

LAND COURT OF QUEENSLAND

CITATION: *Cherwell Creek Coal Pty Ltd v BHP Queensland Coal Investments Pty Ltd & Ors (No 26)* [2020] QLC 30

PARTIES: **Cherwell Creek Coal Pty Ltd**
(ACN 063 763 002)
(applicant)

v

BHP Queensland Coal Investments Pty Ltd
(ACN 098 876 825)
QCT Resources Pty Ltd
(ACN 010 808 705)
BHP Coal Pty Ltd
(ACN 010 595 721)
QCT Mining Pty Ltd
(ACN 010 487 840)
Mitsubishi Development Pty Ltd
(ACN 009 779 873)
QCT Investment Pty Ltd
(ACN 010 487 831)
Umal Consolidated Pty Ltd
(ACN 000 767 386)
(respondents)

FILE NO: MRA1332-08

PROCEEDING: Claim for legal professional privilege

DELIVERED ON: 5 August 2020 [ex tempore]

DELIVERED AT: Brisbane

HEARD ON: 5 August 2020

HEARD AT: Brisbane

PRESIDENT: FY Kingham

ORDER: **The Respondents' claim for legal professional privilege is upheld.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – WAIVER OF PRIVILEGE – where the

applicant subpoenaed four categories of documents from the respondent - where the respondent claimed legal professional privilege over parts of some documents and all of others- where the applicant challenged the claim on the basis of implied waiver - whether the deponents state of mind was in issue – whether disclosure of limited parts of the documents would mislead – where the Court accepted the claims of legal professional privilege

APPEARANCES: N Owens SC with J Redwood, L Sheptooha, D Delany (instructed by Holding Redlich) for the applicant
A Pomeranke QC with A Stumer, S Webster, D Marckwald (instructed by Allens) for the respondents

- [1] A claim of privilege has been made on behalf of the respondent through an affidavit filed today, sworn by Ms Morcom. There is no dispute that a valid claim has been made for legal professional privilege; that is, that the nature of the material would otherwise meet that requirement. The only question is whether that privilege has been impliedly waived in respect of the particular documents that Cherwell Creek seeks to be disclosed in full.
- [2] As I observed, this is not a case of express waiver but implied waiver. In essence, the test for implied waiver is whether there is an inconsistency or an unfairness between the conduct relied upon and the party maintaining its claim for privilege.
- [3] Although I understood from Mr Owens' initial submissions that the implied waiver argument was confined to one of partial disclosure, in reply submissions he said there were two grounds. The first is that Ms Morcom's state of mind or knowledge at various times is in issue because she asserted her knowledge or views at certain times about illegal drilling and reporting of exploration results and, in doing so, impliedly waived her client's legal professional privilege.
- [4] Mr Pomeranke said this was neither asserted initially, nor established, and I accept that submission; that it hasn't been established. Bearing in mind the test of inconsistency and unfairness between the conduct and maintaining privilege, Ms Morcom had not put her state of mind in issue in the proceedings.
- [5] Her affidavit explains why the respondents did not seek to plead illegal drilling and false reporting of exploration results at an earlier time. That is not a substantive issue in the proceedings and there is nothing else to establish inconsistency or

unfairness between that conduct and the respondents maintaining their privilege in legal communications.

- [6] That leads to the second ground, that partial disclosure of communications impliedly waives privilege in the documents in full, because the redactions render the disclosed portion misleading. That cannot apply to item 4 of annexure 1 or items 9 to 12 of annexure 2, which were completely redacted.
- [7] Items 1, 2 and 5 of annexure 1, which were also mentioned in other annexures, and items 13 to 17 of annexure 3 remain in issue. The question, again is this, is there inconsistency and unfairness between the partial disclosure of those documents and the respondents maintaining privilege? That, really, rests on whether what has been disclosed might mislead.
- [8] Mr Owens' submissions focused on the reason he sought access to the material. He expressed an interest in, and indeed, an entitlement to know everything that had transpired, for example, between the parties to the communications. He did not focus, in my view, on the unfairness or inconsistency in the conduct of disclosing only part of a document.
- [9] Mr Owens submitted it is not simply a matter of comparing the statements in the affidavit with what was disclosed for consistency, and I accept that is so. But as I understood Mr Pomerence's submissions, he took me to the passages relied upon in Ms Morcom's affidavit by Mr Owens. to show that there was no basis for inferring from those affidavits that partial disclosure of the relevant documents was misleading.
- [10] Mr Owens did not urge the Court to require production of the unredacted documents to assess whether the disclosed portions might create a misleading impression. Indeed, he initially argued the Court could not do so. He argued his submissions, by reference to the affidavit of Ms Morcom, met the onus of Cherwell Creek on this application.
- [11] I am not persuaded that is so. Mr Owens invited me to reason from the purpose of the partial disclosure to conclude the disclosure was selective; that is, it only disclosed material supportive of Ms Morcom's statements. That requires

speculation, not reason; and speculation that is not grounded in some inconsistency or some other indication either in Ms Morcom's affidavit or in some other evidence that gives rise to an inference that the redactions might create a misleading impression.

[12] In the absence of being able to assess that myself by reference to the documents themselves, I am not satisfied Cherwell Creek has met its onus on the application. I accept the claims of legal professional privilege as made in Ms Morcom's affidavit.

Order:

The Respondents' claim for legal professional privilege is upheld.