



Transcript of Proceedings

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SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MULLINS J

No S3575 of 2002

METYOR INC (FORMERLY TALISMAN
TECHNOLOGIES INC)

First Plaintiff

and

SARACEN FINANCIAL SERVICES LIMITED
(ACN 084 940 983)

Second Plaintiff

and

QUEENSLAND ELECTRONIC SWITCHING PTY
LIMITED
(ACN 003 027 503)

First Defendant

and

BANK OF QUEENSLAND LIMITED
(ACN 009 656 740)

Second Defendant

and

COMPAQ COMPUTER AUSTRALIA PTY LIMITED

First Defendant by
Counterclaim

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06082002 T01/TW12 M/T 1/2002 (Mullins J)

BRISBANE

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..DATE 06/08/2002

JUDGMENT

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HER HONOUR: The plaintiffs seek disclosure of a number of documents in respect of which the first and second defendants, to which I will refer in these reasons collectively as the defendants, have claimed legal professional privilege.

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The documents are identified in the schedule, which is Exhibit BTC4 to the affidavit of BT Cohen, filed by leave on 1 August 2002. I will refer to any particular document by the number which appears in that schedule as the list number for the document in the defendants' lists of privileged documents.

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The parties agreed to the issue of disclosure of document 20 being deferred. It is also not necessary to deal at this stage with documents 11 and 13 as it is intended they will be removed from the defendant's list of privileged documents on the basis of lack of direct relevance.

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The issue to be determined is whether there has been implied waiver of legal professional privilege on the basis of what has been raised by the defendants in their defence and counter claim.

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For the purpose of determining this application I was provided with a bundle of pleadings which are the claim and amended statement of claim filed 10 September 2001, defence and counter claim filed 21 September 2001 and reply filed 19 November 2001. Although at least the statement of claim has been further amended, for convenience I will refer to the versions of the pleadings that were the subject of the

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submissions before me.

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The trial of the proceeding has been ordered to be on affidavit and had commenced in a preliminary way prior to my hearing this application on 1 August 2002.

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It was common ground between the parties that the trial was directed to be on affidavit and that the affidavits relied on by the defendants do not call in aid, or refer to either the factor or the contents of any legal advice, or any other circumstance relating to the privilege claimed by the defendants.

The High Court in *Mann v Carnell* (1999) 201 CLR 1 determined when waiver of legal professional privilege is implied. It was stated in the joint judgment of Chief Justice Gleeson and Justices Gaudron, Gummow and Callinan at para 28:

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"Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege. Examples include disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication, or the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received. (footnotes omitted)

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and at para 29:

"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."

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I was referred to many authorities both pre and post this High Court decision.

In view of the formulation of the test in Mann v Carnell for determining when waiver is implied, these authorities are useful as illustrations rather than for exposition of principle.

Care also is required in considering dicta from these authorities which do not necessarily translate to the circumstances of this proceeding. I will give one example.

Mr Sheahan of senior counsel for the plaintiffs explained the relevance of the time period over which the documents, the subject of the claim for legal professional privilege were generated and submitted that as it coincided with the period which the defendants allege that they were not acting in bad faith, as alleged against them by the plaintiffs, it enabled a strong inference to be drawn that the documents, the subject of the claim for privilege, were directly relevant to the matters in issue.

Reliance was placed on decisions such as Garrett's Ltd v Thangathurai [2002] NSW SC 39, where there was an allegation of defence of economic duress and it was held what was in issue was what contributed to the defendant entering into the relevant agreement. The subject legal advice was given at and around the time the defendant claimed that illegitimate

pressure was applied. The legal advice, therefore, had to be disclosed. It was found that it was probable that the legal advice was relevant to the defendant's state of mind. It was not raised in that case that there was any other purpose for the time related legal advice.

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In this matter when the application first came on before his Honour Justice Byrne on 25 July 2002, the defendants prepared a document summarising the allegations in issue between the parties on the pleadings at the critical time of 6 September 2000 and the submission was made that any one of those allegations could conceivably have been the basis for legal advice sought by the defendants around that time.

The weight to be attached to the dates of the documents to which legal professional privilege is claimed in this matter loses its significance in the light of the summary which was Exhibit 3 before his Honour Justice Byrne.

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Another consequence of the hearing before his Honour Justice Byrne was that after a lengthy hearing of which I have been provided with the transcript for the latter part, the application was adjourned to enable the defendants to consider whether the claim for legal professional privilege would continue to be pressed.

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Apart from a couple of documents the claim is still pressed. In the light of the argument before his Honour Justice Byrne I should not lightly infer error on the part of the defendants

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or their solicitors in continuing with the claim for legal professional privilege.

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This proceeding arises out of a joint venture agreement to which the plaintiffs and first and second and defendants were parties.

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Pursuant to the joint venture agreement the parties were to pursue a business involving the design and installation of a network of web enabled ATM's.

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A company, which is now the fourth defendant to the counter claim and to which I will refer as the joint venture company, was established pursuant to the joint venture agreement to be the vehicle by which the venture was to be carried out.

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The joint venture agreement provided for certain conditions subsequent. The plaintiffs allege that each of the conditions subsequent were satisfied, or was capable of satisfaction, or that the defendants are estopped from denying that the conditions subsequent were satisfied, or capable of satisfaction.

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The plaintiffs' case is based upon alleged breaches of express and implied obligations on the part of the defendants including as to good faith.

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The second defendant has denied that it has breached any of these clauses. By paragraph 41 of the amended statement of

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claim the plaintiffs allege that the defendants by no later than 6 September 2000 had determined to seek to escape their obligations under the joint venture agreement. The conduct relied upon by the plaintiffs is expanded upon in paragraphs 42 to 49 of the amended statement of claim.

The allegation is made in para 49 of the statement of claim that the contents of the questions contained in the issues paper which was produced by the defendants and the circulation of that issues paper was a device deployed by the defendants in bad faith and contrary to their obligations under the joint venture agreement, with a view to contriving a basis for the second defendant to escape its obligations under the joint venture agreement consistent with what is described as the second defendant's desire as expressed in its letter of 9 October 2000.

A conclusionary allegation is found in para 50 of the amended statement of claim to the effect that the contention made by the defendants that the business plan condition and the budget condition were not satisfied, was made in bad faith and in breach of the joint venture agreement.

Paras 51 to 72 of the amended statement of claim deal with the plaintiffs' allegations in respect of the breach by the defendants of the funding condition. In para 71 of the statement of claim the plaintiffs allege that the assertion of the defendants that the conditions subsequent have not all been satisfied or are not capable of being satisfied, the

failure of the defendants to consider or accept any of the further funding proposals and the conduct of the defendants alleged in paras 41 to 49 of the statement of claim was conduct on the part of the defendants in bad faith in that it was for a collateral purpose which was to bring an end to the joint venture agreement or to enable the defendants to withdraw from it.

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Chapter VI of the defence and counterclaim is responsive to the allegations made in paras 41 to 50 of the statement of claim. Chapter VII of the defence and counterclaim is responsive to the allegations in paras 51 to 72 of the statement of claim. Mr Sheehan specifically relied on paras 68, 70, 71(c) and (d), 72, 76, 77(b), 81(a), 86(b), 87(a), 105(e) (i) (A) and (D) of the defence and counterclaim to support his submissions, but focussed more particularly on paras 71(c), 86(b), 87(a) and 105(e) (i) (A) and (D).

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The defendants made a counterclaim against the plaintiffs relying on the matters admitted and alleged in the defence in order to seek relief in respect of the termination of the joint venture agreement and the winding up of the joint venture company.

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In order to analyse the defendants' pleading for the purpose of this application it is necessary to make some observations about the effect of the UCPR on the manner of pleading. Under rule 165(2) a party who pleads a non admission may not give or call evidence in relation to a fact not admitted unless the

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evidence relates to another part of the party's pleading. 1

Under rule 166(4) a party's denial or non admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted. Rule 166(5) then provides if a party's denial or non admission of an allegation does not comply with sub rule 4, the party is taken to have admitted the allegation. 10

Because of the consequence of a failure to comply with rule 166(4) a defence may set out in detail evidentiary matters which are relied on as to the explanation for the belief of the defendant to support a non admission or denial and to ensure the defendant is not precluded from calling evidence relevant to the non admission and therefore not limited to merely putting the plaintiff to proof of the allegation the subject of the non admission. 30

As intended, these rules have affected the way litigation is conducted in Queensland. Even though an assertion in the defence as to the belief of the defendant is explicable by what is now required by rules 165 and 166, that assertion must be taken into account as conduct of the defendant in connection with the litigation. The fact that it is undertaken in compliance with the rules which I have identified does not prevent reliance on it as conduct of the party making the assertion. 4

Dealing with chapter VI of the defence and in particular the paragraphs specifically relied on as by Mr Sheehan as those on

which he could best mount his argument para 70 of the defence
pleads that the second defendant forwarded a facsimile dated 9
October 2000 which advised its position in the joint venture
at that stage. It is then pleaded in para 71 that as at the
date of this facsimile the defendants by two named officers
"(c) believed that no funding could be obtained for the
construction phase of the venture."

The defendants plead in para 86(b) of the defence that they
deny the allegation in para 49 of the statement of claim
because the issues paper was sent by the second defendant for
the purpose stated in the issues paper and the covering
letter. For the purpose of assisting in dealing with this
aspect of the application a copy of the issues paper was
Exhibit BTC2 to the affidavit of BT Cohen filed by leave on 1
August 2002. It is also referred to in para 47 of the
statement of claim which is the subject of admissions in para
84 of the defence and counterclaim.

In para 87(a) of the defence the allegations in para 50 of the
statement of claim are denied because (as it is pleaded) the
contention that the business plan condition and the budget
condition were not satisfied was made in good faith and was
also alleged to be correct by the defendants. Chapter VII of
the defence, which deals with the funding condition, contains
para 105(e)(i)(A) and (D) on which much reliance was placed by
the plaintiffs. Para 105 contains denials of para 71 of the
statement of claim. Apart from some specific pleading in
respect of the allegations in para 71 of the statement of

claim sub para (e) pleads that the allegations in para 71 are denied because the defendants acted after 6 September 2000 in the belief of the four matters that are then set out in sub-subparagraphs (A) to (D).

It is sub-subparagraphs (A) and (D) which were the subject of submissions. I should add that the allegation of bad faith in para 71 of the statement of claim is then directly controverted by para 105(e)(ii) of the defence which states that the defendants "did not act in bad faith as alleged." It is clear from the structure of para 105(e) of the defence that this allegation is not opening up the state of mind of the defendants as such as an issue, but is confined by what has been specifically pleaded as the belief of the defendants as to each of the matters set out in para 105(e)(i) of the defence on the basis of which the defendants allege they acted after 6 September 2000.

The belief that is set out in sub-subpara (A) is, "BOQL was not obliged to provide security to a financier for the construction phase of the venture." The belief that is set out in sub para (D) is, "The condition subsequent in the agreement had not been satisfied."

The plaintiffs submitted that these aspects of the defence in particular opened up the question of the defendant's state of mind and in particular its good faith in relation to actions it took in the period from early to mid September 2000 and following and that as a matter of fairness to the plaintiffs

and in the interests of the Court ascertaining the truth as to
a matter hotly in dispute in the proceeding the claim to legal
professional privilege cannot be maintained.

That submission characterises the effect of the pleading much
more broadly on the issue of good faith than what is actually
alleged in the defence. In applying the test in Mann v.
Carnell the focus is on inconsistency between claiming legal
professional privilege and the conduct of the party claiming
legal professional privilege. It is therefore necessary to
identify in clear terms the conduct of the party claiming
legal professional privilege which may be the source of the
inconsistency which is relied on as the basis of the waiver of
legal professional privilege.

When the pleading of a party is relied on as the necessary
conduct what is looked at is what is asserted by that party
and not a broad brush précis of what is in issue by reference
to both parties' pleadings. In looking at the relevant
paragraphs of the defendants' pleading in this matter at this
stage of the proceeding account must be taken of the fact that
the evidence-in-chief of the witnesses who are relied on by
the defendants to support the allegations in the pleadings do
not refer to any legal advice.

Dealing with para 71(c) of the defence it was submitted on
behalf of the plaintiffs that the belief of the relevant
officers of the defendants that no funding could be obtained
for the construction phase of the joint venture was

significantly affected by the proper construction of the provisions of the joint venture agreement which are pleaded at paras 56 and 57 of the statement of claim and para 92 of the defence and counterclaim about what security the second defendant was required to put up for that purpose. Although there is superficial appeal in the plaintiffs' submissions it cannot be said that it was essential, or even more probable than not, that the defendants obtained legal advice for the relevant officers to have formed the belief that is pleaded in para 71(c).

In the light of the relevant officers' evidence-in-chief and in the light of the various matters on which the defendants were conceivably obtaining legal advice at the same time, I cannot conclude that the assertion of the belief in para 71(c) of the defence could have been reached only as a result of legal advice whether or not it was also the result of other matters. The same process of reasoning applies to each of the other paras of the defence on which particular reliance is placed by the plaintiffs. The plaintiffs have failed to show by reference to the defendants' pleading that the conduct of the defendants in what they assert is inconsistent with maintaining legal professional privilege.

This is not a case which falls into the same category as those where the assertion in the defence, or other relevant document opens up a state of mind, or belief which could have only been a consequence of legal advice in the circumstances of the particular case.

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Contrast the answers to interrogatories by the police officer in Bayliss v Cassidy (No 2) [2000] 1 QdR 464 who was defending a claim for false imprisonment and malicious prosecution and asserted the basis for belief that the offence had been committed by the plaintiff was the legal advice that had been obtained. 10

Contrast cases invoking legal professional negligence, undue influence cases and what have been referred to as "state of mind" cases where a party relies on a cause of action an element of which is the state of mind of the party at the time the party undertook action in reliance on a particular representation made by another: Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152 166-167. 20

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It is submitted on behalf of the plaintiffs that the fact that the defendants raise a counter claim assist the plaintiffs in showing that there is implied waiver. The allegations and admissions relied on in the counter claim are identical to those in the defence and does not affect the nature of the assertions in the defence. 40

The plaintiffs have not shown, in the circumstances of this case, that the conduct of the defendants in asserting the matters identified in the defence is inconsistent with the claims for legal professional privilege to the documents identified in Exhibit BTC4. As is apparent from these reasons it has not been necessary to seek to peruse the challenged 50

documents in order to determine the question of waiver.

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The plaintiffs' application filed on 26 June 2002 for an order for disclosure pursuant to rule 223 of the UCPR based on their contention that there has been waiver of legal professional privilege is dismissed.

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The defendants brought a cross application filed on 23 July 2002 seeking an injunction restraining the plaintiffs from suing, or relying upon the documents numbered 14,102 and 103 and seeking return of the copies of the documents.

The affidavit of Mr Marshke filed on 17 July 2002 sets out the circumstances in which the copies of these three documents were inadvertently included in the bank's core bundle delivered to the solicitors for the plaintiffs on 26 April 2002 in accordance with a direction of the Court. Other privileged documents were included in that bundle in respect of which privilege was intended to be waived. Each of the documents is a copy of a memorandum which has been disclosed by the defendants, but it is the particular copies which are documents numbered 14,102 and 103 in respect of which privilege is still claimed by the defendants.

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The plaintiffs obtained leave to amend the statement of claim on 9 July 2002. The second further amended statement of claim was filed on 31 July 2002 and reference was made to that memorandum, copies of which are documents 14,102 and 103 in para 49 (iii) (b).

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Both parties relied on the principles in the judgment of Slade L J and Guinness Peat Properties Ltd v Fitzroy Robinson Partnership [1987] 1 WLR 1027, 1045.

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The defendants need to show that on inspection the plaintiffs realised that they had been permitted to see the documents only by reason of an obvious mistake. That was not apparent from the face of the documents themselves.

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It may have been apparent if the solicitors for the plaintiffs had checked the bank's core bundle against the list of privileged documents and further checked in respect of those documents in respect of which a claim of privilege had been made, but the documents were in the bank's core bundle, that it was likely the documents were intended to be disclosed because they had been mentioned in trial affidavits.

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Notwithstanding that the three documents had been subject of affidavits claiming privilege at the hearing of an application before his Honour Justice Mackenzie on 12 April 2002, I cannot conclude that it was such an obvious mistake when it came to the plaintiffs' solicitors reading the bank's core bundle that there is a basis for considering whether to grant injunctive relief. Even if the defendants got to that stage, the use which has been made by the plaintiffs of the documents is a discretionary matter which weighs against the grant of an injunction at this stage.

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The defendants' application filed on 23 July 2002 is dismissed.

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HER HONOUR: In relation to costs Mr Cohen, who appears for the plaintiffs sought that there be no order as to costs in respect of the plaintiffs' application on the basis that the application, as originally filed, related to two categories of documents.

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The first were those documents referred to in exhibit BTC1 to the affidavit of Mr Cohen filed on 26 June 2002. Those documents were subsequently disclosed by the defendants after the application had commenced but before it had come on for hearing. The reasons which I have given deal with the documents that were described as those referred to in exhibit BTC2 to the affidavit of Mr Cohen filed on 26 June 2002. Mr Wilkins of counsel for the defendants submits that costs should follow the event.

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In view of the history of the application in respect of the documents described in exhibit BTC1 to the affidavit of Mr Cohen filed on 26 June 2002, it is not appropriate that the costs order which I make in respect of the plaintiffs' application benefit the defendants in respect of the disclosure of those documents.

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I therefore consider that an appropriate order to make in

respect of the costs of the application filed on 26 June 2002
and the order which I make is the plaintiffs pay the first and
second defendants' costs of the application filed on 26 June
2002 excluding costs in connection with the disclosure of the
documents referred to in exhibit BTC1 to the affidavit of B T
Cohen filed on 26 June 2002.

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In relation to the cross-application, which was filed on 23
July 2002, it is appropriate that costs should follow the
event. I therefore order that the first and second defendants
pay the plaintiff's costs of the application filed on 23 July
2002 to be assessed.

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