SUPREME COURT OF QUEENSLAND

CITATION:	*The Queensland Local Government Superannuation Board v Allen* [2016] QCA 325
PARTIES:	**THE QUEENSLAND LOCAL GOVERNMENT SUPERANNUATION BOARD** (applicant) **v** **LYNDA ALLEN** (respondent)
FILE NO/S:	Appeal No 10637 of 2015 DC No 4549 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Brisbane - [2015] QDC 237; [2015] QDC 251
DELIVERED ON:	6 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	30 March 2016
JUDGE:	Margaret McMurdo P and Philippides JA and Burns J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The applicant is granted leave to appeal.** **2. The appeal is allowed.** **3. The orders of the District Court at Brisbane made on 24 September 2015 and 8 October 2015 are set aside and, in lieu thereof, substitute the following orders:** **a. The application filed on 7 September 2015 is dismissed;** **b. The applicant is ordered to pay the respondent's costs of and incidental to the application calculated on the standard basis.** **4. The respondent shall pay the applicant's costs of and incidental to the application for leave to appeal and the appeal calculated on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE

– WAIVER OF PRIVILEGE – where the applicant is the trustee of a superannuation scheme – where the applicant refused the respondent's claim for payment of a total and permanent disability benefit – where the respondent commenced a proceeding in the District Court seeking to establish an entitlement to payment of that benefit – where the respondent brought an interlocutory application in that proceeding seeking disclosure of legal advice provided to the applicant – whether legal professional privilege in the legal advice had been impliedly waived by the applicant

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – OTHER CASES AND MATTERS – where the applicant is the trustee of a superannuation scheme – where the applicant refused the respondent's claim for payment of a total and permanent disability benefit – where the respondent commenced a proceeding in the District Court seeking to establish an entitlement to payment of that benefit – where the respondent brought an interlocutory application in that proceeding seeking disclosure of legal advice provided to the applicant – whether the respondent was entitled to disclosure of the advice on the basis that the advice was the subject of joint privilege so that privilege in the advice was shared by the applicant with the respondent

Local Government Act 1993 (Qld), s 1174, s 1177, s 1180, s 1181
Local Government Act 2009 (Qld), s 208, s 209, s 210, s 217, s 218
Superannuation Industry (Supervision) Act 1993 (Cth), s 101
Superannuation (Resolution of Complaints) Act 1993 (Cth), s 6, s 12, s 14, s 15, s 19
Uniform Civil Procedure Rules 1999 (Qld), r 211

ACI Operations Pty Ltd v Bawden [2002] QCA 286, followed
Adelaide Steamship Co Ltd v Spalvins (1998) 81 FCR 360; [1998] FCA 144, cited
Alcoa of Australia Retirement Plan Pty Ltd v Frost (2012) 36 VR 618; [2012] VSCA 238, cited
Allen v The Queensland Local Government Superannuation Board [2015] QDC 237, overturned
Allen v The Queensland Local Government Superannuation Board (No 2) [2015] QDC 251, overturned
Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1995) 37 NSWLR 405, considered
Archer Capital 4A Pty Ltd v Sage Group PLC (No 3) (2013) 306 ALR 414; [2013] FCA 1160, followed
Attorney-General (NT) v Maurice (1986) 10 FCR 134; [1986] FCA 91, followed

Bailey v Department of Land and Water Conservation (2009) 74 NSWLR 333; [2009] NSWCA 100, cited
Baker v Campbell (1983) 153 CLR 52; [1983] HCA 39, followed
Benecke v National Australia Bank (1993) 35 NSWLR 110, cited
Bennett v Chief Executive Officer, Australian Customs Service (2004) 140 FCR 101; [2004] FCAFC 237, cited
Burnell v British Transport Commission [1956] 1 QB 187, cited
Carnell v Mann (1998) 89 FCR 247; [1998] FCA 1566, cited
College of Law Ltd v Australian National University [2013] FCA 492, cited
Commissioner of Australian Federal Police v Propend Finance Pty Ltd (1997) 188 CLR 501; [1997] HCA 3, followed
Commissioner of Taxation v Rio Tinto Ltd (2006) 151 FCR 341; [2006] FCAFC 86, distinguished
Commonwealth v Temwood Holdings Pty Ltd [2002] WASC 107, followed
Council of the New South Wales Bar Association v Archer (2008) 72 NSWLR 236; [2008] NSWCA 164, followed
Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543; [2002] HCA 49, followed
DSE (Holdings) Pty Ltd v Intertan Inc (2003) 127 FCR 499; [2003] FCA 384, followed
Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd [2011] VSC 477, cited
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49; [1999] HCA 67, cited
Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303; [2013] HCA 46, followed
Farrow Mortgage Services Pty Ltd (in liq) v Webb (1996) 39 NSWLR 601; [1996] NSWSC 259, followed
Ferella v Official Trustee in Bankruptcy (2010) 188 FCR 68; [2010] FCA 766, followed
Finch v Telstra Super Pty Ltd (2010) 242 CLR 254; [2010] HCA 36, considered
GMCG, LLC v Agenix Ltd [2007] QSC 309, cited
Goldberg v Ng (1995) 185 CLR 83; [1995] HCA 39, cited
Grant v Downs (1976) 135 CLR 674; [1976] HCA 63, cited
Gray v BNY Trust Company of Australia Limited (2009) 76 NSWLR 586; [2009] NSWSC 789, cited
Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529; [1981] 2 All ER 485, cited
Hancock v Rinehart (Privilege) [2016] NSWSC 12, cited
In the matter of Idoport Pty Ltd (in liq) (recs apptd); National Australia Bank Ltd v Sheahan [2012] NSWSC 58, cited
Krok v Szaintop Homes Pty Ltd (No 1) [2011] VSC 16, cited
Macquarie Bank Limited v Arup Pty Limited [2016] FCAFC 117, cited
Mann v Carnell (1999) 201 CLR 1; [1996] HCA 66, followed

Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [2001] 1 Qd R 276; [1999] QCA 276, cited
Nine Films and Television Pty Ltd v Ninox Television Ltd (2005) 65 IPR 442; [2005] FCA 356, cited
Nolan v Nolan and Ors [2013] QSC 140, cited
Osland v Secretary, Department of Justice (2008) 234 CLR 275; [2008] HCA 37, followed
Osland v The Queen (1998) 197 CLR 316; [1998] HCA 75, cited
Peninsula Shipping Lines Pty Ltd & Anor v Adsteam Agency Pty Ltd & Anor [2008] QSC 317, cited
Pickering v McArthur [2005] QCA 294, cited
Re Londonderry's Settlement [1965] 2 WLR 229; [1964] 3 All ER 855; [1964] EWCA Civ 6, cited
Rich v Harrington (2007) 245 ALR 106; [2007] FCA 1987, cited
Robson v REB Engineering Pty Ltd [1997] 2 Qd R 102; [1996] QSC 232, cited
Schreuder v Murray (No 2) (2009) 41 WAR 169; [2009] WASCA 145, followed
Russell v Jackson (1851) 9 Hare 387; 68 ER 558; [1851] EngR 955, cited
Secretary, Department of Justice v Osland (2007) 95 ALD 380; [2007] VSCA 96, cited
Switchcorp Pty Ltd and Ors v Multiemedia Ltd [2005] VSC 425, cited
Talbot v Marshfield (1865) 2 Dr & Sm 549; 62 ER 728; [1865] EngR 589, cited
Tarong Energy Corporation Ltd v South Burnett Regional Council [2010] 1 Qd R 575; [2009] QCA 265, cited
Telstra Corporation Ltd v BT Australasia Pty Ltd (1998) 85 FCR 152; [1998] FCA 901, cited
Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd (2015) 321 ALR 191; [2015] VSCA 101, distinguished
Waterford v The Commonwealth (1987) 163 CLR 54; [1987] HCA 25, cited
Yunghanns v Elfic Pty Ltd (No 2) (2000) 1 VR 92; [2000] VSC 113, followed

COUNSEL:	S Fynes-Clinton for the applicant J C Bell QC, with P Bingham, for the respondent
SOLICITORS:	King & Company for the applicant Maurice Blackburn for the respondent

[1] **MARGARET McMURDO P:** I agree with Burns J's reasons for granting the application for leave to appeal and allowing the appeal and with the orders proposed by his Honour.

[2] **PHILIPPIDES JA:** I have had the considerable benefit of reading the reasons for judgment of Burns J which comprehensively set out the relevant background facts, authorities and principles. I agree with his Honour's reasoning in concluding that

leave to appeal should be granted and that the appeal should be allowed with the costs orders proposed.

[3] The issue before this Court was whether a letter from the respondent's solicitors to the respondent, which contained legal advice and which, it was accepted, attracted legal professional privilege, was nevertheless required to be disclosed as determined by the primary judge. The sole basis for the primary judge's determination was that the respondent had implicitly waived its privilege in the advice. As Burns J has explained, the ground of appeal that that determination was erroneous is made out.

[4] A person entitled to the benefit of legal professional privilege may lose the protection provided by that privilege because of implied or imputed waiver. While waiver, strictly speaking, involves an intentional act done with knowledge whereby a person abandons a right (or privilege) by acting in a manner inconsistent with that right (or privilege), in some cases waiver will be imputed even though that consequence was not intended by the party losing the privilege.[1] Such conduct on the part of the person entitled to the benefit of the privilege will ordinarily involve or relate to a limited actual or purported disclosure of the contents of the privileged material.[2]

[5] While in *Attorney-General (NT) v Maurice*[3] waiver of legal professional privilege by imputation or implication of law was stated to be based on notions of fairness,[4] those notions do not, as was clarified in *Mann v Carnell*[5] and reiterated in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management & Marketing Pty Ltd*,[6] involve "some overriding principle of fairness operating at large". Rather, notions of fairness are to be considered in the context of conduct which is inconsistent with the maintenance of the confidentiality.[7] As was stated in *Osland v Secretary, Department of Justice*,[8] waiver of the kind presently in question "reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect". That judgment is one "to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances".[9]

[6] There is no conduct by the respondent from which it can be said that the respondent's privilege was waived on the basis of conduct which was inconsistent with the maintenance of the confidentiality of the legal advice. Certainly, the disclosure of the documents referring to the fact that legal advice had been obtained was not such conduct.

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1 *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 315 [30] per French CJ, Kiefel, Bell, Gageler and Keane JJ; *Mann v Carnell* (1999) 201 CLR 1 at 13 [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

2 *Goldberg v Ng* (1995) 185 CLR 83 at 96 per Deane, Dawson and Gaudron JJ.

3 (1986) 161 CLR 475.

4 (1986) 161 CLR 475 at 492-493 per Deane J; see also at 487-488 per Mason and Brennan JJ and at 497-498 per Dawson J.

5 (1999) 201 CLR 1 at 13; see also *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 316 [31] per French CJ, Kiefel, Bell, Gageler and Keane JJ; *Bennett v Chief Executive Officer, Australian Customs Service* (2004) 140 FCR 101.

6 (2013) 250 CLR 303 at 316 [31] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

7 *Mann v Carnell* (1999) 201 CLR 1 at 13 [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ, as adopted in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 316 [31] per French CJ, Kiefel, Bell, Gageler and Keane JJ.

8 (2008) 234 CLR 275 at 297 [45] per Gleeson CJ, Gummow, Heydon and Kiefel JJ.

9 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 297 [45] per Gleeson CJ, Gummow, Heydon and Kiefel JJ; *Mann v Carnell* (1999) 201 CLR 1 at 13 [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

[7] Nor was this a case, as Burns J has explained,[10] where the advice was required to be disclosed on the basis of "issue waiver". In such cases, the legal professional privilege is waived because the privileged communication has been put in issue in the proceeding by the privilege holder. In the present case, the legal advice was said to go to the issue of the respondent's state of mind. But even if its state of mind could be said to have been put in issue by the privilege holder (by way of a denial of the state of mind alleged against it) the insurmountable obstacle faced by the respondent was that the legal advice in question concerned the applicant's obligation to reconsider the respondent's claim. That was an entirely separate matter from what was argued to have been put in issue, which purportedly formed the subject of "issue waiver"; that matter being the applicant's state of mind in reconsidering the claim.[11] The respondent's submissions failed to appreciate a critical distinction between the issue of the applicant's obligation to reconsider the respondent's claim (to which the advice went) and the manner in which the applicant reconsidered the claim.

[8] Before this Court, the primary judge's order was sought to be upheld on a further basis, namely that the applicant held "joint privilege" with the respondent in the advice by virtue of her being a beneficiary. That submission is flawed for the reasons stated by Burns J.

[9] **BURNS J:** On 24 September 2015, a judge of the District Court ordered the applicant Board to disclose to the respondent, Ms Allen, certain legal advice that had been provided to its officers.[12] The order was made in the course of a proceeding commenced by Ms Allen to establish an entitlement to payment of a total and permanent disablement benefit under a superannuation scheme administered by the Board as trustee. Although the order was interlocutory in nature, it was final in its effect.

[10] The legal advice in question was contained in a letter from the Board's solicitors dated 15 October 2013. It was not disputed that, at the time when the advice was provided, it attracted legal professional privilege. Rather, the issue in the court below was whether the Board had impliedly waived privilege with respect to the advice and, if so, to what extent. On the hearing of the application in this Court, Ms Allen submitted that, if leave to appeal were granted and the Board's contentions upheld, she should have leave to argue that the decision at first instance should be affirmed on a different basis, namely, that the advice was the subject of joint privilege and, for that reason alone, disclosable to her.

[11] The Board applies for leave to appeal against the disclosure order pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) and Ms Allen opposes that application. Given that the issues engaged by the proposed appeal have been fully canvassed in the parties' written submissions, it was appropriate for the parties to address the Court on the merits of those issues in conjunction with the leave application. The hearing of the appeal therefore proceeded in that way.

[12] For the reasons that follow, I am of the opinion that leave to appeal should be granted and the appeal allowed.

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10 At [86].

11 cf *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191 at 208 per Dixon AJA.

12 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237. The primary judge subsequently ordered that the operation of the order be stayed to enable this application for leave to appeal to be brought, heard and determined. In the meantime, the Board was ordered to pay Ms Allen's costs of and incidental to the application for the disclosure order: *Allen v The Queensland Local Government Superannuation Board (No 2)* [2015] QDC 251. By this application, the Board also seeks leave to appeal against the costs order.

Background

The superannuation scheme

[13] The Board is the trustee of the Queensland Local Government Superannuation Scheme. The Scheme was established under the *Local Government Act* 1936 (Qld) and, on the repeal of that statute, continued in existence under later incarnations of that legislation.[13]

[14] Under the legislation, the Board is recognised as a body corporate capable of suing or being sued in its corporate name.[14] The Board's primary responsibility is to act as the trustee of the Scheme[15] and its directors are responsible for the way in which it discharges that obligation.[16] The legislation also requires that rules governing the operation of the Scheme be set out in a trust deed made by the Board and, further, that those rules include provisions that, under the *Superannuation Industry (Supervision) Act* 1993 (Cth), are required to be contained in the governing rules of superannuation funds regulated under that statute.[17] As to its members, an employee of a local government (other than the Brisbane City Council) is "automatically" a member of the Scheme while his or her employment continues.[18] Otherwise, and among a number of defined categories,[19] any person who was, but no longer is, an "automatic member" and whose benefit under the Scheme has not been fully paid out, withdrawn or transferred from the Scheme is eligible to be a member.[20]

[15] Although the trust deed regulating the Scheme was not in evidence in the court below, its relevant features appear in the pleadings and are not in serious contest.[21] For present purposes it is sufficient to note that, under the rules contained in that deed, the Board is obliged to pay a benefit to a "defined benefit member" who has "ceased employment by reason of total and permanent disablement".[22] The expression, "total and permanent disablement", is defined to mean a member who has ceased work through injury or illness for six consecutive months or "such lesser period as [the Board] considers appropriate" and who, in the opinion of the Board, has become incapacitated to such an extent as to render the member "unlikely ever to resume work in any gainful occupation for which the member was or may become reasonably qualified by education, training or experience".[23] Where a member suffers an injury or illness which, in the opinion of the Board, "permanently incapacitated" the member from carrying out his or her ordinary work for the employer (or any reasonably available and suitable alternative work) but did not constitute "total and permanent disablement", then such an injury or illness might constitute a "failure of health" for which a different benefit would be payable under the Scheme.[24]

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13 *Local Government Act* 1993 (Qld), s 1180(1); *Local Government Act* 2009 (Qld), s 217(1).

14 *Local Government Act* 1993 (Qld), s 1173(1); *Local Government Act* 2009 (Qld), s 208(2).

15 *Local Government Act* 1993 (Qld), s 1174; *Local Government Act* 2009 (Qld), s 209(1).

16 *Local Government Act* 1993 (Qld), s 1177(1); *Local Government Act* 2009 (Qld), s 210(2).

17 *Local Government Act* 1993 (Qld), s 1180(3); *Local Government Act* 2009 (Qld), s 217(2).

18 *Local Government Act* 1993 (Qld), s 1181(1); *Local Government Act* 2009 (Qld), s 218(1)(a).

19 *Local Government Act* 1993 (Qld), s 1181(2); *Local Government Act* 2009 (Qld), s 218(2).

20 *Local Government Act* 1993 (Qld), s 1181(2)(h); *Local Government Act* 2009 (Qld), s 218(2)(k).

21 Statement of Claim filed 21 November 2014 at par 3 (ARB 138); Defence filed 11 March 2015 at par 3 (ARB 149). And see Exhibit 1 in the appeal, being a bundle of correspondence passing between the solicitors for Ms Allen and the Board, in particular the letter from those solicitors dated 26 June 2013 at p 2 (Total and Permanent Disability Definition).

22 Statement of Claim at par 3(a) (ARB 138); Defence at par 3(a) (ARB 149).

23 Statement of Claim at par 3(b) (ARB 138); Defence at par 3(c) (ARB 149); Reply at par 3 (ARB 160-161); Exhibit 1 (letter from Maurice Blackburn to the Board dated 26 June 2013 at p 2).

24 Statement of Claim at par 3(c) (ARB 138); Defence at par 3(c) (ARB 149); Reply at par 3 (ARB at 160-161).

Ms Allen's claims

[16] Ms Allen was employed as an administration officer by the Gold Coast City Council between late 1995 and early 2002. By force of the provisions to which reference has just been made, she became a member of the Scheme on the commencement of her employment. Ms Allen ceased work on 11 January 2002 and, apart from a short period of employment in the middle of 2003,[25] has not worked since.

[17] A few days after ceasing work, Ms Allen advanced a claim to the Board for payment of the total and permanent disablement benefit. She claimed that she had been subjected to "bullying and harassment" in the workplace and was permanently incapacitated for work by reason of a number of conditions affecting her health.[26] On 16 May 2002, the Board refused her claim but decided instead that she had suffered a "failure of health".[27] She was subsequently paid the benefit for a "failure of health" under the Scheme.

[18] On 25 October 2002, a request was made for Ms Allen's claim to be looked at again. Although there is something of a dispute on the pleadings as to how this came about,[28] it seems likely that Ms Allen's treating psychiatrist triggered a reconsideration of the claim through the provision of a report to the Board.[29] In any event, the fact is that the Board did reconsider Ms Allen's claim and, on 9 December 2002, caused a letter to be forwarded to her in terms notifying that her claim had again been declined.[30]

[19] Nothing further occurred until 24 May 2006. On that date, the Board received a letter from Ms Allen together with a report from her general practitioner.[31] On 6 June 2006, she forwarded another letter, this time enclosing a copy of a report prepared in 2002 by her rheumatologist.[32] Ms Allen has pleaded that, by this further correspondence and material, she sought a review of the Board's decision notified by letter on 9 December 2002.[33] On the other hand, the Board contends that it treated the correspondence and material as a "request for review of its original decision" in May 2002.[34] That difference noted, the Board proceeded to arrange for Ms Allen to be examined by a psychiatrist, Dr Freed.[35] Following that examination, Dr Freed supplied a report dated 3 August 2006.[36] Then, on 6 September 2006, the Board considered Dr Freed's report along with the other material in its possession relating to the claim. After doing so, it upheld "its previous determination" to the effect that Ms Allen was not entitled to payment of a total and permanent disablement benefit.[37]

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25 Defence at par 5(d) (ARB 150); Reply at par 10 (ARB 163-164).

26 Statement of Claim at pars 5 and 6 (ARB 139-140); Defence at par 5 (ARB 149 -150); Reply at par 5-12 (ARB 161-164). And see Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 at p 2 (ARB 51).

27 Statement of Claim at par 8 (ARB 140); Defence at par 8 (ARB 151); Reply at pars 17-19 (ARB 165); Exhibit 1 (letter from Maurice Blackburn dated 26 June 2013 at p 1).

28 Statement of Claim at par 9 (ARB 141); Defence at par 9 (ARB 151-152); Reply at pars 20-21 (ARB 165).

29 Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 at p 2 (ARB 51).

30 Statement of Claim at par 10 (ARB 141); Defence at par 10 (ARB 152); Reply at pars 24-26 (ARB 165-166).

31 Statement of Claim at par 13 (ARB 141-142); Defence at par 13 (ARB 153); Reply at pars 31-36 (ARB 166-167).

32 Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 at p 2 (ARB 51).

33 Statement of Claim at par 13 (ARB 141).

34 Defence at par 13(e) (ARB 153).

35 Statement of Claim at par 14 (ARB 142); Defence at par 13(f) (ARB 153).

36 Statement of Claim at par 14 (ARB 142); Defence at par 14 (ARB 153-154); Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 at p 3 (ARB 52).

37 Defence at par 14 (ARB 154); Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 at p 3 (ARB 52). The Board's contentions as to what happened after Dr Freed's report was received are not admitted by Ms Allen: Reply at par 37 (ARB 167). In her statement of claim, Ms Allen had pleaded that the relevant decision was made by members of a medical assessment committee and, further, that the decision was based solely on Dr Freed's report: Statement of Claim at par 14 (ARB 142).

[20] Some six years later, in October 2012, there was another attempt to reawaken the claim. Although this met the same fate as the previous attempts in 2002 and 2006, it did lead to the commencement of the proceeding in the court below. Furthermore, the legal advice the subject of this application was sought, and then provided, in response to this further attempt to persuade the Board to reconsider Ms Allen's claim. What happened was this.

[21] On 30 October 2012, the solicitors for Ms Allen forwarded a letter to the "Claims Department" for the Scheme in which they advised that Ms Allen had "last physically worked on or about 30 November 2002".[38] They sought information concerning the Scheme as it applied to Ms Allen including advice whether she had "cover for total and permanent disablement as at the date last worked".[39] A response dated 14 February 2013 advised that Ms Allen's claim for payment of the total and permanent disablement benefit was rejected by the Board on 16 May 2002 when it made the decision that she was instead entitled to payment of the benefit applicable for a "failure of health".[40]

[22] Then, on 26 June 2013, Ms Allen's solicitors wrote to "LG Super". After referring to the response dated 14 February 2013 and the advice to which reference has just been made, they stated:

> "We confirm that after our client sought further review of this decision, the Board subsequently rejected our client's claim on 25 November 2002 and 6 September [2006].
>
> We note your advice that in order to warrant a review of this claim at this time, the Board requires medical evidence that reflects the state of our client's health at the date of termination of employment (11 January 2002) and an opinion as to the degree of incapacity that our client was suffering from at that date.
>
> We are instructed to lodge a complaint/review of the decision and make the following written Submissions in support of the Complaint:
>
> …"[41]

[23] What follows in the 26 June letter are quite detailed submissions on behalf of Ms Allen, including reference to what is described as "new medical evidence in support of our client's claim". A copy of that medical evidence, comprising reports from two general practitioners and a psychiatrist, was enclosed with the letter. Extensive reference was then made to a number of authorities which, it was submitted, assisted on the question whether Ms Allen's medical conditions and circumstances satisfied the definition under the deed of "total and permanent disablement". The letter concludes, relevantly, with these paragraphs:

> "6.6 On the basis of the material previously provided and the above, our client satisfies the definition of 'total and permanent disability' and we await your review decision on our client's claim within ninety (90) days of the date of this letter.
>
> …

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38 Exhibit 1 (letter from Maurice Blackburn dated 30 October 2012).

39 Ibid.

40 This letter was not in evidence, but its contents in this respect were confirmed in a subsequent letter forwarded by Ms Allen's solicitors to the Board: Exhibit 1 (letter from Maurice Blackburn dated 26 June 2013 at p 1).

41 Ibid.

> The complaint/review is sought pursuant to Section 101 of the *Superannuation Industry (Supervision) Act* 1993 and Section 19 of the *Superannuation (Resolution of Complaints) Act* 1993."[42]

[24] It will be seen that, unlike the requests for review or reconsideration made in October 2002 and May 2006, the 26 June letter took the form of a complaint[43] and that s 101 of the *Superannuation Industry (Supervision) Act* 1993 (Cth) and s 9 of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth) were relied on in order to do so. Neither party made reference to these provisions on the hearing of the application before this Court but it is necessary to say something about them because the proper characterisation of what passed between the solicitors for Ms Allen and officers of the Board in connection with this attempt to reopen Ms Allen's claim is, for reasons to be explained, important to the question whether the advice attracted joint privilege.

[25] Under s 101 of the *Superannuation Industry (Supervision) Act*,[44] the Board was obliged to have in place arrangements under which a beneficiary or former beneficiary of the Scheme had the right to make "an inquiry into, or complaint about, the operation or management of" the Scheme "in relation to that person". Under the same provision the Board was obliged to "take all reasonable steps" to ensure that any inquiry or complaint so made was "properly considered and dealt with within 90 days". Indeed, s 101(2) made it an offence for a trustee to intentionally or recklessly contravene these obligations, either as to the existence of the required arrangements or the consideration of an inquiry or complaint within the time specified.

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42 Ibid pp 6-7.

43 On this point, reference may also be made to a letter from the solicitors for Ms Allen to "Local Government Superannuation Scheme" dated 7 January 2014, in which the solicitors confirmed "lodgement of a complaint to your Internal Dispute Resolution Centre by letter dated 26 June 2013": Exhibit 1.

44 At 26 June 2013, s 101 of the *Superannuation Industry (Supervision) Act* 1993 (Cth) provided:

> "**101 Duty to establish arrangements for dealing with inquiries or complaints**
>
> (1) Each trustee of a regulated superannuation fund other than a self managed superannuation fund, or of an approved deposit fund, must take all reasonable steps to ensure that there are at all times in force arrangements under which:
>
> (a) a person referred to in subsection (1A) has the right to make an inquiry or a complaint of the kind specified in that subsection in relation to that person; and
>
> (b) an inquiry or complaint so made will be properly considered and dealt with within 90 days after it was made.
>
> (1A) For the purposes of paragraph (1)(a):
>
> (a) a beneficiary or former beneficiary of a regulated superannuation fund may make an inquiry into, or complaint about, the operation or management of the fund in relation to that person; and
>
> (b) the executor or administrator of the estate of a former beneficiary of such a fund may make an inquiry into, or complaint about, the operation or management of such a fund in relation to the former beneficiary; and
>
> (c) without limiting the generality of paragraph (a) or (b), any person may make an inquiry into, or complaint about, a decision of a trustee of such a fund that relates to the payment of a death benefit if:
>
> (i) the person has an interest in the death benefit; or
>
> (ii) the person claims to be, or to be entitled to death benefits through, a person referred to in subparagraph (i).
>
> (2) A person who intentionally or recklessly contravenes subsection (1) is guilty of an offence punishable on conviction by a fine not exceeding 100 penalty units.
>
> Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.
>
> (3) In this section:
>
> ***regulated superannuation fund*** includes an exempt public sector superannuation scheme that is a regulated superannuation fund for the purposes of the *Superannuation (Resolution of Complaints) Act 1993*."

[26] Section 19 of the *Superannuation (Resolution of Complaints) Act*[45] appears in the statute establishing the Superannuation Complaints Tribunal.[46] The Tribunal is tasked with the duty to inquire into complaints about, among other things, the trustee of a regulated superannuation fund such as the Board.[47] As a person who claims to be entitled to a payment of a benefit as a member or former member of the Scheme and who also claims to be aggrieved by the decision of the Board to refuse that entitlement, Ms Allen had standing to make a complaint to the Tribunal on the grounds that the decision was "unfair or unreasonable".[48] When such a complaint is made, the Tribunal must try to resolve it by conciliation but, failing resolution in that way, it must review the decision about which complaint is made.[49] However, by s 19, it can only do so if it is satisfied that a complaint has previously been made to the Board under s 101 of the *Superannuation Industry (Supervision) Act*, and that complaint was not "settled to the satisfaction of the complainant within 90 days or such longer period as the Tribunal allows."

[27] Those features of the 26 June letter noted, following its receipt, what is described in the material as a "complaint log" came into existence.[50] In an affidavit sworn by the Board's insurance manager, Mr Paré, in response to the disclosure application brought in the court below, he described the log as "an internal document produced by the [Board] as part of a system used for the purpose of tracking developments on complaints made to" the Board.[51] It was one of the documents disclosed by the Board in the proceeding commenced by Ms Allen in the District Court.

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45 At 26 June 2013, s 19 of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth) provided:

> "**19 Tribunal not to deal with complaint unless the complainant has attempted to have the matter resolved**
>
> (1) The Tribunal cannot deal with a complaint under section 14 or 14A unless the complainant satisfies the Tribunal that:
>
> (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made under section 101 of the Supervision Act; and
>
> (b) the complaint so made was not settled to the satisfaction of the complainant within 90 days or such longer period as the Tribunal allows.
>
> (2) The Tribunal cannot deal with a complaint under section 15A or 15B unless the complainant satisfies the Tribunal that the complainant has made all reasonable efforts to have the complaint resolved by the insurer under the annuity policy to which the complaint relates.
>
> (2A) The Tribunal cannot deal with a complaint under section 15CA unless the complainant satisfies the Tribunal that the complainant has made all reasonable efforts to have the complaint resolved by the superannuation provider to which the complaint relates.
>
> (3) The Tribunal cannot deal with a complaint under section 15E or 15F unless the complainant satisfies the Tribunal that:
>
> (a) a complaint about the same subject matter was previously made to an appropriate person under arrangements for dealing with such complaints made under section 47 of the *Retirement Savings Accounts Act 1997*; and
>
> (b) the complaint so made was not settled to the satisfaction of the complainant within 90 days or such longer period as the Tribunal allows.
>
> (4) The Tribunal cannot deal with a complaint under section 15H or 15J unless the complainant satisfies the Tribunal that the complainant has made all reasonable efforts to have the complaint resolved by the insurer who entered into the contract of insurance to which the complaint relates."

46 See *Superannuation (Resolution of Complaints) Act* 1993 (Cth), s 6.

47 See *Superannuation (Resolution of Complaints) Act* 1993 (Cth), s 14.

48 See *Superannuation (Resolution of Complaints) Act* 1993 (Cth), s 14, s 15.

49 See *Superannuation (Resolution of Complaints) Act* 1993 (Cth), s 12.

50 Exhibit "LJM2" to the affidavit of Lachlan Main sworn 7 September 2015 (ARB 49).

51 Affidavit of Robert Paré sworn 16 September 2015 at par 5 (ARB 72).

[28] The entries in the complaint log of relevance to the arguments on this application were these:

> "4. Entry made by Stuart Meekin, on the 29-Nov-13 at 04:00 PM:
>
> 29/11/13 – response sent advising that claim has been re-opened but need additional information. As matter has been outstanding for longer than 90 days, complaint may proceed to SCT.
>
> 5. Entry made by Stuart Meekin, on the 18-Nov-13 at 04:30 PM:
>
> 26/06/13 – received letter from [Ms Allen's solicitors] requesting review of decision to deny TPD claim.
>
> 30/07/13 – matter referred to [the Board's solicitors] for legal opinion on whether Board needs to re-examine claim given two previous denials and no reference to SCT.
>
> 16/10/13 – received legal advice from [the Board's solicitors] that Board needs to reconsider the claim based [sic] given new evidence supplied."[52]

[29] The entry for 16 October 2013 of course refers to the legal advice in dispute. Reference to that advice can also be found in another document disclosed by the Board in the proceeding – an "Incapacity Claim Submission for Consideration by the Board" prepared in early August 2013 by Mr Paré.[53] In his affidavit, Mr Paré described this submission as "an internal document produced to inform the Board … about the ongoing claim for total and permanent disablement for [Ms Allen], and to assist the Board to give consideration to the matter".[54] He deposed that he was responsible for its preparation.[55] He also confirmed that, although the Board was provided with a copy of the submission, it was not provided with a copy of the advice.[56]

[30] The following appears in the submission prepared by Mr Paré:

> "On 30 July 2013, the matter was referred to [the Board's solicitors] for legal opinion to determine if the Board is obligated to re-examine the claim given the passage of time since the claim was first lodged and [that] two previous assessments of the claim had been declined.
>
> In their response to the Board dated 16 October 2013, [the Board's solicitors] confirmed that the Board is required to reconsider the claim based on [the] fact that new medical evidence was supplied."[57]

[31] In the event, the Board did reconsider the claim. However, before it did so, additional information and records were sought from Ms Allen's solicitors. That took some time, but on 4 September 2014, the matter came back before the Board.

[32] At that meeting, the Board resolved to "uphold its earlier decision to decline the claim for total and permanent disablement for Ms Allen".[58] The solicitors for Ms Allen

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52 Exhibit "LJM2" to the affidavit of Lachlan Main sworn 7 September 2015 (ARB 49).
53 Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 (ARB 50-54).
54 Affidavit of Robert Paré sworn 16 September 2015 at par 6 (ARB 72).
55 Ibid.
56 Ibid.
57 Exhibit "LJM3" to the affidavit of Lachlan Main sworn 7 September 2015 (ARB 52).
58 The Board's resolution is set out in a letter from Mr Meekin, Manager Compliance, to Ms Allen's solicitors dated 25 September 2014, being Exhibit 4 in the disclosure application (ARB 132).

were notified of the Board's decision by letter dated 25 September 2014.[59] After setting out the terms of the Board's resolution, the bases for that decision and Ms Allen's entitlement to request reasons, the following appears:

> "**The Superannuation Complaints Tribunal**
>
> Alternatively if your client is not satisfied with our response to their complaint, they are entitled to have their complaint reviewed by the Superannuation Complaints Tribunal (SCT). The SCT is an independent body set up by the Australian Government to help members resolve certain types of complaints with superannuation funds.
>
> The SCT aims to resolve disputes in an informal manner by helping parties reach a mutually satisfactory outcome. If this is not possible, the SCT conducts a more formal review of the complaint and makes a determination that is binding on all parties."[60]

[33] Contact details for the Superannuation Complaints Tribunal are then set out in the letter together with some observations about the ability of the Tribunal to deal with complaints about decisions of this type.

The District Court proceeding

[34] It does not appear that Ms Allen made a complaint to the Superannuation Complaints Tribunal. Instead, on 21 November 2014 she commenced the proceeding against the Board in the court below.[61] In it, Ms Allen seeks a declaration that the decisions of the Board refusing payment of a total and permanent disablement benefit were void and of no effect, a declaration that she is entitled to payment of that benefit and an order that the Board do so. In the alternative, Ms Allen seeks damages in an unspecified amount.[62]

[35] By her statement of claim, Ms Allen alleges that each of the Board's decisions was not "sound" and that, when proper regard is had to her various medical conditions, the Board ought to have formed the opinion that she had become incapacitated to such an extent as to render her unlikely ever to resume work in any gainful occupation for which she was or might become reasonably qualified by education, training or experience.[63] It is then pleaded that the Board owed various duties when considering Ms Allen's claim including a duty to exercise its discretion in good faith and with real and genuine consideration, a duty to take into account relevant considerations and a duty not to take into account any irrelevant consideration.[64] In refusing Ms Allen's claim, the Board is alleged to have breached each of those duties.[65]

[36] By its defence, the Board denies that Ms Allen ceased work because of the medical conditions relied on in her statement of claim,[66] and contends that the formation of its opinion that Ms Allen had not ceased employment by reason of total and permanent disablement was "reasonable on the material before it."[67] Although the Board admits

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59 Ibid p 1 (ARB 132).
60 Ibid p 2 (ARB 133).
61 Claim filed 21 November 2014 (ARB 134).
62 Ibid.
63 Statement of Claim at par 8 (ARB 139).
64 Ibid par 21.
65 Ibid par 22.
66 Defence filed 11 March 2015 at par 5(c) (ARB 149-50).
67 Ibid. See, eg, par 6 (ARB 150).

that it owed a number of the duties pleaded in the statement of claim,[68] it denies that it breached any of those duties.[69]

[37] It is not in issue on the pleadings that Ms Allen was at all material times a "defined benefit member" of the Scheme.[70] Of course, that is not to say that Ms Allen had an as of right entitlement to the payment of a total and permanent disablement benefit. Rather, she could only become entitled to payment of the benefit if the Board was satisfied that she met the definition contained in the rules under the deed, that is to say, that she had ceased work through injury or illness for six consecutive months or "such lesser period as the Board considers appropriate" and, in the opinion of the Board, had become incapacitated to such an extent as to render her unlikely ever to resume work in any gainful occupation for which she is or may become reasonably qualified by education, training or experience. In this sense, her interest was contingent on satisfaction of those matters. It would, however, be wrong to think that, until the Board was so satisfied, Ms Allen was not a beneficiary of the trust. Conformably with the reasoning of the High Court in *Finch v Telstra Super Pty Ltd*,[71] the Board's duty as trustee was to pay the benefit to Ms Allen if she fell within the definition of total and permanent disablement.[72] Put another way, the formation of the Board's opinion was "not a matter of discretionary power to think one thing or the other; it was an ingredient in the performance of a trust duty".[73]

The disclosure application

[38] Following disclosure in the proceeding of the complaint log and the submission prepared by Mr Paré, Ms Allen's solicitors wrote to the Board's solicitors on 17 August 2015 to request disclosure of the advice referred to in each of those documents.[74] Correspondence went backwards and forwards on that issue until, on 7 September 2015, Ms Allen filed the disclosure application in the court below.

[39] By that application, Ms Allen sought an order pursuant to r 223 of the *Uniform Civil Procedure Rules* 1999 (Qld) requiring the Board to disclose the advice together with an order for costs.[75] The application was supported by an affidavit sworn by Ms Allen's solicitor, Mr Main.[76] In opposing the application, the Board relied on two affidavits from the solicitor who provided the advice in question, Mr Williams,[77] as well as an affidavit from Mr Paré.[78] The application was heard on 17 September 2015. There was no application to cross-examine any of the deponents.

[40] In the first of Mr Williams' affidavits he deposed, so far as relevant:

> "3. I have personal knowledge of the facts giving rise to the claim for privilege, as I received instructions from my client to provide advice, and issued my client with the letter dated 15 October 2013 in my capacity as legal advisor to the [Board].

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68 Ibid par 21.
69 Ibid par 22.
70 Statement of Claim at par 4 (ARB 138); Defence at par 4 (ARB 149).
71 (2010) 242 CLR 254.
72 Ibid [30].
73 Ibid. And see *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618 at [71], [72] and [76].
74 Exhibit "LJM1" to the Affidavit of Lachlan Main sworn 7 September 2015 (ARB 47), being the response of the solicitors for the Board to that request.
75 ARB 185.
76 Affidavit of Lachlan Main sworn 7 September 2015 (ARB 42).
77 Affidavits of Mark Williams sworn 9 September 2015 (ARB 69) and 16 September 2015 (ARB 73).
78 Affidavit of Robert Paré sworn 16 September 2015 (ARB 71).

> 4. The letter addresses four discreet issues, only one of which concerns the subject matter of the correspondence exchanged in this matter.
>
> 5. The [Board] objects to disclose the letter [of advice] on the ground that it comprises confidential communications between the [Board's] legal advisors and the [Board], made predominantly for the purpose of giving legal advice or assistance."[79]

[41] Mr Paré swore that, as "Manager – Insurance" for the Board, he had the care and conduct of claims for total and permanent disability including Ms Allen's claim and, further, that he was responsible for the provision of instructions to the Board's solicitors. He confirmed that he was provided with a copy of the letter of advice dated 15 October 2013 after it was received. Mr Paré deposed that he was "personally aware that the Board was not provided with a copy of" the advice.[80]

[42] In the court below, and here, it was contended on behalf of Ms Allen that the advice is relevant to the allegations in the statement of claim that the Board had a duty "not to take into account … any irrelevant consideration"[81] but had nevertheless done so. The particular allegation of breach in this respect was pleaded in these terms:

> "22. In refusing [Ms Allen's claims] … the [Board] breached the duties referred to in the last preceding paragraph above.
>
> PARTICULARS
>
> …
>
> (d) The [Board] took into account in considering the … claim an irrelevant consideration;
>
> …"[82]

[43] Further and better particulars of that allegation were supplied on the day when the disclosure application was filed.[83] The following particulars were held up as being important to Ms Allen's argument:

> "2. **As to paragraph 22(d) of the Statement of Claim:**
>
> The [Board] took into account in considering the … claim the following irrelevant considerations:
>
> …
>
> (g) whether the [Board] was legally obliged to 're-examine the claim given the passage of time since the claim was first lodged and [that] two previous assessments of the claim had been declined';
>
> (h) the preference of the [Board] not to re-examine the claim;
>
> …"[84]

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79 Affidavit of Mark Williams sworn 9 September 2015 at pars 3-5 (ARB 69-70).
80 Ibid par 6 (ARB 72).
81 Statement of Claim at pars 21(d) and 22(d) (ARB 144-145).
82 Ibid par 22(d) (ARB 145).
83 7 September 2015 (ARB 178).
84 Ibid par 2(g)-(h) (ARB 180-182).

[44] For the Board, it was submitted that the advice was not before it at the time when it made its decision and was therefore "irrelevant to the ultimate decision made".[85] The primary judge disagreed:

> "[25] The evidence before the Court clearly indicates that the advice was not before the Board when it made its decision. There is no evidence contrary to that sworn by Mr Pare. However I do not consider that to be the end of the matter.
>
> [26] Mr Pare at all times was an agent of the [Board]. Indeed this is shown by his claim for privilege on behalf of the [Board]. The advice was used in the preparation of the submission to the Board. The Board relied upon the submission significantly and indeed adopted the recommendations contained therein.
>
> [27] I note that the Board requested the advice and that the advice was addressed to the Board.
>
> [28] In those circumstances bearing in mind the further particulars[86] I consider reliance on the ultimate advice was relevant to the conclusion reached by the [Board] and therefore the advice is relevant to the issues here.
>
> [29] I also note Mr Pare does not swear he was not present when the [Board] made its decision nor does he swear he did not discuss the contents of the advice with the decision maker.
>
> [30] Ultimately in this case the Court will need to decide whether the decision was made in good faith with real and genuine consideration and in accordance with the purposes for which the discretion was conferred."[87]

[45] Having thus decided that the advice was "relevant to the issues", the primary judge turned to consider whether the Board had impliedly waived privilege with respect to it. His Honour correctly identified the principles applicable to the question of implied waiver as those discussed by the High Court in *Mann v Carnell*.[88] In addition, consideration was given to what had been held in the earlier decision of that Court in *Attorney-General (NT) v Maurice*.[89] His Honour also considered a number of cases where these principles have been considered and applied: *Bennett v Chief Executive Officer, Australian Customs Service*;[90] *Secretary, Department of Justice v Osland*;[91] *Nolan v Nolan and Ors*;[92] *Tarong Energy Corporation Ltd v South Burnett Regional Council*;[93] *Rich v Harrington*;[94] *Commissioner of Taxation v Rio Tinto Ltd*;[95] *College*

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85 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [24].

86 That is, the further and better particulars extracted in [44] above. The same particulars were earlier set out in the judgment: *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [19].

87 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [25]-[30].

88 (1999) 201 CLR 1 at [28]-[29].

89 (1986) 161 CLR 475.

90 (2004) 140 FCR 101.

91 (2007) 95 ALD 380.

92 [2013] QSC 140.

93 [2010] 1 Qd R 575.

94 (2007) 245 ALR 106.

95 (2006) 151 FCR 341.

of Law Ltd v Australian National University;[96] *GMCG, LLC v Agenix Ltd*;[97] *Switchcorp Pty Ltd and Ors v Multiemedia Ltd*;[98] *Benecke v National Australia Bank*;[99] *Telstra Corporation Ltd v BT Australasia Pty Ltd*[100] and *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd*.[101]

[46] The primary judge then expressed the following conclusions:

> "[62] In my view, after having considered the authorities taking into account the principles of fairness and consistency, privilege has been waived for the following reasons.
>
> [63] Very relevant to the conclusion to be reached by the Court is the approach taken by the Board in reaching its decision. It seems to me that the submission was a crucial document in this regard. Integral in that submission was a reference to the conclusions expressed in the legal advice. As noted the defence specifically alleges the decision was made in good faith taking into account all relevant considerations and no irrelevant ones (para 22).
>
> [64] The submission is certainly a disclosable document in this action as it goes to the heart of the decision here. This was not a meeting held behind closed doors like e.g. in the *Tarong Energy* case. *Tarong* is also distinguishable as no part of the advice was used or disclosed in that case.
>
> [65] The reasons and the approach taken by the Board should be open to scrutiny bearing in mind the issues to be considered in this action as outlined in *Finch*.
>
> [66] The state of mind of the Board is a very relevant matter. The legal advice goes to the state of mind. The Board here adopted in full the recommendation of its officer who considered the legal advice in making his recommendation.
>
> [67] I consider the advice has either directly or indirectly been put in issue in these proceedings.
>
> [68] In those circumstances the principles of fairness and inconsistency dictate that a conclusion should be reached that privilege was waived."[102]

[47] Lastly, the primary judge considered whether "all of the advice was disclosable". His Honour said:

> "[69] In this regard as I noted above the High Court has said in *Attorney-General (NT) v Maurice* that the whole document has become disclosable.
>
> [70] I therefore order disclosure of the whole document".[103]

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96 [2013] FCA 492.
97 [2007] QSC 309.
98 [2005] VSC 425 at [12].
99 (1993) 35 NSWLR 110.
100 (1998) 85 FCR 152.
101 (1995) 37 NSWLR 405 at 411.
102 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [62]-[68].
103 Ibid [69]-[70].

The proposed grounds of appeal

[48] By the proposed appeal,[104] the Board seeks to challenge the primary judge's finding that legal professional privilege in the advice had been impliedly waived. In particular, it is contended under the proposed grounds that his Honour erred in finding that the advice was directly relevant to a fact in issue or was otherwise put in issue by the Board in the proceeding. Alternatively, if it was correct to find that privilege in the advice had been waived, the Board contends that it was waived only with respect to one of four discreet issues dealt with in the advice. Thus, the Board maintains, the order for disclosure should have been limited to that part of the letter of advice.[105]

[49] In addition to the proposed grounds of appeal, if leave to appeal is granted it is necessary to also consider Ms Allen's contention, not raised below but addressed by the parties, that privilege in the advice was shared with beneficiaries such as her.

Consideration

[50] Legal professional privilege is "more than an aspect of civil and criminal procedure and more than a rule of evidence";[106] it is a rule of substantive law.[107] It may be "availed of by a person to resist the giving of information or the production of documents which would reveal communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings".[108] There is no differentiation in legal effect between the two categories of legal professional privilege[109] and, as such, either may be invoked to resist the disclosure of a document in the course of a proceeding where to do so would reveal a communication falling under either category. The principle underlying legal professional privilege is that "a person should be entitled to seek and obtain legal advice without the apprehension of being prejudiced by subsequent disclosure of confidential communications".[110] Without the privilege, the administration of justice "would be greatly impeded or even rendered impossible".[111] It rests not only on the confidence reposed by the client in

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104 A draft Notice of Appeal was exhibited to the Affidavit of Daraius Isaacs sworn 22 October 2015 and filed on behalf of the Board (ARB 215).

105 For completeness, it should be mentioned that it was also a proposed ground of appeal that any inadvertent disclosure of the advice by provision of unredacted versions of the complaint log and the submission prepared for the Board by Mr Paré was, on the authority of *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 319-323 a mistake that could not amount to a waiver of privilege. However, although that argument featured in the Board's written outline (Applicant's Amended Outline of Argument filed 2 February 2016 at pars 10-12) it was abandoned on the hearing of the application for leave to appeal (Transcript of Proceedings at 1-3).

106 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 564 per Gummow J.

107 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490 per Deane J; *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 287-288 per Byrne J; *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9].

108 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [9]-[11] per Gleeson CJ, Gaudron, Gummow & Hayne JJ; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at [35], [61]-[62] per Gleeson CJ, Gaudron & Gummow JJ, [167] per Callinan J.

109 That is to say, litigation privilege or advice privilege.

110 *Baker v Campbell* (1983) 153 CLR 52 at 115-116 per Deane J, and quoted with approval by the plurality in *Mann v Carnell* (1999) 201 CLR 1 at 11 per Gleeson CJ, Gaudron, Gummow and Callinan JJ. And see *Waterford v The Commonwealth* (1987) 163 CLR 54 at 62, 64-65.

111 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 480 per Gibbs CJ. And see Mason and Brennan JJ at 487: "The raison d'etre of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client".

the legal adviser but the necessity, in the interests of justice, of protecting those communications from disclosure.[112] Although confidential communications between the client and lawyer are protected, the privilege exists for the benefit of the client and not the lawyer.[113] A court may examine documents where there is a disputed claim of privilege, and should not be hesitant to do so.[114] In appropriate cases, a court may also permit cross-examination of a deponent of an affidavit claiming privilege.[115]

[51] As the party asserting an entitlement to claim privilege over the advice, the Board had the onus of proving the facts on which the claim for privilege was said to be founded.[116] This therefore required the Board to establish that the advice contained confidential communications for the dominant purpose of either obtaining legal advice or furthering existing or anticipated litigation or for both such purposes.[117] These facts were established by the affidavits filed on behalf of the Board. Indeed, it was not disputed that, at the time when the advice was provided, it attracted legal professional privilege. However, as the party alleging that privilege had been impliedly waived, Ms Allen bore the onus of proof on that issue,[118] and that was the real question for determination on the hearing of the application in the court below.

Implied waiver of privilege

The applicable principles

[52] Because legal professional privilege exists for the benefit of the client, it may be expressly or impliedly waived by the client. Where the waiver is express, there is unlikely to be much room for debate because relinquishment of the privilege will have been the result intended by the privilege holder. However, the position will often be different in cases where it is contended that there has been an implied waiver. In those cases, it may emerge that privilege has been impliedly lost without the privilege holder actually intending that result. That is because, to determine whether privilege has been impliedly waived, the focus will be on the conduct of the privilege holder, viewed objectively, and not on the subjective intention of that party. To the point, the courts may "impute an intention [to waive privilege] where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect".[119]

[53] That said, there can be no doubt that the question whether there was in this case an implied waiver of privilege in the advice provided by the Board's solicitors must be answered by reference to the principles stated in the joint reasons of four members of the High Court in *Mann v Carnell*,[120] and the primary judge certainly recognised that to be so.[121] Because those principles were revisited and then affirmed in a subsequent decision of that Court, *Osland v Secretary, Department of Justice*,[122] it is helpful to

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112 *Farrow Mortgage Services Pty Ltd (in liq) v Webb* (1996) 39 NSWLR 601 at 607 per Sheller JA citing *Russell v Jackson* (1851) 9 Hare 387 at 391; 68 ER 558 at 560.

113 *Mann v Carnell* (1999) 201 CLR 1 at 13 [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.

114 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1991) 201 CLR 49 at [52].

115 Ibid.

116 *Grant v Downs* (1976) 135 CLR 674 at 689 per Stephen, Mason & Murphy JJ.

117 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1991) 201 CLR 49 at [35], [61]-[62].

118 *Nine Films and Television Pty Ltd v Ninox Television Ltd* (2005) 65 IPR 442 at [21].

119 *Mann v Carnell* (1999) 201 CLR 1 at 13 [29] per Gleeson CJ, Gaudron, Gummow and Callinan JJ; *Expense Reduction Analysts Group Pty Ltd & Ors v Armstrong Strategic Management and Marketing Pty Ltd & Ors* (2013) 250 CLR 303 at 315 per French CJ, Kiefel, Bell, Gageler and Keane JJ.

120 (1999) 201 CLR 1.

121 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [35].

122 (2008) 234 CLR 275.

a consideration of the issues that arise on this application to examine both decisions. However, before doing so, mention should be made of the much earlier decision of the High Court in *Attorney-General (NT) v Maurice*.[123]

[54] That case concerned a native title claim brought on behalf of a number of people who claimed to be the traditional owners of land situated near Tennant Creek. The claim was made pursuant to the provisions of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth). Under that Act, the Aboriginal Land Commissioner was empowered to "do all things necessary or convenient to be done for or in connexion with the performance of his functions".[124] In accordance with that power, the first Aboriginal Land Commissioner, Toohey J, promulgated a practice direction to govern the procedure to be followed with respect to land claims made under the Act. Some years later, the claimants commenced their claim and later lodged what was described as a "claim book" with the associate to the then Commissioner (Kearney J). A copy was then distributed to the lawyers representing other parties, including those representing the Attorney-General for the Northern Territory. When the inquiry commenced before Kearney J in late 1982, counsel for the claimants tendered the claim book, although the tender was not formally accepted or rejected. Counsel also referred to the claim book in the course of his opening address. As it happens, the hearing before Kearney J was adjourned to enable a question of jurisdiction to be determined and, after that question was settled in favour of the claimants, it resumed *de novo* before Maurice J in March 1985. At this hearing, the claimants did not rely on the claim book but instead placed reliance on another document which was described as a "guide". Nevertheless, counsel for the claimants made some references to the claim book in the course of his examination of two witnesses. The Attorney-General sought disclosure of certain source material for the claim book. The source material was comprised of field notes and working records which were used in the compilation of the claim book.

[55] The issue at first instance before Maurice J, and ultimately before the High Court, was whether the claimants had waived legal professional privilege attaching to the notes and records constituting the source material. There was no mention of any of those notes or records in the claim book and nor had any passages from them been reproduced in the book. However, the Attorney-General argued that, although the notes and records were originally the subject of legal professional privilege, that privilege was waived when the claim book of which they were the source was distributed and used in the proceeding. Maurice J held that the source materials were the subject of legal professional privilege and that the privilege had not been waived. The Full Court of the Federal Court agreed.[125] The Attorney-General appealed to the High Court. The High Court, constituted by Gibbs CJ, Mason, Brennan, Deane and Dawson JJ, unanimously dismissed the appeal.

[56] Gibbs CJ considered that the question whether a waiver of privilege should be implied "depends on whether it would be unfair or misleading to allow a party to refer to or use material and yet assert that that material, or material associated with it, is privileged from production".[126] After observing that it had been held that the privilege in respect of a document "is not waived by the mere reference to that document in pleadings"[127]

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123 (1986) 161 CLR 475.
124 Section 51.
125 *Attorney-General (NT) v Maurice* (1986) 10 FCR 134.
126 Ibid 481.
127 Ibid.

and that the "position will be different if the document is reproduced in full in the pleading or affidavit",[128] his Honour said:

> "These cases may be explained by saying that it is not unfair or misleading to refer to a document in a pleading or affidavit which is not put into evidence but that if the document is set out in full the privilege is waived. A fortiori, of course, privilege in respect of materials used in drawing a pleading or an affidavit and not referred to therein, would not lose their privilege because they had been used in that way.
>
> It is not difficult to see that where a document deals with a single subject-matter it would be unfair to allow a party to use part of the document and claim privilege as to the remainder. So it has been held that where cross-examining counsel asked a witness whether he had said certain things in a written statement, examining counsel was entitled to require the whole statement to be put into evidence: *Burnell v. British Transport Commission*.[129] Similarly, where a party disclosed a document which contained part only of a memorandum which dealt with a single subject-matter, and then read the document to the judge in the course of opening the case, it was held that privilege was waived as to the whole memorandum: *Great Atlantic Insurance Co. v. Home Insurance Co*.[130] In that case Templeman L.J. said:
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> > "… the rule that privilege relating to a document which deals with one subject matter cannot be waived as to part and asserted as to the remainder is based on the possibility that any use of part of a document may be unfair or misleading, that the party who possesses the document is clearly not the person who can decide whether a partial disclosure is misleading or not, nor can the judge decide without hearing argument, nor can he hear argument unless the document is disclosed as a whole to the other side. Once disclosure has taken place by introducing part of the document into evidence or using it in court it cannot be erased."
>
> The same test must be applied in deciding whether the use in legal proceedings of one document impliedly waives privilege in associated material."[131]

[57] His Honour regarded the claim book as being "in some respects analogous to a pleading; it served to state the case which the claimants intended to present."[132] Although the claim book was not of a kind that would be admissible in ordinary proceedings, his Honour observed that, if it had been admissible and had in fact been admitted as evidence, the Attorney-General "would have been entitled to test its accuracy and weight, and since that could hardly be done unless it was known on what sources it was based, considerations of fairness might have required those sources to have been produced".[133] However, his Honour did not consider it unfair or misleading for the claimants through their counsel to make reference to the book

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128 Ibid.
129 [1956] 1 QB 187.
130 [1981] 1 WLR 529 at 538-539; [1981] 2 All ER 485 at 492.
131 Ibid 481-482.
132 Ibid 483.
133 Ibid.

during the opening of the case before Kearney J or to refer to the claim book in the course of his examination of two witnesses at the hearing before Maurice J.

[58] Mason and Brennan JJ agreed that privilege had not been waived. That could only occur "when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege".[134] Their Honours held that the "holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication".[135] As such:

> "In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject-matter."[136]

[59] After observing that waiver of legal professional privilege by implication was "based on notions of fairness",[137] Deane J agreed that compliance by the claimants with a procedural requirement that they prepare and make available a claims book could not amount to a waiver of their right to claim legal professional privilege over the notes and records comprising the source material. The position might be otherwise, his Honour considered, if the claimants had set forth part of the contents of those documents in the claim book or asserted the effect of, or reliance on, a particular identified document or communication. They had not done so and, as such, privilege remained intact.

[60] The remaining member of the Court, Dawson J, reached the same conclusion and, in the course of so doing, stated:

> "This is a difficult area of the law, but it is clear enough that an implied waiver may be required by fairness notwithstanding that it was not intended. It would not be fair to allow privilege to be waived with respect to a portion of a document or a conversation without requiring disclosure of the rest of it, at least if the document or conversation dealt with the one subject-matter. So much may be obvious, but legal professional privilege is concerned with protecting the confidentiality of a relationship and if that confidentiality is abandoned by a particular disclosure it may be necessary in fairness, whether further disclosure was intended or not, to require disclosure extending beyond the particular communication."[138] [citations omitted]

[61] Thirteen years later, in *Mann v Carnell*,[139] the question whether legal professional privilege in certain communications was lost by disclosure of those communications in the course of pre-suit discovery was considered by the High Court. In that case, the appellant, Dr Mann, had commenced proceedings against the Australian Capital Territory Board of Health for defamation. Subsequently, the Board was abolished and the Territory, as body politic, stood in its place in the proceedings. In due course, the proceedings settled without any admission of liability and a payment of $400,000 was made to Dr Mann. Subsequently, Dr Mann wrote to an independent member of

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134 Ibid 487.
135 Ibid 488.
136 Ibid.
137 Ibid 493.
138 Ibid 497-498.
139 (1999) 201 CLR 1.

the Legislative Assembly for the Territory complaining about the "monumental waste of public funds" expended in defence of the proceedings and calling for a commission of inquiry.[140] At that time, the Chief Minister for the Territory, Ms Carnell, had an informal arrangement under which she would provide information to the independent member on a confidential basis so as to enable him to discharge his responsibilities as a member of the legislature. Pursuant to this arrangement, the Chief Minister sent a letter to the member explaining the basis for the settlement and enclosing a number of opinions provided by counsel who had advised the Territory in the proceedings along with a report from the Australian Capital Territory Government Solicitor. The purpose of doing so appears to have been to satisfy the member that the proceedings, and the settlement, did not involve a waste of public funds and that those who represented the Territory had acted responsibly and in accordance with the legal advice that had been provided.[141] It was common ground that, when the opinions and report were brought into existence, they constituted written communications which were the subject of legal professional privilege.

[62] On receipt of the letter from the Chief Minister, the member returned the enclosures to her without copying them. The Chief Minister, in turn, sent a copy of the letter (without the enclosures) to Dr Mann. Dr Mann, believing that the opinions and report referred to in the letter might have been defamatory of him, made application for pre-suit disclosure. Miles CJ acceded to that application and ordered their production. That decision was reversed on appeal to the Full Court of the Federal Court,[142] but Dr Mann subsequently obtained special leave to appeal to the High Court.

[63] In the High Court, the majority (Gleeson CJ, Gaudron, Gummow, Kirby and Callinan JJ; McHugh J dissenting) held that privilege in the opinions and report had not been waived. In the joint judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ, in the course of a discussion about waiver of privilege at common law, their Honours observed that it is "inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege".[143] Examples of that type of inconsistency were said to include "disclosure by a client of the client's version of a communication with a lawyer, which entitles the lawyer to give his or her account of the communication" and "the institution of proceedings for professional negligence against a lawyer, in which the lawyer's evidence as to advice given to the client will be received".[144] Their Honours continued:[145]

> "Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is 'imputed by operation of law'.[146] This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*,[147] the client

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140 Ibid 17 [43].
141 Ibid 8.
142 *Carnell v Mann* (1998) 89 FCR 247.
143 *Mann v Carnell* (1999) 201 CLR 1 at 13 [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ.
144 Ibid.
145 Ibid 13 [29].
146 eg, *Goldberg v Ng* (1995) 185 CLR 83 at 95.
147 (1993) 35 NSWLR 110.

> was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. 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."[148]

[64] Their Honours proceeded to hold that the purpose of the privilege in that case was to enable the "Territory to seek and obtain legal advice, in relation to the litigation which Dr Mann had instituted, without the apprehension of being prejudiced by subsequent disclosure of that advice".[149] That included subsequent disclosure to Dr Mann. Their Honours observed that, if the member had been given a copy of the opinions and report on the basis that he was at liberty to show them to Dr Mann, that would have waived privilege because "it would have been inconsistent with the confidentiality protected by the privilege".[150] However, their Honours concluded that there was nothing inconsistent with the purpose of the privilege in the Chief Minister conveying the terms of that advice, on a confidential basis, to the member,[151] and Kirby J agreed with that conclusion.[152]

[65] Lastly, in *Osland v Secretary, Department of Justice*,[153] the appellant, Mrs Osland, had been convicted and sentenced to imprisonment for the murder of her husband. After a series of unsuccessful appeals,[154] she petitioned the Governor of Victoria for mercy. The Attorney-General for that State sought advice in relation to that petition including a joint memorandum of advice from a panel of three Queen's Counsel. In the event, the petition was denied and that outcome became the subject of a press release issued by the Attorney-General. It was, relevantly, in these terms:

> "This week I received a memorandum of joint advice from the panel in relation to the petition. The joint advice recommends on every ground that the petition should be denied.
>
> After carefully considering the joint advice, I have recommended to the Premier that the Governor be advised to deny the petition.
>
> The Governor has accepted this advice and denied the petition."[155]

[66] Mrs Osland subsequently sought access under Freedom of Information legislation to a number of documents in the possession of the Department of Justice including the joint advice. She was denied access to the joint advice as well as most of the other documents. She then applied to the Victorian Civil and Administrative Tribunal for review of that decision. The application was heard by the President of the Tribunal,

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148 Ibid 13 [29].
149 Ibid 15 [34].
150 Ibid.
151 Ibid 15 [35].
152 Ibid 48.
153 (2008) 234 CLR 275.
154 See *Osland v The Queen* (1998) 197 CLR 316.
155 (2008) 234 CLR 275 at 286 [15].

Morris J, who ordered that Mrs Osland be given access to the documents. On appeal to the Court of Appeal that decision was reversed.[156] Later, she received a grant of special leave to appeal to the High Court on three issues, one of which concerned the finding of the Court of Appeal that the Attorney-General had not waived privilege in respect of the joint advice by publishing the press release.

[67] For Mrs Osland, it was argued that the inclusion in the press release of the sentence, "The joint advice recommends on every ground that the petition should be denied", amounted to an implied waiver of privilege. The High Court rejected that argument, holding that the part of the decision of the Court of Appeal which held that privilege in the joint advice had not been waived was correct. In that regard, it is sufficient for present purposes to refer to the following passages from the judgment of Gleeson CJ, Gummow, Heydon and Kiefel JJ:

> "On the issue of waiver of privilege in [the joint advice], an issue resolved adversely to the appellant by both the Tribunal and the Court of Appeal, both parties accepted that the principles to be applied were those stated in the joint reasons of four members of this Court in *Mann v Carnell*. The difference between the parties concerned their application to the circumstances of the present case.
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> Waiver of the kind presently in question is sometimes described as implied waiver, and sometimes as waiver 'imputed by operation of law'. It reflects a judgment that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Such a judgment is to be made in the context and circumstances of the case, and in the light of any considerations of fairness arising from that context or those circumstances. In the case of *Benecke*, referred to in *Mann v Carnell*, and discussed by Maxwell P in the present case, an appreciation of the unfairness if Mrs Benecke could give her version of her communications with her lawyer and at the same time prevent the lawyer from giving her own version was one aspect of the inconsistency between her conduct in making certain kinds of allegation against her lawyer and holding her lawyer to obligations of confidentiality. In the present case counsel for the appellant acknowledged that, if the press release had not included the sentence earlier identified as critical, privilege probably would not have been waived. This is undoubtedly correct, even though, upon that hypothesis, the press release would have made some disclosure concerning legal advice taken by the Department.
>
> The conduct of the Attorney-General in issuing the press release and including in it certain information about the joint legal advice is to be considered in context, which includes the nature of the matter in respect of which the advice was received, the evident purpose of the Attorney-General in making the disclosure that was made, and the legal and practical consequences of limited rather than complete disclosure.
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> …
>
> The evident purpose of what was said in the press release was to satisfy the public that due process had been followed in the consideration of

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156 *Secretary, Department of Justice v Osland* (2007) 95 ALD 380.

> the petition, and that the decision was not based on political considerations. The three eminent lawyers who gave the advice were appointed following consultation with the State Opposition. They were external to the Department. Their advice covered all the grounds upon which the petition was based. They recommended denial of the petition. Their advice was carefully considered, and the petition was denied. The Attorney-General was seeking to give the fullest information as to the process that had been followed, no doubt in order to deflect any criticism, while at the same time following the long-standing practice of not giving the reasons for the decision. This did not involve inconsistency; and it involved no unfairness to the appellant. If she had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled. What the Attorney-General said did not prevent the appellant from making public her petition, or any part of it, as and when she desired.
>
> Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of advice will depend upon the circumstances of the case. As Tamberlin J said in *Nine Films and Television Pty Ltd v Ninox Television Ltd*, questions of waiver are matters of fact and degree. It should be added that we are here concerned with the common law principle of waiver, not with the application of s 122 of the *Evidence Act 1995* (Cth) which, as was said in *Mann v Carnell*, has the effect that privilege may be lost in circumstances which are not identical to the circumstances in which privilege may be lost at common law.
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> The reasoning of Maxwell P was correct."[157] [citations omitted]

[68] One additional aspect of *Osland v Secretary, Department of Justice* should be noted. When considering the decision of the Court of Appeal, their Honours observed that Maxwell P (with whom Ashley JA and Bongiorno A-JA agreed) had compared the formulations on the question of waiver advanced by Gyles J and Tamberlin J in the Federal Court in *Bennett v Chief Executive Officer, Australian Customs Service*,[158] and expressed a preference for that advanced by Tamberlin J. That was to the effect that "disclosure of a conclusion expressed in legal advice, without disclosing the reasons, may or may not result in waiver of privilege depending upon a consideration of the whole of the context in which that occurs".[159]

Summary of applicable principles

[69] The decisions just examined inform the following summary of the principles applicable to a determination as to whether legal professional privilege has been impliedly waived:

(a) a person may waive privilege without intending that result; the test is objective and privilege may be waived regardless of the subjective intention of the privilege holder;

(b) privilege will be waived where the conduct of the privilege holder is inconsistent with the maintenance of confidentiality in the communication which the privilege would otherwise protect;

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157 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 296-299 [44]-[46], [48]-[50].

158 (2004) 140 FCR 101.

159 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 292 [34].

(c) the focus is on the conduct of the privilege holder, not the party attempting to destroy the privilege;

(d) whether there is relevant inconsistency is to be evaluated in accordance with the context and circumstances of the case and in the light of any considerations of fairness arising from that context and those circumstances;

(e) the privilege will not be lost merely because there has been a reference by the privilege holder to the privileged communication in a pleading or an affidavit, although it will be lost if the advice is reproduced in full in the pleading or affidavit;

(f) whether a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of the advice as a whole so as to amount to an implied waiver with respect to the whole of the advice will again depend on the context and circumstances of the case;

(g) in such cases, the context can include the nature of the matter in respect of which the advice was received, the evident purpose behind making the relevant disclosure and the legal and practical consequences of limited rather than complete disclosure;

(h) where there has been disclosure of a privileged communication contained in the document, and the document deals with a single subject-matter, it will be unfair to allow a party to use part of the document and claim privilege as to the remainder; at least so far as the document concerns the same subject-matter.

A particular kind of inconsistency

[70] In the application of the above principles to a given case, the court must analyse the acts or omissions of the privilege holder that are said to be inconsistent with the maintenance of privilege in the relevant communication.[160] Because the result of any such analysis will turn on the particular context and circumstances of the case at hand, other cases in which implied waiver has been considered provide only limited assistance. Nonetheless, some broad themes have emerged from the case law in relation to particular kinds of conduct. One of those themes concerns what is sometimes referred to as "issue waiver", that is to say, conduct in connection with the prosecution or defence of a litigated claim by reason whereof an otherwise privileged communication is put in issue. That may be because the privilege holder has advanced a claim, mounted a defence or in some other way placed reliance on the privileged communication to advance its interests in the litigation.

[71] In cases of this kind, it has been held that 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",[161] the privilege in the communication will be waived.[162] It has also

160 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [45].

161 *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 at [58] per Allsop J.

162 And see *Ampolex Limited v Perpetual Trustee Co (Canberra) Limited* (1995) 37 NSWLR 405 at 411 per Giles J; *Adelaide Steamship Co Ltd v Spalvins* (1998) 81 FCR 360 at 372; *Telstra Corporation Ltd v BT Australasia Pty Ltd* (1998) 85 FCR 152 at 165-168; *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [61]; *Rich v Harrington* (2007) 245 ALR 106 at 112 [25]; *In the matter of Idoport Pty Ltd (in liq) (recs apptd); National Australia Bank Ltd v Sheahan* [2012] NSWSC 58 at [52].

been held that it "is not apparently open to another party to litigation to force waiver of a party's legal professional privilege by making assertions about, or seeking to put in issue, that party's state of mind".[163] Indeed, that is just another way of saying that implied waiver can only come about through the acts or omissions of the privilege holder, and not the party seeking to destroy the privilege. Waiver cannot be contrived by such a party, whether by the contents of that party's pleading or otherwise. Lastly, it has been held that the question is not whether the privilege holder has put their state of mind in issue in the proceeding but whether the contents of an otherwise privileged communication have either directly or indirectly been put in issue by the privilege holder.[164] That may occur where a party pleads reliance on the contents of legal advice to justify a claimed state of mind but it will not occur where the party is merely joining issue with an allegation made by the opposing party that he, she or it possessed a particular state of mind.[165] The "mere fact that a party pleads a cause of action that includes their state of mind as a material fact, or otherwise puts their state of mind in issue in the proceedings, does not necessarily give rise to an implied waiver in respect of legal advice that may have been received by the party, even if that legal advice may be relevant to the party's state of mind".[166] In the end, the question is whether, as part of the privilege holder's case, an assertion has been made that lays open the privileged communication to scrutiny, with the consequence that an inconsistency arises between the making of the assertion and the maintenance of the privilege.[167] As Hodgson JA held in *Council of the New South Wales Bar Association v Archer*:[168]

> "It is not enough to bring about a waiver of client legal privilege that the client is bringing proceedings in which the content of the privileged communications could, as a reasonable possibility, be relevant and of assistance to the other party. For the client to do this is not inconsistent with the maintenance of the privilege, and does not give rise to unfairness of the type in question. What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content of the privileged communications, while at the same time seeking to maintain the privilege."[169]

[72] I respectfully agree with what has been held in the cases to which I have referred in the preceding paragraph. They each conform with the principles derived from the joint judgment in *Mann v Carnell*[170] and assist on the application of those principles to disputes about implied waiver arising in the context of a proceeding.

[73] Plainly, much more than a passing reference to legal advice having been taken is needed before privilege in that advice will be lost. Indeed, even where the substance or effect of a legal advice is disclosed, it does not necessarily follow that privilege has been impliedly waived. In that circumstance, the purpose of the disclosure and the extent to which the substance or effect of the advice has been, or is proposed to

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163 *Commonwealth v Temwood Holdings Pty Ltd* [2002] WASC 107 at [10] per Wheeler J.

164 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [65].

165 *Ferella v Official Trustee in Bankruptcy* (2010) 188 FCR 68 at [65]-[66] per Yates J; *In the matter of Idoport Pty Ltd (in liq) (recs apptd); National Australia Bank Ltd v Sheahan* [2012] NSWSC 58 at [119]-[125] per Ward J.

166 *Archer Capital 4A Pty Ltd v Sage Group PLC (No 3)* (2013) 306 ALR 414 at 421 to 422 per Wigney J.

167 *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [65].

168 (2008) 72 NSWLR 236.

169 Ibid [48], which passage has been referred to with approval in, eg, *Macquarie Bank Limited v Arup Pty Limited* [2016] FCAFC 117 at [32]; *Bailey v Department of Land and Water Conservation* (2009) 74 NSWLR 333 at [136].

170 (1999) 201 CLR 1.

be, relied on by the privilege holder in the litigation will be important considerations. What is also clear is that a party to litigation cannot construct a case for waiver through its own pleadings.[171] Even where the privilege holder's state of mind is an issue in a proceeding, the taking of advice and the content of that advice will be facts beyond reach of the other party unless the privilege holder has attempted to boost its case by reliance on the advice in some way. On the other hand, if the privilege holder has sought to justify its position (or state of mind) by reference to the substance or effect of legal advice it has received, such conduct will be inconsistent with the maintenance of confidentiality in the advice. In any such case, the privilege holder has put the legal advice in issue in the proceeding as something supporting the claim or defence. In those circumstances it would accordingly be unfair in the sense explained by the majority in *Mann v Carnell*[172] to permit reliance on the advice for forensic advantage while, at the same time, preventing the opposing party from having access to it.

Should a disclosure order have been made?

[74] On the hearing of the application before the primary judge, it was necessary for Ms Allen to establish that the advice provided by the Board's solicitors was a document which the Board was obliged to disclose and, if it was, that it was not protected from disclosure by legal professional privilege. As to the first matter, the touchstone of a party's obligation to give disclosure of a document is direct relevance to an allegation in issue on the pleadings.[173] A document will be directly relevant in that sense if it tends to prove or disprove such an allegation.[174] As to the second matter, because it was accepted that the advice attracted legal professional privilege at the time when it was provided by the Board's solicitors, it will be protected from disclosure unless privilege was expressly or impliedly waived by the Board.

[75] There was no suggestion of any express waiver. Instead, it was argued on behalf of Ms Allen that privilege was impliedly waived when the Board, by its defence, "put its state of mind in issue"[175] by positively pleading that:

(a) it gave proper consideration to Ms Allen's claim;

(b) it took into account all relevant considerations;

(c) it did not take into account any irrelevant consideration; and

(d) the opinion about Ms Allen's claim was formed on reasonable grounds based on the material before it.[176]

In addition, it was argued that, by disclosing the complaint log and the submission prepared by Mr Paré, the Board "did something to disclose that the substance of the advice affected its state of mind".[177] It was submitted that, in this way, the Board "established a connection between those documents and its state of mind that laid the [advice] open to scrutiny".[178]

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171 For example, by pleading that the privilege holder had a particular state of mind that was informed by the taking of legal advice.

172 (1999) 201 CLR 1 at 13 [29].

173 *Uniform Civil Procedure Rules* 1999 (Qld), r 211(1)((b).

174 *Robson v REB Engineering Pty Ltd* [1997] 2 Qd R 102 at 105 per Demack J; *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 282-283 per Pincus JA; *Peninsula Shipping Lines Pty Ltd & Anor v Adsteam Agency Pty Ltd & Anor* [2008] QSC 317 at [43] per Daubney J.

175 Respondent's Amended Outline of Argument at par 22.

176 Ibid.

177 Ibid 24.

178 Ibid 25.

[76] Accordingly, these two features – the contents of the Board's defence and the disclosure that it did make – were said to amount to conduct on the Board's part that was inconsistent with the maintenance of confidentiality in the advice. The advice was also said to be directly relevant to the allegations in the defence that, Ms Allen contended, put the Board's state of mind in issue. These arguments, it may be thought, represent a considerable expansion on the reasons that the primary judge expressed as to the relevance of the advice and his Honour's conclusion about waiver but, expanded or not, it is necessary to now consider them.

[77] I commence with the pleadings.

[78] It will be recalled from what is set out earlier[179] that the statement of claim contains allegations to the effect that the Board owed various duties when considering Ms Allen's claim including a duty to exercise its discretion in good faith and with real and genuine consideration, a duty to take into account relevant considerations and a duty not to take into account any irrelevant consideration.[180] It is also alleged that, in refusing Ms Allen's claim, the Board breached each of those duties.[181] Of importance to the decision in the court below, but perhaps less so now in light of the way in which the arguments were put on behalf of Ms Allen in this Court, are the particulars that were supplied for the allegation that the Board took into account irrelevant considerations.[182] By those particulars, the irrelevant considerations are alleged to have been: (1) whether the Board was "legally obliged to 're-examine the claim given the passage of time since the claim was first lodged and the two previous assessments of the claim had been declined'"; and (2) the Board's "preference … not to re-examine the claim."[183]

[79] Turning then to the defence, the Board admits that it owed a number of duties to Ms Allen, including a duty not to take into account any irrelevant considerations. However, the allegation that the Board breached any of those duties is denied.[184] A number of grounds for that denial are then advanced and it is these grounds that Ms Allen relies on to submit that the Board has put its state of mind in issue in the proceeding.[185] The grounds relevantly include the assertion that the Board discharged the duties it owed to Ms Allen in that it:

(a) considered the claim;

(b) exercised its discretion in good faith, with real and genuine consideration and in accordance with the purposes for which the discretion was conferred;

(c) took into account all relevant considerations;

(d) did not take into account any irrelevant consideration;

(e) in the alternative, if it took into account an irrelevant consideration, that had no material bearing on the outcome; and

(f) reached a proper decision on the evidence before it.[186]

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179 At [27].

180 Ibid par 21.

181 Ibid par 22.

182 Statement of Claim at pars 21(d) and 22(d).

183 Further and better particulars of the statement of claim at par 2(g)-(h) (ARB 181-182).

184 Defence at par 22.

185 Before setting out the grounds, par 22 of the defence commences in this way:

"The Defendant denies the allegations contained in paragraph 22 of the Statement of Claim on the grounds:

(a) …".

186 Defence at par 22(b)(i)-(vi).

[80] Rule 166(4) of the *Uniform Civil Procedure Rules* 1999 (Qld) requires a party's denial or nonadmission of an allegation in fact to be accompanied by a direct explanation for the party's belief that the allegation is untrue or cannot be admitted. Now, while it may be accepted that what is pleaded by way of explanation for the denial was an attempt to comply with this rule, it is to be noticed that the Board did not also plead that the grounds stated supported its belief that the allegation to which it responds was untrue. Despite that, I think the better view of this part of the pleading is that, contrary to what has been submitted on behalf of Ms Allen, the grounds advanced by way of explanation for the Board's denial do not constitute a positive pleading of those matters as allegations in issue in the proceeding. Nonetheless, the position is not so clear as to allow this point to count against Ms Allen's contentions. I therefore proceed on the basis that there has been a positive pleading of each of those matters and, given the nature of those allegations, that the Board did, by its defence, "put its state of mind in issue".[187]

[81] It is important, though, to consider what then appears in Ms Allen's reply. There, she denies that the Board discharged the duties owed to her because:

(a) in "relation to the first Fund decision,[188] the [Board] did not consider the claim";

(b) the Board "did not exercise any discretion in good faith, with real and genuine consideration and in accordance with the purposes for which the discretion was conferred";

(c) the Board "did not take into account all relevant considerations";

(d) the Board "took into account an irrelevant consideration";

(e) "irrelevant considerations taken into account had a material bearing on the outcome".[189]

[82] As such, although Ms Allen alleges in her reply that the Board failed to consider her claim when it was originally made in 2002, she does not otherwise take issue with the allegation in the defence that the Board considered her claim. To the point, it is not alleged that the Board failed to consider any of Ms Allen's subsequent claims including, most importantly, what is described in the statement of claim as the "fourth Fund decision",[190] being the decision the Board reached at its 4 September 2014 meeting. In any event, the uncontested evidence before the primary judge was that the advice was sought from the Board's solicitors regarding whether the Board was obliged to reconsider Ms Allen's claim and, when received, it was to the effect that the Board should do so. Moreover, it was, and remains, uncontroversial that the Board did reconsider Ms Allen's claim at its 4 September 2014 meeting. In such circumstances, Ms Allen could hardly allege that the Board failed to consider her claim at that meeting.

[83] The argument advanced on behalf of Ms Allen based on the contents of the Board's defence needs to be evaluated in light of what is pleaded as well as these established facts. Of the grounds advanced by the Board as an explanation for its denial of paragraph 22 of the statement of claim, the advice might have been relevant to the question whether the Board "considered the claim"[191] had that been an issue, but it was not; the Board *did* consider Ms Allen's claim. Of the remaining grounds, there

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187 Respondent's Amended Outline of Argument at par 22.

188 The reference to the "first Fund decision" is a reference to the original decision of the Board that was made on 20 May 2002 to refuse payment of a total and permanent disablement benefit and to, instead, approve payment of a "failure of health" benefit: Statement of Claim at par 8.

189 Reply at par 59(b)(2)-(6).

190 Ibid par 18.

191 Defence at 22(b)(i).

is no basis for concluding that the advice was at all relevant to *how* the Board should go about its task of considering Ms Allen's claim at that meeting, whether as to the considerations it should take (or not take) into account, the material to be assessed or any other matter. For the same reason, the irrelevant considerations which, by the particulars, the Board is alleged to have taken into account[192] add nothing to Ms Allen's argument. Whether the Board paused to consider whether it was legally obliged to reconsider Ms Allen's claim or even if its preference was not to do so, the fact is that the Board did, consistent with its legal advice, reconsider her claim. It is therefore difficult to accept that the advice had any relevance, let alone direct relevance, to any allegation in issue on the pleadings.

[84] Furthermore, even if some relevance to what the Board has advanced as grounds for its denial of paragraph 22 of the statement of claim could be made out, it cannot be concluded that the advice was capable of proving (or disproving) any of those matters or, more broadly, that it was capable of proving (or disproving) the Board's state of mind at the time when it decided Ms Allen's claim. That, after all, is the test. The advice could be of no assistance, one way or the other, on these issues. It was not even before the Board at the time when it made its decision.

[85] In my respectful opinion the advice was not directly relevant to an allegation in issue on the pleadings, and the primary judge erred by concluding to the contrary.[193] It should however be kept in mind that the arguments ventilated in the court below were substantially different to the arguments in this Court. Also, it may be that his Honour was distracted by speculation as to the role the advice may have played in the submission prepared by Mr Paré and, ultimately, in the decision reached by the Board. That was of course not the correct inquiry – what needed to be considered was whether the advice tended to prove or disprove an allegation in issue on the pleadings.

[86] It follows that, independently of any question of legal professional privilege, the advice was not a document that the Board was, in my opinion, obliged to disclose to Ms Allen. However, if I should be wrong in that conclusion, I am also of the opinion that there is nothing in the conduct by the Board of its case to give rise to an implied waiver of privilege.

[87] On that point, and for the reasons earlier expressed, the focus must be on the conduct of the Board as the privilege holder. Whatever may be the effect of Ms Allen's pleadings and particulars, they can be effectively ignored; she cannot by her own pleading (or particulars) construct a case for waiver. Ms Allen does not, in any event, attempt to do so, relying instead on the allegations in the defence that I have accepted put the Board's state of mind in issue as well as the feature that the Board disclosed the complaint log and the submission prepared by Mr Paré as conduct impliedly waiving privilege in the advice.

[88] There is however nothing in the defence from which it could be concluded that the Board placed, or intended to place, any reliance at all on the advice when reconsidering Ms Allen's claim. It is not, for example, expressed (or even implied) that the advice in some way supported the manner in which it reconsidered Ms Allen's claim or the decision it made. Nor could the disclosure of the complaint log and the submission be regarded as an act by reason whereof privilege was waived.[194] The

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192 Further and better particulars of the statement of claim at par 2(g)-(h) (ARB 181-182), extracted above at [44].

193 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [25]-[30].

194 C.f. *Commissioner of Taxation v Rio Tinto Ltd* (2006) 151 FCR 341 at [71]-[72] (where the Commissioner had in response to Rio Tinto's request for particulars stated that a number of documents over which privilege had been claimed were "relevant to reaching his state of satisfaction and exercising his discretion" and was found to have thereby impliedly waived privilege over those documents).

evident purpose of doing so was to ensure that the Board complied with its disclosure obligations under the UCPR, not to secure some forensic advantage in connection with an advice merely to reconsider the claim based on the new medical evidence supplied. The advice was, in any event, not disclosed but merely referred to in the complaint log and submission. I cannot accept the submission made on behalf of Ms Allen that the disclosure of these documents "established a connection" between the documents and the Board's state of mind. The references to the seeking and obtaining of advice from the Board's solicitors in the submission were part of the background narrative and nothing more.[195] To the extent that it (and the complaint log) recorded the view of the solicitors that the Board should reconsider Ms Allen's claim, it was not in issue in the proceeding that the Board did so. There is otherwise no conduct on the part of the Board that could be regarded as inconsistent with the maintenance of confidentiality in the advice, and no suggestion that the advice is, or will be, relied on by the Board to advance its cause in the proceeding.

[89] I am therefore unable to agree with the primary judge that privilege in the advice was impliedly waived.[196] In reaching that conclusion, his Honour regarded the submission as a "crucial document" to the "approach taken by the Board in reaching its decision" and observed that "integral in that submission was a reference to the conclusions expressed in the legal advice".[197] His Honour went on to hold that the "legal advice goes to the state of mind" and that the Board "here adopted in full the recommendation of its officer who considered the legal advice" in making it. His Honour therefore decided that the advice has "either directly or indirectly been put in issue in these proceedings".[198]

[90] Whilst it may be accepted that Mr Paré's submission was important to the Board's decision, and that it contains a recommendation that the claim should once again be declined, it cannot be concluded that it says anything about "the approach the Board should take in reaching its decision". Even more to the point, the Board has not sought to place any reliance on the advice to justify how it reached its decision. Similarly, although I have accepted that, by its defence, the Board put its state of mind in issue in the proceeding through the making of a number of allegations to the effect that it exercised its discretion properly,[199] it cannot be concluded that the advice assists one way or the other with respect to those allegations or that the Board has attempted to bolster the proper exercise of its discretion by reference to the advice.[200] In the end, the advice was never before the Board and the only reference to it in the submission is for the purpose of conveying a view expressed by the Board's solicitors that the claim should be reconsidered in light of the new medical evidence, and it was. On the present state of the evidence, the advice could have no other significance.

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195 Ibid 25.

196 Ibid [62]-[68].

197 Ibid [63].

198 Ibid [66]-[67].

199 That is, that it (1) exercised its discretion in good faith, with real and genuine consideration and in accordance with the purposes for which the discretion was conferred; (2) took into account all relevant considerations; (3) did not take into account any irrelevant consideration; (3a) in the alternative to (3), if it took into account an irrelevant consideration, that had no material bearing on the outcome; and (4) reached a proper decision on the evidence before it: par 22 of the defence.

200 The pleadings on both sides contain liberal reference to the "discretion" which the Board exercised. It should be kept in mind that the Board's duty as trustee was to pay the benefit to Ms Allen if she fell within the definition of total and permanent disablement and that the formation of the Board's opinion was "not a matter of discretionary power to think one thing or the other; it was an ingredient in the performance of a trust duty": *Finch v Telstra Super Pty Ltd* (2010) 242 CLR 254 at [28]. And see *Alcoa of Australia Retirement Plan Pty Ltd v Frost* (2012) 36 VR 618.

[91] For completeness, it is necessary to add that, whatever view was taken on the question of waiver, it was not appropriate to order that the whole advice be disclosed.[201] The uncontested affidavit evidence was to the effect that the advice dealt with four discreet issues, only one of which concerned the "subject matter of the correspondence exchanged in this matter".[202] Therefore, if privilege was impliedly waived, it could have only been waived with respect to that one issue. This was not a case where the advice in question dealt with a single subject-matter so that reliance on part of the advice would make it unfair to withhold the remainder, and the statements in *Attorney-General (NT) v Maurice* on this topic need to be considered with that in mind.[203] On the hearing of the application in this Court it was argued on behalf of Ms Allen that, because the complaint log and submission revealed that the Board's solicitors were asked to advise whether the Board should reconsider the claim, the resulting advice must have been devoted to that question and nothing else. As such, it was argued, the four discreet issues must have each been concerned with the same question. The fundamental problem with that argument is that the affidavit evidence was to the contrary. The time to challenge the deponent about this evidence was at the hearing of the disclosure application in the court below, but no application for leave to cross-examine was made.

Joint privilege

[92] As I mentioned at the beginning of these reasons, the final contention was raised for the first time in written submissions filed on behalf of Ms Allen in this Court. It was argued that Ms Allen, as a beneficiary of the Scheme, "shares a joint privilege" in the advice with the Board and, for that reason, it "cannot be kept from her".[204] In support of this argument it was emphasised that the advice was not obtained "in the context of actual or immediately anticipated litigation but in order to make a decision about the proper administration" of the Scheme.[205] Particular reliance was placed on the following passage from the judgment of Pullin JA in *Schreuder v Murray (No 2)*:[206]

> "The trustee and beneficiaries have a correlative duty and interest in the proper administration of the trust. The duty of the trustee includes a duty to properly perform the trust by adhering to and carrying out the terms of the trust. The beneficiaries have an interest and, indeed, a right to compel proper administration of the trust. The trustee and the beneficiaries are in a 'formal legal relationship' and *if the trustee obtains legal advice concerning the proper administration of the trust*, then any legal professional privilege attaching to the advice obtained is the joint privilege of both the trustee and the beneficiaries. As such, the trustee and the beneficiaries, being entitled to joint privilege, may not maintain the privilege against each other."[207] [emphasis added]

[93] There is little room for doubt that legal advice obtained by a trustee concerning the proper administration of the trust belongs, in effect, to the trust.[208] As such, the legal

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201 *Allen v The Queensland Local Government Superannuation Board* [2015] QDC 237 at [69]-[70].

202 Affidavit of Mark Williams sworn 9 September 2015 at par 4 (ARB 70).

203 (1986) 161 CLR 475 at 481-482 per Gibbs CJ, 487-488 per Mason and Brennan JJ and 497 per Dawson J.

204 Respondent's Amended Outline of Argument filed 5 February 2016, pars 5 and 37-42.

205 Ibid pars 5 and 40. Thus, adopting what was said in *Talbot v Marshfield* (1865) 2 Dr & Sm 549; 62 ER 728, it was submitted that the advice was provided "before proceedings were commenced or threatened, and in relation to the trust": at 729.

206 (2009) 41 WAR 169.

207 Ibid [10]. Referred to at par 38 of the Respondent's Amended Outline of Argument.

208 *Re Londonderry's Settlement* [1965] Ch 918 at 933; *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16 at [28]; *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 at [6].

professional privilege attaching to an advice so obtained will ordinarily be shared by the trustee with the beneficiaries of the trust because of their joint interest in it. The principle was stated in a frequently cited passage from Sheller JA (with whom Waddell AJA agreed) in *Farrow Mortgage Services Pty Ltd (in liq) v Webb*:[209]

> "Two or more persons may join in communicating with a legal adviser for the purpose of retaining his or her services or obtaining his or her advice. The privilege which protects these communications from disclosure belongs to all the persons who joined in seeking the service or obtaining the advice. The privilege is a joint privilege. So is it also if one of a group of persons in a formal legal relationship communicates with a legal adviser about a matter in which the members of the group share an interest. Communications by one partner about the affairs of the partnership or a trustee about the affairs of the trust are examples. Implicit in the relationship is the duty or obligation to disclose to other parties thereto the content of the communication. Accordingly no privilege attaches to such communications as against others who, with the client, share an interest in the subject matter of communication. But the parties together are entitled to maintain the privilege 'against the rest of the world': Phipson, par 20-28 and par 20-29. Logically the joint nature of the privilege means that all to whom it belongs must concur in waiving it. Theirs is one inseverable right."[210]

[94] On the other hand, where advice is sought by a trustee, not about the day-to-day affairs of the trust, but about the discharge of the trustee's own obligations regarding a particular beneficiary, no duty or obligation on the part of the trustee to disclose the content of the resulting advice can be implied. In that circumstance, there can be no joint interest, and privilege in the resulting advice will not be shared by the trustee with the beneficiary about whom the advice was sought.[211] Thus, where a trustee seeks advice about its obligations concerning the validity of a claim brought by a beneficiary or some other issue connected with the bringing of the claim (including the standing of the claimant), then the interests of the trustee and the interests of the beneficiary, whether contingent or not, are "selfish and potentially adverse"[212] to each other. In such a case, the advice will have been sought with respect to a matter outside their joint interest and, for that reason, privilege in the advice will not be shared by the beneficiary with the trustee. If the position were otherwise, a trustee could never take confidential legal advice about a claim made by a beneficiary. Indeed, the proper administration of the trust and the interests of the other vested and contingent beneficiaries require trustees to preserve the fund against invalid claims. Trustees must therefore be entitled to seek and obtain legal advice about claims made against the fund without the risk of subsequent disclosure of that advice to the claimant. There can be no joint privilege in any such circumstance. As Buss JA (McLure JA agreeing) said in *Schreuder v Murray (No 2)*:[213]

> "The beneficiary will not be entitled to a joint privilege with the trustee if the confidential communications, information or documents relate

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209 (1996) 39 NSWLR 601.

210 At 608.

211 *Yunghanns v Elfic Pty Ltd (No 2)* (2000) 1 VR 92 at [35]; *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16 at [28]; *Hancock v Rinhart (Privilege)* [2016] NSWSC 12 at [6].

212 To borrow a phrase from the judgment of Giles J in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405 at 409-410 in a passage concerned with common interest privilege.

213 (2009) 41 WAR 169.

> to legal services obtained for the benefit of the trustee personally (for example, if the trustee seeks legal advice as to his or her personal rights or liabilities in connection with an alleged breach of trust …).”[214]

[95] That was the situation here. The advice provided by the Board's solicitors was not sought about the day-to-day administration of the trust; it was about whether the Board was obliged to reconsider Ms Allen's claim in light of the complaint made on her behalf by her solicitors in their letter dated 26 June 2013. The original claim was of course made some 12 years earlier and, after the payment of a total and permanent disablement benefit was declined, requests for reconsideration were made in October 2002 and May 2006 and similarly declined. But, as earlier discussed,[215] what led to the reconsideration and decision the Board arrived at on 4 September 2014 was not merely a request to reopen the claim because of new medical evidence; it was a complaint made in reliance on s 101 of the *Superannuation Industry (Supervision) Act* 1993 (Cth) and s 19 of the *Superannuation (Resolution of Complaints) Act* 1993 (Cth). The request for advice was therefore made at a time when it could reasonably be anticipated that proceedings in the Superannuation Complaint Tribunal could well ensue.

[96] There cannot be any doubt about the character of the letter and enclosures received from Ms Allen's solicitors. It was a statutory complaint and it was treated as such by the Board's officers. In the first place, the letter from Ms Allen's solicitors made that clear, and the making of such a complaint is an essential precondition to the making of an effective complaint to the Superannuation Complaints Tribunal. Furthermore, on its receipt by the Board's officers, the complaint log was brought into existence. On 29 November 2013, one of the Board's officers made an entry in the log to the effect that, although the claim had been reopened, as the "matter [had] been outstanding for longer than 90 days, [the] complaint may proceed to SCT". Ms Allen's solicitors also referred to the "lodgement of a complaint" to the Board's "Internal Dispute Resolution Centre" in their correspondence of 7 January 2014. Then, after the Board reconsidered Ms Allen's claim at its 4 September 2014 meeting, it caused its decision declining the claim to be notified by letter dated 25 September 2014 in which Ms Allen was also advised about her rights to have her "complaint reviewed by the Superannuation Complaints Tribunal". At the time the advice was provided, Ms Allen and the Board were in a dispute which could well have escalated into a proceeding before the Tribunal (if not other litigation); they could not have a joint or shared interest in the advice.

[97] It follows that the factual premise for Ms Allen's argument to support a finding of joint privilege is in my respectful view flawed. There is no joint privilege in the advice.

Leave to appeal

[98] Leave is required to bring the appeal. Section 118(3) of the *District Court of Queensland Act* 1967 (Qld) confers on this Court a general discretion to grant leave. Leave will usually be granted where the appeal is necessary to correct a substantial injustice to the applicant, and there is a reasonable argument that there is an error to be corrected.[216]

[99] On behalf of the Board, it was submitted that "despite the interlocutory nature of the proceeding below, the error deprived the [Board] of the substantive legal right of legal

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214 Ibid [94(f)]. And see *Gray v BNY Trust Company of Australia Limited* (2009) 76 NSWLR 586 at 601 [54]-[56]; *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd* [2011] VSC 477 at [13]-[20].

215 See these reasons at [16].

216 *ACI Operations Pty Ltd v Bawden* [2002] QCA 286; *Pickering v McArthur* [2005] QCA 294 at [3] per Keane JA.

professional privilege in a communication between it and its lawyers" in a final manner.[217] I accept those submissions. In my opinion, there should be a grant of leave to the Board to appeal against both judgments in the court below. Ms Allen's contention that the orders should be upheld because she had joint privilege in the advice is not made out.

Disposition

[100] For these reasons, I am of the opinion that the primary judge erred in ordering disclosure of the advice and in subsequently ordering that the Board pay Ms Allen's costs. In the event that the Court grants leave to appeal, in my opinion, the appeal should be allowed.

[101] I propose the following orders:

1. Grant leave to appeal and allow the appeal;
2. Set aside the orders made in the court below on 24 September 2015 and 8 October 2015;
3. In lieu thereof, substitute the following orders:
    a. The application filed on 7 September 2015 is dismissed;
    b. The applicant is ordered to pay the respondent's costs of and incidental to the application calculated on the standard basis;
4. The respondent shall pay the applicant's costs of and incidental to the application for leave to appeal and the appeal calculated on the standard basis.

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217 Applicant's Amended Outline of Argument filed 2 February 2016 at par 1.