SUPREME COURT OF QUEENSLAND

CITATION:	*Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2006] QSC 418
PARTIES:	**AUSTRALAND CORPORATION (QLD) PTY LTD (ACN 003 251 803)** (applicant) **v** **EVAN RICHARD JOHNSON AND DEBRA ANN JOHNSON** (seventh respondent) **and** **JOHN DELFORCE AND JULIE CHRISTINE DELFORCE** (tenth respondent) **and** **GREGORY ALLEN MYTTON AND ADRIENNE RUTH MYTTON** (twentieth respondent) **and** **KAH YAO PIH** (forty-third respondent)
FILE NO/S:	BS 8521 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	12, 13 September 2006
JUDGE:	PD McMurdo J
ORDER:	**1. Application for further disclosure dismissed**
CATCHWORDS:	EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEDGE – PROFESSIONAL CONFIDENCE – LEGAL PROFESSION – WAIVER OF PRIVILEDGE – where respondents plead non-admission of particular state of mind – where content of legal advice relevant - where procedural rules require respondent to explain non-admission – whether non-admission is conduct inconsistent with maintenance of privilege

EVIDENCE – FACTS EXCLUDED FROM PROOF – ON GROUNDS OF PRIVILEDGE – PROFESSIONAL CONFIDENCE – LEGAL PROFESSION – WAIVER OF PRIVILEDGE – where many respondents to proceedings – where trial involves 'test' respondents – where all respondents represented by same solicitors – where all respondents have privilege – whether conduct of test respondents at trial waives privilege of all respondents

Uniform Civil Procedure Rules 1999 (Qld), r 165.

Commissioner of Taxation v Rio Tinto Ltd [2006] FACFC 86, distinguished

Data Access Corporation v Powerflex Services Pty Ltd (1994) AIPC 91, distinguished

DSE (Holdings) Pty Ltd v Intertan Inc [2003] FCA 384, considered

Farrow Mortage Services v Webb (1996) 39 NSWLR 601, considered;

Mann v Carnell (1991) 201 CLR 1, considered;

Wardrope v Dunne [1991] 1 Qd R 224, distinguished

COUNSEL: J C Bell QC with L F Kelly SC and D A Kelly for the applicant
D Collins SC, with D A Skennar, for the respondents

SOLICITORS: McCullough Robertson for the applicant
Slater Gordon for the respondents

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

McMURDO J

No 8521 of 2003

AUSTRALAND COPORATION (QLD) (ACN 003 251 803)	Applicant
and	
SZE KIAT TANG AND OTHERS	First Respondent

BRISBANE

..DATE 13/09/2006

JUDGMENT

HIS HONOUR: The applicant Australand applies for further disclosure against each of the respondents in the four sets of proceedings which are the subject of the present trial. The application was made last Monday when apart from one question, it was determined in the respondents' favour. That remaining question is whether there has been an implied waiver of legal professional privilege in documents which record instructions to or advice from lawyers in relation to the rights of unit owners against the applicant Australand.

On Monday it became apparent that the respondents wished to argue in response to that application that the privilege was not capable of being waived by them alone because it was a privilege to which they were jointly entitled with other unit holders, or at least that it was a privilege which some authorities have referred to as a common interest privilege. The problem with that argument on Monday was that it was then unsupported by any evidence of any interest of other unit holders.

There are about 60 or 70 other owners involved in these proceedings, that is the wider proceedings brought by the applicant Australand, and they are represented by the same solicitors as are the four who are involved in the present trial and who have been referred to as the test respondents. Those other owners have an interest in the outcome of the proceedings which are now being tried, at least because of the issues of law, which are common to all proceedings, and less directly because of some factual issues which are similar from

case to case but the determination of which would not, strictly speaking, determine the outcome in the claims against them. But that coincidence of issues does not itself establish the factual basis for an argument of joint or common interest privilege.

Consequently, the case then had to be adjourned to allow the respondents to prepare affidavits to establish that basis. Yesterday morning the respondent read five affidavits. One of them is sworn by Mr Pih, who is one of the present test respondents, and it goes to the joint or common interest privilege point. It is unnecessary to discuss the other affidavits because as a result of objections taken this morning, those affidavits are not relied upon.

There was an objection taken to Mr Pih's affidavit upon which I have already ruled.

Mr Pih's affidavit, which, once it was admitted, is now not challenged, establishes that he engaged solicitors in January 2002 to provide advice not only to him but also some other unit owners or at least such of them who agreed to contribute towards the cost of that advice. Thereafter the make-up of that group of owners changed from time to time but the advice which Mr Pih procured, he says, was for the benefit of all the unit owners within that group who had agreed to pay for the advice.

Several firms of solicitors were approached by Mr Pih, in each

case in the same representative capacity. In early 2002 the solicitors now acting for the unit owners and the respondents in the broader proceedings, including of course the test respondents, who are Slater & Gordon, were retained. Mr Pih says that they were "engaged to act on behalf of a group of apartment owners on the basis that each member of the group would contribute to the fees and disbursements incurred". There is also some advice which was provided voluntarily by a solicitor who was the brother of one of the owners but the advice given by that solicitor is not said to be in a different category for the purposes of this application.

Mr Pih's affidavit establishes that the privilege is a joint privilege, such that it could be waived only by the conduct of all of those entitled to it. In this context it is unnecessary to conclude that each member of the group, that is the group who'd agreed to pay for the advice, retained the solicitors in the sense that the solicitor's contract was with each of them. On one view of Mr Pih's affidavit, that was the position, but that this isn't a necessary element of the existence of a joint privilege, as is clear from Farrow Mortgage Services v. Webb (1996) 39 NSWLR 601. In that case it was held to be sufficient for the advice to have been sought on behalf of others in the sense that they "joined in seeking it". See pages 607 and 621 in the judgment of Sheller JA. Indeed, the present case is a stronger one for the existence of a joint privilege because the members of the group here agreed to contribute to the cost of the advice.

The applicant doesn't argue that a joint privilege can be waived by only some of those who are entitled to it. But it argues that everyone entitled to this privilege has waived it. In essence, it is said that the particular conduct of the proceedings now being tried has been in all relevant respects with the authority of all other respondents so that the conduct of the present trial and the content of the pleadings of the so-called test respondents is attributable to that wider group.

That argument requires, firstly, a consideration of the conduct by which it is said that the privilege has been impliedly waived. The advice obtained at the end of 2001 or in early 2002 and in turn documents which record that advice are said to be relevant to the issue of whether the respondents elected to affirm their contracts before determining to terminate them in September 2003.

The applicant has pleaded that from late 2001 or early 2002 the respondents knew facts which the applicant said were those which on the respondents' arguments would have entitled them to avoid the agreements under section 1073 of the Corporations Law.

The applicant pleads that that knowledge is to be inferred from, among other things, the fact that the respondents then obtained legal advice in circumstances in which they were dissatisfied with their investment and were looking for ways in which to divest themselves of the property. The

respondents plead denials of that allegation that they were aware of the facts relevant to a right to avoid under the Corporations Law. Accordingly, the content of the advice then given is relevant to whether they had that knowledge.

The respondents' counsel argued that if the content of the advice did not include any reference to the Corporations Law or to facts relevant to the operation of that law upon these contracts, then the advice which was provided could be of no relevance and, in particular, no direct relevance to an issue. As I indicated in the course of that argument, my view is different. The applicant asks for an inference to be drawn from the fact that advice was obtained as to whether the contracts could be avoided that the lawyers giving that advice adverted to the Corporations Law and, in turn, advised in relation to it. To meet that case, in my opinion it would be open to the respondents to tender documents recording advice given as to other grounds for avoidance of the contract, as probative of the fact that advice was not given in relation to the Corporations Law. Accordingly, the evidence in the form of affidavits from the various solicitors that no advice was given about the Corporations Law would not make letters which advised as to other possible grounds of avoidance documents of no direct relevance.

...

HIS HONOUR: The applicant's argument is that because the content of the advice is now relevant to an issue, there is a

necessary inconsistency between maintaining a privilege and the litigation of that issue such that, in fairness, the privilege must be taken to have been waived. According to Mann v Carnell (1991) 201 CLR 1, especially at paragraph [29] the question of whether particular conduct of a party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect, is an objective question in the sense that the party's actual intention to waive or not waive is not relevant. "What brings about the waiver is the inconsistency which the courts, where necessary informed by considerations of fairness, perceive between the conduct of the client and maintenance of the confidentiality, not some overriding principle of fairness operating at large".

What then is the conduct of the respondents in this case which is inconsistent with the maintenance of the confidentiality in their legal advice? Strictly speaking, it is by their conduct that there is an issue of fact which makes the documents relevant in the trial. That conduct is their putting in issue the applicant's allegation of their knowledge of relevant matters. Is that conduct sufficient to deprive them of their privilege? If it is, then it would seem to be a heavy price for protecting their privilege that they should have to instead admit an allegation which, as far as I can assess now, might be quite untrue. This hardly suggests an unfairness in their taking the alternative course of putting in issue the allegation and maintaining the privilege.

So the fact relevantly in issue is not a fact which the respondents have alleged or need to plead or prove. This makes their case markedly different from all but a few cases in which there has been found to have been an imputed waiver from the litigation of a particular issue. It distinguishes this case from the examples given in Mann v. Carnell at paragraph [28]. And in his extensive review of the authorities on implied waiver of privilege in DSE (Holdings) Proprietary Limited v. Intertan Inc [2003] FCA 384, Allsop J said at paragraph [58] that privilege is waived by a pleading where "the party entitled to the privilege makes an assertion (express or implied), or brings a case which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and by such conduct an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication". At paragraph [6], his Honour rejected "the proposition that a mere denial of an assertion that the holder of the privilege had a certain state of mind will suffice to lead to my waiver of privilege", and at paragraph [96] his Honour expressly disagreed with the views of Heerey J in Data Access Corporation v. Powerflex Services Proprietary Limited (1994) AIPC 91, 112 and Derrington J in Wardrope and Dunne [1991] 1 QdR 224, that the privilege may be lost "by raising an issue to the other party to the case". By the expression "raising the issue" in this context is meant that the allegation of a fact which is then put in issue by its denial or non-admission.

Although Derrington J in Wardrope clearly agreed with Heerey J in Data Access, it is also clear that his Honour's judgment in Wardrope did not depend upon the point. That was a case where it was the party entitled to the privilege which pleaded the factual allegation of its own state of mind which made relevant the legal advice it had obtained.

The present case is also distinguishable from that the subject of a recent decision by the Full Federal Court in the Commissioner of Taxation v. Rio Tinto Limited [2006] FCAFC 86. In that case the content of the relevant legal advice was made relevant by the party entitled to the privilege, who was the Commissioner of Taxation, by his pleading that he had a certain state of mind and that this state of mind was the result of certain legal advice. The Full Court made certain statements in the course of its joint judgment in which there are abstractions of principle which are relied upon in the applicant's argument here. In particular, the applicant relies upon what was said by their Honours at paragraphs [52] through [61] of that judgment. In paragraph [52] their Honours said that the authorities showed that:

> "Where issue or implied waiver is made out, the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence. Where the privilege holder has put the contents of the otherwise privileged communication in issue, such an act can be regarded as inconsistent with the confidentiality that would otherwise pertain to the communication."

And at paragraph 61 their Honours said that:

> "Both before and after Mann, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence."

So particular reliance is placed by the applicant upon the references in those paragraphs to "substantiating a defence" or "by way of defence".

Those general statements, at least if taken out of the context of the particular facts in Rio Tinto, could be problematic for cases in this Court which are thereby governed by the Uniform Civil Procedure Rules and, in particular, rule 165, by which a party putting an allegation of fact in issue even by non-admission, is required to explain within its own pleading that non-admission.

I very much doubt that their Honours in Rio Tinto were implying that simply by putting in issue, by a denial or a non-admission, a factual allegation, there would be in every such case what their Honours have referred to a "substantiation of a defence" and thereby a waiver of privilege.

Mann v. Carnell calls for a consideration of the facts and circumstances of the particular case, informed by a criterion of unfairness of the particular kind described in the passage which I have cited. In my view, in the present case it is not unfair that the respondents, that is, the so-called test respondents, should be able to maintain the existence

of their privilege and at the same time put in issue, even by a denial the allegation of fact which is that they knew various matters.

In my view if the privilege was only that of the test respondents so it was privilege which they could waive by their conduct of this case, thus far they have not impliedly waived that privilege. But in any case, as I have said, it is not their privilege to waive. It is jointly held with many others.

The conduct which is relied upon, however, is their conduct in the pleading of their case, but the applicant says that that conduct is also, effectively, that of the wider group; the other 60 or 70 respondents not participating in this trial and who, by reason of orders of the Court, have been relieved of the obligation to plead their cases thus far.

The applicant ultimately argues that I should infer (there is no direct evidence of this) that the present pleadings are the consequence of instructions obtained from each and every member of that wider group. The solicitor acting for the respondents was cross-examined about the system which is in place for the representation of the wider group and the representation of the so called test respondents. As he explained, he obtains instructions from the test respondents on matters that relate only to their cases. Where there are instructions which have to be obtained on issues which affect

all members of the group he obtains instructions from all such members. As I see it the particular conduct in question here, the pleading in response to the relevant allegation made by Australand, is a case in the former category, that is, it is a matter which affects the respondents who are the test respondents. It was not suggested to Mr Piotti when he was cross-examined that it is a matter in the latter category. Specifically it was not suggested to him that he obtained instructions from the group as to the relevant pleading and nor does it seem likely that he did so.

The issue is a factual one. Its determination will not bind future cases between Australand and other respondents. For example, should Australand fail in this trial on that factual issue nevertheless it would be open to Australand to litigate a like issue against other respondents and it might be encouraged to do so by, for example, the discovery of further evidence.

The inference which I am asked to draw is not one which I am persuaded to draw. I am unable to infer that the conduct of the present proceedings, which is relevant to the present argument, is conduct which carries the authority of each and every other respondent who is entitled to this privilege.

The result is that the privilege is a joint one and that it is not shown to have been waived by anyone but, in particular, by anyone beyond those respondents presently participating in

this trial. That being the remaining point in the application for further disclosure, I will dismiss that application.
