RE: KATHLEEN MONICA BILES v STATE OF NEW SOUTH WALES

Matter No. 2008 / 316976

PLAINTIFF'S OUTLINE OF SUBMISSIONS ON DEFENDANT'S CLAIM FOR PRIVILEGE

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1. There are two broad categories of documents viz:

   (a) correspondence and communications between the defendant's legal representatives and investigator Peter Maxwell or the business Peter Maxwell Investigation.

   (b) documents forming part of the factual investigation being documents or records obtained or created by Mr Maxwell when undertaking his investigations.

2. The defendant seeks to prevent the plaintiff from pursuing her claim for damages on the ground that the effluxion of time has irretrievably prejudiced its right to a fair trial. This is asserted either directly by application of the "Batistatos" principle or as a basis for not extending under time under the Limitations Act.

3. The evidence in support of the defendant's is largely, if not exclusively, the evidence of Peter Maxwell.

4. That evidence seeks to establish that there is a prejudice to the defendant because witnesses are no longer available or are unable to give any meaningful evidence.

5. The first affidavit of Mr Maxwell sworn 17 May 2011 deposes @ paragraph 2, that he was engaged to *"conduct a factual investigation into the circumstances of the plaintiff's claim and to locate witnesses in order to determine whether they are living or deceased and, if living, able to give evidence and to obtain relevant documentation ..."*.

6. Mr Maxwell then goes on to disclose the various sources of information and methodology used for the purposes of his factual investigation and makes a number of

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statements clearly disclosing some of the outcomes of those investigations e.g. paragraphs 11, 12, 14, 26.

7. Mr Maxwell goes further though and in his affidavits provides lengthy details and in some instances reproduces statements made by the potential witnesses he spoke to.

8. If his investigations are privileged, clearly the defendant has chosen to disclose part of the outcome of those investigations for its purposes.

9. On any view of it this is a disclosure (albeit selective) of the contents of the factual investigation.

10. What's more, it is a partial disclosure from which the defendant seeks to obtain an advantage and with which the defendant seeks to deprive the plaintiff of an opportunity to pursue her claim.

11. Use of that partial disclosure must present an incomplete picture of the prejudice the defendant says it suffers. Whether or not the defendant suffers a prejudice cannot be known until the court knows not only what evidence is not available to the defendant but also what evidence is available to the defendant.

12. The little additional information we do now know is that Mr Maxwell has a list of 150 people who are alive and would be useful in determining whether we could get a full picture of events (T: p.85.35 – 85.45).

13. Section 122(2) of the Evidence Act provides for loss of privilege where a party has acted in a way inconsistent with the party objecting to the evidence being adduced.

14. This provision adopts common law principle of fairness reflected in *Mann v Carnell* (1999) 201 CLR 1 where @ paragraph [29] the plurality said:

> *[29] Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law"[23]. This means that the law recognises the inconsistency and determines its consequences, even though such*

> *consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in Benecke v National Australia Bank[24], the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.*

15. This follows on from what had earlier been said by the High Court in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475:

> *[7] The decisions in which this question has been considered seem to me to be particular applications of the rule that in a case where there is no intentional waiver the question whether a waiver should be implied depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production. Thus it has been held that the privilege in respect of a document is not waived by the mere reference to that document in pleadings (Roberts v. Oppenheim (1884) 26 ChD 724; Buttes Oil Co. v. Hammer (No. 3) (1981) QB 223, at pp 252, 268) or in an affidavit (Lyell v. Kennedy (1884) 27 ChD 1, at p 24; Infields, Ltd. v. P. Rosen & Son (1938) 3 All ER 591, at p 597; Tait & Lyell International Co. Ltd. v. Government Trading Corporation, The Times, 24 October 1984), although the position will be different if the document is reproduced in full in the pleading or affidavit: Buttes Oil Co. v. Hammer (No. 3), at p 252. These cases may be explained by saying that it is not unfair or misleading to refer to a document in a pleading or affidavit which is not put into evidence but that if the document is set out in full the privilege is waived. A fortiori, of course, privilege in respect of materials used in drawing a pleading or an affidavit and not referred to therein, would not lose their privilege because they had been used in that way.*

16. The principle established in *Mann v Carnell* has been followed in a number of cases since, which while generally fact sensitive, reflect concepts of inconsistency informed by considerations of fairness. See e.g. *DSE (Holdings) Pty Ltd v Intertan Inc.* [2003]

FCA 384 and *Council of New South Wales Bar Association v Archer* [2008] NSWCA 164 esp. @ [46] – [48].

17. The defendant's maintenance of privilege in the present case is entirely inconsistent with its conduct of this litigation where it seeks to establish prejudice by adducing (only part of) the evidence obtained by Mr Maxwell on this point. Dictates of fairness require that if the plaintiff is to be put out of court because the defendant has suffered a prejudice, having exposed the basis of the so called prejudice, the defendant is required to provide the plaintiff and the court with the full picture.

Dated: 15 November 2012

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Helen Wall

Counsel

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John Catsanos

Counsel