

FILED

10 MAY 2013

STATE OF NEW SOUTH WALES *ats* BILES & ORS

COURT OF APPEAL CASE NO 2012/394728

APPLICANT'S SUBMISSIONS IN REPLY

**Waiver of privilege - the applicant's position**

1. Client legal privilege attaches to the content of a '*confidential communication*' and the content of a '*confidential document*' (*Evidence Act* 1995, ss 117, 118 and 119). Client legal privilege is waived by the making of express or implied assertions about the content of the privileged material where that is inconsistent with maintaining client legal privilege (see White Appeal Folder, Tab 2 - Applicant's Summary of Argument (AS) at paragraphs 22 and 23).
2. The reasons why there has been no waiver on the facts of the present case are set out in AS at paragraphs 25 to 30.

**Waiver of privilege - the opposing party's position**

3. The essence of the opposing party's position appears in the Response dated 16 April 2013 at paragraph 5 (see also paragraph 19). The opposing party contends that by disclosing Mr Maxwell's retainer and relying upon his enquiries to establish prejudice while not disclosing the totality of those enquiries constitutes a waiver of any privilege that would otherwise attach. This approach focuses attention upon the wrong subject matter. Client legal privilege and waiver thereof are not concerned with enquiries or investigations *per se*. Thus it is not to the point to argue that because Mr Maxwell has disclosed some of his enquiries and investigations he should be required to disclose all of his enquiries and investigations. Client legal privilege is concerned with the content of privileged material, whether a '*confidential communication*' or a '*confidential document*' and waiver is concerned with the making of express or implied assertions about the content of the privileged material. Thus by focusing on enquiries and investigations, the opposing party distracts attention from the true issue. The fact that a witness in proceedings gives only

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part of the relevant or potentially relevant evidence that he or she is able to give does not give rise to a waiver of client legal privilege attaching to the content of privileged material which records or refers to or relates to relevant or potentially relevant facts that are not disclosed by the witness.

4. In paragraphs 4(m)-(p) of her Response, the opposing party suggests that the conduct of the applicant at trial was in some way inappropriate. In particular, she refers to the applicant having contended that the “only conclusion” to be reached from Mr Maxwell’s initial affidavits is that his enquiries failed to disclose any available or useful witnesses and, accordingly, that those affidavits present an “incomplete if not entirely distorted picture”. That is not correct. No such contention was made at the hearing (nor is it raised on appeal). When one reads Mr Maxwell’s instructions and the contents of his initial affidavits, it is quite clear that the purpose of the affidavits is to establish that the applicant has been prejudiced by the delay. The affidavits do no more than identify the instances in which that prejudice has occurred.<sup>1</sup> That provides no basis for concluding that Mr Maxwell is making an assertion that he did no more.
  
5. The opposing party treats the issues of privilege and waiver in relation to the investigations in a global way. This approach should be rejected on the basis that it is inconsistent with the schematic of ss 117, 118, 119 and 122 of the *Evidence Act* 1995. Those provisions deal with issues of privilege and waiver by reference to each ‘*confidential communication*’ or ‘*confidential document*’ rather than in a global way (see paragraph 1 above).

#### **Waiver of privilege - conclusion**

6. The opposing party's contention should be rejected and the claim for privilege upheld.

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<sup>1</sup> Upon reading the material, his Honour considered that “... it was blatantly obvious that what Mr Maxwell did was say, “Here are all the people we can’t find ...” They say, “Because we can’t find these, we’re prejudiced.” ” (Tab 30 – T84.37-40).



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