

SUPREME COURT OF QUEENSLAND

CITATION: *Rodionoff & Ors v Favero Enterprises Pty Ltd* [2014] QSC 129

PARTIES: **PHILIP ALEXANDER RODIONOFF**
(first plaintiff)
AMANDA RUTH RODIONOFF
(second plaintiff)
ANDREW LEONARD RODIONOFF
(third plaintiff)
DAVID PAUL RODIONOFF
(fourth plaintiff)
v
FAVERO ENTERPRISES PTY LTD trading as
FAVERO PROPERTY CORP (ABN 41 110 208 074)
(defendant)

FILE NO: BS12222 of 2012

DIVISION: Trial Division

PROCEEDING: Interlocutory application

DELIVERED ON: 16 June 2014

DELIVERED AT: Brisbane

HEARING DATE: 16 May 2014

JUDGE: Mullins J

ORDER: **The amended application filed by leave on 16 May 2014 is dismissed.**

CATCHWORDS: PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – USE OF DOCUMENTS – where the plaintiff had a dispute with the purchaser and real estate agent over contracts for the sale of land – where the plaintiff and purchaser settled their dispute – where the plaintiff commenced proceedings against the real estate agent – where the real estate agent issued a notice of non-party disclosure to the purchaser – where the purchaser produced documents to the real estate agent which the real estate agent used to amend its defence – where the plaintiff claims the documents are subject to joint without prejudice privilege – where the documents are relevant to the matters in issue between the plaintiff and the real estate agent – whether there had been an implied waiver of privilege

Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd (2012) 295 ALR 348; [2012] NSWCA 430, considered
Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 303 ALR 199; [2013] HCA 46, considered
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66, followed
Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [2001] 1 Qd R 276; [1999] QCA 276, considered
Re Turf Enterprises Pty Ltd [1975] Qd R 266, considered
Yokogawa Australia Pty Ltd v Alstom Power Ltd (2009) 262 ALR 738; [2009] SASC 377, considered

COUNSEL: J C Faulkner for the plaintiffs
 S S W Couper QC for the defendant

SOLICITORS: H W Litigation Pty Ltd for the plaintiffs
 Carter Newell for the defendant

- [1] The plaintiffs owned land and retained the defendant which is a licensed real estate agent to sell their land. The defendant negotiated a sale of the plaintiffs' land to Surewood Projects Pty Ltd whose director Mr Hart agreed to guarantee the obligations of Surewood. Surewood retained Johanson Lawyers (Johanson) as its solicitors in connection with the purchase. There were five contracts prepared for the sale of the plaintiffs' land. In September 2007 the contracts were executed and Mr Hart signed the guarantees. It is alleged by the plaintiffs in this proceeding that the defendant did not comply with s 365(2) and s 366B of the *Property Agents and Motor Dealers Act* 2000 (the Act).
- [2] On 5 March 2009 Johanson sent facsimiles to the solicitors (who were then acting for the plaintiffs in connection with the sale of the properties and to whom I will refer as "the conveyancing solicitors") by which Surewood withdrew the contracts. According to Mr Webber who is a legal director of HW Litigation Pty Ltd and whose affidavit was filed on 14 May 2014, in March 2009 HW Litigation was instructed to act on behalf of the plaintiffs in respect of the dispute they had with Surewood and Mr Hart and the defendant and it was not until 23 June 2011 that the plaintiffs settled their dispute with Surewood and Mr Hart on confidential terms.
- [3] This proceeding was commenced on 19 December 2012. The plaintiffs allege that because of failures by the defendant to comply with the Act, Surewood was entitled to withdraw the contracts and did validly withdraw them by the facsimiles sent on 5 March 2009. The plaintiffs claim for breach of contract and negligence against the defendant for the losses they have suffered as a result of Surewood not completing the purchases.
- [4] The defendant issued a notice of non-party disclosure to Mr Johanson on 25 March 2013 seeking production of the complete file created by Johanson with respect to its retainer by Surewood and Mr Hart for the purchase of the subject land from the plaintiffs.

- [5] Before a response was received from Mr Johanson, the defendant filed its defence on 26 March 2013 in which it raises factual matters relevant to, and otherwise puts in issue, whether the defendant had breached the Act and denies that Surewood was entitled to withdraw the contracts on 5 March 2009. The defendant also alleges that the plaintiffs are liable for their losses in failing to take steps to ensure Surewood was held to its obligations under the contracts to purchase the properties. The defendant pleads specifically that the plaintiffs acquiesced to Surewood's unlawful termination of the contracts and failed to mitigate their loss by failing to take any action to pursue proceedings against Surewood for breach of contract or specific performance of the contracts.
- [6] The plaintiffs filed their reply on 9 September 2013. The plaintiffs deny the allegations that their loss and damage was caused by their own conduct, as they assert that Surewood validly terminated and/or withdrew the contracts and (in paragraph 9(b) of the reply) that it was not reasonable for the plaintiffs to pursue any proceedings against Surewood for breach of contract or specific performance.
- [7] After receiving the Johanson file, the defendant filed an amended defence on 17 January 2014. The amended defence includes an allegation in paragraph 32B based on correspondence that passed between the conveyancing solicitors and Johanson that in October 2007, November 2007 or March 2008 the plaintiffs and Surewood proceeded on the basis that there had been compliance with s 365 of the Act, the parties were bound by the contracts, and Surewood was estopped from denying that it was bound by the contracts. Paragraphs 42A to 42L of the amended defence set up a claim against the conveyancing solicitors as a concurrent wrongdoer pursuant to s 30 of the *Civil Liability Act 2003 (CLA)*.
- [8] The amended defence includes paragraph 40A which alleges that, if Mr Hart had the financial capacity or means to pay the purchase price under the contracts, he was liable under the guarantee to the plaintiffs for the amounts that would have been paid by Surewood under the contracts, as Mr Hart had agreed that his liability as guarantor was not affected by the fact that the contracts were wholly or partially void, voidable or unenforceable as against Surewood. The defendant alleges that, by reason of the terms of the guarantee, Mr Hart's obligation as guarantor subsisted in Surewood's favour, irrespective of any right of Surewood pursuant to s 365 of the Act. It is therefore alleged that if the plaintiffs suffered any loss, that loss was caused by their failure to enforce the guarantees against Mr Hart.
- [9] The amended defence includes paragraphs 42M to 42R in which it is alleged that HW Litigation was the firm of solicitors engaged by the plaintiffs on 5 March 2009 to advise them with respect to their rights to enforce the contracts against Surewood and the guarantees against Mr Hart, the firm failed to advise the plaintiffs in breach of the duty of care owed to the plaintiffs, and it was a concurrent wrongdoer pursuant to s 30 of the *CLA*. The allegations made against HW Litigation for failure to advise the plaintiffs are based on factual matters alleged in the defence that the defendant otherwise alleges against the plaintiffs to defend their claims.
- [10] Paragraph 42O of the amended defence provides:
"In breach of the said duty HW Litigation failed to advise the plaintiffs:
(a) That the Buyer was estopped from denying that the Buyer or its agent Johanson Lawyers had received the contracts in a way

which complied with the requirements of section 365 of the *Property Agents and Motor Dealers Act 2000* on the basis of the matters referred to in paragraph 32B herein;

- (b) That the defendant had caused the relevant contracts and warning statements to be received in the manner required by section 365 of the *Property Agents and Motor Dealers Act 2000*, so that the Buyer had no right to withdraw the offers;
- (c) That the plaintiffs were entitled to recover the purchase price under each contract from Hart as guarantor on the bases referred to in paragraph 40A herein.”

- [11] The plaintiffs apply for declarations that the 11 documents identified in the amended application (filed by leave on 16 May 2014) are privileged on the basis of without prejudice privilege and/or legal professional privilege and that the privilege has not been waived, an injunction restraining the defendant from using, copying, distributing and/or relying on those documents for the purpose of defending this proceeding, and an order striking out paragraphs 42M to 42R of the amended defence. The plaintiffs have deferred amending their reply and not finalised their list of documents, pending the resolution of this application.
- [12] The 11 documents were produced by Mr Johanson to the defendant from the Johanson file. Mr Johanson provided the documents in response to the notice of non-party disclosure without the knowledge or consent of the plaintiffs. The subject documents are described by Mr Faulkner of counsel on behalf of the plaintiffs as “part of a continuum of without prejudice communications between [the plaintiffs’ solicitors] and Johanson in the course of negotiating a settlement.” It can be inferred that the settlement related to the plaintiffs’ dispute with Surewood and Mr Hart over the withdrawal of the contracts. The plaintiffs maintain they have not waived their privilege in respect of these communications for the purpose of this proceeding and object to the disclosure of these communications to the defendant.
- [13] The fourth plaintiff in his affidavit filed on 14 May 2014 sets out the grounds for the plaintiffs’ objection to the disclosure and/or use of the subject documents in these terms:
- “8.1 confidential communications between the first, second, third and fourth plaintiffs’ legal advisors and third parties made predominately for the purposes of negotiating a compromise of a dispute the plaintiffs had with Surewood Projects Pty Ltd and Christopher Hart; and
 - 8.2 confidential information/communications passing between the first, second, third and fourth plaintiffs’ legal advisors and third parties made predominately for the purposes of these proceedings at a time when they were either pending or contemplated.”
- [14] No evidence was called by either party from Mr Johanson to explain why he did not seek to object to disclosure of the 11 documents on the basis of a claim of privilege as provided for under r 245(4)(d) of the *Uniform Civil Procedure Rules 1999*.
- [15] The issue between the plaintiffs and the defendant is whether the defendant, having obtained those documents on non-party disclosure from Mr Johanson, is entitled to use those documents in defending this proceeding.

The plaintiffs' submissions

- [16] The plaintiffs rely on the right to claim without prejudice privilege in relation to disclosure of documents: *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at [20] and [35].
- [17] The plaintiffs submit the without prejudice privilege belonged both to the plaintiffs and to Surewood and Mr Hart and could not be waived by one party without the consent of the other party: *Re Turf Enterprises Pty Ltd* [1975] Qd R 266, 267.
- [18] The plaintiffs seek to invoke the approach taken by the High Court in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 303 ALR 199 (*Expense Reduction*) in using case management powers to correct the mistake made by a party in the disclosure of a privileged document.
- [19] It is the plaintiffs' position that if the defendant is prevented from relying on the 11 documents to which the plaintiffs claim privilege, it largely destroys the basis for the allegations in paragraphs 42M to 42R of the amended defence. For the purpose of the application, the plaintiffs accept that it may be possible for the defendant to argue concurrent liability of an apportionable claim pursuant to s 30 of the *CLA*, assuming there was a factual basis for the allegations capable of sustaining them against HW Litigation, but submits that there is no forensic benefit to the defendant to do so. The plaintiffs argue that if the defendants' defence succeeded at trial, it would be wholly successful against the plaintiffs, without recourse to the concurrent wrongdoer allegations against HW Litigation. It is therefore argued that the allegations against HW Litigation tend to prejudice or delay a fair trial, cause a significant increase in costs to the plaintiffs who would have to change their solicitors, and are unnecessary.
- [20] The plaintiffs rely on the philosophy in r 5 of the *UCPR* to request the court to make orders that preclude the defendant from relying on the 11 documents.

The defendant's submissions

- [21] The defendant relies on the fact that the documents were obtained from Mr Johanson in response to the notice of non-party disclosure and submits that the plaintiffs must show that the documents were received by the defendant in circumstances in which a duty of confidence was created in order to succeed in restraining the defendant's use of the documents: *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* (2012) 295 ALR 348 at [102]-[105] and [130] (*Armstrong Strategic*). Although the appeal from the decision of the New South Wales Court of Appeal in *Armstrong Strategic* was allowed by the High Court in *Expense Reduction*, the defendant submits that the *dicta* in *Armstrong Strategic* requiring the existence of a duty of confidence to support the restraint of use of documents obtained using court processes remains authoritative. It is submitted that the decision in *Expense Reduction* was narrowly focused on mistaken disclosure of privileged documents by one party to another party in the same proceeding where there was no basis to assert there had been a waiver of privilege and does not assist in resolving the issue in this matter where the defendant has obtained the documents using court processes.

- [22] The defendant submits that the commencement and prosecution of this proceeding by the plaintiffs against the defendant solely in which the plaintiffs claim the entirety of their alleged losses arising from the failure of Surewood to complete the purchases under the contracts amounts to an implied waiver of the privilege that may otherwise have applied to the plaintiffs' communications with Surewood, in order to settle their claim against Surewood. It is submitted that any privilege in the subject documents must be deemed to be waived on the basis that the conduct of the plaintiffs in pursuing their claims in this proceeding against the defendant is inconsistent with the maintenance of the claim of privilege: *Mann v Carnell* (1999) 201 CLR 1, 13.

Expense Reduction

- [23] In the course of undertaking court-ordered discovery, one party inadvertently disclosed documents which were privileged and in respect of which there was no intention by the party to waive privilege. The other party refused to return the documents. The High Court held in *Expense Reduction* (at [45], [57] and [61]) that, where there has been no significant delay in notifying the mistake or prejudice suffered by the party required to return the documents, the court should rely on its case management powers to permit the correction of the mistake and order the return of the documents, if the party receiving the documents refuses to do so. In light of that approach to the jurisdiction to order return of documents disclosed inadvertently, the defendant's reliance in this matter on the approach in *Armstrong Strategic* is misplaced.

Has there been an implied waiver of privilege?

- [24] There is no real issue as to the scope of without prejudice privilege for the purpose of the application as, on any view, the defendant was a party to the same general dispute that was the subject of negotiations between the plaintiffs and Surewood and Mr Hart. The starting proposition is that the without prejudice privilege in the subject documents belonged jointly to the plaintiffs and to Surewood and Mr Hart, so that Surewood and Mr Hart could not waive that privilege in responding to the notice of non-party disclosure without the consent of the plaintiffs: *Re Turf Enterprises Pty Ltd* [1975] Qd R 266, 267. There are three possibilities as to why Mr Johanson responded the way he did to the notice of non-party disclosure: he responded to the notice, without considering the issue of privilege in respect of the 11 documents; or he did consider the issue of privilege solely from the perspective of his clients, decided that the documents were not covered by a claim of privilege and/or obtained instructions not to claim privilege, and disclosed the documents to the defendant; or he did consider the issue of privilege from the perspective of both his clients and the plaintiffs, decided that the documents were not covered by a claim of privilege and disclosed the documents to the defendant.
- [25] For whatever reason Mr Johanson provided the documents to the defendant without objection (and whether mistaken or not), the plaintiffs seek to invoke their claim of privilege, as between the plaintiffs and the defendant. That claim of privilege by the plaintiffs could not be waived merely by the production to the defendant of the documents from the solicitors for Surewood and Mr Hart without the consent of the plaintiffs in response to the notice of non-party disclosure. That deals with express waiver of privilege. There is still an issue between the parties, as to whether there was an implied waiver of privilege by the plaintiffs.

- [26] It was held in *Yokogawa Australia Pty Ltd v Alstom Power Ltd* (2009) 262 ALR 738 at [89]-[96] and [106] that a party can impliedly waive without prejudice privilege in subsequent proceedings involving a third party. In *Yokogawa* Alstom had entered into a contract with the operator of a power station (FPP) for the refurbishment of the power station. Alstom subcontracted the electrical work for the refurbishment to the appellants. Alstom claimed that there were delays caused by the appellants that resulted in Alstom being exposed to potential liability to FPP. Alstom settled the consequences of those delays with FPP in 2003 (the 2003 settlement). Alstom claimed that the appellants were responsible for further delays after the 2003 settlement which resulted in a dispute between Alstom and FPP and led to a further settlement (the 2005 settlement) by which Alstom agreed to pay FPP the sum of \$20.5m by way of liquidated damages. Alstom then claimed in its proceeding against the appellants the sum of \$20.5m. The appellants sought production from Alstom of documents created in connection with the 2003 and 2005 settlements. The appellants claimed that there was an implied waiver of privilege arising from the manner in which Alstom had pleaded its case. The reasonableness of the settlement with FPP was in issue, but the basis on which it was in issue was very narrow. The real issue in the case was who caused the delay, Alstom or the appellants. It was found at [50] that on the pleadings the reasonableness of the settlement should be able to be determined by reference to the head contract, the 2003 and 2005 settlements and the fact of the delay. Alstom did not intend to rely on legal advice to assist its claim of reasonableness. On the basis of the limited scope of Alstom's case on the issue of the reasonableness of the settlement, Duggan J (with whom Sulan J agreed) at [109] concluded that there had been no waiver of without prejudice privilege, but noted that if Alstom attempted to expand its case beyond the circumstances that had been identified for the purpose of the application, so as to rely on the course of negotiations, a fresh application for disclosure would be anticipated.
- [27] In this matter the 11 documents that are the subject of the claim for privilege have been relied on by the defendant in making the allegations against HW Litigation as a concurrent wrongdoer, but are also relevant to the issue of whether the plaintiffs should have accepted that Surewood validly terminated or withdrew the contracts and whether the plaintiffs' failure to take action against Surewood and/or Mr Hart was the cause of their losses. It raises an issue of fairness (in the sense explained in *Mann v Carnell* at 13) when the plaintiffs plead that it was not reasonable for them to pursue any proceeding against Surewood for breach of contract or specific performance, if the defendant is unable to examine the negotiations that persuaded the plaintiffs to settle their dispute with Surewood. This is not a case like *Yokogawa* where implied waiver of without prejudice privilege was avoided by the confinement of the relevant issue by the party which held the privilege, so that there was no question of unfairness in maintaining the privilege.
- [28] On the basis of what is in issue, as a result of the plaintiffs' claim that the defendant is responsible for all its losses and damage as a result of Surewood not completing the purchases, the allegations raised in the defence about other courses of action that the plaintiffs could have taken when Surewood terminated or withdrew the contracts and the response by the plaintiffs in paragraph 9(b) of the reply, it is unfair of the plaintiffs to maintain their claim of privilege in respect of the 11 documents. There has therefore been an implied waiver of privilege by the plaintiffs.

- [29] To the extent that the plaintiffs also relied on legal professional privilege to seek to restrain the use by the defendant of the 11 documents, there is no different result. The question of whether there has been implied waiver of legal professional privilege must have the same answer.

Should paragraphs 42M to 42R be struck out?

- [30] Although the plaintiffs primarily sought to strike out paragraphs 42M to 42R of the amended defence if the privilege claim in respect of the 11 documents was upheld on the basis there was no material fact capable of supporting the allegations, the plaintiffs still seek to strike out the paragraphs on the basis that the inferences sought to be drawn were not reasonably open and otherwise on the basis of r 171(1)(b) and (c) of the *UCPR*.
- [31] It is acknowledged by Mr Webber of HW Litigation that his firm was engaged by the plaintiffs in March 2009 when Surewood terminated or withdrew the contracts for the dispute that then arose. In addition, the defendant obtained from Johanson the letter dated 1 May 2009 written by HW Litigation on behalf of the plaintiffs to Johanson, when Surewood failed to settle the contracts on 1 May 2009, and the plaintiffs reserved their rights in respect of that failure. The defendants are defending the plaintiffs' claim on the basis of certain actions which it alleges the plaintiffs failed to take against Surewood and Mr Hart. The matters on which it is alleged that H W Litigation failed to advise the plaintiffs correlate to those steps which the defendant alleges the plaintiffs failed to take in respect of Surewood and Mr Hart. In the circumstances, it is arguably an inference that can be drawn that the plaintiffs did not take those steps, because they were not advised to do so. Whether or not they should have been so advised is another question all together. For the purpose of the strike out application, however, the inference that underpins the allegations in paragraph 42O of the amended defence that has been drawn from the fact of the retainer of H W Litigation and the actions not taken by the plaintiffs is not unreasonable.
- [32] To the extent that the plaintiffs seek to strike out paragraphs on the basis that they are unnecessary if the defendant's defence was successful, that overlooks the relevance of a claim against a concurrent wrongdoer for the assessment of damages under s 31 of the *CLA*, if the plaintiffs were successful against the defendant. At this stage, it is difficult to speculate on all the possible outcomes of the proceeding, and it is by no means clear that if the plaintiffs did succeed against the defendant, there would be no room at all for application of s 31 of the *CLA* against HW Litigation (if concurrent liability can be proved by the defendant). It is not appropriate merely on the basis of the current pleadings to conclude that the basis for any concurrent liability of HW Litigation would necessarily result in like diminution of the damages payable by the defendant to the plaintiffs, making it unnecessary for the allegation of concurrent liability to be made against H W Litigation.
- [33] Recourse to the philosophy in r 5 of the *UCPR* cannot be used to deny a defendant the right to take advantage of identifying a concurrent wrongdoer for the purpose of s 31 of the *CLA* because it has the consequence of complicating the proceeding for the plaintiff.

- [34] The plaintiffs' application to strike out paragraphs 42M to 42R cannot succeed at this stage.

Orders

- [35] It follows that the amended application filed by leave on 16 May 2014 must be dismissed. I will give the parties an opportunity to consider these reasons, before dealing with the issue of the costs of the application.