statement of 3<sup>rd</sup> April 1996, was not a statement prepared in the ordinary course of duty, but was prepared for the instruction of Hylton Maxwell's master or principal Maritime Towing in respect of anticipated litigation. I do not think it would be unreasonable to draw an inference that the statement was prepared at Maritime Towing's request, or in accordance with its reporting procedures. However, even without that inference, the authorities suggest that even on the day of the accident when Mr. Anderson suffered injuries, it would be reasonable to expect even an ordinary employee to anticipate litigation. I find the same in respect of the statement of September 1, 1997; it was for, or to the use of, Maritime Towing in respect of any claim or anticipated litigation. The format of this statement and reference to its origin in letter of January 9, 1998 also bolster me in my view. Just prior to describing the enclosures contained therein, starting with "accident report", the letter of January 9, 1998 contains the following statements:

*The matter was reported to our Insurance Company Limited, and an Assessor visited on September 1, 1997, and took a statement from the duty Captain Hylton Maxwell.*

In addition, there is nothing in the content of the two statements which suggest that either of the two statements were ordinary official reports made in the course of

duty and thus nothing to challenge the correctness of the contentions (albeit they may smack of being a mere recital of precedents) in the affidavits with regard to privilege – **Collins v. The London General Omnibus Company** L.J. 63 (Q.B.) 428 at 430 & **Seabrook** at pages 31-32 (supra).

When therefore, the Court looks at the substance and reality of the statements, the circumstances in which they came into existence, and their purposes, as decreed in **International Business Machines Corporation and another v. Phoenix International (Computers) Limited** [1995] 1 All E.R. 413, the statements come into existence essentially as materials for Mr. Anderson's adversary's brief. As Lord Wilberforce described such a situation in **Waugh** at page 531, Mr. Anderson must wait until the cards are played and cannot try to see them in the hand.

I also hold that the three letters from the Port Authority to Maritime Towing, which in any event Mr. Reitzin has indicated he has no interest in seeing, are privileged on the basis that they came into existence with the dominant purpose of being used in aid of obtaining legal advice in respect of pending or anticipated litigation in which both parties have a common interest.

Maritime Towing has satisfied the burden of demonstrating that the documents are properly the subject of a claim to legal professional privilege and as a result, I exercise my discretion to refuse the application for discovery as it relates to the letter of January 9, 1998 and the two statements.