SUPREME COURT OF QUEENSLAND

CITATION:	*Nolan v Nolan & Ors* [2013] QSC 140
PARTIES:	**DONNA MAREE NOLAN** (plaintiff) **v** **ANTHONY GERARD NOLAN** (first defendant) **BRIAN KEVIN NOLAN** (second defendant) **MAJELLA ANNE NOLAN** (third defendant) **NOLAN & SON PTY LTD ACN 010 567 174** (fourth defendant)
FILE NO/S:	BS No 3338 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	18 April 2013
JUDGE:	Ann Lyons J
ORDER:	**I will hear from counsel as to the final form of the orders and as to costs.**
CATCHWORDS:	PROCEDURE – DISCOVERY – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – CLIENT LEGAL PRIVILEGE – WHAT CONSTITUTES – where the second and third defendants' former solicitors produced to the plaintiff certain documents relating to estate planning and the preparation of wills pursuant to a notice of non-party disclosure – where the second and third defendants subsequently claimed legal professional privilege over those documents – where the plaintiff contended that the documents instructing on the preparation of a will were not prepared for the dominant purpose of providing legal advice and were therefore not subject to legal professional privilege – whether the documents provided to the plaintiff were the subject of legal professional privilege

PROCEDURE – DISCOVERY – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – CLIENT LEGAL PRIVILEGE – WAIVER OF PRIVILEGE – where the plaintiff's solicitors served a notice of non-party disclosure on the former solicitors of the second and third defendants – where the defendants' former solicitors produced documents in response to the notice without the knowledge of the second and third defendants – where a copy of the notice was provided to the defendants' current solicitors – where the defendants' current solicitors did not object to the production of the documents – whether the defendants' current solicitors were agents of the defendants with ostensible authority to waive any legal professional privilege attaching to the documents – whether the defendants' current solicitors' failure to assert an available claim of legal professional privilege amounted to waiver

Adamas v O'Connor (2011) 282 ALR 302; [2011] FCA 948
Anford Pty Ltd v GCI Properties Pty Ltd [1999] QSC 358
Commissioner of Taxation v Pratt Holdings (2005) 225 ALR 266
Derby & Co v Weldon [1991] 2 All ER 908
Esso Australia Resources Limited v Commissioner of Taxation (1999) 201 CLR 49
Grant v Downs (1976) 135 CLR 674
Great Atlantic Insurance Co v Home Insurance Co [1981] 2 All ER 485
Griffiths v Evans [1953] 2 All ER 1364
Kabwand Pty Ltd (1988) 81 ALR 721
Kennedy v Wallace (2004) 142 FCR 185
Mann v Carnell (1999) 201 CLR 1
Meltend Pty Ltd & Ors v Restoration Clinics of Australia Pty Ltd & Ors (1997) 145 ALR 391
New South Wales v Betfair Pty Ltd, (2009) 261 ALR 311
Spedley Securities Ltd (in liq) v Bank of New Zealand (1991) 26 NSWLR 711
Tickell v Trifleska (1990) 24 NSWLR 548
Waugh v British Railways Board [1980] AC 521
Webster v James Chapman & Co [1989] 3 All ER 939

COUNSEL: A Greinke for the plaintiff
C Jennings for the second, third and fourth defendants

SOLICITORS: Shannon Donaldson Province Lawyers for the plaintiff
Russells for the second, third and fourth defendants

Background facts

[1] Brian and Majella Nolan (the second and third defendants) have conducted farming operations which include the growing and harvesting of grain and cotton crops on a number of properties at Dalby for many decades. They have been married for fifty years and have six children.

[2] In 1991, Donna Nolan (the plaintiff) married the Nolans' son Anthony (the first defendant) and they lived on one of the farming properties. They were both actively involved in the management and operation of those farming operations until they separated eighteen years later in December 2009.

[3] On 31 March 2010, Donna Nolan filed a claim seeking a declaration that she had an interest, either under a constructive trust or equitable lien, in land owned by the second and third defendants and in other property.

[4] From April 1998 until mid 2000, the second and third defendants sought advice from John Edgar from the firm Justin F O'Sullivan & Edgar Solicitors in relation to estate planning and the preparation of their wills.

[5] The plaintiff's solicitors served a notice of non-party disclosure on the second and third defendants' former solicitors, now called Edgar & Wood, on 4 January 2011. A copy of that notice was also provided to the solicitors who were acting for the second, third and fourth defendants at that time, namely Herbert Geer, in a letter dated 13 January 2011.

[6] In reply to that notice of non-party disclosure, Edgar & Wood produced to the plaintiff's solicitors, via a letter dated 1 March 2011, copies of documents from their file in relation to the period from 1998 to 2000 when the second and third defendants had sought the advice from Mr Edgar.

[7] The second and third defendants now claim that some of those documents were in fact subject to legal professional privilege and were produced without the defendants' knowledge. The second and third defendants state that they were first informed of the production of those documents on 6 April 2011, a month after their production.

[8] In a letter dated 24 October 2011, the current solicitors for the second, third and fourth defendants requested that the plaintiff's solicitors identify the documents that had been disclosed by Edgar & Wood and sought return of any of those documents that were privileged.

[9] The plaintiff's solicitors responded in a letter dated 4 November 2011 that none of the documents that had been disclosed were subject to legal professional privilege and, in any event, any privilege that might have attached to certain documents had been waived and was no longer maintainable.

The current applications

[10] The plaintiff filed an application on 7 February 2013 seeking primarily:

1. A declaration that documents numbered 1 to 17 in Part 2 of the schedule to the fourth further supplementary list of documents

dated 18 December 2012 are not subject to legal professional privilege.

[11] The second, third and fourth defendants filed an application on 12 April 2013 seeking:

1. A declaration that documents numbered 1, 2, 5, 12 and 13 in Part 2 of the schedule to the fourth further supplementary list of documents, dated 18 December 2012 are privileged (the "Documents").
2. That the plaintiff provide to the solicitors for the second, third and fourth defendants, on or before Friday 26 April 2013, all copies and any originals of the Documents in her possession or control.
3. That copies of the Documents that are part of exhibit "MAO10" to the affidavit of Mary-Anne Ole, sworn 6 February 2013, be placed in a sealed envelope and marked "Not to be Opened Other Than by Court Order or Judge."

[12] It is clear that the documents in contention relate to documents previously held by Mr Edgar in relation to discussions about estate planning and the preparation of wills in the period from 1998 to 2000. The second and third defendants signed wills prepared by Mr Edgar on 16 April 1998 and then subsequently signed further wills on 28 June 2000. Whilst it was initially contended that the privilege attached to 17 categories of documents, only five categories of documents remain in contention. Their original numbering and descriptions are as follows:

- (1) Handwritten notes of John Edgar, dated 6 April 1998.
- (2) Letter from Justin F O'Sullivan & Edgar to Mr and Mrs Nolan, dated 8 April 1998.
- (5) Handwritten notes of John Edgar, dated 15 April 1998.
- (12) Handwritten note headed "Assets" by John Edgar, undated.
- (13) Handwritten note of Brian Nolan, undated.

[13] Initially the plaintiff also sought an order pursuant to r 223(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) that the second and third defendants serve on the plaintiff an affidavit stating the circumstances in which certain original documents ceased to exist or passed out of their control. The defendants have since filed and served an affidavit in the form sought and no order is now required.

Issues

[14] The first question for determination, therefore, is whether the five categories of documents described above as documents 1, 2, 5, 12 and 13 are the subject of legal professional privilege.

[15] In the event that the first question is answered in the affirmative, the second issue is whether there has been any waiver of privilege constituted by the defendants' then solicitors failing to claim privilege.

The law on legal professional privilege

[16] It is generally recognised that there are three separate categories of legal professional privilege.[1] The first category is what is described as the "advice privilege" and covers oral and written communications passing between a lawyer and client provided such communications are confidential. The second category covers communications that are written or orally made or prepared in confidence for the dominant purpose of use in existing or contemplated legal proceedings. The third category involves an extension of the litigation privilege to third parties and covers confidential communications, including documents, passing between the lawyer and others while litigation is on foot or contemplated. The documents in the present case would seem to come within the first of those categories. Desiatnik in his text on *Legal Professional Privilege in Australia* states that there are three common elements in each of the three categories, namely "confidentiality, dominant purpose and communications."[2]

[17] The High Court decision in *Esso Australia Resources Limited v Commissioner of Taxation*[3] established that the test at common law for legal professional privilege in relation to documents was whether a communication was made or a document was prepared for the dominant purpose of a lawyer providing legal advice or legal services and that that test should be the test applied to the discovery and inspection of confidential, written communications between lawyer and client. In formulating that test, the majority of the High Court departed from the sole purpose test which had been applied in *Grant v Downs*[4] and instead, preferred the approach of the House of Lords in *Waugh v British Railways Board*.[5]

[18] A convenient summary of the current law is set out in the Federal Court decision of *Commissioner of Taxation v Pratt Holdings.*[6] In that decision, Kenny J extracted a number of principles which can be summarised as follows:[7]

1. That the party claiming the privilege has the onus of establishing its claim for privilege, 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.
2. Where a document is created for the dominant purpose of obtaining legal advice, privilege will be attracted.
3. The purpose for which a document is brought into existence is a question of fact. Where there are a number of purposes for the creation of a document it can be difficult to identify the dominant purpose. The dominant purpose must be determined

---

1 Desiatnik, R Legal Professional Privilege in Australia 2nd ed, Lexis Nexis Butterworths, Chatswood, 2005, at p 23.
2 Ibid, at p 27.
3 (1999) 201 CLR 49.
4 (1976) 135 CLR 674.
5 [1980] AC 521.
6 (2005) 225 ALR 266.
7 Ibid, at [30].

objectively, having regard to the evidence, the nature of the documents and the party's submissions. The purpose will ordinarily be that of the maker of the document, but this will not always be the case.

4. The evidence of the intention of the document's maker or of the person who authorised or procured it is not conclusive of the purpose.
5. The dominant purpose for the creation of a document is to be determined at the time of its production.
6. The fact that a document is provided to solicitors for advice is not determinant of the purpose for which it was created.
7. The dominant purpose is not the same as the primary or the substantial purpose. The dominant purpose may be described as the ruling, prevailing, paramount or most influential purpose.[8] The dominant purpose brings within the scope of the privilege a document brought into existence for the purpose of a client being provided with professional legal services, notwithstanding that some ancillary or subsidiary use of the document was contemplated at the time.
8. Where two purposes are of equal weight, neither is dominant in the relevant sense. Hence,
   (a) a document is not privileged from production where one purpose for its creation is to obtain legal advice but there is another equally important purpose; and
   (b) if the decision to bring the document into existence would have been made irrespective of any intention to obtain legal advice, the purpose of obtaining legal advice cannot be the dominant purpose for the making of the document.
9. Where the claim is in respect of communications in documents the court may examine the documents to ascertain the purpose for their creation.
10. A document that records the substance of a privileged communication between client and legal advisor is itself protected by the privilege from disclosure unless the privilege has been waived. The relevant inquiry is whether the disclosure of a document would involve disclosure of a privileged communication.
11. If the court is satisfied on the balance of probabilities that the entirety of the document was created for the requisite purpose, then the entire document attracts the privilege. If however the court finds that parts but not all of the document were created for this purpose, then those parts attract the privilege.

[19] The plaintiff seeks to rely on the decision of *Tickell v Trifleska*[9] where one of the documents subject to a claim of privilege was a letter addressed to a solicitor giving instructions for the preparation of a will. Rogers CJ in an ex tempore decision, indicated that he was not prepared on the facts before him

---

8 See also *G & S Engineering v Lampson Australia Pty Ltd & Anor* [2009] QSC 361, at [6] and *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, at [416].

9 (1990) 24 NSWLR 548.

to conclude that those instructions amounted to a request for legal advice. He considered that the purpose of the instructions was to bring into existence a will as the record of the testamentary dispositions and to serve as a document which would eventually be subject to a grant of probate. His Honour applied the "sole purpose" test to conclude that there were at least two purposes at play, one of which was not subject to privilege, and, therefore, the documents were not subject to legal professional privilege.

[20] Whilst *Tickell* was subsequently overruled in *New South Wales v Betfair Pty Ltd*,[10] the plaintiff submits that the conclusions about the fact that there were two purposes at play in a will dispute were not overruled. Counsel for the plaintiff argues that if the giving of legal advice is incidental and subsidiary to the dominant purpose of bringing a will into existence then no privilege attaches. In particular, the plaintiff points to Ambrose J's decision in *Anford Pty Ltd v GCI Properties Pty Ltd*[11] which adopted the reasoning in *Tickell* as well as the "sole purpose" test. It is also argued that instructions for making wills might be seen as a special category of communications because a will is a form of public document affecting the rights not merely of a testator but of third parties, including executors and beneficiaries.

[21] The plaintiff argues that solicitors are important witnesses and that usually, the events surrounding the making of a will are directly relevant to the validity of execution. The evidence of a solicitor will therefore be particularly relevant with respect to determining the question as to whether the testator knew and approved the contents of the will. It is argued therefore that the documents surrounding the preparation of the will are not privileged. In this regard, the plaintiff relies on the Queensland Law Society Ethical Guidelines in relation to wills to substantiate this submission. Those Guidelines are in the following terms:

> "A letter may be received from another solicitor informing you that a Will prepared by you is disputed. That letter may ask you to provide information with respect to the circumstances of the making and the execution of the Will. You should provide a statement to anyone who has an interest in the dispute whether or not you act for that person. This applies even if you act for the person seeking to prove the disputed Will."[12]

[22] There is no doubt that the party claiming legal professional privilege carries the onus of proof.[13] Essentially, in this case, the plaintiff argues that the defendants have failed to establish that the communications were for the dominant purpose of obtaining legal advice and that the documents do no more than record the instructions given by the defendants for making their wills.

---

10 (2009) 261 ALR 311, at [20].

11 [1999] QSC 358.

12 QLS Guidance Note for Members – Disputed Wills (Contested Probate Matters), at p 3.

13 *Commissioner of Taxation v Pratt Holdings* (2005) 225 ALR 266.

[23] In this regard, I note the decision in *New South Wales v Betfair Pty Ltd*[14] where the Full Court of the New South Wales Court of Appeal concluded that Rogers CJ did not approach the matter correctly in *Tickell.* The court concluded that a retainer to draw a will "involves necessarily the providing of advice, at least as to its validity and effect. In providing the finally drafted will to the client, the solicitor is effectively saying the will complies with the law and gives effect to the client's instructions."[15] The court concluded that "one would normally draw the implication that the solicitor will provide legal advice as to the effectiveness of the will, either expressly, or implicitly by the mere production of the will to the client".[16]

[24] I also note the reference in the Australian Law Reform Commission in Report No 26 to the fact that a lawyer's office is really the "ante-room of the court room"[17] and that one usually consults a solicitor "for aid in litigation whether actual or expected."[18] Wigmore also states that "rendering of that legal advice would result directly and surely in the disclosure of the client's admissions if the attorney's privilege did not exist."[19]

[25] Having considered the contents of the documents which are numbered 1, 2, 5, 12, and 13 in the Schedule, I am satisfied that a perusal of those documents indicates that the dominant purpose was indeed the obtaining of legal advice. I am satisfied that the notes and letters in those five categories were created by Mr Edgar for the purpose of discussion with the second and third defendants to obtain his legal advice not only about their wills but also the complex and interrelated issues of estate, partnership and succession planning. The documents are not simply the instructions of the second and third defendant but rather, record issues to be resolved after recourse to legal advice.

[26] I am satisfied that the documents record what are, in fact, confidential communications between the second and third defendants on the one hand and their solicitor, Mr Edgar, on the other. The flavour of that advice is reflected by Mr Edgar in particular in the letter of 8 April 1998 (document 2). That letter sets out the issues about which his advice was sought and indeed gives advice about a number of things including reference to a particular trust and the possible execution of a trustee's memorandum which might prescribe a particular formula. The dominant purpose of the meetings between Mr Edgar and the second and third defendants was not the preparation of the wills but rather, discussions about a whole suite of possible arrangements. The documents record what is referred to as "the most likely strategy" and note that that strategy emerged after there was "considerable discussion and examination of various alternatives".

[27] Whilst I note the argument by the plaintiff that the documents were not confidential because they were provided to an accountant, I am not satisfied

---

14 (2009) 261 ALR 311.
15 Ibid, at [17].
16 Ibid, at [20].
17 MacNicol, S The Law of Privilege Law Book Company 1992.
18 Wigmore on Evidence, quoted in MacNicol, S The Law of Privilege Law Book Company 1992, at p 6.
19 Ibid.

that this is such as to displace my finding that the documents were for the dominant purpose of the provision of legal advice to the second and third defendants.

[28] I also note that *Kennedy v Wallace*[20] indicated that legal professional privilege extends to documents prepared for the dominant purpose of obtaining advice even though they do not constitute communications. It is clear that where legal advice is involved, the privilege also extends to all of the peripheral aspects of the matter, even though some might not, in isolation, be concerned with the communication of strictly legal advice. In *Adamas v O'Connor*[21] Gilmore J held that the privilege extends to the instructions to the lawyer:

> "12. The privilege attaches to confidential communications between a party and his or her legal adviser, in connection with giving or obtaining legal advice or the provision of legal services, including representation in proceedings in a court: *Esso Australia Resources* at 35. A communication for the dominant purpose of obtaining legal advice or obtaining or providing legal services attracts privilege: *Esso Australia Resources* at [61]. The privilege extends to documents that record confidential legal advice or confidential legal advice or confidential legal work, and to any document prepared by the lawyer or client from which the nature of the advice may be inferred: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [1996] HCA 3; (1997) 188 CLR 501 at 569, per Gummow J. The principles and cases are discussed by Young J in *AWB Limited v Cole* [2006] FCA 571; (2006) 152 FCR 382 at [127]- [132]. The advice from and the request for advice to the lawyer are privileged: *Bolton v Liverpool Corporation* [1833] EngR 409; (1833) 1 My & K 88 at 94; [1833] EngR 409; 39 ER 614 at 617.
>
> 13. When the relevant communication is set out in a document, the use made of a document is not determinative. The test is "anchored to the purpose for which the document was brought into existence": *Propend Finance Pty Ltd* at 508 per Brennan CJ. A compendious statement of the classes of documents to which privilege will attach was given by Lockhart J in *Trade Practices Commission v Sterling* [1979] FCA 33; (1979) 36 FLR 244. Relevantly, they include not only the communication between a party and his or her legal adviser, including any note or record of that communication, but documents that would reveal the knowledge, information or belief of a client derived from privileged communications. The relevant question is "*what was the intended use or uses of the document which accounted for it being brought into existence"*: *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357 at 366.

---

20 (2004) 142 FCR 185 at [62].

21 (2011) 282 ALR 302; [2011] FCA 948.

> The purpose for which a document is brought into existence is a question of fact to be determined objectively."

[29] Accordingly, as I have indicated, I am satisfied that the documents sought were brought into existence for the dominant purpose of obtaining legal advice and that they record confidential communications between the second and third defendants and their legal advisor in connection with giving or obtaining legal advice about a number of matters, one of which was the preparation of wills.

Has the privilege been waived?

[30] The next issue which needs to be resolved is whether the privilege which attaches to those documents has been waived by the actions of the second and third defendants' legal representatives.

[31] Counsel for the second, third and fourth defendants argues that the privilege has not been waived in the present case as the actual consent of those defendants is required before any confidential information can be disclosed:

> "17. The confidential communications passing between a client and a legal advisor may not be disclosed by the legal advisor without the client's consent. *O'Reilly v Cmrs of State Bank of Victoria* (1983) 153 CLR 1, 22-3 per Mason J. The existence of privilege is not subject to a balancing exercise in respect of some other public interest. Unless privilege has been waived by the person entitled to it, or has been abrogated by statute, it is absolute. *Adamas v O'Connor* (2011) 282 ALR 302, [14].
>
> 18. There is no scope for equity to intervene and relax or avoid what is otherwise an absolute right."[22]

[32] In relation to the question as to whether the privilege has been waived, the defendants also argue that such consent is a pre requisite for any waiver of the privilege as follows:

> "19. The plaintiff asserts that the second and third defendants have waived any privilege over the relevant documents. The determinative question in any case concerning waiver is whether the person claiming privilege has acted inconsistently with the maintenance of the confidentiality of the privileged documents such that it would be unfair to the other party. *Mann v Carnell* (1999) 201 CLR 1, [28]-[29]. It is not enough that the opponent in possession of privileged communications sees a way to turn it to some forensic advantage *(ACCC v Cathay Pacific Airways Ltd* [2012] FCA 1101, [20] per Buchanan J) and "fairness" in this context "has not been treated as requiring that the other party should have all the

---

[22] Outline of Argument on behalf of the second, third and fourth defendants, dated 16 April 2013.

> information available to the party claiming privilege, but as requiring that that party should not abuse privilege so as to disadvantage the other party forensically." *G & S Engineering v Lampson Australia Pty Ltd* [2009] QSC 361, [28] per Applegarth J.
>
> 20. The second and third defendants have not, by their conduct, acted inconsistently with the maintenance of privilege over the documents produced by Edgar & Wood. They had no knowledge of the wrongful production of those documents by their former solicitors and, upon learning of that production, have maintained their objection. They have not sought to elicit any benefit by that production."[23]

[33] In the present case, it is clear that the documents in contention were produced by Edgar & Wood in answer to a notice of non-party disclosure. It is also clear that before the documents were produced, the plaintiff's solicitors served a copy of the notice on the defendants' solicitors at the time, Herbert Geer. That notice was quite specific and expressly sought production of all wills, codicils or testamentary scripts of Brian Kevin Nolan and Majella Anne Nolan and any draft wills, codicils or testamentary scripts, drafting instructions, attendance notes, correspondence and tax invoices in relation to the preparation of any wills, codicils or testamentary scripts.

[34] Furthermore, the letter to Herbert Geer of 13 January 2011 not only enclosed a copy of the notice to Edgar & Wood but actually set out within the letter itself a reference to the fact that copies of previous wills were being sought as well as "any other documents pertaining to the Wills in your clients' possession or control e.g. correspondence from those solicitors or other parties, drafting instructions forwarded to the solicitors by your clients, draft Wills etc, which have not been disclosed".

[35] There is therefore no doubt that the solicitors acting for the second and third defendants knew that documents such as those documents which are presently in contention might be required to be produced by the defendants' previous solicitors. Edgar & Wood produced the relevant file in its entirety six weeks after the request was received. The solicitors for the second and third defendants did not serve a notice of objection to the production of those documents or take any steps to claim privilege in that period.

[36] In *Spedley Securities Ltd (in liq) v Bank of New Zealand*,[24] Cole J considered a failure by a solicitor to assert an available claim of privilege of their client and indicated that such a failure amounted to a waiver of that privilege:

> "I am of the opinion that the conduct of Bank of New Zealand in sitting by with knowledge that the Registrar had the document, that it was probable that the liquidator had the document, with the document being available on the bar table on 24 April, with Bank of New Zealand's solicitor

---

23 Ibid.

24 (1991) 26 NSWLR 711.

> presumably having at least a file copy of the statement prepared by Bank of New Zealand's solicitors, with the statement being identified in the initial questions to the witness in the s 541 examination as being a document prepared by Bank of New Zealand's solicitors, with Bank of New Zealand's solicitors having been given permission by the court to attend and take notes at the examination, and yet taking no steps to make a claim of privilege on behalf of Bank of New Zealand, or seek an adjournment to enable a claim for legal professional privilege to be asserted and the documents delivered up to Bank of New Zealand, does constitute waiver of legal professional privilege…"[25]

[37] Legal professional privilege is the privilege of the client. Generally, it is the client who must waive the privilege. However, that is not a universal rule and such a role can be delegated. Indeed, I would consider that such a role is frequently delegated to a client's legal representatives given that it would be generally impossible to conduct litigation otherwise.[26]

[38] That waiver can also be express or ostensible. In *Griffiths v Evans*[27] Denning LJ held that a "solicitor is the agent of his client in all matters that may reasonably be expected to arise for a decision in the cause." In my view, Herbert Geer were the agents of the defendants in all matters in relation to these proceedings at the time. An examination of the correspondence indicates that the issue of previous wills of the second and third defendants was a live issue between the parties.

[39] I consider that the solicitors were therefore the agents of the defendants and had ostensible authority to waive the privilege. I consider that by their actions, Herbert Geer did indeed waive the privilege. The decision by Goldberg J in *Meltend Pty Ltd & Ors v Restoration Clinics of Australia Pty Ltd & Ors*[28] clearly stated that there is ostensible authority in a solicitor to waive privilege:

> "Although legal professional privilege is the privilege of the client which cannot be waived without the clients' consent, I consider that there are circumstances where it is within the ostensible authority of a solicitor to waive privilege in respect of a document on the client's behalf. Such ostensible authority exists in relation to the preparation of a case for trial and the conduct of the trial. In *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529 at 539 Templeman LJ said:
>
> > 'The general principle is that `a solicitor is the agent of his client in all matters that may reasonably be expected to arise for decision in the cause:' per Denning LJ in *Griffiths v Evans* [1953] 2 All ER 1365, 1371'."

---

25 Ibid, at 729.

26 *Spedley Securities Ltd v Bank of New Zealand* (1991) 26 NSWLR 711 at 729-730.

27 [1953] 2 All ER 1364 at 1371.

28 (1997) 145 ALR 391, at 403.

[40] In *Great Atlantic Insurance Co v Home Insurance Co*,[29] Templeman LJ had held that the privilege can in fact be waived even if there has been waiver contrary to a client's wishes. He stated:

> "the plaintiffs who are entitled to the privilege have instructed solicitors and counsel to represent them for all the purposes of the action and are bound by the decisions made by their legal representatives within the scope of their ostensible authority including authority to conduct the case in such manner as they think in the interests of the clients, involving decisions as to waiver of privilege and other matters connected with the proceedings."

[41] It is also apparent that subsequent to the disclosure of those documents by Edgar & Wood pursuant to the third party notice, the plaintiff and her solicitors have inspected the documents and actually acquired knowledge of their contents. A similar issue was discussed by Scott J in *Webster v James Chapman & Co*:[30]

> "Suppose a case where the privileged document has come into possession of the other side because of carelessness on the part of the party entitled to keep the document confidential and has been read by the other party, or by one of his legal advisers, without realising that a mistake has been made. In such a case the future conduct of the litigation by the other party would often be inhibited or made difficult were he to be required to undertake to shut out from his mind the contents of the document. It seems to me that it would be thoroughly unfair that the carelessness of one party should be allowed to put the other party at a disadvantage."

[42] This difficulty was also referred to in *Meltend Pty Ltd & Ors v Restoration Clinics of Australia Pty Ltd & Ors*[31] by Goldberg J who held that the process of discovery would become unworkable if parties were able to change their minds:

> "A party seeking inspection should be entitled to assume that the discovering party has carried out the process properly and in accordance with relevant principles. Otherwise parties will be placed in difficult situations if documents can be withdrawn from inspection after an initial inspection with the result that there is an inability to use information properly obtained on discovery."

[43] His Honour held that the only exception would be if there was an "obvious" mistake. This is not a case where the solicitors for the plaintiff must have known that the disclosure was inadvertent or a mistake. It is not a case such as *Derby & Co v Weldon*[32] where the English Court of Appeal considered

---

29 [1981] 2 All ER 485 at 493.
30 [1989] 3 All ER 939 at 947.
31 (1997) 145 ALR 391, at 406.
32 [1991] 2 All ER 908.

that the inspecting parties must have realised that the documents had been disclosed by mistake.

[44] I note the view of Pincus J (as his Honour then was) in *Kabwand Pty Ltd*:[33]

> "The essential question is, does production by mistake waive the privilege? My view is that it depends upon the circumstances. The privilege will no longer be protected, I should think, if it has lost its point- that is if such complete knowledge has been obtained as to make it futile to attempt to preserve it."

[45] It is clear that in this case the plaintiff has not only seen the documents and actually acquired knowledge of their contents but has, in addition, pleaded those matters in the statement of claim. Those facts are relied upon as part of the plaintiff's case. In *Mann v Carnell*[34] the High Court held that "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 the maintenance of the confidentiality; not some overriding fairness operating at large".[35]

[46] In my view, the defendants have waived privilege in relation to these documents.

[47] Accordingly, there should be a declaration in terms of the plaintiff's application filed on 7 February 2013 that documents numbered 1, 2, 5, 12 and 13 in Part 2 of the schedule to the fourth further supplementary list of documents dated 18 December 2012 are not subject to legal professional privilege.

[48] I will hear from counsel as to the final form of the orders and as to costs.

---

33 (1988) 81 ALR 721 at 723.
34 (1999) 201 CLR 1.
35 Ibid, at [29].