SUPREME COURT OF QUEENSLAND

CITATION:	*G & S Engineering v Lampson Australia Pty Ltd & Anor* [2009] QSC 361
PARTIES:	**G & S ENGINEERING** (applicant) v **LAMPSON AUSTRALIA PTY LTD** (first respondent) and **WESFARMERS CURRAGH PTY LTD** (second respondent)
FILE NO:	4969 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	12 November 2009
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2009
JUDGE:	Applegarth J
ORDER:	**1. The first respondent provide to Dr Gilmore or otherwise make reasonably available for inspection by Dr Gilmore within seven days all submissions, reports, correspondence, photographs or memoranda made or prepared by or on behalf of the first respondent and submitted to the Department of Mines and Energy concerning the incident which occurred on 7 December 2008 more particularly described in the affidavit of Adam Charles Butson filed herein on 21 October 2009, and in particular, provide to Dr Gilmore or otherwise make reasonably available to him a copy of the Incident Report provided to the Department of Mines and Energy by the first respondent on 4 February 2009, including the annexures to the said report.** **2. The first respondent pay the applicant's costs of and incidental to the application.** **3. The first respondent pay the second respondent's costs of and incidental to the application.**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS –

PRODUCTION AND INSPECTION – GROUNDS FOR RESISTING PRODUCTION – LEGAL PROFESSIONAL PRIVILEGE – WAIVER OF PRIVILEGE – where damage was caused to a dragline and a crane – where the Department of Mines and Energy seized the crane and investigated the incident to determine its cause – where supplier of the crane prepares an incident report for its legal representatives and for the purpose of the department's investigations – where the report was provided to the department without a formal directive to produce it and to achieve the release of the crane from seizure – where the applicant requests the report so that a report on why the incident occurred can be completed by a court-appointed expert – whether the incident report was created for the dominant purpose of submission to legal advisers or for use in legal proceedings – whether any legal professional privilege had been impliedly waived by conduct inconsistent with the privilege

Coal Mining Safety and Health Act 1999 (Qld), s 159
Uniform Civil Procedure Rules 1999 (Qld), r 429S(9)

AWB Ltd v Cole (No 5) (2006) 155 FCR 30, cited
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49, cited
Goldberg v Ng (1995) 185 CLR 83, considered
Grant v Downs (1976) 135 CLR 674, cited
Kennedy v Wallace (2004) 142 FCR 185, cited
Mann v Carnell (1999) 201 CLR 1, applied
Osland v Secretary, Department of Justice (2008) 234 CLR 275, applied
Watkins v State of Queensland [2008] 1 Qd R 564, cited

COUNSEL: G A Thompson SC for the applicant
G E Underwood for the first respondent
S Couper QC for the second respondent

SOLICITORS: CLS Lawyers for the applicant
Hewitt Commercial for the first respondent
Carter Newell for the second respondent

[1] The applicant ("G & S") applies for an order that the first respondent ("Lampson") give to the Court or the Court's appointed expert, Dr Gilmore, documents submitted by Lampson to the Department of Mines & Energy ("DME") concerning an incident. The incident occurred on 7 December 2008 at the Blackwater mine owned by the second respondent ("Curragh") in which a dragline was damaged. G & S had been contracted by Curragh to assist in a 12 week shut-down process for the overhaul and upgrade of the dragline. A crane supplied by Lampson to Curragh was being used to lower the dragline and boom. The crane was being operated by a driver engaged by way of labour hire agreement from G & S. The dragline boom was in the process of being lowered by the crane when it fell, sustaining damage to the dragline and the crane.

[2] On 5 June 2009 Byrne SJA made an order in proceeding 547/09 pursuant to rule 429S of the *Uniform Civil Procedure Rules* appointing Dr Gilmore to prepare a report giving an opinion as to the likely cause of failure of the crane on 7 December 2008.

[3] The focus of the present application is on a document that was prepared on or about 30 January 2009 and which was given by Lampson to the Chief Mines Inspector of DME at a meeting on 4 February 2009 ("the 30 January report"). Dr Gilmore has requested a copy of the report to enable him to complete his report. G & S and Curragh, through their legal representatives, have made repeated requests for the 30 January report to be provided so that it may be briefed to Dr Gilmore. Understandably, Dr Gilmore is of the view that the provision of the submissions that were provided to the DME will expedite the completion of his report and produce the most reliable opinion. G & S foreshadowed bringing an application. Lampson declined to disclose any submissions or reports given by it to the DME on the ground that any such document is the subject of legal professional privilege.

[4] Lampson opposes the order sought by G & S[1] and contends that the 30 January report is the subject of legal professional privilege. G & S and Curragh each submit that Lampson has failed to establish its claim for legal professional privilege, and rely particularly upon the contents of contemporaneous documents prepared at about the time the report was completed and given to the DME, and also on evidence given during cross-examination of the Managing Director of Lampson, Mr Lunn, concerning the purposes for which the 30 January report was prepared. In the alternative, they submit that legal professional privilege was waived. After being provided with the 30 January report the DME investigation concluded that, on the balance of probabilities, the fall of the dragline boom was the result of error by the operator of the crane, and decided that the crane that was seized by it as evidence should be returned to Lampson.

[5] The issues for my determination are:

(a) Has Lampson established that the 30 January report is the subject of legal professional privilege?

(b) If so, has any such privilege been waived, particularly by reason of Lampson's provision of the report to DME for the purpose of the DME's investigations under the *Coal Mining Safety and Health Act* 1999 (Qld)[2] and in order to secure the release of the crane from seizure?

Legal professional privilege

[6] Only those documents which are brought into existence for the dominant purpose of submission to legal advisers for advice or for use in legal proceedings are entitled to immunity from production on the grounds of legal professional privilege.[3] The

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1 *UCPR* r 429S(9) provides that: "The Court may make orders and give directions to facilitate the expert's preparation of a report."

2 The *CMSHA*.

3 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; *Cross on Evidence Australian edition* Chapter 13 at [25220].

relevant purpose is the purpose of bringing into existence the document containing the confidential communication.[4] *Cross on Evidence* states:

> "A 'dominant' purpose is that which was the ruling, prevailing or most influential purpose. It is one which is of greater importance than any other. It is more than the primary or a substantial purpose. It must be clearly paramount. Where two purposes are of equal weight, neither is dominant. If the decision to bring the document into existence would have been made irrespective of any purpose of obtaining legal advice, the latter purpose cannot be dominant."[5]

Factual background

[7] Before addressing the factual background, it is important to note that the application is not concerned with an earlier report that was prepared by Lampson in early January 2009. Such a report was said by Mr Lunn to have been created for the purpose of obtaining legal advice and to have been communicated to Lampson's legal advisers in or about mid-January 2009 at about the time he instructed them to seek an injunction restraining Curragh from trespassing on the crane. The application for an injunction was filed on 12 January 2009. Mr Lunn's affidavit says that he prepared the report "for the sole purpose of obtaining legal advice" because it was clear to him that the incident would result in litigation of some sort.[6] This evidence on affidavit was qualified, if not contradicted, by Mr Lunn's evidence in cross-examination. His evidence was that the preparation of an Incident Report was an established procedure and that the purposes for preparing such a report included:

(a) addressing deficiencies in systems and to address safety concerns by finding out the cause of the incident and avoiding its repetition;

(b) making a claim on insurance;

(c) reporting to the owner of the crane.

Given Mr Lunn's evidence under cross-examination, I do not accept that the report that was prepared and given to Lampson's legal advisers in or about mid-January 2009 was prepared for the sole purpose of obtaining legal advice. However, the essential point of reference is the purpose or purposes for which the report dated 30 January 2009 was prepared, and whether that document was brought into existence for the dominant purpose of submission to legal advisers for advice or for use in legal proceedings. That issue requires attention to be focused upon the immediate background to the document's preparation.

[8] On 28 January 2009 the crane was seized by a Senior Inspector of Mines at the Curragh Mine because he reasonably believed that the crane was evidence of an offence against the *CMSHA*. Pursuant to s 146 of the *CMSHA* the Senior Inspector directed that the crane be secured and access restricted to it.

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4 *Grant v Downs* (1976) 135 CLR 674 at 667-668, 682-683, 689, 692.

5 *Cross on Evidence Australian edition* Chapter 13 at [25240] (citations omitted).

6 Affidavit sworn 26 October 2009, para 2, filed by leave 4 November 2009; affidavit sworn 3 November 2009, para 1, filed by leave 4 November 2009.

[9] On or about 29 January 2009 Mr Lunn, on behalf of Lampson, was invited to attend a meeting with the Executive General Manager of Curragh and the Chief Mines Inspector, Queensland at Blackwater. Mr Lunn gave evidence that one of the purposes of attending the meeting was to obtain the crane's release from seizure.[7] Another was said to be to prevent Curragh from "cutting my crane up and destroying the evidence".[8] He also wanted to move the crane from the Curragh Mine to Lampson's place of business at Toronto in New South Wales. It is the purpose for which the document was brought into existence, not the purpose of any meeting at which it was communicated that is crucial.[9] However the purpose of the meeting is relevant to the purpose or purposes for which the 30 January report was brought into existence.

[10] I found Mr Lunn's oral evidence concerning the sequence of events at the meeting of 4 February 2009, and the circumstances under which the 30 January was provided to DME that day unsatisfactory. For instance, Mr Lunn's evidence concerning the circumstances under which the cover sheet to that report was prepared was unsatisfactory. He suggested that it might have been prepared on the day and sent to Lampson's representatives prior to the provision of the report to the DME. I find this unlikely. The cover sheet is dated 30 January 2009. Another deponent for Lampson, Mr Hodgson, who attended the meeting gave evidence that after Mr Lunn agreed to hand over the report he asked Mr Hodgson to get the report, which Mr Hodgson had in a sports bag with him. Mr Hodgson refers to a request that was made of the Chief Inspector to sign the acknowledgment of confidentiality and privilege that was on "the cover page". I do not accept that the cover page was only prepared on the day of the meeting and in response to a demand by the DME for production of information. I find that the cover sheet and the report of 30 January 2009 were probably prepared on 30 January 2009 in anticipation of the planned meeting.

[11] The cover sheet of the 30 January report is as follows:

"**INCIDENT REPORT:**

DRAGLINE Boom Lowering Incident 7th December 2008 – Curragh Mine North Qld.

The following report has been compiled independently from Curragh Mining Incident Investigation Team and Qld Mines Dept Inspectorate.

This report was prepared for the Legal Representatives of Lampson (Australia) Pty. Ltd. and is prepared only for the purpose of the investigations under the *Coal Mining Safety and Health Act 1999* (Qld). By providing a copy of this report to the Department of Mines and Energy, Lampson does not waive any legal professional privilege or equitable rights that may attach to this report.

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7 Transcript 1-15 l 10 – 1-16.

8 T 1-16 l 10.

9 *Kennedy v Wallace* (2004) 142 FCR 185 at 214 [155] – [158].

> All Intellectual Property Rights in this report shall remain the property of Lampson (Australia) Pty. Ltd."

[12] Under cross-examination Mr Lunn was taken to the sentence that reads "This report was prepared for the Legal Representatives of Lampson (Australia) Pty. Ltd. and is prepared only for the purpose of the investigations under the *Coal Mining Safety and Health Act 1999* (Qld)". His evidence was that this reflected the purposes for which the 30 January 2009 report was prepared.[10] He did not suggest that the expression "is prepared only for the purposes of the investigations" was in error and that the word "prepared" should have read "provided". On the basis of the terms of the document itself, and Mr Lunn's evidence, I find that a substantial purpose for which the 30 January report was prepared was to provide it to the DME for its use in its investigations. The preparation of the 30 January report for this purpose was intended to serve Lampson's interests. It wished the DME's investigations to lead to acceptance of Lampson's opinions or, at least, the release of the crane from seizure by the DME.

[13] Mr Lunn accepted under cross-examination that one of the purposes of the meeting on 4 February 2009 was to agree a plan to determine the nature and cause of the incident, and that part of his purpose in attending the meeting was "to secure a release of the crane from seizure".[11] I find that the 30 January report, including its cover page, was prepared prior to the meeting and with this latter purpose in mind. I do not accept Mr Lunn's denial that he did not have in mind before he went to the meeting that he might have to give the report to the DME.[12] On the contrary, I find that the 30 January report was prepared and taken to the meeting on 4 February in anticipation that, depending upon the discussions, the report might have to be given to the DME in order to achieve Lampson's purpose of securing the release of the crane from seizure.

[14] The cover sheet of the 30 January report identifies two purposes for which the report was prepared. The first is stated to be "for the Legal Representatives of Lampson (Australia) Pty Ltd". This stated purpose may be a relic from an earlier document that was prepared for the purpose of enabling Lampson's legal representatives to obtain an injunction. However, it is unnecessary to decide that issue, and I am prepared to accept Mr Lunn's evidence that the 30 January report was prepared both for the legal representatives of Lampson and for the purpose of the investigations under the *CMSHA*. He accepted that these were both important purposes for the preparation of the report.[13]

[15] As with the earlier document, there were a number of other purposes for the preparation of the 30 January report. They included ensuring that Lampson's business systems and its equipment were operating satisfactorily,[14] and to analyse the safety implications of the incident in order to make sure that the problems could not happen again.[15] Another purpose of the report was for insurance purposes.[16]

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10 T 1-14 l 45.
11 T 1-15 ll 7 – 10.
12 T 1-16 l 40.
13 T 1-40 l 45.
14 T 1-34 ll 8 – 10.
15 T 1-39 l 46.
16 T 1-35 l 52.

Another was to report to the owner of the crane.[17] Under cross-examination Mr Lunn denied that insurance was one of the main purposes for preparing the report, following which he was asked the open question, "What are the other purposes?" to which he responded:

> "The main purpose was that I had been excluded from the investigation by Curragh Mining. ... And we were left on a limb – without a crane – without an investigation and we were barred from going to site to complete our own investigations to prepare our own reports."[18]

This answer, the immediate context in which the 30 January report was prepared, namely in preparation for a meeting on 4 February following which Lampson's hoped to have the crane released from seizure by the DME, and the purposes stated on the front cover of the 30 January report serve to identify the substantial purposes for which it was prepared. Given the potential for litigation and the fact of a DME investigation, one purpose was to inform Lampson's legal representatives. There were the other purposes that I have identified. However, the primary purpose is that stated on the document itself, namely the purpose of the investigations under the *CMSHA*, and Lampson intended that the report achieve its desired outcome of that investigation, namely to obtain the release of the crane from seizure by the DME as soon as possible and the return of the crane to Lampson to enable it to complete its own investigations.

[16] It is not necessary for G & S or Curragh to prove that this was the dominant purpose. However, I find this to be the case. Instead, it is for Lampson to discharge the onus of proving that the dominant purpose for which the 30 January report was brought into existence was for submission to legal advisers for advice or for use in legal proceedings. It has not discharged that onus. The main purpose for which the 30 January report was brought into existence was for it to be given to the DME for the purpose of its investigations and so as to secure the release of the crane from seizure. I conclude that Lampson has not established that the 30 January report is the subject of legal professional privilege.

[17] The statement in the cover sheet that by providing a copy of the report to the DME Lampson "does not waive any legal professional privilege or equitable rights that may attach to this report" does not lead to the conclusion that the report attracted legal professional privilege. I find that it did not.

[18] This makes it strictly unnecessary to consider the issue of waiver. However, the matter having been argued, I shall proceed to do so.

The circumstances under which the 30 January report was provided to the DME

[19] A meeting occurred on 4 February 2009 that was attended by representatives of DME, Curragh and Lampson, along with two field engineers. Minutes were taken by an Executive Assistant, and there is no reason to suppose that they do not represent a generally accurate account of the sequence of events and what was said. Mr Lunn, who exhibited the minutes to an affidavit, acknowledged their accuracy by initialling them. The meeting opened shortly after 11 am and the Chief Inspector

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17 T 1-38 l 40.

18 T 1-36 ll 1 – 7.

of Mines, Mr Taylor, identified his focus as being on the nature and cause of the incident, followed by which the parties would move onto risk mitigation. The minutes record Mr Taylor as having indicated that there were two ways that the parties could handle the situation. The first was to "work together in a collaborative manner". The second was for him to use his powers under the Queensland legislation, and this was recorded as being "a last resort". The meeting proceeded to discuss a variety of issues concerning the testing of the crane and its retention on site at Curragh. Mr Lunn, on behalf of Lampson, reported that Lampson had carried out "a process of elimination".

[20] Mr Taylor addressed relevant provisions of the *CMSHA* relating to his power to seize a thing that he reasonably believed to be evidence of an offence against the Act.[19] He displayed his DME identity card. He later referred to s 159 of the Act and the minutes record that he explained that a person must answer questions asked by the DME about a "high potential incident". The discussion turned to the location of the testing on the crane. Mr Taylor wanted it done on site at Curragh, whereas Mr Lunn is recorded as wanting to do work on the crane in Toronto West, Newcastle and tried to convince Mr Taylor as to why this should be done. At 11.45 am Lampson broke out into a separate meeting. At 12.15 pm the DME joined Lampson in a separate meeting that lasted until 12.35 pm. Accounts of what were said during this "break-away meeting" are given in affidavits by Mr Lunn, Mr Hodgson and Mr Nightingale who were present at representatives of Lampson. I accept their evidence that during this meeting Mr Taylor reiterated that he had power under the Act to require Lampson to supply him with information. I accept that Mr Taylor, in explaining his powers under the Act, said words to the effect that the powers meant that Lampson had to give him whatever information it had. The different accounts given of this conversation indicate that Mr Taylor spoke in terms of his power to require "information". According to Mr Nightingale, Mr Taylor said that under the relevant Acts he could force the release of anything that he considered relevant but that he would "prefer that Lampson hands over any information rather than requiring the formality of seizure via the Acts". According to Mr Nightingale, Mr Lunn then said that he would supply the report on the understanding that it was for departmental use and not for public use. Mr Lunn recalls that he asked Mr Taylor the following question:

> "I ask you again, are you demanding this information from me or asking for it? I have no intention of providing it to you unless I have no other choice."

He says that Mr Taylor responded with words to the following effect:

> "When we get to this point I would rather you provide it to me than for me to invoke the Act."

Mr Lunn says that he felt that he had no other choice but to disclose the report which was the only information that he had into the incident that the DME did not already have. He says that he understood that he would be required in any event to provide the report pursuant to a directive from the DME, and was concerned that if he did not provide the report on confidential terms to the DME he would be forced to

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19 *CMSHA*, s 143 – s 150.

produce it and it could be made public. For these reasons he felt that he had no other choice but to produce the report to ensure that it remained confidential.

[21] The minutes of the meeting record that it reconvened at 12.40 pm and at this point Mr Lunn released the report to the DME. Discussion then included a statement, apparently from Mr Lunn, that the report was a "full comprehensive report into the incident." Mr Lunn told Curragh that it was heading down the wrong track and should be looking at other alternatives than the crane. Mr Taylor is recorded as having expressed his appreciation that Mr Lunn gave him the report "without a directive".

[22] I find that prior to the report being given to the DME, Mr Taylor foreshadowed his use of powers under the *CMSHA* to obtain information. At the start of the meeting that day he had indicated that he would use his powers under the Act as a "last resort", but in the breakaway meeting with Lampson he made it clear that if information was not provided voluntarily he would exercise those powers. However, he did not purport to exercise his power under s 159 or other provisions of the Act. I find that Mr Lunn accepted the inevitability that such powers would be used. The report was provided to the DME after Mr Taylor said words to the effect, "I would rather you provide it to me than for me to invoke the Act". The minutes of the meeting accurately record that the report was given "without a directive".

[23] Section 159 of the *CMSHA* provides:

> "**159 Person must answer question about serious accident or high potential incident**
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> (1) The section applies if a person refuses to answer a question about a serious accident or high potential incident asked by an officer.
>
> (2) If the officer requires the person to answer the question, the officer must advise the person of the following -
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> (a) that if the answer might incriminate the person the person may claim, before giving the answer, that giving the answer might incriminate the person;
>
> (b) the effect of making the claim on the admissibility of the answer and any information, document or other thing obtained as a direct or indirect result of the person giving the answer as evidence in any proceeding against the person.
>
> (3) The person must answer the question, unless the person has a reasonable excuse.
>
> Maximum penalty – 40 penalty units.

> (4) It is not a reasonable excuse to fail to answer the question that answering might tend to incriminate the person.
>
> (5) Subsection (6) applies if an answer might incriminate the person and the person claims, before giving the answer, that giving the answer might incriminate the person.
>
> (6) Neither the answer nor any information, document or other thing obtained as a direct or indirect result of the person giving the answer is admissible in any proceeding against the person, other than a proceeding in which the falsity or misleading nature of the answer is relevant."

[24] Legal professional privilege could have been claimed to resist a demand to produce the report unless the statute that conferred the coercive power to require production of it abrogated the privilege. Section 159 is concerned with a requirement to answer questions, rather than produce documents. Section 159 does not purport to abrogate legal professional privilege. Questions asked under s 159 concerning the contents of the report could have been met by a claim for legal professional privilege if the report attracted legal professional privilege. If the exchanges between Mr Lunn and Mr Taylor during the 20 minute "break-away meeting" on 4 February 2009 were as heated as the affidavit evidence and Mr Lunn's oral evidence suggests, then it is surprising that Lampson did not seek legal advice concerning its obligation, if any, to provide the report. Mr Lunn gave evidence that after the representatives of Lampson went into a separate meeting at 11.45 am and before the DME was invited into that meeting at 12.15 pm, he contacted his "legal team".[20] His evidence was that he does not recall a discussion at that time about providing a copy of the report to the DME before they joined the separate meeting.[21] This is surprising since prior to the break-away meeting Mr Taylor had referred to his powers under the Act, including the power under s 159 to require a person to answer questions. If, as Mr Lunn's evidence seems to suggest, he did not seek legal advice on the day about asserting legal professional privilege in response to Mr Taylor's request for information, then this is consistent with the position identified on the cover sheet of the 30 January report. Lampson was prepared to provide the report to the DME rather than assert legal professional privilege in respect of it. In fact, a purpose, and an important purpose for which the report had been prepared, was for the DME's investigations under the *CMSHA*.

[25] I find that the 30 January report was provided to the DME at the meeting on 4 February without any actual exercise of coercive powers by the DME. It was provided by Lampson to the DME in circumstances which Lampson had anticipated prior to the meeting, namely that it might choose to provide the report to the DME. This is apparent from the fact that the cover sheet was prepared before the meeting and taken with the rest of the report to the meeting in Mr Hodgson's sports bag. A stated purpose of the report was for the DME's investigations, and this was the purpose for which the report was provided to the DME on 4 February 2009.

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[20] T 1-24 l 32.

[21] T 1-24 ll 32 – 37.

Lampson hoped that the report would lead to the DME concluding that the incident was the result of operator error, the operator having been engaged by way of a labour hire agreement from G & S, rather than the failure of the crane that Lampson had supplied. When the meeting reconvened at 12.40 pm Lampson released the report to the DME, described it as "99.9% complete" and as being "a full comprehensive report into the incident". The contents of the report were not disclosed to other participants at the meeting, particularly Curragh. However, Mr Lunn apparently relied upon the report as indicating to Curragh that it was heading down the wrong track and that it should be looking at other alternatives than the crane as the cause of the incident. I am not asked to rely upon these statements in the reconvened meeting as constituting a waiver of any legal professional privilege, and do not do so. However, a substantial argument could be advanced that Lampson's effective disclosure of the conclusion reached in the report constituted a waiver of legal professional privilege.

Waiver

[26] The contention by G & S and Curragh that any legal professional privilege has been waived rests upon the act of Lampson in providing the report to the DME for the purpose of advancing Lampson's interests in the outcome of the DME investigation and securing the release of the crane. Both G & S and Curragh submit, in reliance upon *Mann v Carnell,*[22] that an implied waiver is brought about by the inconsistency between the conduct of Lampson in providing a copy of the report to the DME for the purpose of advancing Lampson's interests in the outcome of the DME investigation and the purported maintenance of confidentiality in respect of Dr Gilmore's investigation into the same matter, namely the cause of the incident.

[27] G & S submits that Lampson, having used the report in this way, it would be unfair to the other parties to withhold it from the Court appointed expert, who is required to express an opinion on the same questions as were before the DME. This is said to be particularly the case because, by utilising the report, Lampson secured release of the crane. In that regard, on 11 February 2009 the Inspector of Mines for the Central Region issued a Mine Record Entry to confirm the conclusion of his investigation. He noted that he had recently been given a report prepared by Lampson detailing its investigation, analysis and conclusion into the incident. He also noted that interviews were conducted with various parties and from the information gathered the inspector reached the opinion that, on the balance of probabilities, the fall of the dragline boom was the result of operator error. The directive issued to have the crane remain at the Curragh mine and isolated for investigation purposes was withdrawn. The seized crane was returned in accordance with s 147 of the *CMSHA*.

[28] Waiver of the kind contended for by G & S and Curragh is sometimes described as implied waiver, and sometimes as waiver "imputed by operation of law".[23] 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.[24] The law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective

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22 (1999) 201 CLR 1 at 13 [28] – [29].

23 *Osland v Secretary, Department of Justice* (2008) 234 CLR 275 at 296 – 297 [45].

24 Ibid.

intention of the party who has lost the privilege.[25] As Gleeson CJ, Gaudron, Gummow and Callinan JJ stated in *Mann v Carnell*:

> "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."[26]

By way of illustration that there is not some overriding principle of fairness operating at large, in the context of litigation between parties it is "in the nature of things that a party who enjoys a right to keep information relevant to a forensic contest confidential will also enjoy an advantage over that party's opponent: the mere existence of that advantage cannot be a reason for the abrogation of the right."[27] In this context "fairness" has not been treated as requiring that the other party should have all the information available to the party claiming privilege, but as requiring that that party should not abuse privilege so as to disadvantage the other party forensically.[28] The consideration of fairness which informs a judgment about inconsistency is more readily understandable in the context of litigation between parties. It is more difficult to apply in other contexts.[29]

[29] Waiver is not established merely by way of a voluntary disclosure to a third party, for example for a limited and specific purpose.[30] The reasoning of all members of the High Court in *Goldberg v Ng*[31] was inconsistent with the proposition that any voluntary disclosure to a third party necessarily waives privilege. The Court was divided upon whether privilege was waived in circumstances which involved the disclosure of privileged information to the Law Society of New South Wales after an assertion of the confidentiality of the documents and the retention of legal professional privilege in relation to them. An officer of the Law Society said that it would not give the documents to anybody else. By majority the Court found that there had been a waiver of privilege in circumstances in which the relevant documents were provided to the Law Society voluntarily and for the calculated purpose of demonstrating the reliability of Mr Goldberg's denial of the complainant's allegations. The Law Society possessed powers of compulsion, and a failure by a solicitor to respond adequately to a complaint of professional misconduct might, in some circumstances, be seen by the Law Society as itself constituting such misconduct. Nevertheless, the provision of the documents to the Law Society was found to be voluntary and for the calculated purpose of assisting Mr Goldberg to rebut the complaint. These and other considerations led the majority to conclude that there was an imputed waiver by Mr Goldberg of legal professional privilege.

[30] Toohey and Gummow JJ dissented in separate judgments. Toohey J concluded that a waiver could not be imputed in the circumstances. Those circumstances included the fact that the partial disclosure was made outside the proceedings, making it

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25 *Mann v Carnell* (supra) at 13 [29].
26 Ibid.
27 *Watkins v State of Queensland* [2008] 1 Qd R 564 at 590 [55].
28 Ibid at 591 [57].
29 *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at 67 – 68 [131] – [132].
30 *Mann v Carnell* (supra) at 14 [30] – [32]; *Cross on Evidence* Australian ed [25010] n 21.
31 (1995) 185 CLR 83.

difficult to speak in terms of fairness or unfairness. The disclosure occurred in the context of the investigation of a complaint by the Law Society exercising its powers under statute, and was said to be made for the purposes of the Act.[32] Gummow J observed that although Mr Goldberg chose to make the disclosure that he did and did so in order to obtain a benefit vis-à-vis his former clients, the interview with him was conducted in the particular legal setting provided by the existence of the compulsive powers enjoyed by the Law Society pursuant to statute in dealing with complaints by clients. His Honour stated:

> "Looked at objectively, the occasion in which the disclosure made by Mr Goldberg was not one in which he was an entirely free actor. Even without the backing provided by the statutory sanction, it might be thought incumbent upon Mr Goldberg, as a practitioner whose conduct has been called into question, to deal with it fully and frankly before the responsible professional body."[33]

Gummow J characterised the disclosure as one of making documents available to enable the recipients to carry out their statutory duties and that the circumstances included "statutory compulsory processes".[34] The circumstances did not provide sufficient justification to deprive Mr Goldberg of legal professional privilege.

[31] Lampson submitted that the observations of Gleeson CJ, Gaudron, Gummow and Callinan JJ in *Mann v Carnell*[35] indicate that the dissenting position of Toohey and Gummow JJ in *Goldberg v Ng* should be considered to be the correct one. I do not agree with that submission. The observations in *Mann v Carnell* do not express the view that the dissenting judgments in *Goldberg v Ng* are to be preferred. There are some factual parallels between the circumstances of *Goldberg v Ng* and the present matter. The relevant disclosure occurred in the context of an investigation authorised by statute. The body to whom the documents were provided undertook to preserve their confidentiality. The disclosure could be said to have assisted the body to carry out its investigation, while still having been "voluntary and for the calculated purpose" of demonstrating the correctness of Lampson's view concerning the cause of the incident and thereby to secure the release of its crane. Despite these parallels, there are some points of distinction. Unlike a solicitor who is expected to fully and frankly assist a professional body, Lampson was under no similar professional obligation towards the DME. In *Goldberg v Ng* there was no express or implied threat by the Law Society or by anyone on its behalf to invoke its powers of compulsion. Here there was a threat to invoke Mr Taylor's powers if information was not provided. However, whereas officers of the DME might exercise certain powers under the *CMHSA*, their powers did not extend to compelling disclosure of a document that was the subject of legal professional privilege.

[32] Ultimately, the resolution of the issue of waiver does not depend upon points of similarity and difference between the facts of *Goldberg v Ng* and the facts of the present case. It depends upon the application of the principles that have been more recently stated and restated by the High Court in *Mann v Carnell* and *Osland v Secretary, Department of Justice* to the circumstances of the present case. The issue is whether the conduct of Lampson in providing the report to the DME is

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32 Ibid at 110 – 111.
33 Ibid.
34 Ibid at 123.
35 Supra at 13 – 14 [30] – [32].

inconsistent with the maintenance of the confidentiality that the privilege is intended to protect. The judgment about inconsistency "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".[36] Questions of waiver are matters of fact and degree.[37] An important circumstance is the evident purpose in making the disclosure and the practical consequences of limited rather than complete disclosure.[38] The evident purpose of Lampson making limited disclosure to the DME was to secure an outcome of the DME's investigations that advanced Lampson's interests by securing the release of the crane from seizure and its return to Lampson. The practical consequences of limited disclosure was to insulate the report and its contents from critique by those with conflicting interests. The disclosure was for the calculated purpose of advancing Lampson's interests at the expense of others and to achieve an outcome to the DME investigation without the report being subject to scrutiny by parties such as G & S that had an interest in criticising it.

[33] The investigative context, and the threat to resort to coercive powers, is not a compelling factor against an implied waiver because legal professional privilege was available in answer to the exercise of the powers which the DME threatened to use.[39]

[34] The document was disclosed to the DME on a confidential basis for the specific purpose of its investigations and with a reservation of any legal professional privilege or equitable rights that attached to the report. These reservations were accepted by the DME.

[35] The disclosure was not of legal advice.[40] The disclosure was of a document which had been prepared for the purpose of its provision to the DME. Although, according to Mr Lunn and the cover sheet of the report, it had also been prepared for Lampson's legal advisers, the purpose of the relevant disclosure was to disclose information and opinions to the DME. It is not suggested that the information and opinions could not have been provided to the DME in the same form and with the same contents, save for the assertion of legal professional privilege, in order to achieve the stated purpose of aiding the DME's investigation. The disclosure to a third party was not incidental to the conduct of litigation.[41] The communication was not the communication of legal advice to parties with a financial interest in litigation.[42] The communication was of an incident report to a third party. That third party was conducting an investigation directed to the same issue to which Dr Gilmore's investigation is directed.

[36] Lampson chose to use a report that it had prepared for, amongst other purposes, referral to its lawyers in the context of contemplated litigation over the cause of the incident. In doing so it stood to achieve something akin to a forensic or tactical advantage, namely the return of the crane at the end of an investigation that it hoped

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36 *Osland v Secretary, Department of Justice* (supra) at 297 [45].
37 Ibid at 298 – 299 [49].
38 Ibid at 297 [46].
39 *AWB Pty Ltd v Cole (No 5)* (supra) at 69 – 70 [140].
40 cf *Australian Rugby Union Ltd v Hospitality Group Pty Ltd* (1999) 165 ALR 253.
41 cf the provision of the legal advice in *Mann v Carnell* to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the Territory in relation to the litigation.
42 cf *Spotless Group Ltd v Premier Building & Consulting Group Pty Ltd* [2006] 16 VR 1.

would find that the cause of the incident was operator failure. It chose to use a report which, according to its cover sheet, was prepared for the dual purpose of being provided to its lawyers and for the purpose of the DME's investigation. The conduct that is alleged to constitute the waiver arises from the deployment of the report purely for the latter purpose, being a disclosure that was voluntary and for the calculated purpose of achieving an outcome that was favourable to Lampson. Having deployed the report to its advantage in order to achieve a certain outcome in respect of the DME investigation into the incident, it now seeks to withhold production of the report to Dr Gilmore for the purpose of investigating the same issue. On Lampson's case it chose to provide a report that was prepared for two purposes: the latter purpose having no claim to legal professional privilege. The disclosure of the report to the DME under cover of a document that asserted the retention of legal professional privilege was intended to achieve the latter purpose. Lampson used a report that had been prepared, in part, for submission to its lawyers as a convenient means to achieve a different purpose, being a purpose that had no claim to legal professional privilege. Such a use was not merely a matter of convenience. Lampson hoped to have the best of both worlds: retain legal professional privilege and use the document to achieve a practical outcome that suited its own interests, namely a finding about the cause of the incident that would lead to the release of the crane to it, and disadvantage the other parties in contemplated litigation about the cause of the incident. Those parties would be disadvantaged by the crane's removal from the site because their interests were in having it remain on site for examination as to the cause of the incident.

[37] The deployment of a report which, for present purposes, is assumed to attract legal professional privilege in the circumstances in which the 30 January report was communicated to the DME so as to achieve Lampson's purposes gives rise to considerations of unfairness that inform a judgment about inconsistency. The use of a document that was prepared for the dual purpose of informing legal representatives and for use by the DME, but which was deployed on this occasion only for the latter purpose with an asserted retention of legal professional privilege, had the practical consequence of placing G & S and Curragh at a disadvantage. It was not simply the disadvantage that a potential litigant suffers when a party, to its forensic advantage, asserts legal professional privilege over a document that contains information, the disclosure of which would advantage the other party. It was the disadvantage of achieving an outcome of an investigation into the same subject matter as the contemplated litigation, namely the cause of the incident, which resulted in the release of the crane to Lampson without permitting other parties with an interest in that outcome from being shown the report and commenting upon it. Lampson voluntarily disclosed the report to the DME for the calculated purpose of achieving the crane's release by the DME, knowing that its release would disadvantage other parties.

[38] The matter did not involve the disclosure of legal advice to a third party for a limited purpose. It involved the disclosure of a report that was prepared both for the legal representatives of Lampson and for disclosure to the DME, in circumstances in which the disclosure to the DME was for the calculated purpose of assisting Lampson to achieve a favourable outcome of the investigation, release of the crane from seizure and its removal to Lampson's headquarters in New South Wales. Such a course was to the intentional disadvantage of G & S and Curragh in respect of the further inspection and testing of the crane.

[39] The possibility that Lampson did not intend to waive legal professional privilege is not to the point. Lampson intended to retain legal professional privilege if it could. The issue, however, is whether the conduct of Lampson in releasing the report to the DME is inconsistent with the maintenance of the confidentiality which legal professional privilege is intended to protect. The disclosure of the report occurred in circumstances in which the DME could not compel its release had Lampson chosen to claim legal professional privilege in it. Having secured a calculated advantage by communicating the report to the DME in the circumstances that it did, with the purpose of obtaining that advantage, there is a distinct unfairness in asserting legal professional privilege in connection with an investigation into the same subject matter. That unfairness arises in circumstances in which the report was not prepared simply for provision to legal representatives. It was prepared for the express purpose of the DME's investigations. Having deployed the report for the latter purpose, the assertion of legal professional privilege on the basis that the report was also prepared for provision to Lampson's lawyers involves the assertion of privilege to the unfair disadvantage other parties. The unfairness to the other parties does not arise from some general notion of fairness because Lampson has information which the other parties lack. The unfairness arises from the calculated use of the report in the context of the DME's investigation so as to secure an advantage for Lampson in circumstances in which Lampson could not have been compelled to produce the report to the DME if it in fact attracted legal professional privilege. Having obtained that advantage by obtaining the DME's agreement to not communicate the report to other parties, Lampson now wishes to assert legal professional privilege.

[40] This is not a case in which, as a matter of convenience, Lampson chose to disclose to an authority a document which was prepared simply for use by its lawyers in circumstances in which the authority could exercise a statutory power that abrogated legal professional privilege in the document. It is a case in which Lampson made a calculated choice to disclose a document which had been prepared for the purpose of providing it to the DME investigation so as to advance Lampson's own interests if, as it hoped, the investigation resulted in the return of the crane to it. In the circumstances, the voluntary and calculated disclosure of the report in order to achieve this intended result is inconsistent with the maintenance of the confidentiality which legal professional privilege is intended to protect.

[41] I conclude that there has been a waiver of any legal professional privilege in the 30 January report.

Conclusion

[42] Lampson has failed to establish a claim for legal professional privilege in respect of the 30 January report. Subject to further submissions of the parties on the form of order and the question of costs, the orders of the Court will be:

1. The first respondent provide to Dr Gilmore or otherwise make reasonably available for inspection by Dr Gilmore within seven days all submissions, reports, correspondence, photographs or memoranda made or prepared by or on behalf of the first respondent and submitted to the Department of Mines and Energy concerning the incident which occurred on 7 December 2008 more particularly described in the affidavit of Adam Charles Butson filed herein on 21 October 2009, and in particular, provide to Dr Gilmore or otherwise make reasonably

available to him a copy of the Incident Report provided to the Department of Mines and Energy by the first respondent on 4 February 2009, including the annexures to the said report.

2. The first respondent pay the applicant's costs of and incidental to the application.

3. The first respondent pay the second respondent's costs of and incidental to the application.