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IN THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

5 JUDGE CURTIS

FOURTH DAY: THURSDAY 15 NOVEMBER 2012

10 2008/00316976 - AIL [REDACTED] AND DOUGLAS BRUCE BILES v
STATE OF NEW SOUTH WALES

15 CATSANOS: May it please the Court, your Honour, I appear for the plaintiff
with Ms Wall as before.

HIS HONOUR: Mr Catsanos, Mr Cashion.

20 CASHION: May it please the Court, I appear for the defendant with
Mr Arblaster and Mr Woods.

HIS HONOUR: How long will this take?

25 CASHION: Only a couple of minutes for our part, your Honour. In short,
overnight we have made inquiries in relation to the gathering together of the
documents the subject of the factual investigations part of the call. I might add
that clearly the call relates to all the plaintiffs, not just Kathleen Biles. The
relevant material is spread over many folders over many files and it's going to
30 take time to go through them and extract the material to have it reviewed with a
view to what we're going to claim privilege in respect of and what we're not so
that the matter can be argued properly before your Honour. We're obviously
fully aware of our obligation promptly to comply with the call and as
your Honour alluded to yesterday, it's by no means improbable that this matter
35 may go further. So for all those reason, it's important that it's done properly
and what we seek is a little more time to comply with the call.

HIS HONOUR: What do you say, Mr Catsanos?

40 CATSANOS: I'm grateful to my learned friend for that, your Honour, but I
understood that the in-principle position would be argued today; that is, the
crown, as I understand it, objects in principle to producing documents and also
the correspondence which has been handed to your Honour. I thought the
absence of the documents was not going to impede the argument as to the
privilege--

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HIS HONOUR: Well, that's what I thought, but it is now, as I understand it,
possible the defendant will produce much material. Is that right?

50 CASHION: It is likely that the defendant will produce a very large amount of
material to the Court in response to that part of the call which relates to factual

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investigations conducted by Mr Maxwell. There were three parts to the call: the first was letters of instruction; the second part was correspondence between Mr Maxwell and the defendant's legal representatives. That material is in the bundle which was handed up yesterday. It's the third part that's the problematic part, the factual investigations part. We are getting that together. We have no difficulty in doing so and getting it to the Court and then we can have an argument on legal professional privilege. Your Honour, with respect, it would be inappropriate to argue legal professional privilege in relation to that category of documents in the abstract in a vacuum, as it were.

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The normal course is, of course, the documents are produced to the Court and the parties then have an argument in relation to those specific documents, the Court makes its decision in respect of those particular documents, and we submit it's inappropriate to have an argument in the abstract until they're produced.

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HIS HONOUR: Well, I think you're right, because I have no document before me pursuant to which the call for the documents is identified. It could be in the nature of a subpoena and the documents would be produced pursuant to the subpoena and then the argument held, but there will be different categories of documents. I think it's probably useful if you issue a subpoena setting out the categories of documents upon which you call and then we can have an argument as to that. When do you envisage this would be done?

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CASHION: Your Honour, we envisage that the documents can be physically gathered together by early next week and then there will be a need for someone to look through them with a view to determining the ones in respect of which there will be claim for privilege and the ones in respect of which there won't. So we were anticipating that we would be able to produce documents to the Court probably in the latter part of next week. My juniors are looking horrified. They've obviously got other commitments. Would your Honour pardon me a moment? Yes. Mr Woods reminds me that the process may involve redacting certain documents because some of those documents may refer to children other than Kathleen Biles or other plaintiffs. Perhaps it's better if we suggest two weeks for the process because, as I said, we're keen to do it properly but it's an extensive process.

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HIS HONOUR: If a claim for privilege is upheld, then it doesn't matter that children have been identified. If it's denied, then you could go along with the process of redaction.

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CASHION: Yes. The process of redaction may not be overcome simply by an undertaking by the plaintiffs' legal representatives not to disclose those identities. As I understand it, there are statutory prohibitions on such disclosure and I would need to look into that, but I'm sure we can work it out in a practical sense. It's just a question of the time necessary to do it properly.

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HIS HONOUR: Well, I think that's a preferable course. Mr Catsanos, you're busy for the next foreseeable few weeks, are you?

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5 CATSANOS: Your Honour, I am. I hear what my friend says and I, with respect, hear what your Honour says. We've been asking for these documents since February this year and since February we've been told we can't have them because they're privileged. I would have thought that the crown, having
10 made that assertion, would know precisely what documents it told us we could not have in February this year. We find it difficult to accept that it will take two weeks to extract documents which we've already been told we can't have. So the crown must have known what they were, must have known the source of them.

15 HIS HONOUR: Yes, but what I'm to proceed upon is if the documents are produced to the Court, which they must be, then I may have to look at them to see whether privilege is upheld or not and, as Mr Cashion says, that can't be done on the abstract because I have to rule on particular documents or
20 tranches of documents. It's regrettable and I understand your position, but let's do it properly.

25 CATSANOS: As your Honour please. There may be cost implications. I can deal with that later. Can I just say one thing, your Honour? I'm keen to move forward rather than backwards, but can I just say that we don't necessarily accept the accuracy of what my learned friend has said in relation to the history of the call.

30 HIS HONOUR: Yes. Well, I suppose he might reply he doesn't necessarily accept the accuracy of the first affidavit by Mr Maxwell. Very good. Now, what about a date?

35 CATSANOS: Could we approach your Honour's associate? I'll speak to my learned friend.

40 HIS HONOUR: Yes. We can stand the matter over until a date agreed between the parties, and let my associate know. I'm pretty free, I think. We'll accommodate you.

45 CATSANOS: Your Honour, the only outstanding matter is the correspondence which has been produced. I assume that will just..(not transcribable)..the determination.

50 HIS HONOUR: Well, that is one category of document and that shall be determined then, when we've heard argument on principle.

CATSANOS: As your Honour please.

55 HIS HONOUR: It would be useful if before the next occasion you could have short written submissions, mainly drawing my attention to relevant authorities.

CATSANOS: Your Honour, I have some here. I can provide them now if that would assist. Well, it's just that I understood we were coming here to argue.

60 HIS HONOUR: Yes, so did I. I think it's best, then, if you hand those up. Yes,

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hand them up to me now. You've got a copy have you, Mr Cashion?

CASHION: No, your Honour. Thank you. I do now, your Honour.

5 HIS HONOUR: Yes, very good. Stood over then, to a date to be fixed.

CATSANOS: Could your Honour reserve the question of costs?

HIS HONOUR: Yes, costs reserved.

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ADJOURNED TO A DATE TO BE FIXED