SUPREME COURT OF QUEENSLAND

CITATION:	*Santos Limited v Fluor Australia Pty Ltd & Anor (No 3)* [2021] QSC 281
PARTIES:	**SANTOS LIMITED** ABN 80 007 550 923 (plaintiff) v **FLUOR AUSTRALIA PTY LTD** ABN 28 004 511 942 (first defendant) AND **FLUOR CORPORATION** (second defendant)
FILE NO/S:	BS 12939 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application filed 26 July 2021, application filed 20 August 2021 and application filed 27 August 2021
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	8 November 2021
DELIVERED AT:	Cairns
HEARING DATE:	16-17 September 2021
JUDGE:	Brown J
ORDER:	**The order of the Court is:**

1. **The amended application filed by the defendants on 27 August 2021 seeking a declaration that documents 1(k)-1(n), 1(o), 1(p), 1(r)-1(aa), 1(bb)-1(cc) are not the subject of a valid claim for privilege is dismissed.**

2. **The amended application filed the plaintiff on 20 August 2021 seeking a declaration that documents 1-62 and 81-90 in the category 2 documents identified in JBC-1 to the affidavit of John Barry Cooper filed 14 September 2021 are not the subject of a valid claim of privilege, save in respect of document 81, is dismissed.**

3. **Document 81 in JBC-1 to the affidavit of John Barry Cooper filed 14 September 2021 is not the subject of a valid claim for privilege to prevent disclosure.**

4. **Costs of the amended application referred to in paragraphs 1 and 2 are costs in the proceedings.**

5. **The parties have liberty to apply on two days notice.**

6. **These reasons will be published after 2.30pm on 9 November 2021, unless the parties indicate that the reasons should not be published as a result of confidentiality prior to that time, identifying those parts of the reasons that they contend should not be published.**

CATCHWORDS: PROCEDURE – CIVIL PROCEDURE IN STATE AND TERRITORY COURTS – TRIAL – MODE OF TRIAL – ASSESSOR, SPECIAL REFEREE ETC – where there was a dispute between the parties as to whether the referees had the power under existing orders to determine the question of privilege – where the referees sought orders as to their power to determine the question of privilege – where the Court has the power under r 501 of the *Uniform Civil Procedure Rules 1999* (Qld) to make such an order – where the parties consented to the terms of the order

EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PRIVILEGES – CLIENT LEGAL PRIVILEGE – LOSS OF PRIVILEGE – RELATED COMMUNICATIONS – where the defendants made an application challenging privilege claims by the plaintiff – whether affidavit material provided on behalf of the plaintiff properly claims privilege in accordance with rule 213 of the *Uniform Civil Procedure Rules 1999* (Qld) – where the defendants argue that it must be shown that the document over which privilege is sought was created for the purpose of being communicated to the lawyer to obtain legal advice – where the plaintiff submits the relevant purpose for which people were engaged by the plaintiff is relevant to the claim of privilege – whether documents created were part of the process of confidential communications with solicitors – whether it could be inferred that the documents that were created were part of the process of confidential communications with solicitors even if the particular version was not intended to be imparted to the solicitors but was a document created in the process of preparing documents to be provided to the solicitors for the

purpose of obtaining advice – whether the documents constitute a statement or report of an expert given the nature of the people engaged by the plaintiffs -

EVIDENCE – ADMISSIBILITY – EXCLUSIONS: PRIVILEGES – CLIENT LEGAL PRIVILEGE – LOSS OF PRIVILEGE – IMPLIED WAIVER – where the plaintiff made an application challenging privilege claims made by the defendant – where the plaintiff contends the defendant waived privilege as a result of assertions made in the defence and counterclaim – where the defendant pleads a case in estoppel in defence to the plaintiff's case – whether the certain documents relate to state of mind as an essential element of the defendant's pleading of estoppel by way of defence to the claim

Uniform Civil Procedure Rules 1999 (Qld) rr 211, 212, 213, 501, 505

Archer Capital 4A Pty Ltd (as trustee for Archer Capital Trust 4A) v Sage Group PLC (No 3 (2013) 306 ALR 414, cited
Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [2013] QSC 82, cited
Austral Dutch Kaolin Pty Ltd v Hanjin P&C Co Ltd [2011] FCA 638, cited
AWB Ltd v Cole (No 5) (2006) 155 FCR 30, considered
Barnes v Commissioner of Taxation (2007) 242 ALR 601, cited
Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission (2002) 213 CLR 543, cited
Fletcher & Ors v Fortress Credit Corporation (Australia) II Pty Limited & Ors [2014] QSC 303, considered
Century Drilling Limited v Gerling Australia Insurance Company Pty Limited [2004] 2 Qd R 481, cited
Commissioner of Taxation v Rio Tinto Ltd (2006) 151 FCR 341, cited
Council of the New South Wales Bar v Archer (2008) 72 NSWLR 236, cited
Dalleagles Pty Ltd v Australian Securities Commission [1991] 4 WAR 325, considered
GSA Industries (Aust) Pty Ltd v Constable [2002] 2 Qd R 146, cited
Hancock v Rinehart [2016] NSWSC 12, cited
Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 1) [1999] 1 Qd R 141, cited
Jones v Dunkel (1959) 101 CLR 298, cited
Kennedy v Wallace (2004) 142 FCR 185, considered
Mann v Carnell (1999) 201 CLR 1, considered

Macquarie Bank Limited v Arup Pty Limited [2016] FCAFC 117, cited
Mazelow Pty Ltd v Herberton Shire Council [2001] QSC 250, cited
Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board [2005] 1 Qd R 373, cited
Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority (2002) 4 VR 332, cited
Murphy Operator Pty Ltd v Gladstone Ports Corporation Limited [2019] 3 Qd R 255, considered
Neurim Pharmaceuticals (1991) Ltd v Generic Partners Pty Ltd [2018] FCA 1082, cited
Oceltip Pty Ltd v Noble Resources Pty Ltd [2018] QSC 317, considered
Osland v Secretary, Department of Justice (2008) 234 CLR 275, cited
Queensland Local Government Superannuation Board v Allen [2016] QCA 325, considered
Saunders v Commissioner of Australian Federal Police (1998) 160 ALR 469, cited
Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors [2019] QSC 144, considered
Santos Limited v Fluor Australia Pty Ltd & Anor [2020] QSC 373, cited
Santos Limited v Fluor Australia Pty Ltd & Anor (No 2) [2021] QSC 189, cited
Seketa v Gadens Lawyers [2021] VSC 245, considered
Tarong Energy Corp Ltd v South Burnett Regional Council [2010] 1 Qd R 575, cited
Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd (2015) 321 ALR 191, cited
Viterra Malt Pty Ltd v Cargill Australia Ltd (2018) 58 VR 333, considered

COUNSEL: P O'Shea QC with J Mitchenson for the plaintiff
S Couper QC with A McKinnon for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Jones Day for the defendants

[1] Santos Limited (**Santos**) and Fluor Australia Pty Ltd and Fluor Corporation (the first and second defendants, who will be collectively referred to as "**Fluor**") have been engaged in a long running dispute in relation to a project to extract coal seam gas from fields in the Surat Basin for commercial sale or conversion to liquefied natural gas, referred to as the GLNG gas project (the **Project**). Santos entered into an amended EPC Contract with the first defendant in or about September 2011 (**EPC Contract**). Fluor was responsible for the engineering, procurement, and construction of certain facilities of the Project. An overview of the proceedings and

the referral of questions to referees has been set out by Bradley J in *Santos Limited v Fluor Australia Pty Ltd & Anor* [2020] QSC 373 at [10]-[16] and [83]-[95]. I do not propose to repeat that background.

[2] Three applications were made in relation to this matter, namely:

(a) Power of Referees to determine privilege;

(b) An application by Fluor challenging privilege claims by Santos;[1] and

(c) An application by Santos challenging privilege claims by Fluor.[2]

Power of the Referees to determine privilege

[3] The parties had reached a consent order in this regard. After reviewing the submissions and material in that respect, including the judgment of Bradley J,[3] I determined that there was a sufficient basis for the making of the order. The parties had resolved the matters that were in issue when it was previously sought to be raised before Bradley J for a decision on the papers. In the interests of clarifying the position to the referees as soon as possible, by consent of the parties, I made the order on the papers. The parties did not require reasons. I set out, however, brief reasons for the making of the order.

[4] The order was sought following the referees raising the fact that they did not consider that they had the power under the existing orders to determine the question of privilege, following one of the parties claiming privilege in relation to a document sought to be put before the referees by the other party. There was dispute between the parties as to the scope of the power of the referees for resolving questions of privilege and the mechanism for doing so. It is envisaged that it is likely, during the hearing, that there will be more disputes as to privilege claimed in respect of particular documents. Although the referees were given power to address questions of disclosure, the question of whether or not privilege exists is a substantive legal matter rather than a procedural matter involving questions of fact. Rule 501 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR)** provides for a question of law and fact to be referred to a referee. The parties also relied on r 505 of the UCPR, but considered that the scope of r 501, particularly r 501(4), put the power of the Court to make such an order beyond doubt.

[5] The referees have the relevant legal expertise to determine the question of privilege. In the interests of an expeditious hearing, that would be best dealt with by the referees unless they thought it should be dealt with by the Court, which is provided for under r 505A of the UCPR. I satisfied myself that it was appropriate to make the order in the terms framed by the parties, which provides for the expeditious resolution of matters during the hearing, but that the ultimate decision about questions referred to the referees are to be decisions of the Court, as provided for under rr 505B, 505C and 505D of the UCPR.

Fluor's application challenging Santos' claim of privilege

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1 Application dated 27 August 2021.
2 Application dated 20 August 2021.
3 *Santos Limited v Fluor Australia Pty Ltd & Anor (No 2)* [2021] QSC 189.

[6] In light of the parties narrowing the issues, including at the hearing before me, the documents in issue, which are the subject of the application were as follows:

(a) Documents referred to at 1(k)-1(n) of the application which are "Defects Register Claims Summaries" said to have been prepared by Ms Suzie Reintals all made by Mr Peter Turner;

(b) The document referred to at 1(o) of the application alleged by Santos to have been created by Mr Peter Turner;

(c) A document referred to at 1(p) of the application alleged by Santos to have been created by Mr Chuck Nickel concerns a document titled "Table 02 Completion Date Comparison 1 Oct 14" dated 2 December 2014;

(d) Documents referred to at 1(r) to 1(aa) of the application alleged by Santos to have been prepared by Mr Nickel or made by Mr Turner which are dated variously between 24 July 2014 and 11 August 2014; and

(e) Documents referred to at 1(bb) - 1(cc) of the application alleged by Santos to have been prepared by Mr Mauger or Mr Turner which are dated September 2014 and refer to being "an electronic spreadsheet analysing potential deviation of notices".

Nature of Dispute

[7] A convenient overview of the issues in dispute on the pleadings was provided by Fluor as follows.[4]

[8] In aggregate, the quantum of the claims advanced by Santos in these proceedings exceeds AUD $1.4 billion.[5] Broadly, Santos seeks to recoup alleged overpayments made by it, pursuant to payment certificates issued and certified throughout the course of the Project, which it contends were made and paid in error. Santos contends that it was only contractually obliged to pay "Actual Costs" and it erroneously also paid "Excluded Costs". In August 2014, nearing the end of the Project, Santos issued 13 interim negative payment certificates under the EPC Contract.[6] The negative payment certificates were issued expressly pursuant to clause 29.4 of the EPC Contract.[7] It is uncontroversial that the issuing of the negative payment certificates was the culmination of at least a 12-month period of investigation and analysis undertaken by Santos.

[9] On 11 August 2020, Fluor amended its defence in the proceeding to expand its claims in estoppel and related claims based on waiver and misleading and deceptive conduct. These claims are partly based, in short, on the notion that:[8]

(a) During the course of the Project, Santos approved payment claims made by Fluor under the EPC Contract, thereby representing that it accepted the validity of those claims;

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4 [7]-[12] of the defendant's written submissions.
5 Affidavit of John Barry Cooper filed 29 January 2020 (CFI 124) at [20].
6 Affidavit of Simon Edward Jensen filed 9 August 2021 (CFI 290) at [10(a)].
7 Affidavit of Simon Edward Jensen filed 9 August 2021 (CFI 290) Ex SEJ 1 at p. 3.
8 By way of example, see the claims advanced at paragraphs 330J to 330ZN of what is now the Fifth Amended Defence and Counterclaim (CFI 214)

(b) Santos was aware at the times those claims were approved, of the facts and circumstances which it now asserts meant that those payments were not due; and

(c) Santos covertly worked to develop a strategy under which it would later seek to recover these amounts from Fluor, pursuant to an alleged right to do so under the EPC Contract.

[10] The allegations relevant to these claims include, in summary, as follows:

(a) the way in which Santos administered the EPC Contract and co-operated with Fluor during the Project gave rise to a representation that the amounts that it certified and paid were payable under the EPC Contract, and that Santos would not seek repayment of those amounts absent the discovery of new facts indicating that the sums were in fact not due;

(b) the conduct of Santos relied upon by Fluor includes its repeated signing of Payment Certificates during the four year course of the Project, approval during the Project of PDNs (Potential Deviation Notices) and RFCAs (Requests for Contract Action) submitted by Fluor in respect of matters now said to render costs non-reimbursable, and engaging KPMG to review Fluor's Payment Claims during the Project and making adjustments to the sums payable in the light of that review;

(c) Fluor relied upon Santos' approval of the sums so certified as payable to Fluor, including by paying monies away to subcontractors;

(d) had Fluor known the true position, it would have taken steps to protect its position;

(e) the representations made by Santos are misleading, for Santos now seeks to recover amounts it has previously certified and paid notwithstanding that it has not discovered any new facts: Santos was well aware of all of the key circumstances that it now says makes the sums it paid Excluded Costs or otherwise not Actual Costs; and

(f) Santos is estopped from resiling from its representations (330ZE and 330ZG) or has waived its right to the relief it seeks (330ZI), or Fluor is entitled to relief under the ACL in relation to Santos' misleading or deceptive conduct.

[11] Hence, Fluor's case in this respect is that Santos developed a claims strategy which it deliberately kept secret from Fluor so that it did not jeopardise the relationship with Fluor while the LNG facility was still under construction. In other words, Santos knew that if its strategy, with which it later surprised Fluor had been revealed, Fluor would have taken steps to protect itself and this would have interrupted the progress of the works.

[12] The claims for privilege made on behalf of Santos (and which are challenged by Fluor) are said to be in relation to documents relevant to the build up by Santos of claims or a claims strategy against Fluor prior to the completion of the Project and the commencement of the proceedings and the deletion by Santos of documents relating to that course of conduct.

Evidence

[13] Mr Simon Jensen, the Legal Manager Onshore for Santos, who has the responsibility of instructing Corrs Chambers Westgarth in the proceeding, provided an affidavit in support of the claim for privilege.[9] In brief, Mr Jensen stated that in relation to an amended EPC Contract entered into between Santos and Fluor Australia for various works in relation to the project, he had been informed in the first half of 2013 that the costs were significantly in excess of costs that had been estimated and there were significant delays causing concern. As a result, he provided legal advice to various directors, the Director of the GLNG project, and Vice President and Chief Executive Officer of Santos.

[14] On or about 12 September 2013, Santos instructed Herbert Smith Freehills (**HSF**) to provide it with legal advice in relation to rights it may have against Fluor under the EPC Contract. Following the receipt of the initial advice from HSF, Santos instructed HSF to commence a legal review and assessment of Fluor's management of the EPC Contract to consider and identify if Santos had any potential claims against Fluor. Subsequently in March 2015, Santos engaged Corrs Chambers Westgarth (**Corrs**) in place of HSF to continue that review and assessment and to provide legal advice to Santos in relation to potential claims it may have against Fluor.

[15] Mr Jensen gave evidence that he engaged Ms Suzy Reintals, a Senior Lawyer based in Adelaide, in March 2014 for the sole purpose of providing legal advice to Santos as part of the Fluor EPC review and assessment. Ms Reintals held a practising certificate at the time. She worked closely with the Santos internal team and HSF.

[16] A number of people were engaged to assist in that process. One was Mr John Henderson. As a result of various concessions made during the hearing, I no longer need to concern myself with documents said to have been prepared by him.

[17] In May 2014, Mr Chuck Nickel was engaged, having been recommended by Ms Reintals. Mr Jensen approved his engagement for the sole purpose of preparing material to be provided to HSF and Ms Reintals, so that they could provide legal advice to Santos.

[18] Mr Peter Turner, a Contract Claims Consultant, was approved by Mr Jensen following Ms Reintals suggesting that Santos engage him to provide assistance to her and HSF. Relevantly, Mr Travis Mauger was also engaged. Mr Jensen was not involved in his engagement.

[19] An objection was made to Mr Jensen's evidence on the basis that he was giving secondary evidence as to the engagement of the individuals to which I have referred, and the relevant document relating to their engagement had not been produced. Santos contends that the evidence is admissible as Mr Jensen gives evidence as to the purpose for which the individuals were engaged, not as to the content of any engagement letters or instruction letters between Santos and those individuals. While Mr Jensen did not engage the individuals himself, he was the person who was responsible for approving their engagement and would have, as part of that process, personal knowledge of the purpose for which they are engaged. To that extent, Mr Jensen's evidence is direct evidence as to the purpose for which the individuals were engaged (save for Mr Mauger) and is admissible. There was

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9 CFI 290.

no challenge to Mr Jensen's evidence that those people were engaged for that sole purpose.

[20] Mr Andrew Stephenson, a Partner at Corrs, also gave evidence. He confirmed that, amongst other things, Corrs had been reviewing material which had been prepared for HSF and for Ms Reintals for the purpose of providing advice to Santos regarding potential claims, arising as a result of the EPC Contract, against Fluor, since February 2015. He further stated that in order to provide legal advice to Santos, and prepare for anticipated litigation, Corrs and Santos had caused various written briefing documents to be prepared by a number of people, including Ms Reintals, Mr Nickel, Mr Turner and Mr Mauger. A database of some ten million documents were uploaded into a ringtail data base and reviewed for the purpose of disclosure.

[21] An issue was raised in the present proceedings by Fluor, contending that if the Court found that the documents the subject of challenge were in fact privileged, the documents were, in any event, an expert statement or report and not protected by privilege under r 212(2) of the UCPR. Some questions were asked in evidence chief of Mr Stephenson as to whether the people concerned were recognised as experts within their area. According to Mr Stephenson, he had never understood Mr Nickel, a Delay Analyst, to be somebody who was regarded as having expertise in that field. He further stated that Mr Turner had no qualifications of which Mr Stephenson was aware, and that Mr Turner's experience was commercial, rather than technical. Mr Stephenson stated that the documents, the subject of the application, did not provide an analysis which could be described as providing an analysis based on specialised knowledge in a field of expertise.

[22] Mr Stephenson gave a general description of what the documents the subject of the dispute contained. That is a matter to which I will return. It was submitted by Counsel on behalf of Fluor that the Court should take a cautious view of Mr Stephenson's assessment of privilege, due to an approach he had taken with respect to a particular email. I am not persuaded, given Mr Stephenson's experience as a construction litigation lawyer, and having regard to the evidence he gave, that I should adopt such an approach. He is clearly someone who was honest and of significant legal expertise and while his approach to whether an email (not the subject of this application) attracted privilege or not reflected a very technical approach, which was not ultimately maintained, it did not cause me to regard his evidence with scepticism, given he made appropriate concessions and showed caution in respect of his answers. His sometimes technical approach, and his drawing of fine legal distinctions on occasion, was reflective of hard-fought litigation where every point appears to be taken and if there was a legal basis to support a position, it being taken, although ultimately being abandoned in relation to an email the subject of cross examination.

Contentions of the parties as to the claim of privilege

[23] Fluor submitted that the Santos claim of privilege could not be maintained for a number of reasons.

[24] First, it was submitted on behalf of Fluor that the affidavit material provided on behalf of Santos did not properly claim privilege in accordance with r 213 of the UCPR. Rule 213 deals with privilege claims. It provides that a party making a

privilege claim which is challenged must file and serve on the other party an affidavit stating the claim. Rule 213(3) provides that:

> "The affidavit must be made by an individual who knows the facts giving rise to the claim."

[25] According to Fluor, the affidavits of Mr Stephenson and Mr Jensen do not establish the purpose of the creation of the document. It is not sufficient, in Fluor's submission, to give evidence about what the overall purpose was for engaging a particular person. The relevant question and evidence required was what the purpose of the creation was of a particular document. Fluor contends that the evidence relied upon by Santos does not identify the purpose of the creation of any of the documents in contention. In particular, the affidavit material does not provide evidence of the purpose of creating the document by the person who created the document or the person who directed its creation. In that regard, Counsel for Fluor relied on the Full Court of the Federal Court in *Kennedy v Wallace.*[10] According to Fluor, it must be shown that the document over which privilege is sought was created for the purpose of being communicated to the lawyer to obtain legal advice, even if it ends up not being sent to the lawyer.

[26] In Fluor's submission, if the affidavit evidence fails to comply with r 213(3) without excuse, it is not appropriate for the Court to have regard to the terms of the documents themselves to determine the question of privilege.[11]

[27] Fluor also refers to the evidence of Mr Stephenson in relation to who created and made a document as being deficient in establishing the dominant purpose for which the document was created where two different people are identified as being responsible for the document's creation and then making the document.

[28] Santos, however, submits that in the present case, it is not the purpose of the people engaged by Santos which can evidence the relevant purpose of creating the documents concerned. Rather the relevant evidence is the purpose for which they were engaged by Santos which is relevant to the claim of privilege which was provided by Mr Jensen. Mr Jensen has provided evidence of the purpose of the engagement of Ms Reintals, Mr Turner and Mr Nickel, namely for the production of documents for the purpose of obtaining legal advice from HSF and Santos as to potential claims. Santos submits that is sufficient. Contrary to the submission of Fluor, Santos contends that if you produce a document and the purpose for producing that particular document is not to communicate it to the client or the lawyer for the purpose of obtaining legal advice, but it is produced as part of the overall purpose of creating documents to provide to the client or the lawyer for the purpose of obtaining legal advice, that is insufficient for a claim of privilege. In that regard, it relies on the decision of Young J who conveniently summarised the relevant principles in *AWB v Cole (No 5).*[12]

[29] Santos further submits that it does not matter who created the document, or who subsequently amended it, because the sole purpose of the engagement of the individuals who either created or amended it was for the purpose of preparing

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10 (2004) 142 FCR 185.

11 *Fletcher & Ors against Fortress Credit Corporation (Australia) II Pty Limited & Ors* [2014] QSC 303.

12 (2006) 155 FCR 30.

material to be provided to Ms Reintals or HSF or Corrs so that they could provide advice as to potential claims.

[30] Santos provided the Court with the documents in question to review if it considered it appropriate to do so.

Legal principles

[31] There is no issue of relevance in relation to the documents the subject of the present application.

[32] It is uncontroversial that the onus lies on the party claiming privilege to establish the facts necessary to establish that claim. It is not a matter of mere assertion, but rather setting out the facts that establish the claim is properly made.[13] The time for establishing a claim for privilege is when the document came into existence.[14]

[33] The relevant legal professional privilege claimed by Santos is advice privilege, which requires that the confidential communication is made for the dominant purpose of giving or obtaining advice or the provision of legal services.[15]

[34] In *AWB Ltd v Cole (No 5),*[16] Young J relevantly set out the principles in relation to legal advice privilege as follows:

> "The general principles that I consider relevant to the disposition of this case can be summarised as follows:
>
> > (1) The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. **The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents**, supported by argument or submissions: see *Grant v Downs* (1976) 135 CLR 674 at 689 ; 11 ALR 577 at 589 (*Grant*); *Cmr of Taxation v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 ; [2005] FCA 1247 at [30] (*Pratt Holdings*); and *AWB* at [63] .
> >
> > (2) The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication: see *AWB* at [110].

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13 *Hancock v Rinehart* [2016] NSWSC 12 at [7].

14 *Barnes v Commissioner of Taxation* (2007) 242 ALR 601 at [5].

15 *Daniels Corporation International Pty Ltd & Anor v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 552.

16 (2006) 155 FCR 30 at [44].

(3) The existence of legal professional privilege is not established merely by the use of verbal formula: *Grant* at CLR 689; ALR 589 per Stephen, Mason and Murphy JJ. Nor is a claim of privilege established by mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving "legal advice": *National Crime Authority v S* (1991) 29 FCR 203 at 211–12 ; 100 ALR 151 at 159–60 per Lockhart J; *Candacal Pty Ltd v Industry Research and Development Board* (2005) 223 ALR 284 ; [2005] FCA 649 at [70] (*Candacal*); *Seven Network Ltd v News Ltd* [2005] FCA 142 at [6]–[8] . If assertions of that kind are received in evidence in support of the privilege claim, their conclusionary nature can leave unclear what advice was really being sought. There will be cases in which a claim of privilege will not be sustainable in the absence of evidence identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed: *Kennedy v Wallace* (2004) 142 FCR 185; 213 ALR 108 ; [2004] FCAFC 337 (*Kennedy (FCAFC)*) at [12]–[17] per Black CJ and Emmett J and at [144]–[145] and at [166]–[171] per Allsop J; see *also Southern Equities Corp Ltd (in liq) v Arthur Andersen & Co (No 6)* [2001] SASC 398.

(4) Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications: *Kennedy v Wallace* (2004) 208 ALR 424 ; [2004] FCA 332 at [65] (*Kennedy (FCA)*) per Gyles J; affirmed on appeal, *Kennedy (FCAFC)*at [23]–[27] per Black CJ and Emmett J. In *Kennedy (FCAFC)* , Black CJ and Emmett J inclined to the view that in the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given.

(5) A "dominant purpose" is one that predominates over other purposes; it is the prevailing or paramount purpose: *AWB* at [105]–[106] ; *Pratt Holdings* at [30] per Kenny J.

(6) An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence: *Pratt Holdings Pty Ltd v FCT* (2004) 136 FCR 357 ; 207 ALR 217 ; [2004] FCAFC 122 at [35] per Finn J.

…

(8) Legal professional privilege protects the disclosure of documents that record legal work **carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client**: *Daniels* at [44] per McHugh J; *Cmr of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 550 ; 141 ALR 545 at 582 ; [1997] HCA 3 (Propend), per

> McHugh J; *Dalleagles* at WAR 333–4; ACSR 505–7 per Anderson J; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245–6 (*Sterling*) per Lockhart J; and *Kennedy v Lyell* (1883) 23 Ch D 387 at 407 ; *Lyell v Kennedy (No 3)* (1884) 27 Ch D 1 at 31 per Bowen LJ; *Propend Finance Pty Ltd v Cmr of Australian Federal Police* (1995) 58 FCR 224 at 266 ; 128 ALR 657 at 697 per Lindgren J.
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> (9) Subject to meeting the dominant purpose test, legal professional privilege extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser to enable him or her to advise: *Sterling* at 246. **The privilege extends to drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are themselves actually communicated to the lawyer**: *Saunders v Cmr of Australian Federal Police* (1998) 160 ALR 469 at 472."

(emphasis added).

[35] In *Kennedy v Wallace*,[17] Allsop J discussed the relevant principles with respect to privilege in the context of considering an argument by ASIC that privilege did not attach to an uncommunicated personal note in the context of a claim for advice. In his Honour's discussion, his Honour stated at [233] – [234] the following:

> "In one sense, it is axiomatic that the purpose must have a connection with the communication, because it must have a connection with the advice that is sought. **The protection of the communication protects a document created for the dominant purpose of using it or its contents in order to obtain legal advice**: *Grants v Downs* at CLR 677; ALR 579. This provides the necessary connection with the communication.
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> **It would not matter whether the document was or was not later used in the actual physical communication. The purpose of protecting the advice which is intended to be sought or given requires, in my view, that such distinctions not be made. Otherwise, there will be artificial constraints on the task of getting advice**. The process of enquiring of the lawyer will be limited and endangered. This approach buttresses the protection of the communication by permitting proper contemplation of, and preparation for, the occasion of such advice. This approach conforms with the privacy of the communication as the focus of the privilege. It accords with the views of Barwick CJ in *Grant v Downs* and Deane J in *Maurice* at CLR 490; ALR 40–1 which have not been rejected in the High Court…"
>
> (emphasis added).

[36] Fluor submits that the authorities demonstrate that the evidence must show that the document was created for the purpose of its content being communicated to the lawyer to obtain legal advice. Fluor do not contend that a document needs to actually be provided to a lawyer in order to attract legal professional privilege in relation to the giving of advice, however it contends that the purpose of creating the

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17 (2004) 142 FCR 185.

document must be for the purpose of communicating its content to the lawyer for advice. Fluor submit that is the effect of *Kennedy v Wallace.*[18] It contends that neither the affidavit of Mr Jensen nor Mr Stephenson establish that to be the case in relation to the particular documents in question.

[37] Santos, however, contends that the approach of Young J in *AWB Ltd v Cole (No 5),*[19] which accurately summarises the relevant legal principles, supports the fact that a document which is not necessarily itself intended to be communicated to the solicitor, but which is created as part of the process of creating such documents for the dominant purpose of obtaining legal advice is sufficient where it can be identified that was the sole task of the individuals involved.

[38] The statements by French J in *Saunders v Commissioner of Australian Federal Police (**Saunders**),*[20] are also of assistance to the resolution of the present matter. Having referred to Anderson J in *Dalleagles Pty Ltd v Australian Securities Commission*,[21] French J relevantly stated that:

> "The principle which he applied extends with equal facility to materials brought into existence by the client for the purpose of communication to the solicitor whether or not they are themselves provided to the solicitor". In the case of a client who has a complex array of historical transactions and perhaps little consciousness of notions of relevance and necessity, such notes or drafts may be extensive. … The question for the purpose of the application of legal professional privilege is whether or not they are to form the basis of confidential communications to the solicitor."

[39] In that case, French J considered that spreadsheets which had been prepared by the client were for the purpose of obtaining legal advice albeit that they may have been intermediate stages in the preparation of a composite document. His Honour considered the fact the document may not have been shown to the solicitor but was supplanted for that purpose by a more elaborate or complete version did not defeat the privilege that attached to them as part of the confidential communications with a legal advisor.[22] The client in that case had deposed to the fact that the documents in question were prepared by him at the request of the solicitor.

Consideration

Was the Affidavit evidence sufficient?

[40] As to whether the affidavit material complied with r 213(3) of the UCPR, Santos engaged people to carry out the task of preparing and providing material to HSF and Corrs to provide advice in the context of thousands of documents being prepared. Unlike the case of *Fletcher & Ors v Fortress Credit Corporation (Australia) II Pty Limited & Ors* (***Fortress***),[23] Mr Jensen is somebody who had knowledge of those who were employed as part of the Fluor EPC review and assessment and gave evidence as to the purpose of their engagement by Santos. While Mr Jensen was

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18 (2004) 142 FCR 185.
19 (2006) FCR 30.
20 (1998) 160 ALR 469.
21 [1991] 4 WAR 325 at 333.
22 (1998) 160 ALR 469 at 478.
23 [2014] QSC 303.

not able to give evidence as to the individual employed, namely Mr Mauger, Mr Stephenson spoke to Mr Mauger and was informed that the documents were prepared by him likely for the purpose of being provided to Ms Reintals.[24] The present case does have similarities to that discussed in *Fortress* by McMurdo J (as his Honour then was) insofar as the case involves considerable complexity and those who created or amended the documents would not necessarily be able to depose as to the purpose themselves, given the vast number of documents involved. Mr Stephenson's evidence confirms the source data identifies the individuals who were involved in the creation or making of the documents on the basis of what he was informed by the Corrs Legal Technology Solutions Manager. The description of the documents reviewed by Mr Stephenson are consistent with a description of documents that were prepared in the course of the EPC review and assessment including tables summarising defects in various work packages, a comparison of Hub Mechanical Completion Milestone Dates, and spreadsheets analysing potential deviation notices.

[41] In the circumstances I am satisfied that Santos have complied with r 213(3) of the UCPR.

Is Privilge established

[42] Given documents created by Mr Henderson are no longer in issue, the question is whether legal advice privilege can be claimed in relation to documents prepared by Ms Reintals, Mr Nickel, Mr Turner or Mr Mauger, or by a combination of those people.

[43] I accept that Ms Reintals, a practising lawyer, was engaged by Santos for the sole purpose of bringing documents into existence herself, or to causing them to be brought into existence by members of her team, for the purpose of obtaining legal advice. Relevantly, that team included Mr Turner, Mr Nickel and Mr Mauger.

[44] The evidence of Mr Jensen supports the fact that there was a dedicated group of people employed by Santos for the purpose of gathering information to be provided to solicitors for the purpose of obtaining legal advice, and that was the sole purpose of their engagement.

[45] The evidence does not, as Fluor submits, address the purpose of creating each individual document the subject of the present dispute. The question is whether, given the onus lies on Santos, it has produced sufficient evidence to support the claims of privilege, and according to the authorities, privilege has been established.

[46] In my view, although the circumstances are unusual, the evidence provided by Santos is sufficient to establish that:

(a) Ms Reintals was employed by Santos to provide legal advice to it in respect of the claims that may be made against Fluor and to provide and co-ordinate the provision of documents to HSF and Corrs. She held a practising certificate and had been specifically employed to act as a legal advisor in her role;

(b) Given Ms Reintals', Mr Turner's and Mr Nickel's engagement was for the sole purpose of preparing documents to provide to HSF and then Corrs for the

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24 Affidavit of Andrew Jon Stephenson affirmed 6 August 2021 at [80](a).

purpose of obtaining advice, I infer that the documents that were created were part of the process of preparing confidential communications to provide to the solicitors;

(c) Although the evidence does not show that the particular version of the document over which privilege is claimed was intended to be imparted to the solicitors, I infer that it was created as a step in the process of creating documents that were to be provided to the solicitors for the dominant purpose of obtaining advice or for Ms Reintals to provide advice to Santos;

(d) Although the evidence of Mr Stephenson derived from the review of the document database which contained the source of the documents by the Legal Technology Group State Manager for Queensland from Corrs, Mr Tri Huynh, which does not show who was necessarily responsible for creating a document and then subsequently "making" the document, the evidence does show it was either, or a combination of, Ms Reintals, Mr Turner and/or Mr Nickel;

(e) None of Ms Reintals, Mr Turner or Mr Nickel are the relevant minds in terms of Santos, and were acting within the terms of their engagement. In those circumstances, evidence as to the purpose for which the document was created is by reference to the job they were engaged to do in circumstances where they were engaged to only carry out one task does sufficiently establish the factual basis for the claim of privilege;

(f) Although of limited weight, the description of the documents deposed to by Mr Stephenson is consistent with the nature of the task being carried out in the context of the EPC Contract. He also confirmed that Corrs were receiving documents from Santos for the purpose of providing legal advice; and

(g) The dominant purpose of the creation of the documents was for the purpose of using their contents in order to obtain legal advice.

[47] In my view, the above is sufficient to establish the factual foundation for the claim of privilege. As was made clear by Young J in *AWB v Cole (No 5),*[25] the protection of legal advice privilege does extend to notes, memoranda or other documents made by officers or employees of the entity that relate to the information sought by the client's legal advisor, whether or not they themselves were communicated to the lawyer. That must incorporate the notes or memoranda prepared as part of the process of preparing the document ultimately to be communicated to the lawyer, even though the version of the document itself is not intended to be communicated to the lawyer. It is material brought into existence as part of the process of preparing documents for the purpose of being communicated to the lawyer. Were it otherwise, the privileged communication provided to the lawyer being the ultimate document communicated to lawyers for the dominant purpose of obtaining advice would be protected by privilege, but not draft documents recording information in the interim to provide that ultimate document. That would undermine the privilege in the document ultimately communicated. Some analogy can be drawn in that regard from the protection of draft advices which are protected by privilege so as not to disclose the privileged communication.

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25 (2006) 155 FCR 30.

[48] Consistent with Young J in *AWB v Cole (No 5)*,[26] are the statements of Allsop J in *Kennedy v Wallace* where his Honour stated that:[27]

> "…I do not understand that the law in Australia to deny privilege to a document made with the dominant purpose of obtaining legal advice on the basis that the document does not amount to a communication."

[49] Justice Allsop further stated that:[28]

> "The protection of the communication protects a document created for the dominant purpose of using it or its contents in order to obtain legal advice." (emphasis added)

[50] Further support is found in the statement of French J in *Saunders* that:[29]

> "The question for the purpose of the application of legal professional privilege is whether or not they are to form the basis of confidential communications to the solicitor."
>
> (emphasis added).

[51] Although the present case is unlike the case of *Saunders,* where the privilege holder deposed to the fact that he had prepared draft spreadsheets at the request of the solicitors, the evidence does support the fact that the sole task of Ms Reintals, a solicitor and those she had recruited to assist her, was preparing material for the solicitors for the purpose of obtaining advice.

[52] I am satisfied that the evidence supports the fact that those documents would form the basis of confidential information to the solicitors for the dominant purpose of obtaining advice even if they themselves were not intended to be communicated to the solicitors, but rather were prepared as part of the process for the preparation of documents ultimately communicated to lawyers for the dominant purpose of obtaining legal advice. I am satisfied that the content of the documents was for the dominant purpose of obtaining legal advice and formed the basis of confidential communications to the solicitor.

[53] As to Mr Mauger, who was a Santos employee, as Counsel for Fluor quite properly conceded, given the evidence of Mr Stephenson as to his conversation with Mr Mauger, Fluor would find it difficult to contend that the legal advice privilege in relation to those documents had not been established. Mr Stephenson's evidence, which was clarified in cross-examination, was that he spoke to Mr Mauger and was informed that the documents were prepared by him likely for the purpose of being provided to Ms Reintals.[30] Given Ms Reintals position I am satisfied that legal advice privilege is established in respect of those documents.

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26 (2006) 155 FCR 30.
27 (2004) 142 FCR 185 at [229].
28 *Kennedy v Wallace* (2004) 142 FCR 185 at [233].
29 (1998) 160 ALR 469 at 472.
30 Affidavit of Andrew Jon Stephenson affirmed 6 August 2021 at [80](a).

[54] I am satisfied that Santos has established that the documents referred at 1(k)-1(n), 1(o), 1(p), 1(r) -1(aa) and 1(bb)-1(cc) of the application are properly the subject of a claim of privilege.

Expert Report or Statement?

[55] That, however, does not resolve the application. Fluor submitted that if the Court found privilege was established, it should find that the documents are not privileged from disclosure under r 212(2) of the UCPR on the basis that they are a statement or report of an expert. This was based on the evidence that the people relevantly engaged, namely Mr Nickel, a Delay Analyst, Mr Turner, a Contract Claims Consultant and Mr Mauger, who was an engineer said to be involved in cost control support, are said to be experts in their field, and the fact that the documents described by Mr Stephenson, at least in the case of analysing potential deviation notices, constituted a statement or report of an expert which, pursuant to r 212(2), is not privileged from disclosure.

[56] In the submission of Fluor, rule 212(2) is very broad in its terms and would extend to documents created by those individuals possessing expertise who were employed for their skills, even if the documents contained factual matters and were not constituted wholly or substantially by expressions of opinion.[31]

[57] Santos contends that r 212(2) of the UCPR has no application because:

(a) Rule 212(2) is excluded by operation of the Order of Flanagan J relieving the parties from their obligation of disclosure under r 211 of the UCPR, of which r 212 of the UCPR is a carve out pursuant to r 224 of the UCPR;

(b) the documents are not statements or reports of an expert; and

(c) r 212(2) is not intended to capture documents such as those the subject of the application, but is intended to apply to expert reports.

[58] Before considering whether r 212(2) of the UCPR would extend to documents created in the circumstances of the present application, or whether it has no application due to the order made by Flanagan J on 25 October 2017,[32] I will consider whether I am satisfied that the documents in question could be regarded as a statement or report of an expert.

[59] Fluor submits that in order to come within the r 212(2) exception, the following must be established:

(a) First, that there is a field in which specialised knowledge exists and the subject matter of the opinion (contained in the statement or report) forms part of such a body of knowledge;
(b) Secondly, the "expert" him or herself possesses the requisite specialised knowledge, which may be obtained through formal training or experience, for example;[33] and
(c) Thirdly, the documents in questions must be "statements or reports".

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31 See *Mazelow Pty Ltd v Herberton Shire Council* [2001] QSC 250.
32 Exhibit 2
33 As to the first and second points, see *Cross on Evidence* (11th ed), pp. 1093 and 1102.

[60] Fluor referred the Court to the decision of *Mazelow Pty Ltd v Herbeton Shire Council (**Mazelow**)*.[34] In that case, it was found that a report prepared by engineers, who were superintendents under a contract, for the purpose of being provided to the solicitors, was privileged. Cullinane J found that it was brought into existence in reasonable anticipation of litigation. His Honour, however, found that the report prepared was a report of an expert and therefore r 212(2) of the UCPR applied and it had to be disclosed. However, in reaching that view, his Honour commented that his determination could not be divorced from its surrounding circumstances. The subject matter of the report given by the engineers was said to relate to directions given to the plaintiff, which his Honour stated involved the making of judgments and was a justification of theirs position. Those directions were the subject of the dispute in litigation. Even though the report contained a lot of factual material with only minor expressions of opinion, his Honour stated that the report in question had to be considered in light of the surrounding circumstances in concluding that it was a report of an expert. In the course of his Honour's reasoning, his Honour commented that some areas of expertise may not involve expressions of opinion, but the presentation of data established by scientific means. Those surrounding circumstances were said to colour what was essentially a factual report. *Mazelow* was therefore clearly a case which turned on its facts.

[61] To the extent *Mazelow* has been relied upon, it was referred to in *Century Drilling Limited v Gerling Australia Insurance Company Pty Ltd (**Century Drilling**)*.[35] In that case Holmes J, as her Honour then was, referred to *Mazelow* as authority for the fact that it was unnecessary, in order to be able to characterise a document as an expert report or statement, that a document be constituted wholly or substantially by expressions of opinion.[36]

[62] The evidence in this case shows the individuals were engaged for their particular skills and experience. The mere fact that a person has particular qualifications does not qualify them as an expert nor that any document prepared by them is an application of their expertise. I accept the evidence of Mr Stephenson that Mr Turner, who was a contract claims consultant, is someone who is commercial, rather than having technical expertise. I do not find he was an expert. As to Mr Nickel, who was a data analyst, he has qualifications in what may be regarded as a field of specialised knowledge. Similarly, Mr Mauger, who was a mechanical engineer and cost engineer, is a person who has qualifications in what may be regarded as an area of expertise. The qualifications alone would not be sufficient to qualify Mr Nickel or Mr Mauger as experts, but assuming they are experts, are the documents created by them statements or reports of an expert?

[63] Mr Stephenson reviewed the documents in question and gave evidence as to the nature of the documents over which privilege is claimed. He did not consider any of the documents in question were created relying on the specialised knowledge of a data analyst or an engineer. That is of some weight given he has extensive experience in construction litigation.

[64] As was recognised in *Mazelow* and *Century Drilling,* a document does not need to wholly or substantially contain expressions of opinion to be characterised as an

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34 [2001] QSC 250.
35 [2004] 2 Qd R 481 at 486.
36 [2004] 2 Qd R 481 at [20].

expert report or statement. However, there must be some degree of expertise applied.

[65] As was pointed out by Crow J in *Murphy Operator Pty Ltd v Gladstone Ports Corporation Limited*, the critical part of any expert report is the reasoning in the expert report.[37] In his Honour's view, the test utilised by Douglas J in *Mitchell Contractors Pty Ltd v Townsville-Thuringowa Water Supply Joint Board*,[38] is correct namely, in respect of each document whether they are titled "report", "draft report", "statement" "draft statement" or by any other title, if the document prepared reflects the state of the mind of the expert, it is properly disclosable under r 212(2).[39]

[66] In *Interchase Corporation Limited v Grosvenor Hill (Qld) Pty Ltd (No 1),*[40] drafts of parts of a valuation, working papers and various other documents selectively collated were not documents which were considered to be a statement or a report. The documents related to the eventual report but went no further than that and, therefore, were not considered to fall within rule 212(2).[41] The documents described in the present case by Mr Stephenson are of a similar nature.

[67] Apart from the reference to "analysing" by Mr Stephenson when describing the documents and the fact that the individuals hold qualifications which are arguably specialised fields of knowledge, there is nothing to suggest that these documents involved the reasoning or opinion of an expert and have the character of being a statement or report of an expert. Mr Stephenson was asked in evidence-in-chief about each of the categories of documents and whether the documents contained any analysis which relied upon specialisation in a particular field of expertise. Mr Stephenson indicated each category of document did not involve such an analysis.[42] While it may be accepted that each person was employed for the skills they possessed, the evidence is not sufficient to establish that the documents in question contained any expression of expert opinion or reasoning. I am not satisfied that it is reasonable to infer that documents prepared by Mr Turner, Ms Reintals or Mr Mauger are a statement or report of an expert, even taking account of the fact that the document does not need to be wholly or substantially an expression of an opinion in order to be a statement or report of the expert. I do not consider that the documents fall within r 212(2) of the UCPR and that they have to be disclosed.

[68] As a result, I do not need to consider the argument that these types of documents created in the course of employment by someone with expertise could be within the scope of a statement or report of an expert referred to in r 212(2) of the UCPR, as opposed to it being limited to someone who was engaged as an expert in legal proceedings. My preliminary view is that it is unlikely that the rule would be construed so broadly as the first construction given it would potentially encompass legal advice of a solicitor or a statement of a doctor alleged to have been negligent, prepared for litigation. However, *Mazelow* does suggest otherwise. Given it raises a significant issue as to the scope of r 212(2) of the UCPR which could have

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37 [2019] 3 Qd R 255 at [102].
38 [2005] 1 Qd R 373.
39 [2019] 3 Qd R 255 at [104].
40 [1999] 1 Qd R 141 at 159.
41 [1999] 1 Qd R 141 at 159.
42 T 1-18 26- 27; T1-18 44-45; T1-19 6-7; T1(r)-1(aa); T1-19 23-24; T1-20 1-4.

significant consequences for the conduct of litigation, it is not appropriate for me to comment further. It is also not necessary for me to consider the effect of the order of Justice Flanagan made on 25 October 2017.

[69] I find that Santos has established its claim for privilege over the documents and does not have to make disclosure of the documents in question.

Santos Application

Waiver of Privilege

[70] Santos makes an application before this Court primarily alleging that Fluor has waived privilege in respect of certain documents. The application relates to category 2 documents which are set out at exhibit JBC-1 of the affidavit of Mr Cooper sworn 14 September 2021,[43] save for documents 2, 12, 37 and 63-80, which Santos no longer press.

[71] The documents concerned are described by Mr Cooper in his affidavit sworn 13 August 2021. They are said to consist of an advice provided by Jones Day on 7 May 2014, emails which passed between Jones Day and Fluor employees said to be for the dominant purpose of obtaining advice, and emails and documents post dating the advice which reveal the contents of the advice or internal emails between Fluor employees which are said to reveal the substance of communications and the work prepared by Jones Day in the course of preparing of the advice given in May 2014.[44]

[72] According to Mr Cooper, Jones Day had been engaged by Fluor in early March 2014. He was made aware at the time of the engagement that the Project was experiencing considerable time and cost overruns. Mr Cooper stated that Jones Day was retained to provide advice in relation to the Amended EPC contract and in particular "…Fluor's legal position in the event Santos did not make payment of the amounts claimed by and to be claimed by Fluor Australia for work being performed by Fluor Australia on the Project and/ or Santos' asserted claims against Fluor Australia including in respect of liquidated damages."[45]

[73] As to the question of waiver, Santos contends that it arises as a result of assertions made by Fluor in the sixth amended defence and counterclaim (**Defence**). In particular, Fluor pleads a case in estoppel in defence to some of Santos' claims. I set out the particular paragraphs below, however I will briefly outline the case in question. Fluor pleads, inter alia, reliance by Fluor upon an impression that Santos would not make any claims. One of the particulars of reliance is that at no time during the performance of the Project did it occur to identified executives, or any other executive of the Fluor defendants, that "the plaintiff could or would bring forward claims of the kind articulated in the Corrective Payment Certificate and in

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43 CFI 308.
44 CFI 293 at [22].
45 CFI 293 at [20].

the Statement of Claim." That impression relies on conduct which includes Santos expressly denying it was preparing claims against Fluor in December 2012, and Santos not responding when asked whether it was preparing a claim in September 2013. It is alleged that Santos' strategy to prepare claims under the contract, or other claims, was kept secret from Fluor by Santos. According to Santos, an expectation held by Fluor that Santos might well make claims is clearly inconsistent with the reliance on it not making such claims. It also contends that whereas it is pleaded by way of a particular that executives did not consider that Santos could, or would, bring forward a claim as a result of the impression created by Santos, the possibility of such a claim being made would occur to such a person if that person had received a communication about such a claim.

[74] In particular, Santos contends that it is inconsistent to maintain legal professional privilege in the advice given by Jones Day in May 2014 and in communications by which Fluor sought that legal advice. Santos contends that the seeking of that advice would be inconsistent with it contending that Fluor did not know that Santos was intending to make claims and then kept them secret. Santos further contends that the claim of privilege that is made in column E of annexure A refers to the documents being privileged on the basis that they were for the dominant purpose of litigation being reasonably anticipated. Jones Day were instructed in March 2014, which lead to the inference that proceedings between Fluor and Santos were contemplated at that time. Santos claims that is at the very time that Fluor asserts that it was relying on an impression that no claims would be brought by Santos, and that the claims subsequently brought had taken the executives of Fluor by surprise. According to Santos, the communications between Jones Day and Fluor in relation to claims to be brought by Santos against Fluor and the pleading as to matters "not occurring" to executives of Fluor is inconsistent with the confidentiality of the documents. In those circumstances, it is said that if the documents were otherwise privileged Fluor has expressly or impliedly made an assertion about the contents of such privileged communications and waived privilege.

[75] Santos does not contend that the documents sought would boost Fluor's case, but rather if documents directly relevant and material to the allegations do exist, that they would tend to disprove the assertions made by Fluor in its estoppel case.

[76] Santos asserts that the circumstances of this case, of which it relies on a number, demonstrate it is inconsistent for Fluor:

(a) to assert, on the one hand, that certain things "did not occur" to executives of Fluor and that it was relying upon the impression that Santos was not preparing claims; and

(b) to maintain, on the other hand, privilege over documents directly relevant and material to whether those things had occurred to the executives of Fluor, and whether it was relying upon the impression that Santos was not preparing claims.[46]

[77] The circumstances which Santos contends leads to a conclusion that there is an inconsistency in the position adopted by Fluor, such that there has been a waiver of

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46 Plaintiff's written submissions in reply at [22].

privilege in the documents claimed are set out at paragraph 23 of Santos' submissions in reply as follows:

(a) the pleaded state of mind in [330Y] is an essential element of Fluor's estoppel pleaded in [330ZE];

(b) the estoppel plea is put forward by Fluor in [330ZE] of the 6ADC as a complete defence to the major claims advanced by Santos in the Statement of Claim. In this sense, it is central to the just resolution of the dispute between the parties;

(c) the reasonableness of Fluor's reliance on the alleged representations made by Santos will be an issue in the proceeding by virtue of the principles governing estoppel;

(d) the estoppel claim is raised by Fluor and Fluor is the party maintaining the privilege. Fluor has not pleaded its state of mind in response to an allegation by Santos that it held a contrary or different state of mind;

(e) the conclusion must be drawn that the communications in Documents 1 to 62 of Category 2 in exhibit JBC-1 to the Cooper Affidavit relate closely to the state of mind alleged in [330Y] (including [330N]-[330NE]) of the 6ADC. It is not a question of inference. Mr Cooper states in [20] of the Cooper Affidavit that "Fluor engaged Jones Day for advice in respect of the Amended EPC Contract … and, in particular, Fluor's legal position in the event Santos did not make payment of the amounts claimed by … Fluor …and / or Santos' asserted claims against Fluor Australia…" In other words, the evidence before the Court is that at a time when Fluor pleads that the possibility of claims did not occur to them, and that the preparation of claims was being kept secret from them, they were in fact seeking advice about asserted claims. The communications in question include not only legal advice provided by Jones Day to Fluor but also instructions and documents provided to Jones Day directly relevant and material to the lack of knowledge pleaded by Fluor; and

(f) the specific nature of the pleaded state of mind is one of mixed fact and law. The particulars to [330Y] allege that at no time during the performance of the Project did it occur to Fluor that Santos "could or would" bring such claims. The allegation is that Fluor held a belief that Santos was not entitled to bring such claims and would not bring such claims;

(g) it is forensically unfair (in the sense used by the High Court in Mann v Carnell) to permit Fluor to simultaneously allege a lack of knowledge while maintaining privilege over confidential communications to the contrary.

[78] Fluor contends that, contrary to Santos' contentions, the fact that Fluor has pleaded reliance and knowledge as part of its estoppel claim does not mean that Fluor has waived privilege. It submits that the authorities support the fact that a party, such as Fluor, which puts its state of mind in issue in a pleading does not thereby waive privilege in any privileged document that might be relevant to that alleged state of mind. It contends that a waiver would only have occurred if Fluor had sought to justify its alleged state of mind by reference to those privileged documents, which it has not done.

[79] Fluor contends that where a party has pleaded its state of mind, the specific circumstances where a waiver of privilege occurred were those set out by Burns J in *Queensland Local Government Superannuation Board v Allen,*[47] which do not exist in this case. It points to the fact that it, in its pleading of reliance and knowledge in [330Y] of the Defence, does not include an allegation that any particular legal advice or other privileged document is relied upon to support its state of mind. It has not sought to deploy privileged documents to "boost" its case.

[80] Santos in reply contends that Fluor's contention in this regard must fail because it is not necessary that the privileged communication needs to be deployed for the purpose of "boosting" a party's case in order for a waiver to occur, as is demonstrated by the decision of *Oceltip Pty Ltd v Noble Resources Pty Ltd (**Oceltip**)*,[48] where the fact that the privileged communication had not been referred to in its pleading did not mean there could not be a waiver of privilege. In reaching this view, Justice Bond relied on a number of authorities, including *Macquarie Bank Limited v Arup,*[49] and *Neurim Pharmaceuticals (1991) Ltd v Generic Partners Pty Ltd* .[50]

[81] Fluor further stated, in relation to the notion that it was necessarily inconsistent to plead that its executives did not think Santos would or should bring a claim with the fact that Fluor may have contemplated legal proceedings with Santos in March 2014, it does not follow that those contemplated legal proceedings must have been of a kind articulated in the Statement of Claim.

[82] Fluor's Counsel further elaborated on this in oral submissions, contending that Santos' claim is misconceived insofar as Santos' case seeks to recover money that had been paid to Fluor by Santos. The state of mind referred to in [330K] is directed to whether Santos was ever going to ask for the money back or assert some legal basis for saying it was entitled to get it back. Paragraph 330ZD similarly refers to the plaintiff's representation "that it would not later seek to recover back the sums paid." In contrast, the estoppel case pleaded by Fluor is not connected to liquidated damages, or asserted claims, or claims that Fluor might have which was the subject of the advice of May 2014. Mr Cooper's evidence as to the advice provided in May 2014 was that the advice was about asserted claims of Santos or liquidated damages. At that time, no claims had been asserted by Santos. According to Fluor, it was not until 11 June 2014 that Santos suggested to the first defendant that the costs charged by the first defendant were not reimbursable.[51]

[83] According to Counsel for Fluor, unlike the case of *Oceltip* relied upon by Santos, the state of mind relevant to the present case is what Fluor thought Santos would or would not do. In those circumstances, there is no basis to say objectively that any legal advice as at May 2014 was going to be relevant to that subject. This is unlike *Oceltip* where one could see objectively that because the state of mind was about the enforceability of a legal document, legal advice could well impinge on that issue. According to Fluor, there is no evidence to support any inference that Fluor made communications with its lawyers which necessarily involves the proposition

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47 [2016] QCA 325 at [73].
48 [2018] QSC 317.
49 [2016] FCAFC 117.
50 [2018] FCA 1082.
51 Defence at [330S].

that they were, or might be, wrong in their belief about what Santos would or would not do in relation to the monies paid.

[84] Fluor submits that the correct approach with respect to *Oceltip* was that adopted by Justice Flanagan in *Sanrus Pty Ltd v Monto Coal 2 Pty Ltd* (***Sanrus***).[52] The approach adopted by his Honour was that *Oceltip* was a case that turned on its own facts and was not seeking to state a principle contrary to that identified in the authorities that it is not enough to establish an implied waiver of privilege that the state of mind asserted relates to a legal position and it is likely that a party obtained legal advice in respect of that legal position.

Legal Principles

[85] The test for determining whether there has been a waiver of privilege was set out by the majority of the High Court in *Mann v Carnell*:[53]

> "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 the waiver is "imputed by operation of law". 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… 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."

[86] The onus lies on the party asserting that the privilege has been waived to establish that there has been a waiver. The question is an objvective one.

[87] Implied waiver includes "issue waiver", which the Full Federal Court in the *Commissioner of Taxation v Rio Tinto Ltd,*[54] described as:

> "These authorities show that, where issue or implied waiver is made out, the privilege holder has expressly or impliedly made an assertion about the contents of an otherwise privileged communication for the purpose of mounting a case or substantiating a defence. Where the privilege holder has put the contents of the otherwise privileged communication in issue, such an act can be regarded as inconsistent with the confidentiality that would otherwise pertain to the communication."

[88] The parties referred to a number of authorities relevant to whether there is a waiver of privilege where the privilege holder's state of mind was in issue.

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52 [2019] QSC 144.
53 (1999) 201 CLR 1 at [29].
54 (2006) 151 FCR 341 at [52].

[89] In *Queensland Local Government Superannuation Board v Allen,*[55] the Court considered whether there was an implied waiver. In that case, the primary judge determined that a legal advice was relevant to the decision made by the Board and considered that privilege had been impliedly waived "taking into account the principles of fairness and consistency". The primary judge found that the state of mind of the Board was a relevant matter, that the legal advice went to the state of mind and that the advice had directly or indirectly been put in issue in the proceedings. The Board appealed that decision.

[90] The Court of Appeal determined that privilege had not been waived. Philippides JA, who agreed with Burns J (with whom McMurdo P also agreed), made some additional comments. Her Honour referred to the test as to waiver being clarified in *Mann v Carnell,*[56] which was reiterated by the High Court in later cases, and noted there was not some overriding principle of fairness, but rather notions of fairness were to be considered in the context of conduct which is inconsistent with the maintenance of confidentiality.[57] Her Honour considered that the case contained an "insurmountable obstacle" to there being a waiver of privilege, being the fact that the legal advice in relation to which waiver was said to have occurred, and which was said to go to the privilege holder's state of mind, concerned a separate matter from what was said to have been put in issue, noting that there was a critical distinction between the issue of the applicant's obligation to reconsider the respondent's claim and the manner in which the applicant reconsidered the claim.[58]

[91] Burns J reviewed the relevant High Court authorities as to implied waiver and summarised the relevant principles which relevantly included:[59]

(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;

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

(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.

[92] As his Honour recognised, the Court must, in a given case, analyse the acts or omissions of the privilege holder that are said to be inconsistent with the maintenance of privilege in the relevant communication. The result of such analysis will turn on the particular context and circumstance of the case at hand, such that other cases as to implied waiver provide only limited assistance.[60] His Honour, however, noted that some broad themes emerged from the authorities particularly

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55 [2016] QCA 325.
56 (1999) 201 CLR 1.
57 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [5].
58 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [7].
59 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [69].
60 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [70].

with respect to "issue waiver". His Honour noted that a particular form of waiver arose in the circumstances set out by the Full Federal Court in *Commissioner of Taxation v Rio Tinto Ltd,*[61] set out above. His Honour noted that the mere fact that a party 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, even if it may have been relevant to the privilege holder's state of mind. His Honour referred to the decision of *Archer Capital 4A Pty Ltd (as trustee for Archer Capital Trust 4A) v Sage Group PLC (No 3,*[62] and stated that " 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 maintenance of the privilege."[63] His Honour agreed with the authorities referred to, and noted they conformed with the principles derived from the joint judgement in *Mann v Carnell*.[64]

[93] In the course of his Honour's reasoning that privilege had not been waived, Burns J stated in a passage emphasised by Fluor that:

> "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 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. 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* to permit reliance on the advice for forensic advantage while, at the same time, preventing the opposing party from having access to it."
>
> (footnotes omitted).

[94] In reaching the view that privilege in legal advice referred to in the submission before the Board was not waived, the circumstances noted by his Honour are quite different to the present case.[65] His Honour considered that the advice in question, as to whether the Board was legally obliged to reconsider the appellant's claim, was

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61 (2006) 151 FCR 341.
62 (2013) 306 ALR 414.
63 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [71], referring to *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236.
64 (1999) 201 CLR 1.
65 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [78]-[82].

not relevant since the Board did reconsider her claim.[66] His Honour further considered that even if he was wrong in that regard, there was nothing in the conduct by the Board of its case to give rise to an implied waiver of privilege.[67]

[95] A similar approach was adopted by the Victorian Court of Appeal in *Viterra Malt Pty Ltd v Cargill Australia Ltd,*[68] as that discussed by Burns J in *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at paragraph 69 (excerpted above), where the Court of Appeal stated as follows:

> "The applicants have sought documents which record or evidence the knowledge of the Cargill parties of the Undisclosed Matters. That would extend to documents in which Cargill sought legal advice from its lawyers about matters arising in the due diligence and bearing on the Undisclosed Matters. But there would be nothing inconsistent in maintaining privilege in relation to such documents, while asserting ignorance of the Undisclosed Matters and reliance as pleaded. This is not a case where the nature of the pleading makes it inconsistent to withhold privileged communications about the transaction, notwithstanding that those communications might reveal something of Cargill's state of mind. It is entirely to be expected that a party pleading a misleading or deceptive conduct case arising from a commercial transaction will have received legal advice regarding the transaction before its consummation. The applicants' argument would suggest that privilege is waived by pleading such a case. The authorities show that something more is required."

[96] Associate Judge Derham, in *Seketa v Gadens Lawyers,*69 identified the "something more" to be the "boost" referred to by Burns J in *Queensland Local Government Superannuation Board v Allen,*[70] where the privilege holder has sought to boost its case by reliance on legal advice in some way, such as justifying its position by reference to the substance of advice received.

[97] In *Oceltip Pty Ltd v Noble Resources Pty Ltd,*[71] a decision upon which Santos placed considerable reliance, Oceltip asserted that Noble Resources had waived privilege over legal advice as a result of matters pleaded in its defence relevant to a pleading of estoppel. Justice Bond considered several matters relevant to determining whether there were confidential communications that were likely to have affected their state of mind. In defence of an allegation by Oceltip, that a waiver deed was not validly executed, as it was signed without the knowledge or consent of its second director (which was central to the case), Noble Resources, the defendant, pleaded that Oceltip was estopped from denying its validity. As part of the estoppel allegation, Oceltip pleaded that Noble Resources had a belief that the waiver deed had been validly executed and was effective to bind Oceltip.

[98] Justice Bond considered that the decision of *Macquarie Bank Limited v Arup*[72] accurately summarised the relevant principles in relation to implied waiver at [29]-[33] which stated that:

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66 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [85].
67 *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 at [86].
68 (2018) 58 VR 333 at [78].
69 [2021] VSC 245 at [55].
70 [2016] QCA 325.
71 [2018] QSC 317.
72 [2016] FCAFC 117.

"[29] In determining whether there has been an implied waiver of privilege, the Court's focus will be on whether there has been conduct that is inconsistent with the maintenance of confidentiality in the communication over which privilege is asserted. An assessment of whether there has been an implied waiver will be informed by considerations of forensic unfairness.

[30] Whilst not to be treated as a statutory formulation, in *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 ('*DSE'*), Allsop J (as his Honour then was) described (at [58]) an implied waiver as arising when:

> … 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.

[31] As the primary judge recognised, a pleading of legal advice may be sufficient to give rise to a waiver of privilege, however a pleading is not necessary for waiver to occur. To this effect, in *Hancock v Rinehart* [2013] NSWSC 1978 , Brereton J noted (at [22]) that the pleading in that case did not deploy or even refer to legal advice or its effect. His Honour noted that it was nonetheless open to conclude that privilege had been waived if other factors of the case warranted such a finding.

[32] As stated in *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236 at [48], by Hodgson JA, with whom Campbell JA agreed:

> 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. <u>In this respect, it may be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were confidential communications likely to have affected that state of mind</u>.
>
> (Emphasis added.)

[33] It was contended by Macquarie that these principles have particular application where a party pleads its understanding of the legal effect of a contract or agreement. In this regard Macquarie relied upon *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191 ('*Vic Hotel'*), where the Victorian Court of Appeal found an implied waiver of privilege in a context where the pleaded allegation put in issue another party's state of mind

as to the existence of legal rights. Dixon AJA (with whom Mandie and Beach JJA agreed) noted (at [46]):

> I accept that merely putting a state of mind in issue will not, of itself, give rise to waiver of privilege in respect of legal advice that is relevant to the existence of the state of mind. But that is not this case. The state of mind that is put in issue concerns an understanding of legal rights, not simply knowledge of terms recorded in a contract."

[99] In *Oceltip,* his Honour considered that the authorities supported the fact that a party may make an implied assertion, or bring a case which necessarily lays open a confidential communication to scrutiny, and by such conduct, an inconsistency might arise between that act and the maintenance of the confidence informed partly by the forensic unfairness of allowing the claim to proceed without disclosure. Somewhat controversially in the context of the present case, his Honour stated that "…to establish an implied assertion of the content of privileged communications, it might be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were… confidential communications likely to have affected that state of mind.[73] I do not consider that his Honour's decision was controversial in this regard, insofar as he stated that it would be "in circumstances" which, by reference to his Honour's subsequent consideration, clearly encompasses a number of considerations.

[100] His Honour expressly considered the decision of *Queensland Local Government Superannuation Board v Allen,* and the passage by Burns J at [69], and concluded that it did not conflict with the summary of the principles extracted from *Arup*.[74] Having reviewed the decision of Burns J in *Queensland Local Government Superannuation Board v Allen,*[75] I agree with Bond J in that regard.

[101] His Honour considered a number of circumstances that had been referred to by the applicant in considering whether Noble, in fact, was making assertions about its state of mind in circumstances where his Honour should conclude that there were confidential communications likely to have affected that state of mind.[76] His Honour agreed the estoppel allegation was central to the case. His Honour also agreed that reasonableness of reliance was relevant in that case, that the circumstances are derived from a positive case put forward by the party to claim the privilege, and that it was likely that there were confidential communications which affected that state of mind. His Honour further considered that the specific nature of the state of mind was a state of mind concerning the effect of a legal document, namely a belief that the waiver deed had been validly executed. He also agreed that if the privilege was not waived, it was not appropriate at trial for Noble to seek to avail itself of a *Jones v Dunkel*[77] inference, because assertion of a valid claim for legal professional privilege was an adequate explanation. His Honour then evaluated the unfairness and forensic advantage in asserting the position.

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73 [2018] QSC 317 at [13].
74 [2018] QSC 317 at [15]-[18].
75 [2016] QCA 325.
76 [2018] QSC 317 at [20].
77 (1959) 101 CLR 298.

[102] While noting all considerations were relevant, his Honour particularly emphasised two matters as being persuasive of the correctness of the conclusion that Noble should be taken impliedly to have asserted something about the content of its privileged communications. First, that the state of mind put in issue was as to a legal conclusion, namely that particular circumstances gave rise to a validly executed and effective waiver deed. Secondly, that his Honour inferred, on the basis of a number of facts, that it was likely that there were confidential communications likely to have affected that state of mind.

[103] Bond J concluded that there had been a waiver of privilege in that case, although confining the scope of the declaration made.[78]

[104] Justice Flanagan had to address whether there had been an implied waiver in *Sanrus Pty Ltd & Ors v Monto Coal 2 Pty Ltd & Ors* (***Sanrus***).[79] In that case, there was an issue as to whether the defendants had pleaded and conducted a case about their state of mind in a manner that effected an implied waiver in respect of legal advice relevant to the state of mind.[80] There was no pleading in the defence raising common assumptions, reliance, acting in good faith or inducing breach of contract which expressly pleaded reliance on legal advice.[81] The plaintiffs, however, submitted that the defendants had put their state of mind in issue both on the pleadings and in the conduct of the case, being a state of mind concerning the content of the defendant's rights and obligations, or matters in respect of which legal advice would ordinarily be important, and it would be unfair to plead and prosecute the case without laying open to scrutiny legal advice that bears upon that state of mind.[82]

[105] Justice Flanagan set out the relevant legal principles, noting that they were generally uncontroversial save in relation to the decision of *Oceltip*. As his Honour noted, the estoppel plea in *Oceltip* was expressly based on a belief that the waiver deed had been validly executed and was effective to bind *Oceltip*.[83] Justice Flanagan did not question the correctness of the decision in *Oceltip,* but noted that it was a decision that had to be understood in context. His Honour did not consider that Bond J asserted a principle contrary to other authorities, namely that it is not enough to establish an implied waiver of privilege that the state of mind asserted relates to a legal position and it is likely that a party obtained legal advice in respect of that legal position insofar as that may be suggested by [24] of his Honour's decision. As Flanagan J found, a finding which I agree with, his Honour's decision, and particularly [24] of Bond J's decisions, are to be understood by reference to the circumstances of that case.[84]

[106] As Justice Flanagan alluded to in *Sanrus,* whether wavier is to be imputed is a judgment to be made by reference to the particular facts and circumstances of the case in question. The test for implied waiver has been established by the High Court in *Mann v Carnell*.[85] While *Queensland Local Government Superannuation Board v*

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78 [2018] QSC 317 at [26].
79 [2019] QSC 144.
80 [2019] QSC 144 at [5].
81 [2019] QSC 144 at [19].
82 [2019] QSC 144 at [26].
83 [2019] QSC 144 at [42].
84 [2019] QSC 144 at [43].
85 (1999) 201 CLR 1.

Allen refers to the notion that there would not be a waiver unless the privilege holder has attempted to "boost its case", whether there has been a waiver is not confined to that circumstance. As Greenwood J commented in *Austral Dutch Kaolin Pty Ltd v Hanjin P & C Co Ltd*,[86] it can also arise as a result of the nature of the claim made, such as an action for professional negligence or undue influence.[87] The test remains one of whether there is inconsistency between the act said to constitute the waiver and the maintenance of privilege, rather than confining the categories to which it applies.

[107] There is no principle based on the authorities that for issue waiver to arise, the reference to the confidential communications or its effect must be express. The key question is whether there is an inconsistency between the conduct of the privilege holder in making an implied assertion about the content of the privileged communication, and the maintenance of privilege in relation to the communications in question, consistent with the test laid down by the High Court in *Mann v Carnell.*[88] However, the mere putting a state of mind in issue will not, of itself, be sufficient to give rise to waiver, but will depend on a range of matters.[89]

[108] In my view, the decision of Bond J was correct in *Oceltip* insofar as it is not necessary for reference to be made to a confidential communication in the pleading of a state of mind for there to be a waiver. However, the mere pleading of a state of mind which relates to a legal position on which the party is likely to have received advice, of itself, would not be enough to give rise to an inconsistency. It has, however, been consistently held, and is accepted, that it is not enough to establish an implied waiver of privilege that the state of mind relates to a legal position and it is likely that a party obtained legal advice in respect of that position. Something more is required.[90] In such a case, the Court has to consider all the relevant circumstances, which are relevant to whether there is an inconsistency between the pleaded case and the maintenance of privilege, to determine whether a waiver of privilege should be imputed.

[109] As was stated by the majority of the High Court *in Osland v Secretary, Department of Justice*,[91] whether there is inconsistency between the conduct of the party entitled to privilege with the maintenance of privilege. Whether there is a waiver of privilege is a judgement to be "*made in the context and circumstances of the case, and in light of any considerations of fairness arising from that context of those circumstances*."[92]

Pleadings

[110] As is evident from the above, the contention of Santos that there has been a waiver of privilege arises from the pleading of estoppel by Fluor by way of defence to Santos' claim.

[111] The pleading of estoppel is contained in [330ZE] of the Defence which states that:

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86 [2011] FCA 638.
87 [2011] FCA 638 at [22].
88 (1999) 201 CLR 1.
89 *Neurim Pharmaceuticals (1991) Ltd v Generic Partners Pty Ltd* [2018] FCA 1082.
90 *Council of the New South Wales Bar v Archer* (2008) 72 NSWlR 236 at [48]; *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191 at [46].
91 (2008) 234 CLR 275 at [45].
92 (2008) 234 CLR 275 at [45].

"330ZE. In the premises of paragraph 330ZD, it would be unconscionable for the Plaintiff to now resile from the representations pleaded in paragraph 330J and 330K, and the Plaintiff is estopped from doing so, such that:

(a) the Plaintiff is not entitled to rely upon the Corrective Payment Certificate, the Payment Certificate the subject of prayer G C of the Statement of Claim, or the relief sought in prayer A, B and G C of the Statement of Claim;

(b) alternatively, the Plaintiff is not entitled to rely upon those Payment Certificates and the relief in prayer A, B and G C of the Statement of Claim, to the extent that the costs incurred by and paid to the First Defendant that are the subject of those claims, would not have been incurred but for the First Defendant's detrimental change of position, or there was a real chance that they would not have been so incurred, or they would have been incurred in circumstances where the parties had agreed that the costs were reimbursable (and were not refundable), or there was a real chance that they would have been incurred in those circumstances;

(c) alternatively, the Plaintiff is not entitled in the manner aforesaid, to such extent as the Court thinks fit having regard to the requirements of equity and good conscience."

[112] It relies on [330ZD] which states that:

"330ZD. In the premises of paragraph 330Y, 330Z, 330ZA and 330ZB, the First Defendant has relied to its detriment upon:

(a) the Plaintiff's assurances that the sums charged and paid were in fact reimbursable, and that it had reasonable grounds for so believing, pleaded in paragraph 330J;

(b) the Plaintiff's representations, that it would not later seek to recover back the sums paid, absent new information, pleaded in paragraph 330K;

(c) the impression created by the conduct pleaded at paragraphs 330A - 330E (Payment Certificates), 330L-330LI (KPMG reviews), 330M-330MH (contingency and budget), 330O-330OL (PDNs and RFCAs), 330N-330NC (no claims), 330S (silence), that the First Defendant could rely upon the payments made to it as being in respect of sums due under the Contract, and that were secure, pleaded in paragraph 330T(c);

(d) the Plaintiff's silence during performance of the Work, between about January 2011 and about June 2014 or August 2014, pleaded in paragraph 330S."

[113] Paragraph 330Y and its particulars are a matter to which Santos places considerable importance. It provides that:

"330Y. The First Defendant relied upon the affirmation, assurances and representations made by the Plaintiff, pleaded in paragraph 330J and 330K

above, upon the impression created by the Plaintiff's conduct, pleaded in paragraph 330T(c) above, and upon the Plaintiff's silence, pleaded in paragraph 330T(d) above.

Particulars

(i) Mr Almquist, Ms Marshall, Mr Gittins and Mr Van Ginhoven, so relied.

(ii) Mr Almquist, Ms Marshall, Mr Gittins and Mr Van Ginhoven, understood that the payments made by the Plaintiff were secure, and that the First Defendant could rely upon the security of those payments, absent some error or mistake later discovered by the Plaintiff or First Defendant.

(iii) Mr Almquist, Ms Marshall, Mr Gittins and Mr Van Ginhoven, proceeded on the assumption that in carrying out its part of the Project, and in administering the Contract, the Plaintiff would conduct itself with honesty and candour, and in good faith.

(iv) At no time during performance of the Project did it occur to Mr Almquist, Ms Marshall, Mr Gittins or Mr Van Ginhoven, or any other executive of the First Defendant or the Second Defendant, that the Plaintiff could or would bring forward claims of the kind articulated in the Corrective Payment Certificate, and in the Statement of Claim."

[114] Paragraph 330T(c) relevantly provides that:

"330T. By issuing the Corrective Payment Certificate, and in asserting before this Honourable Court that the First Defendant has claimed, and the Plaintiff has paid, sums that are not due under the Contract, in the respects pleaded in the Statement of Claim, the Plaintiff is acting inconsistently with:

(c) the impression created by the conduct pleaded at paragraphs 330A - 330E (Payment Certificates), 330L-330LI (KPMG reviews), 330M-330MH (contingency and budget), 330O-330OL (PDNs and RFCAs), 330N-330NE~~C~~ (no claims), 330S (silence), that the First Defendant could rely upon the payments made to it as being in respect of sums due under the Contract, and that were secure;

[115] Paragraph 330T(c) relies on amongst other things the pleadings in [330N]- [330NE] which are also relevant to the pleading contained in [330J] and [330JA].

[116] Paragraphs [330N] - [330NE] provide that:

"330N. In about December 2012 the Plaintiff assured the First Defendant that the Plaintiff was not preparing claims against the First Defendant and that it had no hidden agenda in terms of preparing claims against the First Defendant.

Particulars

(i) The assurance was provided in a face to face discussion between senior representatives of, respectively, the Plaintiff and the First Defendant, Messrs Placines (the Plaintiff's then Project Director) and Almquist (the First Defendant's then Project Director) on or about 9 December 2012, to the following effect:

Mr Almquist: "*Christian, you guys have rejected this PDN [8903] and said it is because it is a 'corporate overhead'. What is this, why aren't you agreeing to pay for it? This is a project resource that is needed, this isn't 'corporate overhead', there is no reason you shouldn't be paying for it.*

Where are you headed with this sort of thing? Is this a subtle indicator that Santos is preparing a claim against us or is going to stop paying us? What is going on here?"

Mr Placines: *"No Mike, we aren't preparing claims against you, we don't have a hidden agenda.*

Are you preparing claims against us?"

Mr Almquist: *"Claims for what? We are reimbursable. You are the one paying – we aren't paying."*

(ii) The assurances were recorded in an email from the First Defendant (by Michael Almquist) to the Plaintiff (by Christian Placines) dated 10 December 2012, in which Mr Almquist stated:

"Christian and I have had an open and honest exchange on whether either Fluor or Santos (Total) were preparing claims against the other. Both of us have assure (sic) the other that there are no such actions contemplated by either of our companies…"

(iii) The assurance was repeated in an email from the Plaintiff (by Christian Placines), to the First Defendant (by Michael Almquist), dated 10 December 2012, in which Mr Placines stated:

"I reiterate my verbal commitment that there is no hidden agenda for any claims in Santos GLNG team engagement with Fluor"

330NA. The Plaintiff did not subsequently withdraw or qualify the assurance it had this provided at a senior management level in December 2012.

330NB. In about September 2013, the First Defendant asked the Plaintiff whether the Plaintiff was preparing to make claims against the First Defendant.

Particulars

(i) On 8 September 2013, the First Defendant, by Peter Oosterveer, asked the Plaintiff, by Trevor Brown, whether the Plaintiff was preparing to make claims against it.

(ii) The request was made in an email dated 8 September 2013 from Peter Oosterveer to Trevor Brown, in which Mr Oosterveer stated as follows:

> *"One final thing that I think might be helpful to clear the air and help the trust factor. Our team has the impression that Santos is preparing to make claims against Fluor. We cannot be sure but it would be helpful if we understood your intentions."*

330NC. The Plaintiff did not subsequently inform the First Defendant that it was preparing to make claims against the First Defendant, and in subsequent discussions between Mr Brown and Mr Oosterveer, and other members of the project team of the First Defendant and the Plaintiff, the Plaintiff did not tell the First Defendant that it was preparing claims against it (as was the case, as pleaded ~~particularised~~ in Schedule 22 hereof).

330ND. At material times from at least May 2013, the Plaintiff was preparing claims under the Contract, or implementing a strategy to prepare claims for repayment of moneys from the First Defendant.

Particulars

The First Defendant relies upon the facts pleaded in Schedule 22 hereto.

330NE. The strategy of the Plaintiff to prepare claims under the Contract or other claims was deliberately kept secret from the First Defendant by the Plaintiff notwithstanding a continuing commercial discussion between representatives of the Plaintiff and the First Defendant as to how the First Defendant could improve its performance, and contribute commercially to the success of the Project (in which discussion the Plaintiff did not mention to the First Defendant that the Plaintiff was contemplating or preparing legal claims against the First Defendant).

Particulars

(i) On 27 May 2013 Trevor Brown, the Plaintiff's Executive Sponsor for the Project, on behalf of the Plaintiff, wrote to the First Defendant, by Peter Oosterveer, the First Defendant's Executive Sponsor for the Project, suggesting that the First Defendant, in order to contribute to a commercial solution to costs overruns and delays, put the then unpaid

part of its Fee under the Contract at risk as a solution to the problems with the Project.

(ii) Trevor Brown did not inform Peter Oosterveer that the Plaintiff was addressing the cost overruns and delays experienced on the Project by preparing legal claims against the First Defendant in relation to those cost overruns and delays.

(iii) The commercial suggestion that the First Defendant put part of its Fee under the Contract at risk was rejected by Peter Oosterveer by email dated 31 May 2013.

(iv) On 4 June 2013 the Chief Executive Officer of the Plaintiff, David Knox met with David Seaton, the Chief Executive Officer of the First Defendant. David Knox prepared a note of this meeting which was forwarded to various senior people from the Plaintiff including Trevor Brown. David Knox stated in his note, amongst other things:

> "… We finished on a tough note, performance needs to improve, Fluor is not meeting its owns standards and the 'machine' is not running at all well. I left him [Seaton] with my briefing materials with the exception of Simon's [Simon Jenson from the Plaintiff] legal brief. My aim was to ensure he understood the need for immediate improvement".

(v) In an email of 8 September 2013, as pleaded in paragraph 5B of Schedule 22, Peter Oosterveer of the First Defendant sought clarification from Trevor Brown of the Plaintiff as to whether the Plaintiff was preparing "to make claims against Fluor. We cannot be sure but it would be helpful if we understood your intentions".

(vi) Trevor Brown of the Plaintiff was advised by Andrew Hesse of the Plaintiff, in response to the First Defendant's email of 8 September 2013, to give a false impression to the First Defendant, namely, not to reveal that claims were being prepared, as pleaded in paragraph 5B(c) of Schedule 22.

(vii) Trevor Brown did not reveal to anyone from the First Defendant that claims were being prepared, as pleaded in paragraph 5B(d) of Schedule 22.

(viii) In an email of 16 September 2013 from John Henderson of the Plaintiff to James Broadhurst (an engineer working for the Plaintiff), John Henderson stated:

> "James,
>
> I have been tasked with researching and developing a possible claim against FLR with input from Legal and outside claims analysts.

Please delete after reading".

(ix) In accordance with the direction of John Henderson, James Broadhurst deleted the email.

(x) In an email of 18 October 2013 from John Henderson of the Plaintiff to Mick Dunne of the Plaintiff, John Henderson referred to potential claims against the First Defendant for recovery of moneys now sought to be claimed as "Excluded Costs" in these proceedings, and stated "This info should not be disseminated further as it is extremely confidential", as pleaded in paragraph 5B(e) of Schedule 22.

(xi) In an email of 20 February 2014 from John Henderson of the Plaintiff to Robert Simpson, Andrew Hesse and Kylie Breadsell, each senior representatives of the Plaintiffs, as pleaded in paragraph 5B(f) of Schedule 22, John Henderson stated, in relation to an email received from the First Defendant:

> "… It contains a few hand grenades and it would appear they may have a hint of what we're working on behind the scenes…".

(xii) The Defendants otherwise rely upon the matters pleaded in Schedule 22."

[117] Paragraphs [330J] and [330JA] provide that:

> "330J. In the premises of paragraphs 330A-330E, alternatively paragraphs 330A-330E and the paragraphs of this pleading identified at 330JA below (or each of them), by certifying and making payment to the First Defendant of the sums claimed, as set out in Schedule 17 hereto, the Plaintiff (by its conduct in the circumstances aforesaid):
>
> (a) affirmed, and assured the First Defendant, and by doing so represented that the sums claimed and paid, were payable under the Contract;
>
> (b) represented to the First Defendant that it considered the sums claimed and paid, to be payable under the Contract;
>
> (c) by implication, represented to the First Defendant that it had reasonable grounds for that belief.
>
> 330JA. The following paragraphs:
>
> (a) paragraph 330S (silence);
>
> (b) paragraph 330G(e) (costs);
>
> (c) (from the date of approval of the PDN or RFCA), paragraphs 330O-330OL (PDNs, RFCAs);
>
> (d) (from December 2012), paragraphs 330L-330LI (KPMG reviews);
>
> (e) paragraphs 330M-330MH (budget and contingency).;

(f) paragraphs 330N to 330NE (assurance that the Plaintiff was not preparing claims)."

Consideration

Waiver of Privilege

[118] There is no express reference to the contents of the confidential communications in the Defence. The implied waiver is said to arise because of the inconsistency that exists between Fluor pleading a case based on certain things not occurring to executives of Fluor, as a result of their relying on the impression that Santos was not preparing claims, and Fluor maintaining privilege over documents directly relevant and material as to whether those things had occurred to the executives of Fluor, and whether it was relying upon an impression Santos was not preparing claims.

[119] In the pleading for estoppel, Fluor relies inter alia on impressions created by Santos' conduct. That includes conduct alleged in 330N-330NE of the Defence,[93] which refers to inquiries made, and assurances given, by Santos that it was not, in December 2012, preparing claims against Fluor and had not hidden an agenda. It also includes that in September 2013, Santos did not respond when asked whether they were preparing claims against Fluor when they are alleged to have been doing so since May 2013. The conduct giving rise to the impression that Santos would not make claims is part of the conduct relied upon by Fluor in [330Y], which includes as a particular, that no executive of either of the Fluor entities could or would bring forward claims of the kind articulated in the Corrective Payment Certificate and in the Statement of Claim during the performance of the Project.[94] As contended by Santos, that encompasses a factual and a legal question. It is said by that pleading that Fluor does not merely plead reliance, but it is a positive pleading that something did not occur to the executives and that there was active concealment by Santos of its intention to make claims against it. That analysis is correct. The pleading of reliance upon the impression that Santos would not or could not make claims against Fluor is said to be inconsistent with an expectation by Fluor that Santos may make claims against it contained in confidential communications identified by Mr Cooper directly relevant to that issue.

[120] Santos does not seek to contend that the confidential communications are sought to be used to bolster its claim. Like *Oceltip,* there is no such pleading. Rather, to the contrary, they contend such documents would be contrary to the claim in estoppel and likely to disprove the claim. As discussed above, implied waiver is not limited to the use of confidential documents to bolster the case of the privileged holder nor to where it is expressly referred to in the pleading. Santos does not contend that the mere fact that a person pleads a state of mind, which might be affected by privileged communications, is a sufficient basis for a waiver. In particular, it focusses on the breadth of the pleading in [330N]-[330NE] by which it is said Santos created the impression it was not going to make any claim against Fluor and was seeking to keep secret its strategy of preparing claims against Santos. However, it relies on the further circumstances set out in [23] of its submissions.

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93 Relied upon in [330T(c)].

94 [330Y](iv) of the particulars.

[121] As to the matters identified by Santos as relevant to supporting the fact that there is such an inconsistency to a degree that gives rise to a waiver, I accept that the matters in sub-paragraphs (a)-(d) of [23][95] are accurate and relevant to the Court's assessment. The estoppel alleged is said to make it unconscionable for Santos to rely on identified relief sought in the Statement of Claim, which is the substantial part of Santos' claim,[96] although there are other not insignificant parts of Santos' claim which are unaffected by the claim in estoppel. However, the centrality of the estoppel claim is one thing while the pleading as to the impression created by Santos' conduct is only one aspect of the conduct relied upon in respect of the estoppel. There is something to be said for Fluor's submission that the state of mind is said to have arisen as a result of conduct in 2012 and 2013, is distant in time from when the advice in question was not sought in 2014.

[122] If advice was sought by Fluor in relation to claims to recover monies by Santos, that would be relevant to the reasonableness of a belief at least insofar as it would be relevant to whether Fluor executives believed that no claim could or would be made by Santos. In those circumstances, it is a relevant consideration.

[123] The pleading of an estoppel case by Fluor is a positive case relied upon by it where it relies on its state of mind, rather than responding to a pleading by Santos.

[124] The contention raised in paragraph 23(e) of Santos' reply submissions, however, cannot be so readily accepted, namely that the conclusion must be drawn that the communications in the category 2 documents 1-62 are closely related to the state of mind alleged in [330Y] and [330N]-[330NE] of the Defence. According to Santos, given Mr Cooper's identification of the advice they were engaged to give, that is not a question of inference. It contends that the evidence before the Court is that, at the time the executives were acting on the basis of the alleged impression and Santos was keeping the preparation of claims secret, they were seeking advice about asserted claims of Santos for which instructions and documents provided to Jones Day would be directly relevant and material to the lack of knowledge pleaded by Fluor.

[125] In Mr Cooper's first affidavit, he set out the basis of Jones Day's engagement.[97] According to Mr Cooper, at the time of Jones Day's engagement, he was aware that the project was experiencing considerable time and cost overruns and Jones Day were engaged for advice in respect of the amended EPC contract between Fluor and Santos. He stated that, in particular, Jones Day was engaged to advise of Fluor's legal position in the event Santos did not make payment of the amounts claimed by and to be claimed by Fluor for work being performed by Fluor Australia on the project and/or Santos' "asserted claims against Fluor Australia including in respect of liquidated damages" (emphasis added). That advice was provided on 7 May 2014.

[126] Mr Cooper was not cross-examined in relation to those aspects of his affidavit.

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95 [23] of Santos' reply submissions.

96 Extending to A, B, E and G of the relief claimed, A being the principal relief seeking the recovery of a large amount said to be a debt owing to Santos under the EPC contract and the others being alternative relief, save that G seeks declarations which are claimed further and in the alternative and seek declarations as to amounts paid being excluded costs. If successful, the claim on the guarantee in C and D would also likely fail.

97 CFI 293 at [18]-[21].

[127] The evidence supports the fact that the over-runs and delays, the subject of the present litigation, had been an ongoing issue in relation to the project, and particularly for Fluor. That stemmed back to work of subcontractors. By reference to the statement of Mr Donald McDonald, an engineer and senior executive who was employed by Fluor, Mr Cooper agreed that he was informed that there were concerns by Fluor that a joint venture between a Clough company and a Downer company, who was a subcontractor to Fluor on the project, was the subject of concern from 2012. According to what Mr Cooper had seen, there was a concern about their lack of performance, which was an issue for Fluor by July 2012. In particular, the statement of Mr McDonald had identified a critical path analysis which demonstrated that delays of CDJV were the primary force driving critical path delay to the completion of milestones across the whole project.[98] Mr Cooper, however, stated that he was not briefed with the information about the critical path analysis in March 2014.[99] He did agree Mr Donald McDonald was briefing him in March 2014, but could not recall when he was briefed with any material in relation to the CDJV subcontract. However one would not conclude the advice sought in 2014 would relate to monies already paid under the EPC contract which is alleged to relate to the nature of the costs sought to be reimbursed.

[128] In simplistic terms, the estoppel claim relates to monies paid by Santos to Fluor which it contends were not payable under the EPC contract and were excluded costs. That claim is not relevant to the liquidated damages nor at the time the advice was sought from Jones Day were they the subject of "asserted claims". According to Counsel for Fluor, there were no claims asserted by Santos in relation to monies paid before June 2014. As such, Fluor contends that there is a misconception in Santos' starting point because the claims identified by Mr Cooper in his affidavit as being the subject of advice[100] were Fluor's legal position if Santos did not pay amounts claimed or to be claimed by Fluor and asserted claims by Santos including liquidated damages. None of those claims, according to Fluor, are relevant to the estoppel case.

[129] In relation to the estoppel case, Fluor refers to [330J], which refers to certification and making payments to Fluor of the sums claimed by Fluor. The fact that it relates to monies paid and claims seeking those monies back is further supported by [330K] of the Defence, which refers to Santos not seeking to later recover payments on the ground they were never chargeable.[101] Thus, the relevant state of mind relevant to the estoppel case was that of Fluor in respect of monies already paid to it by Santos. That is further supported by [330ZD] of the Defence, which sets out those claims in respect of which it asserts Santos cannot seek relief. Thus, according to Fluor, the estoppel case does not encompass any of the categories of claim which were identified by Mr Cooper as being the subject of the advice sought by Jones Day. However the pleading in [330N]-[330NE] does relate to a belief about any claims being made.

[130] While there is a possibility that "asserted claims" may refer to actions by Santos to recover monies already paid, I am unpersuaded that it is likely. As submitted by Counsel for Fluor, there is a distinction between advising in relation to claims that

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98 CFI 295, Statement of McDonald annexed to affidavit of Joseph Barbaro at [35](m).
99 T1-38 16-18.
100 CFI 293 at [20].
101 [330K(a) and (b)]

by May 2014 had been asserted, as opposed to the possibility of claims being made that had not been asserted. In that respect, the evidence identifies the first notification by Santos that monies paid to Fluor were not paid in respect of costs that were reimbursable under the EPC Contract was made on 11 June 2014 after the provision of the advice.[102] The nature of the asserted claims was not a matter elaborated upon in cross-examination of Mr Cooper. While Counsel for Santos submitted that the reference to "asserted claims" is, in fact, in the nature of the claims the subject of the estoppel, that is a matter of speculation. While it is true that the matters pleaded in [330N]-[330NE] of the Defence, relied on to contend Santos created an impression relied upon by Fluor, pleads assurances being sought and given as to any claims being made by Santos, and the seeking of advice from Jones Day in the face of the impression said to be created, those matters are relied upon in respect of the state of mind relevant to the claim of estoppel, which is directed to claims relating to the recovery of payments made and that is the subject of the belief contained in the particular of [330Y](iv) as part of the asserted reliance. The belief identified in [330Y](iv) refers to claims of the kind articulated in the Corrective Payment Certificate and the Statement of Claim. In those circumstances, I am not persuaded that the content of the communications relating to the May 2014 advice had any connection to the claims the subject of the estoppel case and did relate closely to the state of mind alleged in [330Y] (including [330N]-[330NE]) of the Defence

[131] As to [23(f)] of the plaintiff's submissions in reply, I accept the nature of the pleaded state of mind, given the particulars in [330Y](iv), is one of mixed fact and law.

[132] Paragraph 23(g) of the plaintiff's submissions in reply asserts that it is forensically unfair[103] to permit Fluor to simultaneously allege a lack of knowledge while maintaining privilege over confidential communications to the contrary. Given I am unpersuaded that I should infer that the advice and associated confidential communications are likely to relate to the state of mind relevant to the estoppel case, I do not consider that there is a forensic unfairness in the present case in the maintenance of privilege. Unlike *Oceltip,* the circumstances do not show that there is a degree of inconsistency in the position of Fluor that should result in the Court concluding there is a waiver of privilege. Unlike *Oceltip,* I have not found there is an obvious relationship between the relevant state of mind and the legal advice that his Honour inferred in that case was likely to have been sought. Just as his Honour considered it a significant factor that legal advice was likely to exist or advice have been taken in relation to the state of mind, the fact I am not persuaded that is a factor that I find weighs against my finding that there is a forensic unfairness in Fluor maintaining privilege. The impression created as a result of conduct in 2012 and 2013 is only one facet of the case relied upon in respect of the estoppel case and occurred a considerable time before the May 2014 advice was sought and towards the end of the Project, making it more remote that Fluor impliedly asserted something about the conduct of its privileged communication.

[133] As was stated by Hodgson JA in *Archer* it is not enough that the client is bringing proceedings could, as a reasonable possibility be relevant and of assistance to the other party. In the present case I am not satisfied that this is presently a case of more

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102 [330S] of the Defence.

103 As discussed in *Mann v Carnell* (1999) 201 CLR 1.

than that such that Fluor's allegations of estoppel are inconsistent with the maintenance of privilege and give rise to an unfairness of the type in question. The circumstances are not sufficient to conclude that the conduct of Fluor has laid open the advice to scrutiny/

[134] Santos have not persuaded me that Fluor have impliedly made an assertion about a privileged communication or otherwise necessarily laid open to scrutiny any confidential communication such that there is a waiver of privilege.

Has Fluor established privilege?

[135] While it is somewhat illogical, the list of issues identifies two contentions in the alternative to the question of waiver:

(a) That Fluor's evidence in respect of the documents is insufficient to establish the privileged nature of the documents; and

(b) In respect of documents 5, 6, 26 and 51, which have been disclosed in a redacted form, the whole of the document should have been disclosed.

[136] Neither of those matters were addressed in oral submissions. Given the Court was not informed that the matters are no longer live issues, I have assumed they remain live issues and I have addressed them below. The documents concerned are those documents identified in a schedule as being the subject of dispute, the final version of the schedule containing each parties' respective position (the schedule being attached to Mr Cooper's affidavit.[104] The complaints of Santos were, at least to some extent, addressed by the further affidavit of Mr Cooper sworn on 14 September 2021. While only provided just prior to the hearing, Santos appeared to rely on all the matters identified in their submissions, notwithstanding the affidavit had sought to address at least some of those complaints contained in their earlier submissions save for the paragraphs in the submissions that the Court was advised were not relied upon.[105]

[137] Fluor claims privilege on the basis that the document will attract professional privilege if it was brought into existence for the "dominant purpose":

(a) of giving or obtaining legal advice (advice privilege)[106]; or

(b) for use in, or in relation to, litigation then existing or reasonably anticipated or contemplated (litigation privilege).[107]

[138] Fluor's claim for privilege was, in most instances, on the basis of advice privilege and/or litigation privilege. That was generally unsatisfactory without explanation. It was only as a result of cross-examination that it became clear when litigation was

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104 CFI 308, Category 2 documents schedule, JBC-1, p 40.

105 Santos did, by email, in response to an inquiry by the Court notify the Court that the contention that the claim for privilege on the basis that documents were part of a continuum of correspondence between Jones Day and Fluor for the purpose of keeping both Jones Day and Fluor updated and informed in respect of Jones Day's preparation of the May Legal Advice (contained in [57] and [58] of the submissions dated 13 August 2021) were not relied upon. Nor was the challenge to documents 63-71 relied upon in [61] of the submissions relied upon.

106 As to which the principles are set out above.

107 As to which see *Mitsubishi Electric Australia Pty Ltd v Victorian Workcover Authority* (2002) 4 VR 332.

reasonably anticipated in March 2014, and that the nature of the advice sought, which was provided in May 2014, was for the dominant purpose of advice in relation to reasonably anticipated proceedings that the dual basis for claiming privilege became clear.[108]

[139] Santos raised some deficiencies with how privilege was addressed in Mr Cooper's original affidavits. Mr Cooper addressed some of those matters in a further affidavit. Mr Cooper, a partner of Jones Day, provided two affidavits in relation to the claim of privilege by Fluor. He was also cross-examined. I accept the evidence given by Mr Cooper and the clarifications made. In relation to the documents created up until May 2014, which are confidential communications passing between Fluor's solicitors and employees of Fluor and confidential documents prepared by Jones Day during the course of that retainer,[109] Mr Cooper clarified in his last affidavit[110] that the reference to documents prepared "in connection with contemplated legal proceedings" or "in contemplation of legal proceedings" were shorthand expressions he used in the table. What he meant by those expressions is that the documents in question were brought into existence for the dominant purpose of use in, or the provision of legal advice or legal services in relation to, litigation then existing or reasonably anticipated or contemplated. To the extent that one of the complaints of Santos was the deficient manner in which the claim for privilege was described Mr Cooper's affidavit, Mr Cooper addressed that deficiency and the claim was further clarified in cross-examination by explaining the point in time at which legal proceedings were said to be reasonably anticipated.

[140] Cross-examination of Mr Cooper further clarified the basis upon which privilege was claimed.

[141] In relation to document 3 of the Category 2 Schedule, Mr Cooper clarified that he meant "and/or" to be "and". According to Mr Cooper, when the advice was sought in March 2014 it was sought in relation to reasonably anticipated legal proceedings at that time.[111]

[142] In relation to document 3, which was still the subject of dispute, Mr Cooper clarified that the documents on a thumb drive were sent for the purpose of obtaining legal advice in relation to reasonably anticipated litigation and that litigation was reasonably anticipated at that time.[112] I find Fluor has established a sufficient factual basis to support privilege in relation to the communications. Privilege has also been established in relation to document 4 on the same basis.

[143] In relation to document 5, which had been partially disclosed, Mr Cooper clarified that the document in question related to a draft statement, for the dominant purpose of use in or in relation to litigation then existing or reasonably anticipated or contemplated, and also for the dominant purpose of seeking legal advice in relation

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108 Cf CFI 293 at [22].

109 Documents 1-62 of JBC-1.

110 CFI 308 at [7].

111 As opposed to his earlier affidavit, which referred to the fact that he considered litigation was certain to occur by December 2014. There was no challenge in cross-examination.

112 Although he had not reviewed every single document, he had reviewed them to be satisfied that they were documents in relation to the project and clarified with another solicitor that they were for the purpose of the advice.

to anticipated litigation. Mr Cooper agreed that by April 2014, circumstances were sufficiently advanced to actually prepare a statement. I find privilege is established.

[144] In relation to documents 5, 6, 25 and 51, following Santos' original challenge to the claim for privilege, Fluor provided the documents in a redacted form. Fluor also provided documents 82, 83 and 89 in an unredacted form. Santos, however, maintained the challenge to privilege over the redacted portions. In Fluor's submissions they had acknowledged that privilege could not be claimed over the whole document and that the privilege claim was in respect of portions which were a re-communication of privileged communications. Fraser JA (with whom Muir JA and White J agreed), in *Tarong Energy Corp Ltd v South Burnett Regional Council,*[113] confirmed that privilege is properly claimed on that basis, even though the document in which it is contained was not made for a purpose which would attract privilege. Given Mr Cooper's clarification of the basis upon which privilege is claimed, and as to when litigation was reasonably anticipated, the claim for privilege, I am satisfied the claim in relation to the redacted portions is properly made out.

[145] As to the challenge in relation to the remainder of documents 1, 10-11, 13-24, 26-36, 38-40, 42-50, and 52-62 in category 2, I have reviewed the schedule of category 2 documents and the basis upon which privilege is maintained. Given Mr Cooper's clarification of the basis of the claim for privilege and the time when litigation was reasonably anticipated, I find that a proper basis for the claim for privilege has been established given the evidence demonstrates:

(a) Jones Day were engaged on or about 5 March 2014 in relation to the project which, at that time, involved providing advice in respect of the amended EPC Contract with Santos and, in particular, as to Fluor's legal position in the event that Santos did not make payment of the amounts claimed under the contract for work performed on the Project and in respect of Santos' asserted claims against Fluor including liquidated damages. Mr Cooper was the senior partner at Jones Day at the time responsible for providing the advice;

(b) That litigation was reasonably anticipated by at least 20 March 2014 and the dominant purpose of the advice was in respect of reasonably anticipated legal proceedings;

(c) That by 23 April 2014, draft statements were being prepared for the dominant purpose of use in or in relation to reasonably anticipated proceedings and to obtain legal advice;

(d) That the category 2 documents between Fluor and Jones Day were exchanged in the course of that retainer and were relevant to the work Fluor had engaged it to do; and

(e) By December 2014, Mr Cooper considered proceedings were almost certain to occur.

[146] As to documents 81-90, I address document 81 separately below. I have addressed those documents which have been disclosed in a redacted form above.

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113 [2010] 1 Qd R 575 at [9].

[147] As to document 84, Mr Cooper clarified that litigation was reasonably anticipated in March 2014 in cross-examination, which was not subject to challenge. As to document 84, insofar as reliance was placed on [61] of Santos' submissions, the Court was advised that was not relied on at the hearing. I consider the claim for privilege was established.

[148] As to documents 85-88, the basis of privilege was clarified, as was the question of relevance. Insofar as it relates to particular parts of phase 2 works, it is said that the documents are not relevant. Fluor also clarified that they relate to a potential adjudication. Given the contention that the documents were not relevant, or that they related to a potential adjudication were not the subject of challenge, I find that the claim for privilege is established.

[149] As to documents 89 and 90, given Mr Cooper's clarification[114] that he was involved in their preparation, I am satisfied that privilege is established.

Document 81

[150] Outside of the claim of waiver, Santos maintains that privilege was not properly claimed in relation to document 81[115] which, according to Fluor, is a confidential email dated 9 December 2015 from Donald McDonald, to Paul Bruno, a senior Fluor executive and Fluor inhouse legal Counsel, for the dominant purpose of legal advice and/or in contemplation of legal proceedings, which was copied to Jones Day (amongst others).[116]

[151] Santos contends that privilege is not properly made because Mr Paul Bruno lacks the relevant legal qualifications, such that it is not a communication to a lawyer within the Australian understanding of legal professional privilege.[117] In that respect, a number of objections were made to the affidavit of Mr Cooper which were upheld. The document in that regard is exhibit 1. As a result of the concessions that a number of paragraphs were inadmissible, there is no evidence that Mr Bruno held a practising certificate and was employed purely in a legal role and provided legal advice to others within Fluor, rather than holding broader duties.[118]

[152] It is well established that legal professional privilege may attach to documents passing between the employees of a company and in-house counsel. In order for such communications to be protected by legal professional privilege, the in-house counsel must have been consulted in their professional capacity as a lawyer and the communications must have been made in confidence and arise from the relationship of a lawyer. In addition, the in-house counsel must be sufficiently independent,[119] and hold a practising certificate.[120] The dominant purpose of the creation of the communication must be to obtain or give legal advice or for use in or in relation to, existing or anticipated or contemplated litigation.

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114 CFI 308 at [14] and 15.
115 Which had originally been contained in category 1 incorrectly.
116 CFI 308, JBC-1, pg. 93.
117 T2-54 24-32.
118 As suggested by the searches carried out by Mr Barbaro. See CFI 295 at [5] and JDB-1.
119 *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 at [29]-[31].
120 *GSA Industries (Aust) Pty Ltd v Constable* [2002] 2 Qd R 146 at [13]-[18].

[153] The claim for privilege by Fluor fails at the threshold, given Mr Bruno does not have the requisite qualifications nor is there evidence that he had the requisite level of competence or independence for legal professional privilege to attach to the communication passing between Mr Donald McDonald and Mr Bruno. I find that the claim for legal professional privilege is not properly made out.

Conclusion

[154] Fluor has established its claim for privilege is properly founded, other than in relation to document 81.

[155] The order of the Court is:

(a) The amended application filed by the defendants on 27 August 2021 seeking a declaration that documents 1(k)-1(n), 1(o), 1(p), 1(r)-1(aa), 1(bb)-1(cc) are not the subject of a valid claim for privilege is dismissed.

(b) The amended application filed the plaintiff on 20 August 2021 seeking a declaration that documents 1-62 and 81-90 in the category 2 documents identified in JBC-1 to the affidavit of John Barry Cooper filed 14 September 2021 are not the subject of a valid claim of privilege, save in respect of document 81, is dismissed.

(c) I declare that document 81 in JBC-1 to the affidavit of John Barry Cooper filed 14 September 2021 is not the subject of a valid claim for privilege to prevent disclosure.

(d) Costs of the amended application referred to in paragraphs 1 and 2 are costs in the proceedings.

(e) The parties have liberty to apply on two days notice.

(f) These reasons will be published after 2.30pm on 9 November 2021, unless the parties indicate that the reasons should not be published as a result of confidentiality prior to that time, identifying those parts of the reasons that they contend should not be published.