SUPREME COURT OF QUEENSLAND

CITATION:	*Talbot v Boyd Legal (A Firm) & Ors* [2020] QSC 185
PARTIES:	**AMANDA DIANNE TALBOT** (plaintiff) **v** **BOYD LEGAL (A FIRM)** (first defendant) and **ARNOLD BLOCH LEIBLER (A FIRM)** (second defendant) and **BRIAN DAVID BARTLEY** (first third party) and **PAUL WILLIAM GLEESON** (second third party) and **WILLIAM FRANCIS BOYD AS ADMINISTRATOR OF THE ESTATE OF KENNETH TALBOT** (third third party)
FILE NO:	BS 641 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application for the separate determination of questions under r 483 of the *UCPR*
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	19 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 June 2020
JUDGE:	Applegarth J
ORDERS:	**1. The application filed 14 May 2020 is dismissed.** **2. Subject to any submissions as to costs, the plaintiff pay the other parties' costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – SEPARATE DECISION OR DETERMINATION OF QUESTIONS AND CONSOLIDATION OF PROCEEDINGS – SEPARATE DECISION OR DETERMINATION – GENERALLY – where the plaintiff applies for separate determination of two questions, being whether certain documents on a "new will

file" were subject to a valid claim of legal professional privilege, and if not, whether their production could have been compelled by reliance upon certain rules or the inherent jurisdiction of the Court – where the proposed questions concern two of many issues in a complex case – whether the same witness would be required to give contentious evidence at both a separate trial and a later trial of the remaining issues – whether a separate determination of the proposed questions would contribute to a saving of time and cost – whether a separate determination of the proposed questions would be just and convenient

Uniform Civil Procedure Rules 1999 (Qld), r 414, r 483, r 629, r 637

Advance Traders Pty Ltd v McNab Constructions Pty Ltd [2011] QSC 212, cited
AWB Ltd v Cole (2006) 152 FCR 382; [2006] FCA 571, cited
Balabel v Air-India [1988] Ch 317, cited
Bass v Permanent Trustee Co Ltd (1999) 198 CLR 334; [1999] HCA 9, cited
Byrne v People Resourcing (Qld) Pty Ltd & Ors [2014] QSC 39, cited
Carter Holt Harvey Wood Products Australia v Auspine Ltd [2008] VSCA 59, cited
Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd (2005) 225 ALR 266; [2005] FCA 1247, cited
Dalleagles Pty Ltd v Australian Securities Commission (1991) 4 WAR 325, cited
DSE (Holdings) Pty Ltd v Intertan Inc (2003) 135 FCR 151; [2003] FCA 1191, cited
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49; [1999] HCA 67, cited
IOOF Holdings Ltd v Maurice Blackburn Pty Ltd [2016] VSC 311, cited
New South Wales v Betfair Pty Ltd (2009) 180 FCR 543; [2009] FCAFC 160, cited
Re Multiplex Constructions Pty Ltd [1999] 1 Qd R 287, cited
Reading Australia Pty Ltd v Australian Mutual Provident Society (1999) 240 FCR 276; [1999] FCA 718, cited
Sexton v Homer [2013] NSWCA 414, cited
Sydney Airports Corp Ltd v Singapore Airlines Ltd [2005] NSWCA 47, cited

COUNSEL: P J Dunning QC and P Telford for the plaintiff
R P S Jackson QC and A Nicholas for the first defendant
S L Doyle QC and S McCarthy for the second defendant
G D Beacham QC and T Naylor for the second third party

SOLICITORS: Everingham Lawyers for the plaintiff
Hall & Wilcox for the first defendant
K&L Gates for the second defendant

Carter Newell for the second third party

[1] Before he died in June 2010, Mr Ken Talbot considered changing his 2002 will. He gave some instructions to his solicitor and received some advice. However, it appears that he did not give final instructions about his testamentary intentions. No interim will or new will was prepared.

[2] Mr Talbot's widow sues two firms of solicitors. Mr Boyd of the first defendant prepared the 2002 will and took instructions from Mr Talbot about a new will. After Mr Talbot died, Mr Boyd accepted a limited retainer from the plaintiff which included liaising with lawyers appointed to provide her with independent legal advice. The plaintiff engaged the second defendant in August 2010.

[3] The plaintiff alleges that the first defendant and the second defendant were each negligent in their performance of certain retainers.

[4] This complex case bristles with issues. They include the terms of each defendant's retainer, what they were asked to do and what a reasonable solicitor would have done in their position. Among the many issues in the case are disputes about the contents of a file which recorded instructions and advice about an updated will for Mr Talbot, his complex business affairs, who should benefit from his estate and how they might benefit ("the new will file"). In different contexts in her pleadings, the plaintiff disputes that the new will file (or at least certain documents in it) was subject to legal professional privilege. Each defendant pleads that certain documents were subject to legal professional privilege and obligations of confidence.

[5] The plaintiff applies for an order under r 483(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) ("*UCPR*") for the separate determination of two questions. In simple terms, the questions are whether a subset of documents on the new will file were subject to a valid claim of legal professional privilege; and, if not, whether their production could have been compelled by reliance upon certain rules or the inherent jurisdiction of the Court.

[6] The present issue is whether it is just and convenient to order the separate trial of those issues before the trial of the many other questions which arise in the proceeding.

[7] The plaintiff submits that it is, and that:

(a) the issues are largely questions of law and relatively discrete;

(b) they will not give rise to significant contested factual issues or the need to adduce evidence from Mr Boyd about the purpose for which documents were created;

(c) resolution of the issue of whether some or all of the documents in the new will file were confidential and subject to legal professional privilege, such that production of them could have been compelled by the plaintiff, is an important question in the context of the defences and also arises in two of the third party proceedings. The plaintiff goes so far as to submit that these questions underpin "the competence" of the defence of each defendant; and

(d) resolution of the issues prior to trial will contribute to the saving of time and costs by substantially narrowing the issues for trial, and will likely enhance the prospect of a compromise of the plaintiff's claim.

[8] Each defendant opposes the application. In essence, they submit:

(a) the questions lack utility and relate to only two of the many issues that arise in the plaintiff's cases against each defendant;

(b) the separate questions are inappropriate, do not conform with the plaintiff's own pleading and proceed upon an incorrect characterisation of the defences;

(c) the proposed questions do not capture the question of confidentiality, namely whether Mr Talbot's executor was entitled to assert that the contents of the new will file were confidential: the proposed questions are directed only to whether a subset of 21 documents from the file were subject to legal professional privilege;

(d) the separate determination of that question would require witnesses to give evidence, and, in particular, Mr Boyd to give evidence at the separate trial and also at the subsequent trial in a proceeding in which his credit is likely to be an issue;

(e) the plaintiff has not demonstrated that the prior and separate determination of the proposed questions would likely result in a material saving in costs and time;

(f) instead, a separate trial is likely to lead to increased costs, delay and complexity in an already complex proceeding; and

(g) the resolution of issues of legal professional privilege is unlikely to resolve more important factual disputes between the parties on issues of liability and damages;

[9] In short, the defendants submit that the proposed separate determination of the questions lacks utility. It is likely to prove to be an expensive exercise that distracts from the expeditious resolution of the real issues in dispute.

[10] The plaintiff accepts that, if contrary to her expectation and submissions, Mr Boyd would be required to give evidence about the contents of the new will file and the purpose for which certain documents were created, then it would not be appropriate to grant the application.

[11] For the reasons which follow, I have concluded that Mr Boyd is likely to be a witness whose evidence is relevant to the resolution of the issue of legal professional privilege and that his evidence in relation to that issue and his evidence at a subsequent trial is likely to be contentious. That is sufficient to dispose of the application. However, even if it was possible to resolve the proposed questions without receiving evidence from Mr Boyd, the plaintiff has not demonstrated that it would be just and convenient to do so in a separate trial. I conclude that ordering the separate determination of the proposed questions is not just and convenient, but is likely to complicate and delay the resolution of the real issues in dispute.

Background

[12] Mr Ken Talbot died in a plane crash on 19 June 2010. He was survived by his wife (Amanda), two children (Liam and Courtney) from a previous marriage and two younger children (Alexandra and Claudia). These five family members were the beneficiaries of a testamentary trust created by his 2002 will.

[13] Mr Talbot's estate was large and complex. His great wealth was the subject of a complex arrangement of companies and trusts, and included properties and investments in different parts of the world.

[14] A will had been executed by Mr Talbot on 29 November 2002 with the assistance of his long-term solicitor, Mr Boyd. The 2002 will appointed a Texas-based investment banker, Mr Bret, as the sole executor and trustee of Mr Talbot's will. It also appointed two "International Friends" as well as the managing director of a major accounting firm in Brisbane and the managing partner of a major law firm in Brisbane as advisers. His sole executor was obliged to consult, and act in accordance with instructions from, the International Friends.

[15] The 2002 will made gifts to specific beneficiaries and distributed the residue of Mr Talbot's estate with:

(a) 70 per cent to be held on the terms of the Talbot Estate Trust established by the will which allocated his five beneficiaries interests proportionately in the expectation that his wife, as the mother of Alexandra and Claudia, would make provision for them in her will as well as for her family. That was why he allocated a combined 52 per cent share in that trust to his wife, Alexandra and Claudia (18 per cent, 17 per cent and 17 per cent respectively) and 24 per cent each to Liam and Courtney; and

(b) the remaining 30 per cent of the residue of his estate was to be held by the Talbot Foundation which he instructed his trustee and executor to establish as a permanent foundation, taking into account certain instructions.

[16] After 2002 Mr Talbot's circumstances changed and continued to change as a result of the sale or acquisition of different properties and investments. This included the sale in about April 2008 of his interest in Macarthur Coal for approximately $860 million. The Talbot Family Foundation was established in about June 2008.

[17] In 2006 and 2007, Mr Boyd had reminded Mr Talbot in writing on three occasions that he needed to do something about getting his will updated. On 23 November 2007, Mr Boyd, on behalf of the first defendant, was retained by Mr Talbot and given instructions about a new will to replace the 2002 will. According to Mr Boyd,
Mr Talbot instructed him that the portion of the estate to be held by the Talbot Estate Trust was to be split:

(a) 56 per cent to the plaintiff, leaving her to provide for Alexandra and Claudia;

(b) 22 per cent to Liam; and

(c) 22 per cent to Courtney.

[18] Mr Boyd says that he orally advised Mr Talbot that he would have to make specific provision for Alexandra and Claudia as he had done in the earlier will, and that Mr Talbot said that if that was the case then he would probably look at reverting to

something along the lines of his current will in order to treat the children fairly. Mr Boyd pleads that at no time prior to his death did Mr Talbot finalise his instructions about those matters and, therefore, there were no finalised testamentary instructions as to the proportions in which Mr Talbot was to leave the residue forming the Talbot Estate Trust. In addition, Mr Boyd pleads that on 5 May 2010 Mr Talbot told him that he wanted to change his instructions for his will and that he would let Mr Boyd know when he had made his mind up. Mr Boyd pleads that he inquired as to whether Mr Talbot was thinking about changes to the percentages or at an individual asset level, and Mr Talbot replied that he was re-thinking the percentages in particular.

[19] Between accepting the retainer to prepare a new will in November 2007 and Mr Talbot's death, Mr Boyd sought and obtained instructions and documents about the numerous corporate entities and trusts which constituted Mr Talbot's business affairs and which held property. In August 2008 Mr Boyd sought and obtained instructions to brief counsel to advise in relation to Mr Talbot's succession planning and to assist with the preparation of a new will. Counsel sought further information and instructions in relation to the corporate structures in late 2008. On 10 December 2008 Mr Boyd advised Mr Talbot that counsel and Mr Boyd agreed that Mr Boyd should prepare a broad form of will that encompassed Mr Talbot's current instructions so that those instructions were documented and signed while they worked through the other tasks. According to Mr Boyd, he also advised Mr Talbot in December 2008 or January 2009 that counsel had confirmed that there was a need to make specific provision for Alexandra and Claudia as opposed to the provision for them forming part of a provision to the plaintiff. Mr Boyd says that he conveyed other advice from counsel about the appointment of executors and trustees, and told Mr Talbot that it was necessary to review the percentage distribution of the beneficiaries and allocation of real estate, and that an interim will could not be drafted without those instructions.

[20] On or about 1 June 2009, counsel sent Mr Boyd a draft of a new will which in various places identified matters about which further instructions from Mr Talbot were required.

[21] Neither a new will nor an interim will was executed before Mr Talbot's death on 19 June 2010.

[22] After Mr Talbot's death, Mr Bret was appointed sole executor and trustee of Mr Talbot's estate. Mr Bret was replaced after problems arose between him and the beneficiaries. On 29 June 2012, Mr Boyd was appointed as the sole administrator of the estate.

The plaintiff's case against the first defendant

[23] The plaintiff alleges in her pleading four retainers of Mr Boyd:

(a) a retainer in 2002 by Mr Talbot for the purposes of preparing the 2002 will;

(b) a retainer by Mr Talbot to provide continuing advice in respect of the 2002 will;

(c) a retainer by Mr Talbot by on or about 23 November 2007 to prepare a new will; and

(d) a retainer by the plaintiff from the date of Mr Talbot's death until June 2012 in relation to issues that arose as a result of Mr Talbot's death.

[24] It is unnecessary for present purposes to outline the contentious issues arising from the pleadings about whether the first defendant owed a duty of care to the plaintiff under each of the four alleged retainers, whether or not it breached any duty of care and the diverse causal chains which the plaintiff alleges, and which the first defendant disputes. The plaintiff alleges that she suffered substantial economic loss as a result of different breaches of duty.

[25] For present purposes, it is sufficient to focus on the final retainer which relates to events after Mr Talbot's death. The plaintiff pleads that after Mr Talbot's death, she asked the first defendant (by Mr Boyd) to act for her in relation to issues that arose as a result of Mr Talbot's death, and that the express terms of that retainer are contained in a document dated 31 August 2010.

[26] According to the first defendant's pleading, Mr Boyd told the plaintiff in July 2010 that:

(a) he and Mr Talbot had been in the process of updating Mr Talbot's will but had not finalised it before Mr Talbot's death;

(b) there were constraints on who Mr Boyd could advise and on what subject matter because he was the solicitor who was involved in the drafting of the will, and that a requirement may arise for her to obtain independent advice;

(c) he had duties of confidentiality as to Mr Talbot's instructions for the will and that those duties were now owed to the executor.

[27] On 31 July 2010 the plaintiff told Mr Boyd that it had been suggested to her that she meet with a lawyer in Melbourne. She requested him to travel with her to Melbourne for that purpose. Early the next morning Mr Boyd sent an email to her in which he stated that he would be free to accompany her to Melbourne to meet with an independent lawyer, and continued:

> "One thing I should mention before committing to this is the scope of my constraints in participating in this meeting. There are two areas where I am presently subject to obligations of confidentiality. The first is Ken's will instructions and the second is the actual make-up of his estate (pending Paul Bret reporting to the beneficiaries) … I thought I should raise this now."

The plaintiff submits that the assertion of confidentiality in this communication is inconsistent with the later assertion of legal professional privilege. I disagree. The reference to confidentiality in that context is entirely consistent with legal professional privilege residing in certain confidential communications.

[28] The first defendant says that the retainer which commenced shortly after Mr Talbot's death was on a limited basis pro bono for the provision of legal services as requested from time to time in relation to the estate of Mr Talbot, including liaising with lawyers appointed to provide the plaintiff with independent legal advice, facilitating the obtaining of such advice and liaising with other advisers such as financial and taxation advisers.

[29] According to the first defendant, its retainer expressly provided that it was:

(a) subject to existing obligations of confidentiality and its possession of legally privileged documents and information ("the privileged matters") as a result of dealings with Mr Talbot and Talbot Group companies over approximately 15 years; and

(b) not obliged to disclose any privileged matters to the plaintiff and that the first defendant would not advise the plaintiff about any privileged matters.

It says that the plaintiff agreed for the first defendant to act for her on the basis that Mr Boyd could not, and would not, disclose any privileged matters to her. It pleads that the first defendant could not inform the plaintiff of the matters alleged because to do so would purport to waive legal professional privilege which was not his to waive, or breach obligations of confidence owed to Mr Talbot's personal representative.

[30] According to the plaintiff, the terms of the retainer which was entered into with Mr Boyd was for him to act as solicitor generally for her in relation to issues that arose as a result of Mr Talbot's death. She pleads that this retainer impliedly obliged the first defendant, among other things, to:

(a) inform her of, and provide advice in relation to, any information which Mr Boyd knew which may be relevant to her entitlement as a beneficiary under the 2002 will or the proposed new will, in the way that a reasonably competent solicitor would;

(b) inform her of any conflict which Mr Boyd may have had which may prevent him from acting for her or providing information of which he was aware about her entitlements; and

(c) not allow his personal interest in not being pursued for negligence, or even arguable negligence, over the 2002 will and the proposed new will to conflict with those duties.

[31] The plaintiff alleges that the first defendant acted in breach of the duty of care which it owed and its fiduciary duties by not:

(a) informing her of certain matters;

(b) providing her with a copy of the new will file in response to her alleged requests; or

(c) referring her for independent legal advice.

[32] The plaintiff also alleges that the first defendant failed to provide to the plaintiff a copy of the new will file in response to requests for it.

[33] The plaintiff's pleaded case is that had it not been for the first defendant's breaches of duty, she would not have retained the first defendant, would have sought and obtained independent advice and would have acted on that advice. One aspect of this pleaded causal chain is that she would not have agreed to Mr Boyd's appointment as an administrator to replace Mr Bret and would have actively opposed his appointment. She says that as a result, she suffered a variety of losses, including the opportunity to commence certain proceedings as a disappointed

beneficiary and loss and damage which are alleged to have been occasioned by Mr Boyd's administration of the estate. It is unnecessary to address for present purposes the first defendant's responses to the numerous alleged breaches of duty and the various losses which are alleged by the plaintiff to have been caused by them.

[34] As earlier noted in connection with the first defendant's case as to its limited retainer, including that it could not disclose any privileged matters to the plaintiff, the first defendant pleads that it could not inform the plaintiff of certain matters pleaded by her because to do so would purport to waive legal professional privilege, which was not Mr Boyd's privilege to waive, or breach obligations of confidence owed to Mr Talbot's personal representative, Mr Bret.

[35] In reply, the plaintiff pleads that:

(a) the preparation by a solicitor of a will, and effecting its execution, is not the provision of legal advice;

(b) as a consequence, *prima facie*, a solicitor's will file, its contents and the will, if executed, will not be the subject of legal professional privilege;

(c) the only exception would be if confidential legal advice had been given about some aspect of the proposed will, or the will once executed;

(d) consequently, a solicitor's will file will never be the subject of a valid claim for legal professional privilege in respect of all of its contents; and

(e) Mr Boyd knew at all times that there was in fact no confidential legal advice in the new will file and that no part of it was the subject of a valid claim of legal professional privilege.

[36] To be clear, I am not presently concerned with the legal authorities concerning the extent to which there is an express or implied request for advice whenever a client instructs a lawyer to perform specialist legal services involving the exercise of professional skill, including succession planning and the preparation of a will.[1] It is sufficient to observe that the issue is not resolved by categoric statements that a will file is never or is always the subject of legal professional privilege. Instead, whether or not documents within a will file are the subject of legal professional privilege depends upon questions of fact about the relevant retainer and the dominant purpose for which the document was created.

The case against the second defendant

[37] The plaintiff's case against the second defendant is that it was retained from about August 2010 to about November 2015 to act as her solicitor and to give general advice in relation to the estate, to assist her to understand the 2002 will and the structure of the Talbot Group, to advise her about her rights and entitlements under the 2002 will, to advise her about potential claims under the *Succession Act* 1981 (Qld) for adequate provision from the estate in respect of herself, Alexandra and Claudia, and to advise about numerous other matters. Some of those matters are pleaded to be Mrs Talbot's wish to obtain whatever access could be obtained to the new will file and assertions made at various times by the solicitors for the executor,

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1 See in this regard *New South Wales v Betfair Pty Ltd* (2009) 180 FCR 543 at 548 [16] – 549 [20].

Mr Bret, and by Mr Boyd about the existence of legal professional privilege in respect of the new will file.

[38] The second defendant denies that it was retained in all the respects the plaintiff alleges. It may be recalled that the 2002 will, after making gifts to specific beneficiaries, provided for 30 per cent of the estate to be held by a foundation to be established by the executor as a vehicle for charitable purposes. Also, after that will was made and before Mr Talbot's death, the Talbot family established a philanthropic vehicle called the Talbot Family Foundation. According to the second defendant, the plaintiff sought its assistance to, among other things, attempt to secure the charitable gift for the Talbot Family Foundation rather than a foundation to be established and controlled by Mr Bret, the then executor.

[39] The second defendant acknowledges that there were later specific retainers including instructions to advise in relation to the removal of Mr Bret as executor, certain taxation matters, potential claims for family provision and liaising with certain parties about a variety of matters. The second defendant admits that in August 2010 it was retained to review and understand the terms of the 2002 will, to assist the plaintiff to understand those terms and to provide advice regarding the actions she should take immediately in relation to her rights and entitlements under the 2002 will.

[40] According to the plaintiff, by June 2011 the second defendant knew that it had instructions to try and obtain a copy of any file Mr Boyd had in relation to the new will, and knew that there was a proper basis to investigate whether the engagement of Mr Boyd to prepare a new will had in fact produced a later will for Mr Talbot, even in reliance on s 18 of the *Succession Act* 1981 (Qld) (which relates to informal wills). The plaintiff pleads that as a consequence the second defendant was obliged to take all of the steps that a reasonably competent solicitor would take to obtain access to the contents of any file Mr Boyd had in relation to the new will.

[41] The plaintiff also pleads that by June 2011, the second defendant knew that she wished to see what were the contents of any file Mr Boyd had in relation to the new will and that it was relevant to the proper execution of the second defendant's retainer to access and consider the contents of that file.

[42] The plaintiff also pleads that by this time the second defendant knew, or ought to have known, that the plaintiff:

(a) had an entitlement to issue a subpoena requiring a person such as Mr Boyd or Mr Bret to bring into the Registry a will or other testamentary paper pursuant to r 637(i)(a) of the *UCPR*;

(b) as a beneficiary under the 2002 will had the right to access documents concerning the validity of the 2002 will by reason of the obligation of a party in "a contested proceeding concerning a will to file an affidavit of scripts"[2], or might subpoena such documents pursuant to r 414 of the *UCPR*.

[43] The second defendant denies that it was instructed as the plaintiff alleges, or that it was relevant to its retainer to obtain and generally consider Mr Boyd's file. On the

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2 Which is defined by r 629 to include documentary instructions for a will made by or at the request of the testator.

second defendant's case, its relevant retainer was limited and its instructions were to seek to ascertain whether Mr Talbot had discussed or considered leaving a charitable bequest to the Talbot Family Foundation. This information was to be sought for the purposes of supporting representations to the administrator that he should make the charitable bequest under the will to the Talbot Family Foundation, rather than a new foundation established and controlled by Mr Bret.

[44] The second defendant denies that the plaintiff instructed it that she wished to see the contents of any file Mr Boyd had in relation to the new will. Instead, it says that she gave oral instructions on or about 31 May 2011 that she wanted the charitable bequest under the 2002 will to be made to the Talbot Family Foundation and not to a foundation to be established and controlled by Mr Bret, and that Mr Boyd would know whether Mr Talbot had discussed making any such change in the will he intended to make. The second defendant says that it was instructed to write to Mr Bret's solicitors to inquire whether Mr Talbot had had any discussions with Mr Boyd about changing his will to make the charitable bequest to the Talbot Family Foundation, and whether the executor's solicitors had sought access to Mr Boyd's file and made inquiries of Mr Boyd on the issue. The second defendant wrote to the executor's solicitors on 2 June 2011. The executor claimed privilege and confidentiality over Mr Boyd's file in relation to the communications concerning the Talbot Family Foundation or any other matter.

[45] As to the plaintiff's specific allegation that in June 2011 the second defendant knew that it was relevant to the proper execution of its retainer to access the contents of Mr Boyd's file, the second defendant says that it was relevant to the performance of its retainer to make reasonable inquiries of Mr Boyd and Mr Bret as to whether Mr Talbot had discussed making any change to his will to make the charitable bequest to the Talbot Family Foundation, and to use that information to support representations to the executor that he ought to direct the charitable bequest to the Talbot Family Foundation rather than to a new foundation.

[46] It also pleads that Mr Boyd's file was:

> "(A) legally professionally privileged in relation to its contents which comprised:
>
> (1) documents recording or containing Mr Talbot's instructions to Mr Boyd for the purpose of Mr Boyd providing legal advice or services to Mr Talbot;
>
> (2) documents recording or containing or relating to the provision of legal advice or services by Mr Boyd or Mr Petersen of Counsel to Mr Talbot; and
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> (3) documents otherwise brought into existence for the dominant purpose of Mr Talbot seeking, or Mr Boyd or Mr Petersen of Counsel providing, legal advice or services to Mr Talbot;
>
> (B) confidential to Mr Talbot's personal representative."

[47] As noted, the executor claimed privilege and confidentiality over Mr Boyd's file. The second defendant says that it made all reasonable inquiries of Mr Boyd and Mr

Bret in relation to the plaintiff's interest in Mr Boyd's file and in accordance with her instructions.

[48] The second defendant denies that it was instructed to investigate whether a later will of Mr Talbot had been prepared. Instead, it was instructed to seek Mr Boyd's file for the reasons earlier stated in connection with the charitable bequest and to make representations to Mr Bret about that matter. It also denies that it was instructed to try and obtain a copy of any file Mr Boyd had in relation to the "New Will" or any later will of Mr Talbot.

[49] As to the plaintiff's allegations in paragraph 63 of her pleading that the second defendant knew, or ought to have known, that she had an entitlement to issue a subpoena to bring into the registry a will or other testamentary paper, the first defendant says the provisions of the *UCPR* to which the plaintiff points were not relevant and did not apply to the new will file because there were no "contested proceedings" as defined in r 629. It also pleads that r 637 was not relevant and did not apply because Mr Boyd's file did not contain a will or other testamentary paper, that its instructions were that Mr Talbot died without changing his will, that it was not instructed to investigate whether he may have made a later will or other testamentary paper, and that it had no reason to inquire whether Mr Boyd's file contained a later will or other testamentary paper of Mr Talbot.

[50] In further response to the plaintiff's allegations that the second defendant knew that she had an entitlement to subpoena certain documents, the second defendant says that it had no reason to advise her that there was a basis for an application to the Court under r 637 and that, when it wrote in mid-June 2011 to Mr Boyd and inquired whether Mr Talbot had any discussions or correspondence with him in relation to amending or otherwise updating the 2002 will, Mr Bret, as Mr Talbot's personal representative, claimed privilege attaching to any confidential communications between Mr Talbot and Mr Boyd in relation to the Talbot Family Foundation or any other matter. The second defendant goes on to plead that Mr Boyd's file was the subject of legal professional privilege and was confidential, was not something that Mr Bret was required to make available to the plaintiff and that the plaintiff did not have a right of access to the new will file by subpoena.

[51] In reply, the plaintiff alleges that:

(a) the entire content of the new will file was not privileged, in that privilege would only attach to communications passing between Mr Talbot and Mr Boyd to obtain confidential legal advice; and

(b) a reasonable solicitor in the position of the second defendant, having knowledge of the new will file, but having been denied access to it would have been put on alert as to the bona fides of the claim for privilege, investigated the claim to privilege and made a demand for script in specific reliance upon Chapter 15, Parts 8 and 9 of the *UCPR*.

[52] The plaintiff goes on to plead that in the event the new will file was still not produced, a reasonable solicitor in the position of the second defendant would have caused a subpoena to issue pursuant to r 637(1)(a) or approached the Court for appropriate relief, including directions pursuant to r 367 of the *UCPR*. She pleads

that such compulsive steps would have ensured that confidentiality would not have been a basis for the refusal of production.

[53] In its submissions on the present application, the second defendant contests these assertions about the availability of compulsory processes under the *UCPR*. It submits that the procedures under r 637(1)(a) concern a subpoena to bring into the Registry a will or other testamentary paper. The availability of that procedure in the circumstances of this case raises numerous factual questions which make inappropriate the hypothetical question of whether the documents "could" have been obtained by those means. This includes the absence of instructions to investigate whether the file contained such a document, that r 637(3) requires such an application to be supported by an affidavit showing that the will or testamentary paper is believed to be in the possession or control of the person to whom the subpoena is directed and the grounds for that belief and, amongst other things, the fact that the file contained no document which would have been produced on a subpoena under r 637. As to reliance upon Chapter 15, Part 8 of the *UCPR*, the second defendant reiterates that probate had been granted and that there was no "contested proceeding"[3] on foot to which an affidavit of scripts would be relevant.

[54] It is unnecessary to resolve those issues at this point. They relate to the second question which the plaintiff proposes should be the subject of a separate determination. It is sufficient to observe that the second defendant's position on the application is that there is no utility in deciding what *could* be done by engaging the identified provisions without identifying the factual basis to invoke such a process. For example, it is not agreed, and it should not be assumed, that there were "contested proceedings" on foot to which an affidavit of scripts could be relevant.

[55] For other reasons, the second defendant submits that there is no utility in deciding what *could* be done by engaging the processes referred to in the plaintiff's pleading and in the second question about which she seeks a separate determination. The relevant issue on the pleadings is, assuming the contested retainer, instructions and state of knowledge are proven, what a reasonably competent solicitor in the second defendant's position *would* have done in the circumstances.

[56] On that aspect of the plaintiff's claim, the second defendant says that, in accordance with its instructions, it inquired about whether Mr Talbot had any discussions or correspondence with Mr Boyd about amending or otherwise updating the 2002 will and, in particular, about whether the balance of Mr Talbot's estate for charitable purposes would be left to the Talbot Family Foundation. In response to this inquiry, the executor claimed and refused to waive legal professional privilege in relation to the Talbot Family Foundation or any other matter. According to the second defendant, the documents in question were likely to be privileged. The second defendant submits that the exercise of care and skill did not require it to do any more than it did to obtain access to any documents held by Mr Boyd, that the file was in fact privileged, and, in any event, confidential to Mr Talbot's personal representative. In respect of the present application, the second defendant says that what a solicitor *could* do is a hypothetical question since the case concerns what a reasonable solicitor *would* have done in the circumstances known to it.

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[3] Defined by r 629 to mean a claim in which the court is asked to pronounce for or against the validity of a will, or a claim brought in opposition to an application for a grant.

Other issues in the proceedings

[57] Necessarily, the foregoing outline of the claims made by the plaintiff against the first defendant and against the second defendant concentrates on those parts of the pleadings which are relevant to the separate questions for determination. There are numerous other contested issues on the pleadings. The Court Book for the purpose of this application consists of about 250 pages of pleadings, not including particulars. As previewed, they concern various alleged retainers of the first defendant, contentions about the retainer and instructions given to the second defendant, events in relation to the making of the 2002 will, the appointment of Mr Bret as executor and the appointment of Mr Boyd as administrator in his place, whether the plaintiff had claims as a disappointed beneficiary against the first defendant in respect of Mr Boyd's conduct as a solicitor for Mr Talbot, whether Mr Boyd or the second defendant knew that she had any such claims, limitation periods, questions of causation and complex issues concerning lost opportunity and the conduct of the administration by Mr Boyd. The foregoing is not intended to be an exhaustive statement of the many issues in this complex case. Instead, it serves to highlight that the contentious issue of legal professional privilege in respect of all or part of the contents of the new will file, and whether those contents were the subject of obligations of confidentiality, forms a relatively small part of a complex case.

The proposed separate questions

[58] The plaintiff applies pursuant to r 483(1) of the *UCPR* for an order that the following questions be subject to the decision of the Court separately from other questions arising in the proceeding and before the trial of the proceeding:

> "(a) At any time prior to June 2018 were any of the documents identified in the table exhibited to the Affidavit of Ms Julia Maree Wallace filed in support of this Application, subject to a valid claim of legal professional privilege, stating which were and which were not?
>
> (b) To the extent the answer to the question in subparagraph (a) is "no" in respect of each such document, could production of that document have been compelled by reliance upon:
> (i) *UCPR* 637(1)(a)?
> (ii) *UCPR* Chapter 15, Part 8?
> (iii) *UCPR* 414?
> (iv) The inherent jurisdiction of the Court?"

[59] I note that proposed question (a) concerns whether certain documents identified in a table were subject to a valid claim of legal professional privilege, whereas some of the pleaded issues concern whether the "new will file" was the subject of legal professional privilege. Also, as matters transpired, in 2018 Mr Boyd in his capacity as administrator responded to correspondence from the plaintiff's solicitors in connection with a different proceeding concerning the administration of Mr Talbot's estate. The plaintiff's solicitors sought information including certain notes kept by Mr Boyd. Mr Boyd's solicitors contested allegations made concerning his conduct as administrator. The plaintiff, as beneficiary, sought copies of all file notes and contemporaneous documents produced or held by Mr Boyd in relation to the

making of the new will. On 3 September 2018 Mr Boyd said that the matters in respect of which information was sought had been known for many years by the plaintiff and that the file was available for review at any time and could be copied by the plaintiff's solicitors. Mr Boyd asserted that there was nothing in the file that remotely suggested that Mr Talbot had instructed him about his final thoughts with respect to the terms of a new will, much less that Mr Boyd breached any duty he owed to any person. As a result of the disclosure of the contents of the "new will file", all parties have copies of the documents on it.

[60] While the present application relates to only some of those documents, the contents and composition of the whole of the "new will file" may be important in ascertaining the context in which particular documents, about which the present application seeks a determination of legal professional privilege, arose.

Relevant principles for ordering determination of a separate question

[61] Generally, all issues of fact and law in a matter should be tried at once. However, r 483(1) of the *UCPR* provides that:

> "The court may make an order for the decision by the court of a question separately from another question, whether before, at, or after the trial or continuation of the trial of the proceeding."

[62] The principles to be applied in deciding whether to grant an application for determination of a separate question have been canvassed in a number of authorities.[4] These decisions affirm the utility of orders for the determination of a separate question in appropriate cases. The appropriateness of a determination of a separate question depends on facts being agreed or determined at a preliminary trial, whether the question depends upon an assumption about the happening of a future event, whether answering what may be described as hypothetical questions has utility, and where the interests of justice lie.[5]

[63] The Court has a wide discretion but ultimately must exercise it having regard to what is just and convenient.[6] Granting an order for determination of a separate question can avoid the necessity for a lengthy trial, or reduce a trial's length. However, care must be taken in ensuring that having separate trials of different issues is not productive of delay, additional expense, appeals and uncertainty.[7] If the effect would be to prolong rather than shorten the litigation, this will be a factor tending against the determination of a separate question.[8]

[64] As Branson J observed in *Reading Australia Pty Ltd v Australian Mutual Provident Society*,[9] judicial determination of a preliminary question must also be "a conclusive or final decision based on concrete and established or agreed facts for the purpose of quelling a controversy between the parties".[10] Failing this, the question will be

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4 *Reading Australia Pty Ltd v Australian Mutual Provident Society* (1999) 240 FCR 276 ("*Reading*") at 279-280; *Advance Traders Pty Ltd v McNab Constructions Pty Ltd* [2011] QSC 212; *Byrne v People Resourcing (Qld) Pty Ltd & Ors* ("*Byrne*") [2014] QSC 39.

5 *Byrne* at [6].

6 *Re Multiplex Constructions Pty Ltd* [1999] 1 Qd R 287, 288; *Reading* at 280 [9].

7 *Byrne* at [3], citing *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 332 [436].

8 *Reading* at 280 [8].

9 (1999) 240 FCR 276.

10 At [8].

"purely hypothetical" and "at best… do no more than declare that the law dictates a particular result when certain facts in the material or pleadings are established."[11] Answering such a question may be beyond the limits of judicial power.[12] Further, if the relevant facts upon which the separate question is to be based are not appropriately identified and the existence of some of them is in dispute, the answers are not likely to be of use to the parties and may even mislead them as to their rights.[13]

[65] An order granting determination of a separate question may be just and convenient where the separate determination would contribute both time and cost savings by substantially narrowing the issues in dispute at trial, or where the separate determination could lead to disposal of the action or settlement of the litigation.[14] An order may also be appropriate to avoid the necessity for a lengthy trial or at least to reduce the expected length of a trial.[15]

[66] Determination of a separate question at a preliminary trial is unlikely to be just and convenient where there is a significant overlap of factual and legal issues at both stages of the hearing. This is especially so if the same witnesses will need to be called at both hearings of the proceedings, or if the Court is asked to form a view as to the credibility of such witnesses.[16]

Are the proposed questions largely questions of law which are unlikely to require any significant evidence to be adduced?

The first question

[67] The plaintiff submits that the issues in respect of which it seeks a separate determination are largely questions of law and are relatively discrete. The plaintiff submits that there is no risk that proceeding in accordance with r 483 will give rise to significant contested factual issues both at the time of the hearing of the preliminary questions and at the time of trial. She also submits that there is no risk that in so proceeding there will be a significant overlap between the evidence adduced on the hearing of the separate questions and at trial. In particular, there is said to be no risk that the Court may be required to form a view as to the credibility of witnesses who may give evidence at both stages of the hearing of the proceeding.

[68] In March, well before the application was filed, the solicitors for the second defendant advised the plaintiff's solicitors that the proposed questions were not apt for separate determination. One of the reasons was that the purpose for which the documents were created can be established, not only from the face of the documents, but also from what was described as the "subjective evidence from the creator of the documents". The plaintiff submits that this proposition is wrong as a matter of law and that the second defendant misconceived that Mr Boyd would need to be cross-examined at the hearing of the separate question. On the hearing of the application before me, the plaintiff submitted that no part of her application

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11 *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 ("*Bass*") at 357 [49].
12 *Bass* at 359 [56].
13 *Bass* at 357 [49].
14 *Reading* at 279 [8].
15 *Byrne* at [3].
16 *Reading* at 280 [8].

contemplated the need for Mr Boyd to be cross-examined at the hearing of the separate questions.

[69] Legal professional privilege attaches to confidential communications made for the dominant purpose of obtaining or giving legal advice or the provision of legal services including representation in court proceedings.[17]

[70] Legal professional privilege does not attach to documents recording transactions, nor draft documents or other communications unless they expressly or by way of reasonable inference reveal the substance of the legal advice given.[18]

[71] A broad approach has been adopted in determining whether a communication is made for the purpose of obtaining or giving legal advice. In *Balabel v Air-India*,[19] Taylor LJ (with whom Parker LJ and Lord Donaldson MR agreed) said:

> "Those purposes have to be construed broadly. … In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may well be required or appropriate on matters great or small at various stages. There will be a continuum of communication and meetings between the solicitor and client … Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. … Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the circumstances."

[72] That approach has been followed in Australia.[20] In *Dalleagles Pty Ltd v Australian Securities Commission*,[21] Andersen J stated:

> "… whenever a lay client gives instructions to a legal practitioner to perform specialist legal services involving the exercise of professional skill, there is imposed on the solicitor a duty to give any advice reasonably necessary to protect the client's interests in the transaction whether expressly requested or not … It is not a large step from that position to say that whenever a client gives instructions to his solicitor there is assumed to be a request for advice. In my opinion, discourse between solicitor and client with reference to the transactions covered by those instructions, that is, professional discourse in a professional capacity, should be regarded as prima facie for the purpose of giving and receiving advice. This would apply to any communication that is on its face a communication of a professional nature from the solicitor to the client or his agent touching the subject matter of the solicitor's engagement and any communication from the client to the solicitor

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17 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 64 [35], 73 [61].

18 *AWB Ltd v Cole* (2006) 152 FCR 382 at 417 [131] – [133].

19 [1988] Ch 317 at 330.

20 *AWB Ltd v Cole* (2006) 152 FCR 382 at 406 [86] and 410 [100]; *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 135 FCR 151 ("*DSE (Holdings)"*) at 163-164 [38], 173 [71].

21 (1991) 4 WAR 325 at 332-333.

> in connection with that engagement. Only if the rule is applied in that way can the policy of it be carried out and its object practically fulfilled."

[73] It is apparent that Mr Boyd was not engaged to prepare a simple will. He sought and received instructions to brief counsel in relation to Mr Talbot's "succession planning and to assist with the preparation of a new will or wills". It seems reasonably apparent that the retainer was one which required the giving of advice, including advice from counsel and advice about property that was located in France, Italy and China. It was not a matter of acting on instructions to make a simple will in circumstances in which one would normally draw the inference of implicit advice that the draft will produced in accordance with those instructions was effective to implement the client's simple instructions.

[74] Justice Allsop observed in *DSE (Holdings)* that "the obligation of the lawyer to advise, once retained, is 'pervasive'". His Honour continued:

> "It would be rare that one could, with any degree of confidence, say that a communication between client (or agent) and lawyer, in the circumstances of a retainer requiring legal advice and the directing of the client by a legal adviser, was not connected with the provision or requesting of legal advice."[22]

[75] The essential issue is whether a document was created for the dominant purpose of obtaining or giving legal advice.

[76] The plaintiff's submissions accept that a party asserting legal professional privilege may establish its claim "whether by evidence as to the circumstances in which the documents were brought into existence, reference to the nature of the documents, or by argument". The authority for this proposition is *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd*.[23]

[77] Based on this accepted principle, the first defendant submits that the first proposed question, which is focused on the issue of legal professional privilege, requires careful consideration of the purpose for which the documents were created. That is said to raise complex questions of fact and law which, presumably, would require evidence from Mr Boyd in their resolution.

[78] Similarly, the second defendant submits that Mr Boyd's evidence as to what he did and the purpose for which the documents were created would be admissible and relevant.

[79] The plaintiff submits that whether or not a document was created for the dominant purpose of obtaining or giving legal advice is to be determined objectively. This submission is clearly correct and accords with the observations of Kenny J in *Pratt Holdings* which have been followed in later authorities. However, the fact that the dominant purpose is to be determined objectively does not render evidence of the intention of the document's maker irrelevant. There is a difference between saying

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22 *DSE (Holdings)* at 168 [52].

23 (2005) 225 ALR 266 at 278 [30].

that a purpose is to be determined objectively and saying that the evidence of the intention of the document's maker is irrelevant.

[80] An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.[24] Ordinarily, the relevant purpose will be that of the author of the document in question.[25]

[81] The plaintiff relies upon the decision of Young J in *AWB Ltd v Cole*[26] as establishing that the stance taken by the second defendant's solicitors in their letter of 9 March 2020 is "wrong as a matter of law". I do not agree. Far from stating that evidence of intention from the maker of a document is not relevant or admissible in determining the issue of privilege, Young J confirmed that it was. His Honour stated:

> "In *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd*, Kenny J observed at [30], correctly in my view, that the dominant purpose must be determined objectively, **having regard to the evidence, the nature of the document and the parties' submissions**. Kenny J added that the **evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive of that purpose** … [citations omitted]. As these cases make clear, it may be necessary to examine the evidence **concerning the purpose of other persons involved** in the hierarchy of decision-making or consultation that lead to the creation of the document and its subsequent communication."[27] (emphasis added)

[82] This approach is consistent with other cases including the judgment of Spigelman CJ (with whom the other members of the Court of Appeal agreed) in *Sydney Airports Corp Ltd v Singapore Airlines Ltd*.[28] It accepted that while the test of what is a "dominant purpose" is objective, "the subjective intention of the person responsible for the document coming into existence was entitled to weight". Judgments of other Australian courts are to similar effect.[29]

[83] In summary, I conclude that the person who made or procured the document can give evidence as to their intended purpose in doing so. In this case, Mr Boyd can give evidence about his purpose in making certain communications with Mr Talbot and in seeking instructions and information from him. The documents on the file would appear to have been predominantly created or procured by Mr Boyd. His evidence as to what he did and the purposes for which the documents were created would be admissible and relevant. In a case in which the application of legal

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24 *AWB Ltd v Cole* (2006) 152 FCR 382 at 411 [107].
25 *AWB Ltd v Cole* (2006) 152 FCR 382 at 411 [108].
26 (2006) 152 FCR 382 at 412 [110].
27 At 412 [110].
28 [2005] NSWCA 47 at [6].
29 *Carter Holt Harvey Wood Products Australia v Auspine Ltd* [2008] VSCA 59 at [2]; *Sexton v Homer* [2013] NSWCA 414 at [108]; *IOOF Holdings Ltd v Maurice Blackburn Pty Ltd* [2016] VSC 311 at [47(5)].

professional privilege to some or all of the documents which are the subject of the plaintiff's application is likely to be contested, the defendants probably will rely upon evidence from Mr Boyd about what he did and the purpose for which documents were created.

[84] Mr Boyd's evidence about what he did and the purpose for which certain documents were created is likely to be contentious. Insofar as his evidence is given for the purpose of resolving contentious issues about whether legal professional privilege applied to the documents, his evidence is likely to overlap with the evidence about what he did over a substantial period in connection with his retainer in respect of the new will. What he did and when he did those things is relevant to allegations of negligence against him.

[85] I leave to one side the overlap between the evidence about what Mr Boyd did in carrying out Mr Talbot's instructions, the timing of the steps that he took and whether his conduct breached a duty of care owed to Mr Talbot or the plaintiff as a disappointed beneficiary and the evidence of what he did in bringing certain documents into existence during this period and his purpose in doing so. The latter is relevant to the issue of legal professional privilege. If the proposed question about legal professional privilege was to be made the subject of a separate and preliminary trial, Mr Boyd would need to be called at both hearings, and the Court is likely to be asked to form a view as to the reliability and credibility of his evidence.

[86] The overlap in Mr Boyd's evidence and the necessity for him to be called to give contentious evidence at both hearings is sufficient to dispose of the application.

[87] Senior counsel for the plaintiff fairly accepted at the hearing of the application that if I reached the view that Mr Boyd would be a witness at the separate determination of the issue of legal professional privilege, then the application would not be granted. The plaintiff's application did not contemplate the need for Mr Boyd to give evidence and to be cross-examined. Its submissions were that the suggestion that he could give evidence about subjective matters such as his intent was misconceived. I have concluded that it was not.

[88] The material fact is the dominant purpose, determined objectively. Mr Boyd's evidence is some of the evidence from which that fact might be proven. I leave aside the question of whether his evidence needed to be pleaded or particularised to guard against surprise since the calling of it was previewed before the application was filed.

[89] However, were it necessary to decide the point, then I consider that the second defendant's plea of legal professional privilege in respect of documents brought into existence for "the dominant purpose of … Mr Boyd … providing legal advice or services to Mr Talbot" made relevant Mr Boyd's evidence about his purpose. On the authorities, the plaintiff should not have been surprised that this plea envisaged evidence being given by Mr Boyd about his purpose.

[90] In summary, although it may be possible in some cases to determine a question of legal professional privilege by reference to the nature of the documents, their contents and the context in which they appear in a certain file, evidence as to the circumstances in which the documents were brought into existence, including

evidence of the intention of the document's maker, or the person who authorised or procured it, is admissible. That evidence is not necessarily conclusive on the issue of purpose. The dominant purpose for which a document was created must be determined objectively.

[91] The question of legal professional privilege requires careful consideration of the purpose for which documents were created. In this matter, it is unlikely that any separate trial of the proposed questions would involve simply a document by document determination of legal professional privilege by reference to the document itself. Mr Boyd can give, and might be expected to give, evidence about what he did and the purpose for which the relevant documents were created. Mr Boyd's evidence about the purpose for which documents were created is likely to overlap with his evidence about what he did in carrying out his retainer in respect of a new will, and why he did what he did. The overlap in evidence is a consideration against ordering a separate trial. However, the concern is not simply with an overlap in evidence. Mr Boyd's evidence at both hearings is likely to be contentious. It is highly unsatisfactory that he should give contentious evidence at two separate trials. This is sufficient reason to dismiss the application.

[92] The plaintiff submitted that resolution of the first proposed question would involve largely a question of law which is unlikely to require any significant evidence to be adduced. I do not agree. Its resolution will depend upon evidence, including probably contentious evidence from Mr Boyd about what he did and the purpose for which certain documents were created.

The second question

[93] I turn to the second proposed question which would need to be answered in the event a particular document was found to have not been subject to a valid claim of legal professional privilege. It asks whether production of that document could have been compelled by reliance upon certain provisions of the *UCPR* or the inherent jurisdiction of the Court. This "could" question depends upon questions of fact about the existence or absence of conditions which would have been necessary to engage those processes at the relevant time. Those facts are ill-defined for the purpose of a separate determination and, consistent with the relevant principles stated in *Bass v Permanent Trustee Co Ltd*,[30] the facts should be proven or agreed. Facts that are determinative of the legal issue should not be left open. Unless the relevant facts are identified and proven or agreed, the answer to the question may be of no use at all to the parties and may even mislead.

[94] As outlined above, and as more fully developed in the second defendant's submissions, the relevant processes which are available under the *UCPR* depend upon the existence of certain conditions, and may require an affidavit deposing to those matters. For example, in the context of r 637, the second defendant contends that there was no basis to depose to those matters. If the plaintiff contends otherwise, then this gives rise to a factual dispute about whether the conditions necessary to engage r 637 existed at the relevant time. That factual dispute would need to be resolved at the separate trial in order to answer the relevant question. As for the procedures under Chapter 15, Part 8, the second defendant says that these provisions could only be engaged if there were "contested proceedings" and that it

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30 (1999) 198 CLR 334 at 357 [49].

should be common ground that there were no such proceedings on foot. If that is right, then the separate determination of that part of the question lacks utility. The plaintiff must know the answer.

[95] More generally, the "could" question in respect of the specific rules or the inherent jurisdiction of the Court depends upon evidence about the instructions which the second defendant received at the relevant time, what the second defendant knew or ought to have known and whether, on the basis of those matters, the process was to be engaged to obtain production of a particular document, various documents in a certain category or all or most of the new will file. These involve the investigation of factual matters including the existence of instructions and the evidentiary basis to invoke a rule by which production of a certain document or documents *could* be compelled. They would need to be the subject of evidence. Evidence about those matters would overlap with evidence relevant to issues to be determined at a later trial, including what a solicitor in the second defendant's position *would* have done in the circumstances. The evidence would include the plaintiff's instructions, the advice which would have been given by a reasonable solicitor in response and the instructions that the plaintiff would have given having received advice about the prospects and utility of engaging the suggested processes. This evidence would require the calling of witnesses, including quite possibly the plaintiff, and witnesses from the second defendant.

[96] The second question would be hypothetical and lack utility unless it was based upon agreed facts or a factual determination of what specific documents the plaintiff was seeking, her purpose in seeking them and the existence of conditions to invoke a specific rule or the Court's inherent jurisdiction.

[97] I conclude in respect to the second question that its resolution also is likely to require evidence of substance to be adduced and factual disputes to be resolved.

The new will file and specific documents in it

[98] As noted, some parts of the pleading involve assertions that the new will file was subject to legal professional privilege or confidential to Mr Talbot's personal representative, whereas in other parts of the pleading only some of its contents are said to have been legally professionally privileged. The first question proposed by the plaintiff seeks the determination of whether 21 documents from the new will file are subject to a valid claim of legal professional privilege, not that the whole of the new will file is subject to such a claim. The first defendant notes that the plaintiff has not identified why this particular subset was chosen and why this selection would advance the litigation in a way which would dispose of the matters in dispute between the parties. The second defendant opposes the application on the ground that the separate questions are inappropriate and do not conform with the plaintiff's own pleading.

[99] There may be good reason for the selection by the plaintiff for the purpose of the application of a subset of documents on the new will file. The reason for that selection has not been explained. However, if it is that the selected documents are the documents or the kind of documents which the plaintiff was interested in obtaining or which she would reasonably have been advised to target on any contested process to compel their production, rather than seek the whole of the new

will file, then it serves to highlight the issue discussed above. It assumes that certain instructions were given or that certain advice would have been given.

[100] There may be some other explanation for the selection, such that the selected documents are the only documents on the new will file which arguably could have been the subject of a claim for legal professional privilege. It is unnecessary to resolve the application on the basis that the application seeks a determination of legal professional privilege only in respect of a subset of the documents on Mr Boyd's file.

Confidentiality

[101] The first defendant submits that even if the new will file, or some part of it, could be said to be not privileged, its case is that the contents of the file were confidential to Mr Talbot's personal representative. The application for the separate determination of questions does not address the issue of confidentiality. The second defendant pleads that Mr Boyd's file was confidential to Mr Talbot's personal representative.

[102] I accept the first defendant's submission that resolving any question of privilege at a preliminary stage would not substantially advance the litigation or otherwise dispose of matters in dispute between the parties. It would leave to be determined a number of significant issues, including whether the contents of the new will file were confidential. The application therefore lacks utility.

The "could" and "would" distinction

[103] A substantial ground of opposition to the application is that the plaintiff asks what is said to be the hypothetical or abstract question of whether the selected documents on the file (assuming they were not privileged) *could* have been obtained by certain court processes. The answer to that question is said to be of no utility as it does not address the pleaded issue of whether a solicitor in the second defendant's position, acting with reasonable care and skill, would have obtained them.

[104] In my view, answers to the proposed questions might have some utility. However, the distinction highlighted by the second defendant suggests that answering them would have limited utility and would be unlikely to dispose of the question of what a reasonably competent solicitor would have done in the circumstances. It might be a starting point from which to consider allegations of negligence. However, a judicial determination of the "could" question in 2020 would have to be based upon specific findings or agreed facts about the instructions given and the purpose for which reliance upon the relevant rule was to be invoked to obtain some or all of the documents on the new will file or the file itself. A judge's opinion in 2020 that production of a certain document could have been compelled by reliance upon a certain rule would not address the issue as to whether that was a matter about which reasonable minds might have differed, based upon what was known to them many years earlier and without access to the relevant documents at the time.

[105] Although the preliminary determination of the "could" question may assist the resolution of the different "would" question, I doubt whether it has substantial utility.

[106] Assuming that the relevant document or documents were not privileged, and the Court answered the second question by deciding that they could have been obtained, that answer does not address the important issue in dispute between the parties as to whether, in all the relevant circumstances, the documents should have been obtained by a solicitor exercising reasonable care and skill. Apart from addressing the question of the prospects that the relevant rule could successfully be invoked in the circumstances, a solicitor exercising reasonable care and skill would need to consider and advise on the prudence, costs and consequences of relying upon the compulsory processes. That would depend upon all of the relevant circumstances, including the plaintiff's purpose in seeking the relevant document or the whole new will file, the potential consequences of commencing proceedings against the executor whose co-operation was being sought in relation to the charitable bequest and whether instituting such proceedings would help or harm a different process by which the plaintiff sought his replacement as executor. The plaintiff would have then considered advice about the prospects of obtaining the documents and the benefits and consequences of launching a compulsory process against the executor.

[107] In summary, I am not persuaded that separate determinations of the kind sought by the plaintiff will substantially contribute to narrowing the issues for trial or substantially contribute to the resolution of other, more important issues. In particular, answers to the questions will not determine what a solicitor in the second defendant's position, acting without negligence, would have done to obtain or attempt to obtain the documents, even if the Court finds in 2020 that it could have done so.

[108] I do not accept the plaintiff's submission that whether some or all of the documents in the new will file were confidential and legally professionally privileged such that production of them could not be compelled by the plaintiff is a question that "underpins the competence" of the defence of each defendant. The issue is one part of a range of defences. It is a relatively small part of a complex case.

[109] Even in respect of the part of the case which concerns whether the second defendant could have obtained the documents, despite the executor's assertion of legal professional privilege and confidentiality, for the reasons discussed, the resolution of the "could" issue does not determine the mixed question of fact and law whether the second defendant, acting with care and skill, should have advised the plaintiff that the documents could be obtained by certain court processes and that she would be well-advised to pursue such a process.

[110] That issue, and the other substantial issues between the parties, as well as the type of questions proposed in the present application, are best resolved as soon as reasonably possible on the basis of agreed facts or findings. Those matters of fact would include:

(a) what the second defendant was specifically instructed to do and the plaintiff's purpose in seeking information about or access to documents on the new will file;

(b) what was known by the second defendant and the basis upon which it acted;

(c) whether a reasonably competent solicitor in its position would have acted any differently; and

(d) if different advice would have been given, whether the plaintiff would have acted on that advice and whether the result would have been any different.

[111] Different issues arise in relation to Mr Boyd. However, it is important to recall that any separate determination of the issue of legal professional privilege does not resolve the issue of confidentiality and, in any event, any claim of privilege or confidentiality was for the executor, not Mr Boyd, to make. Mr Boyd was not in a position in which he could act against the express wishes of the party to whom obligations of confidence were owed and in whom any legal professional privilege was reposed, namely Mr Talbot's executor, Mr Bret. Mr Boyd could not waive legal professional privilege because it was not his to waive.

[112] Answers to the proposed questions are unlikely to do a great deal to resolve other issues in the case, including the question of whether it was appropriate for Mr Boyd, after Mr Talbot's death, to advise the plaintiff that he was subject to existing obligations of confidentiality and in possession of legally privileged documents and information, including Mr Talbot's instructions in relation to a new will, and therefore was not in a position to disclose those matters to the plaintiff.

[113] If the separate determination established that some or all of the documents were not in fact the subject of legal professional privilege, that conclusion would not necessarily make the different view expressed by Mr Boyd or any other lawyer years earlier negligent. It may have been a view about which reasonable minds would differ.

[114] Ultimately, I conclude that answering the proposed questions will not do a great deal to resolve the many and substantial issues that arise between the plaintiff and each defendant.

[115] I should add in this context that this is not a case, like many, in which resolution of issues of legal professional privilege occurs without certain parties having access to the documents in respect of which legal professional privilege is claimed. In this matter all the parties have copies of the relevant documents.

[116] The hearing of the present application for the separate determination embarked to some extent on arguments about the application of legal professional privilege to a "will file" in general and the "new will file" in this case, which contains no new will. The parties are aware that Mr Boyd's file was not an ordinary "will file" in which instructions to prepare a will in a certain form are given and the solicitor's task is a relatively simple one of engrossing a will which accords with those instructions. The parties are in a position to consider the file and reach an informed view about the extent to which Mr Boyd was retained to give advice and the purpose for which certain documents, including the documents which are the subject of the present application, were created. The parties have the benefit of each other's submissions concerning the authorities about whether legal professional privilege attaches to the kind of documents in respect of which the plaintiff seeks a preliminary determination. The parties are in a position to consider those authorities and their application to all or some of the documents on the "new will file". They are in a position to consider the prospect that legal professional privilege would attach to some or all of the documents. They can do so by reference to the nature of the documents and the circumstances in which the documents apparently were brought into existence, even without the further

illumination which the evidence of Mr Boyd may bring as to whether legal professional privilege attaches to them. The parties also have the benefit of each other's submissions about the availability or otherwise of the compulsory processes to which the plaintiff points.

[117] In some respects, the present application has been an expensive dress rehearsal of the kind of arguments which would have been deployed had I ordered the separate determination of the proposed questions. That dress rehearsal should place the parties in a better position to decide how those questions, or similar questions, are likely to be resolved at trial. They can make those informed assessments now, and without the delay associated with the proposed separate determination of the questions.

Savings in time and cost?

[118] The plaintiff's submission that the separate determination of the proposed questions would contribute to the saving of time and cost by substantially narrowing the issues for trial and would likely contribute to the prospect of a compromise of the plaintiff's claim was not developed to any extent in the evidence. It was based upon the opinion of the plaintiff's solicitor whose affidavit did not explain how the resolution of those issues would contribute to the saving of time and cost by substantially narrowing the issues for trial.

[119] That evidence and the submissions made on the plaintiff's behalf about those matters appear to have been premised on the assumption that the questions largely involved questions of law, were relatively discrete and would be unlikely to require any significant factual evidence to be adduced, let alone contentious evidence from Mr Boyd or others. I found that not to be the case.

[120] Further, the extent of any saving in time and costs was not subject to any estimate, for example, by predicting the duration of the separate hearing and the duration and timing of any subsequent trial, including whether any subsequent trial would have to be delayed due to an appeal from the separate determination. In the circumstances, the extent of any potential time or cost saving has not been estimated and I am not in a position to make a well-informed assessment of it.

[121] As presently informed, a trial of the separate questions would involve a substantial hearing, including oral evidence, and would be heard before the end of the year. Irrespective of its outcome, and assuming in the plaintiff's favour that the determination of the questions is likely to prove more decisive than I think, an appeal from any declarations or similar order would be a distinct possibility. The appeal would be unlikely to be heard and determined until mid-2021. The process of separate determination is likely to delay the final hearing of the proceeding. I am not persuaded that the separate determination of the proposed questions would lead to a significant shortening of the trial by a narrowing of issues or lead to an early resolution of the proceeding. One reason is that they relate to a limited number of issues and their resolution does not necessarily, or even probably, lead to the resolution of the more substantial issues which are in dispute in the proceedings.

Third party proceedings

[122] The issue of whether the new will file or some documents on it should have been obtained and advised upon does not apparently arise in the claims against the first third party or the third third party. The plaintiff submits that the same question arises in respect of proceedings against the first third party. However, I am not sure that that is the case. The second defendant submits that it is not alleged that the first third party ought to have obtained, considered, or advised upon the contents of Mr Boyd's file. On 29 May 2020 the first third party advised that he would abide the order of the Court in relation to the plaintiff's application and, as a result, I did not require his appearance and no submissions were made on his behalf.

[123] The second third party did appear. He also was joined as a third party by the second defendant. The claims against him were premised upon certain allegations made in the plaintiff's claim succeeding. Paragraph 12 of the third party's statement of claim against him alleges that if those allegations are made out then the second third party breached his retainer and duty of care to the plaintiff in failing to advise her that she "could and ought to" obtain Mr Boyd's notes or file pursuant to the three processes stated in the plaintiff's pleading against the second defendant. Therefore, the claim against the second third party, insofar as it contends that the plaintiff "could" obtain certain documents, aligns with the "could" question raised in the second proposed question, save that the question arises at a different period in respect of the second defendant to the period that applies to the second third party.

[124] The second third party's submissions were made on the understanding that the plaintiff proposed essentially an analysis of the documents on the new will file and whether the proposed mechanisms in the *UCPR* were capable of being employed. On that premise, a determination of the separate questions was submitted to largely answer the "could" aspect of the breach claim pleaded against the second third party. That had some merit in resolving or refining the claim against the second third party. I take the submissions of the second third party into account. However, for the reasons I have given, the plaintiff has failed to persuade me that the proposed separate determination is able to proceed essentially on an analysis of the documents on the new will file.

Other unpleaded issues that might be avoided by the separate questions

[125] The new will file was ultimately produced in 2018 in separate proceedings between the plaintiff and Mr Boyd in his capacity as administrator. Legal professional privilege was not asserted or persisted in at that time.

[126] The plaintiff submits that this means that a "not yet pleaded" point could be avoided if the separate questions were determined in her favour. The new point is that the new will file would have been produced in any event had the second defendant pressed for it.

[127] As I understand it, the plaintiff indicates that if she was to be unsuccessful in obtaining the answers which she seeks to the separate questions, then she has a further, unpleaded point. In other words, even if the Court rules that the documents were subject to legal professional privilege or could not have been obtained by the compulsory processes suggested in her pleading, the plaintiff says that the documents could have been obtained anyway if the second defendant had pressed for them.

[128] One unpleaded basis for that contention is that Mr Boyd ultimately produced the file in 2018. It is inappropriate in the circumstances to reach any conclusion about this argument. However, the second defendant's submissions identified some immediate problems with it. Mr Boyd was not the administrator until June 2012. When the second defendant made its request in 2011, Mr Boyd sought instructions from the executor, Mr Bret, who claimed privilege and refused to disclose communications about the Talbot Family Foundation or any other issue on the grounds that those matters were confidential. My provisional view is that Mr Boyd's attitude as administrator in 2018 to producing the file in answer to proceedings which sought his removal as administrator is of very limited weight in determining what a different administrator would have done in 2011 or even what Mr Boyd would have done as administrator in response to a request for the new will file many years earlier.

[129] The plaintiff also previews an argument that if the second defendant had pressed for the new will file then, even if its contents were the subject of a valid claim of legal professional privilege, then there was an arguable means of avoiding that, based upon the Court's power to inquire into whether a will was duly executed. However, as presently advised, there was no issue concerning the attestation or execution of a will which would permit the Court's inquisitorial powers to be invoked.

[130] The plaintiff also points to authorities and Queensland Law Society guidance concerning the conduct of persons involved in the preparation and execution of a will. Again, it is unnecessary for me to address the relevance of those cases and the scope for a practitioner to give evidence about the circumstances in which a will was prepared or executed. This is not a case where an issue arises concerning the circumstances in which a will was prepared or executed, as occurs when there is an issue concerning testamentary capacity or the validity of a will. There is no question concerning the due execution of a will. If one thing is clear in this case, a new will was not prepared for Mr Talbot before he died.

[131] If, however, the points which the plaintiff previews have more merit than I presently think they do, they tend to highlight the lack of utility in ordering the separate determination of the proposed questions. According to the plaintiff, if she is not successful in the determination of those questions, it does not matter because there are other, yet to be pleaded arguments to fall back upon. I appreciate that the failure to plead these points may have been well-intentioned in order to avoid the needless proliferation of issues in an already complex case. However, if the points are of any merit, they should have been pleaded. The possibility that the plaintiff may at this late stage seek to further amend her pleading to raise these additional points is another reason as to why ordering the separate determination of questions lacks utility.

Summary determination of the issue of legal professional privilege and compellability

[132] The plaintiff's written submissions contended that "the real question on this application is not so much whether there should be some form of summary determination of the issue of legal professional privilege and compellability in relation to the new will file, but rather what form it should take". Ordering the determination of separate questions was said to have advantages over a strike out application or an application for summary judgment. Her submissions indicated

that in the event the application for a separate question was unsuccessful, she would seek programming orders for the hearing of an application for summary judgment or strike out applications. These submissions were not mentioned in oral submissions, presumably because the first defendant's written submissions answered them.

[133] The only "real question" for determination on this application is whether, applying well-established principles, the plaintiff has established that the questions proposed by her should be the subject of separate determination.

[134] On 27 March 2020 I directed that any party seeking to have an application heard was to file it by 18 May 2020, together with any supporting affidavit material and submissions. If the plaintiff had wished to apply for summary judgment or strike out orders as an alternative to the application for a separate determination, then the application should have been made. That also would have been consistent with the efficient conduct of proceedings in accordance with r 5. Even now, the plaintiff has not identified what paragraphs of the defences she might seek to strike out.

[135] Any application for summary judgment or strike out orders would confront the same obstacles that the application for a separate determination has confronted, and more. The issue of whether some or all of the documents on the "new will file" were subject to legal professional privilege involves questions of fact and law which should be tried, rather than subject to summary determination. It is arguable (to say the very least) that legal professional privilege applied to some of the documents. That would be sufficient to dispose of an application for the striking out of paragraphs of defences concerning legal professional privilege.

[136] The contention that the new will file contained privileged material is not an essential element of either defendant's defence. Even if the defendant had no real prospect of successfully contending that legal professional privilege applied, it would not remove the need for a trial of the plaintiff's claims.[31] Contrary to the plaintiff's submissions, the issues of legal professional privilege and compellability are not suitable ones for summary judgment or an application to strike out.

[137] The possibility that the plaintiff might have applied (or still might seek leave to apply) to have those issues determined on a strike out application or a summary judgment application is not a reason to order that those questions be the subject of an order for separate determination pursuant to r 483. An order for the separate determination of those questions is not appropriate for the reasons which I have given, applying established principles in relation to the use of that procedure. An application to strike out presently unidentified parts of pleadings or to seek summary judgment is an even less appropriate process to determine the issues of legal professional privilege and compellability.

Conclusion

[138] The question of legal professional privilege requires careful consideration of the purpose for which documents were created. Mr Boyd's evidence about the purpose for which documents were created is likely to overlap with his evidence about what he did in carrying out his retainer in respect of a new will, and why he did what he did. The overlap is a consideration against ordering a separate determination.

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31 *UCPR* r 292(2)(b).

However, the concern is not simply with an overlap in evidence. It is that Mr Boyd's evidence at both hearings is likely to be contentious. It is highly unsatisfactory that he should give contentious evidence at two separate trials, particularly about related and overlapping subjects. This is sufficient reason to dismiss the application.

[139] The second question also depends upon the resolution of contested factual issues.

[140] There are many other reasons why the application should be refused. The proposed questions do not capture the question of confidentiality and whether Mr Talbot's executor was entitled to assert that the contents of the new will file were confidential.

[141] The plaintiff has not demonstrated that the separate determination of the proposed questions would likely result in a material saving in time and costs. Their resolution would depend upon the resolution of factual issues. The separate trial of the proposed questions would be unlikely to result in a substantial narrowing of the remaining issues for trial and a saving in time and costs. Instead, a separate trial would probably lead to additional costs and delay.

[142] I am not persuaded that the separate determination of the proposed questions has utility. I am not persuaded that it is just and convenient to order their separate determination.

Orders

[143] I dismiss the application. Subject to further submissions, costs should follow the event. The first defendant and the second defendant successfully opposed the application. The second third party's qualified support for the application was premised upon the plaintiff making good her argument that it was possible for the plaintiff to obtain a separate determination of the question of legal professional privilege by an analysis of the documents on the new will file. The plaintiff failed to establish this premise. In the circumstances, as between the plaintiff and the second third party, I consider that the plaintiff should also pay the second third party's costs of and incidental to the application to be assessed on the standard basis. The first third party neither supported nor opposed the application. I consider that he should be compensated for his costs in considering the application and communicating his attitude to it.

[144] Therefore, subject to any submissions as to costs, the orders will be:

1. The application filed 14 May 2020 is dismissed.

2. The plaintiff pay the other parties' costs of and incidental to the application to be assessed on the standard basis.