SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Securities and Investments Commission v Managed Investments Pty Ltd & Ors (No 6)* [2013] QSC 355
PARTIES:	**AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION** (Plaintiff) v **ACN 101 634 146 (in liquidation)** (First defendant) **MICHAEL CHRISTODOULOU KING** (Fourth defendant) **CRAIG ROBERT WHITE** (Fifth defendant) **GUY HUTCHINGS** (Sixth defendant) **DAVID MARK ANDERSON** (Seventh defendant) **MARILYN ANNE WATTS** (Eighth defendant)
FILE NO/S:	SC 12122/10
DIVISION:	Trial Division
PROCEEDING:	Evidentiary ruling in a trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 November 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 November 2013
JUDGE:	Douglas J
ORDER:	**Direct the witness to answer a question whether he had signed an affidavit.**
CATCHWORDS:	EVIDENCE – WITNESSES – COMPETENCE AND COMPELLABILITY – where witness was a CEO of a company – where witness was charged with two offences against s 58 of the *Securities Act* 1978 (NZ) regarding related events to the proceedings on foot – where witness signed an affidavit in present proceedings – where witness refused to answer a question in examination in chief regarding whether

he had signed the affidavit – where witness claimed privilege against self-incrimination – whether a privilege against self-incrimination exists in circumstances where a witness has already affirmed an affidavit – whether the common law privilege against self-incrimination applies in respect of incrimination under the laws of any jurisdiction – whether the witness could claim privilege – whether the witness must answer the question whether he signed the affidavit

Evidence Act 1977 (Qld), s 92, s 98
Securities Act 1978 (NZ), s 58

Accident Insurance Mutual Holdings Ltd v McFadden (1993) 31 NSWLR 412, cited
Attorney-General for the Northern Territory v Maurice (1986) 161 CLR 475, cited
Australian Securities and Investments Commission v Mining Projects Group Ltd (2007) 164 FCR 32, cited
BTR Engineering (Australia) Ltd v Patterson (1990) 20 NSWLR 724, considered
R v McDonnell & Armstrong [1988] 2 Qd R 189, followed
Registrar, Court of Appeal (NSW) v Craven (1994) 126 ALR 668, cited
Thompson v Bella-Lewis [1997] 1 Qd R 429, followed

COUNSEL: PJ Riordan SC with MT Brady and JP Moore for the plaintiff
PJ Davis QC with DS Piggott for the fourth defendant
R Jackson with N Andreatidis for the fifth defendant
DL Williams SC with C Withers for the sixth defendant
B O'Donnell QC with CK George for the seventh defendant
PA Freeburn QC for the eighth defendant
D O'Brien QC given leave to appear for the witness, Maywald

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Tucker & Cowen Solicitors for the fourth defendant
Bartley Cohen Litigation Lawyers for the fifth defendant
Kennedys for the sixth defendant
DibbsBarker for the seventh defendant
James Conomos Lawyers for the eighth defendant
Russells for the witness, Maywald

[1] **DOUGLAS J:** Mr Jason Maywald has been called by the plaintiff as a witness in these proceedings. He is said to have affirmed an affidavit on 17 August 2012 in respect of his evidence in chief in the matter but has claimed privilege against self-incrimination against a question directed to whether he had signed that document. His claim for privilege arises because he was charged earlier this month with two offences against s 58 of the *Securities Act* 1978 (NZ) relating to the distribution of an advertisement alleged to include untrue statements and the signing of a registered prospectus also alleged to have been distributed and to have included untrue statements. The allegations in the New Zealand charges cover many similar facts to those being litigated in the proceedings before me, including the circumstances

relating to a payment of $17.5 million received into a company called MFS Pacific Finance Limited (PacFin) on 27 December 2007. The New Zealand charges allege in the particulars that he should have been aware of that transaction after December 2007. That is one example of the area in which it is said that questions of him in these proceedings could tend to incriminate him in the New Zealand prosecution.

[2] The law in Queensland, expressed in *R v McDonnell* [1988] 2 Qd R 189, supports the view that the common law privilege against self-incrimination applies in respect of incrimination under the laws of any jurisdiction and that is the basis on which the parties argued this case. Nor did Mr Riordan SC for the Australian Securities and Investments Commission ("ASIC"), which is the plaintiff in these proceedings, who called Mr Maywald as a witness, contend that either he or any of the other parties should examine Mr Maywald further about evidence relevant to this litigation because of his claim for privilege. The sole question that Mr Riordan wished to be answered was whether Mr Maywald had signed the affidavit on which ASIC intended to rely.

[3] The submission for Mr Maywald by Mr O'Brien QC relied principally upon the decision of the New South Wales Court of Appeal in *Accident Insurance Mutual Holdings Ltd v McFadden* (1993) 31 NSWLR 412. In that decision, the witness had admitted that the signature on the relevant statement was his but declined to acknowledge its truth and to answer questions about the issues in the case on the grounds that the answers might incriminate him. In this case, the document is not simply a statement, but an affidavit that has been affirmed and Mr O'Brien argued that passages in the judgment of Clarke JA in *Accident Insurance Mutual Holdings* in particular led to the conclusion that I should not require his client to answer the question whether the affidavit bore his signature, partly because of the greater reliance that could be placed on an affidavit than on an unsworn statement.

[4] His Honour decided at 432E-F that:

> "In principle it would seem to me that that conduct [the making of the earlier statements] could not constitute a waiver of a right to decline to provide self-incriminating answers to questions put during the course of a trial. If it were otherwise, it would mean that persons who had made admissions to police could be taken to have waived the right to remain silent. This has never been suggested and, if correct, it would constitute an enormous infringement of an ancient and fundamental right of all citizens. For these reasons I am of opinion that his Honour was correct to decline to hold that the witness had waived his privilege."

[5] Kirby P similarly took the view that the primary judge in that case was correct in upholding the witness's claim for privilege "in respect of the demand for *further* oral testimony"; see at 424D-E (emphasis added). His Honour went on to say, however, that:

> "The witness may have been fixed with the written statements which he had already signed. But he was not obliged to go beyond those statements to provide elaborated oral testimony which could be used in later criminal proceedings or could afford the prosecuting

> authorities evidentiary leads with which to enlarge the prospects of obtaining his conviction out of his own mouth."

[6] Mr Riordan submitted that the fixing of the written statements already signed by the witness was what was sought to be established here. He relied in particular on the decision of Giles J in the Supreme Court of New South Wales in *BTR Engineering (Australia) Ltd v Patterson* (1990) 20 NSWLR 724. His Honour rejected a claim to privilege against self-incrimination by a witness who was requested to adopt the contents of a statutory declaration and a statement made by him in connection with proceedings between third parties. He did that partly on the basis that there had been a waiver on the principles discussed in *Attorney-General for the Northern Territory v Maurice* (1986) 161 CLR 475, an approach criticised by Mr O'Brien in light of the decision in *Accident Insurance Mutual Holdings* and its discussion of the application of the doctrine of waiver in these circumstances, but also because, in providing the statutory declaration and statement, the witness had already made himself liable to any prosecution that might be laid, quite apart from any subsequent adoption of it. Secondly his Honour decided that the claim for privilege lacked bona fides and, thirdly, his Honour disallowed the claim on the basis that the purpose of the privilege in providing protection against the jeopardy of criminal charges could not be fulfilled, since the adoption of the statutory declaration and the statement in evidence could not add to any existing jeopardy suffered by the witness.

[7] Should the New Zealand authorities wish to use this affidavit against Mr Maywald it would be open to them, no doubt, to call the witness to the affidavit to prove that it was executed by Mr Maywald and to that extent that would not add to the jeopardy in which he already stands by having made it.

[8] The practical effect of the decision of the Court of Appeal in *Thompson v Bella-Lewis* [1997] 1 Qd R 429 also supports the view that a judge may direct an answer to questions whether a witness has signed an affidavit, although it questions what the consequence should then be in respect of the admissibility of the document. There, the trial judge, in a case about the proof in solemn form of an alleged will, directed a witness to answer questions about the execution of the will and affidavits. The witness was one of the witnesses to the will and, when called to the witness box, claimed privilege against giving evidence relating to the circumstances of its signing or creation and in respect of the signing and contents of two earlier affidavits by her on the ground that her answers might tend to incriminate her. Fitzgerald P and Davies JA allowed the appeal from the decision of a civil jury at the trial.

[9] Fitzgerald P did so on the basis that the judge did not perform his duty to exercise his discretion to admit or exclude the affidavits under ss 92 and 98 of the *Evidence Act* 1977 (Qld) in a manner which did not unfairly advantage one party and correspondingly disadvantage the other and on the basis that his summing up to the jury did not seek to restore the balance in any material respect, which led to a miscarriage of justice. Davies JA also took the view that the learned trial judge misdirected or failed correctly to direct the jury. Whether the privilege extended to

a refusal to answer the question whether an affidavit had been signed was not canvassed explicitly in the reasons of the majority.

[10] McPherson JA dissented on the basis that the witness's action in signing the affidavits and providing them to solicitors for the plaintiff involved a waiver of her privilege with respect to the making and signing of those documents in reliance on the decision in *BTR Engineering (Australia) Ltd v Patterson*; see at 453 of the decision in *Thompson v Bella-Lewis*. His Honour disagreed with the majority in respect of the directions given by the learned trial judge.

[11] Fitzgerald P came closest to considering the issue in this case when he said at 434 that the consequence of the trial judge's rulings was that he, in deciding to allow the reception of her affidavits into evidence but refusing to permit cross-examination, failed in his duty to exercise his discretion to admit or exclude her affidavits under ss 92 and 98 of the *Evidence Act* in a manner which did not unfairly advantage one party and correspondingly disadvantage the other.

[12] Davies JA also expressed the view at page 438 that:

> "The trial judge required Mrs Ferguson to give evidence of her signature on her affidavits notwithstanding his apparent intention of allowing the privilege claim. Having regard to that apparent intention his Honour could have refrained from requiring Mrs Ferguson to give that evidence or he could have excluded the affidavits pursuant to s 98 of the *Evidence Act* 1977. There was, in the circumstances, a good argument that it was inexpedient in the interests of justice to admit those affidavits because a likely inference from Mrs Ferguson's claim of privilege, or at least the allowance of that claim, was that they were false."

[13] I do not reach the necessary conclusion in this case that the affidavit said to have been affirmed by Mr Maywald should be the subject of the likely inference that it is false. Nothing has been said in the submissions to that effect although I can infer that parts of it at least may be controversial. There will be argued, as a separate issue whether the affidavit should be admitted into evidence having regard to the claim for privilege.

[14] The conclusion I draw from the Court of Appeal's decision in *Thompson v Bella-Lewis* is, therefore, that there is at least a discretion for me to permit the relevant question to be asked. That also seems consistent with the reasons of Kirby P in *Registrar, Court of Appeal (NSW) v Craven* (1994) 126 ALR 668 at 685-686, a later decision than *Accident Insurance Mutual Holdings,* where his Honour said:

> "However, a witness may waive the privilege against self-incrimination. Waiver can be express and implied: See *Goldberg v Ng* (SC(NSW)(CA), 11 July 1994, unreported); [1994] NSWJB 68. If a witness intentionally discloses privileged material then the privilege is lost. For example, if the witness has in earlier court proceedings answered the same questions, he or she is not entitled,

> by claiming the privilege against self-incrimination, to refuse to answer the same questions when put."

[15] That passage was also relied on by Finkelstein J in *Australian Securities and Investments Commission v Mining Projects Group Ltd* (2007) 164 FCR 32 at 41 for the proposition that: "A person who has made a statement before trial can be compelled to repeat that statement in court."

[16] In the current circumstances, therefore, it does not seem to me that requiring Mr Maywald to answer the question whether he signed the document will add to the jeopardy in which he already stands. Accordingly, I propose to direct Mr Maywald to answer that question and then receive further submissions upon the issue of whether his affidavit should be admitted in these circumstances.