

SUPREME COURT OF QUEENSLAND

CITATION: *Sea Swift Pty Ltd v Torres Strait Island Regional Council*
[2023] QSC 160

PARTIES: **SEA SWIFT PTY LTD**
ACN 010 889 040
(applicant)
v
TORRES STRAIT ISLAND REGIONAL COUNCIL
ABN 15 242 645 165
(respondent)

FILE NO/S: BS No 839 of 2023

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 18 July 2023

DELIVERED AT: Brisbane

HEARING DATE: 7 July 2023

JUDGE: Kelly J

ORDERS:

1. It is declared that Documents 26, 27 and 28 in the respondent's List of Documents served pursuant to the order of Justice Applegarth dated 17 April 2023 are the subject of valid claims of legal professional privilege.
2. It is declared that Documents 29 and 38 in the respondent's List of Documents served pursuant to the order of Justice Applegarth dated 17 April 2023 are not the subject of valid claims of legal professional privilege.
3. It is declared that the redacted parts of the Document 45 in the respondent's supplementary List of Documents served 7 June 2023 are the subject of valid claims of confidentiality and are not required to be disclosed.
4. It is ordered that by 4pm on Wednesday 19 July 2023, the respondent is to electronically produce Documents 29 and 38 to the solicitors for the applicant.
5. I will hear the parties as to costs.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR

RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – GENERALLY – where the applicant applies for declarations that six documents disclosed by the respondent are not the subject of valid claims of legal professional privilege – where the respondent resists production on the grounds that the documents are subject to legal professional privilege – whether the documents are the subject of valid claims of legal professional privilege

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – FOR PURPOSES OF OR IN CONTEMPLATION OF LITIGATION – where the respondent contends that particular documents were brought into existence for the dominant purpose of or in contemplation of anticipated litigation – whether the documents were brought into existence for this purpose and are therefore the subject of valid claims of legal professional privilege

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – WAIVER OF PRIVILEGE – where the applicant contends that legal professional privilege has been waived by the respondent in respect of Document 29 – whether legal professional privilege has been waived in respect of Document 29

Evidence Act 1995 (Cth)

Local Government Act 2009 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd [\[2013\] QSC 82](#), cited

ASIC v Park Trent Group Properties Group Pty Ltd (2015) 105 ACSR 565; [2015] NSWSC 342, cited

Australian Hospital Care (Pindari) Pty Ltd v Duggan (No 2) [1999] VSC 131, cited

AWB Ltd v Cole (No 5) (2006) 155 FCR 30; [2006] FCA 1234, applied

Baker v Campbell (1983) 153 CLR 52; [1983] HCA 39, cited
Barnes v Commissioner of Taxation (2007) 242 ALR 601; [2007] FCAFC 88, cited

Cargill Australia Limited & Ors v Viterro Malt Pty Ltd & Ors (No 8) [2018] VSC 193, cited

Commissioner of Taxation (Cth) v Spotless Services Ltd (1996) 186 CLR 404; [1996] HCA 34, cited

Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd (2005) 225 ALR 266; [2005] FCA 1247, cited
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49; [1999] HCA 67, applied
Grant v Downs (1976) 135 CLR 674; [1976] HCA 63, cited
Green in his capacity as liquidator of Arimco Mining Pty Ltd (in liq) v CGU Insurance Ltd [2008] NSWSC 390, cited
Hancock v Rinehart [2016] NSWSC 12, cited
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66, cited
Marshall v Prescott [2013] NSWCA 152, cited
Santos Ltd v Fluor Australia Pty Ltd (No 3) (2021) 9 QR 353; [2021] QSC 281, cited
Sparnon v Apand Pty Ltd (1996) 68 FCR 322; FC 6 August 1996, cited
Tabcorp Holdings Limited v State of Victoria [2013] VSC 302, applied
Talbot v Boyd Legal (A Firm) [2020] QSC 185, cited
Watkins v State of Queensland [2008] 1 Qd R 564; [2007] QCA 430, cited

COUNSEL: B O'Brien for the applicant
A W Duffy KC with S L Walpole for the respondent

SOLICITORS: Herbert Smith Freehills for the applicant
Clyde & Co for the respondent

An application disputing claims of privilege

- [1] The applicant ("Sea Swift") applies for declarations that six documents disclosed by the respondent ("the Council") are not the subject of valid claims of legal professional privilege.

Matters of background

- [2] Sea Swift is a shipping company which operates vessels in the Torres Strait Region. The Council is a local government within the meaning of the *Local Government Act 2009* (Qld) and represents 15 island communities in the Torres Strait. The Council is responsible for operating and maintaining certain landing and mooring facilities on the islands ("the Facilities"). Sea Swift uses the Facilities under permits which require it to self-report its usage to the Council. It pays maritime fees to the Council based on that usage.
- [3] On 21 December 2022, the Council's lawyers issued to Sea Swift 253 invoices levying what are described as Default Maritime Fees in the sum of \$66,543,146.37 ("the Invoices"). The Council described the Default Maritime Fees as being calculated where there had been no self-reporting by Sea Swift.¹

¹ T1-39.41.

- [4] On 20 January 2023, Sea Swift commenced a proceeding in this Court seeking judicial review of the Council’s decision to impose the Default Maritime Fees and to issue the Invoices (“the Judicial Review Proceeding”). The grounds of review include that the decisions to impose the Default Maritime Fees and issue the Invoices were beyond power or unreasonable. Sea Swift seeks, inter alia, a declaration that the Invoices are invalid. On this application, it is not necessary for me to analyse or form a view about the legality or reasonableness of the Default Maritime Fees. It suffices to observe that there is an issue which awaits determination by the trial judge as to whether the Council had power to impose the Default Maritime Fees. The Council contends that the source of power is subordinate legislation.
- [5] In December 2021, prior to the Judicial Review Proceeding, the Council had filed a preliminary discovery application in the Federal Court of Australia seeking discovery of documents from Sea Swift in relation to its use, and the reporting of its use, of the Facilities (“the Preliminary Discovery Proceeding”). Pursuant to a consent order made in the Preliminary Discovery Proceeding, on 27 May 2022 and 29 July 2022, Sea Swift subsequently produced to the Council over 126,000 documents.
- [6] In its covering letter dated 21 December 2022 provided with the Invoices, the Council’s solicitors, Clyde & Co, indicated that the issuing of the Invoices had been preceded by Clyde & Co’s review of the documents produced by Sea Swift in the Preliminary Discovery Proceeding. That covering letter attached a summary table of alleged “Noted Under-Reporting” based on Clyde & Co’s review and indicated that the levying of the Default Maritime Fees and the issuing of the Invoices was based on “the information contained in ... logbook extracts” which formed part of the 126,000 documents.
- [7] On 17 April 2023, in the conduct of the Judicial Review Proceeding, Applegarth J ordered that the Council provide disclosure to Sea Swift of certain categories of documents (“the Disclosure Order”). Annexure A to the Disclosure Order relevantly identified the following categories:

Category	Description
1.	Documents which record or evidence the decision and any reasons for the decision to issue the Default Maritime Fee invoices, including instructions to Clyde & Co referred to in paragraphs [6] and [24] of the affidavit of Mr James William sworn on 28 March 2023 (William Affidavit).
4.	Documents which record or evidence consideration of the legality of: (a) a default maritime fee (including but not limited to the satisfaction of any requirements for implementing the default maritime fee as a condition of a permit); or (b) the decision to issue the Default Maritime Fee invoices.
5.	Documents which consider, record or evidence the quantum or calculation of the amounts described in the Default Maritime Fee invoices (including any workpapers, calculations or underlying source documents prepared used or relied upon to calculate the amounts described in the Default Maritime Fee invoices).
7.	Documents which record or evidence the terms of the Litigation Funding Agreement to which the Respondent is a party, or any approval sought or obtained in relation to the decision to issue the

	Default Maritime Fee invoices in connection with any Litigation Funding Agreement.
10.	Documents which record or evidence consideration of when to issue Default Maritime Fee invoices and the length of the appeal period to be prescribed.

- [8] On 12 May 2023, the Council provided a List of Documents with a Part 2 which relevantly provided:

Document Number	Description of Document	Basis of the [Privilege] Claim ...	Date
<i>Category 1</i>			
26	Letter from Clyde & Co to Torres Strait Island Regional Council entitled: “Re: Torres Strait Island Regional Council v Sea Swift Pty Ltd (Federal Court of Australia proceeding QUD 439/2021)”	Legal professional privilege [LPP]	6 December 2022
27	Email from Maurice Thompson to James William entitled: “Legal professional privilege: [the Council] v Sea Swift” Attachment entitled: a) 2022 12 06 — Letter to [the Council] re DMF invo(11724989.1)	[LPP]	6 December 2022
28	Email from Maurice Thompson to James William entitled: “Legal professional privilege: [the Council] v Sea Swift” Attachment entitled: a) Annexure A b) Annexure B c) Annexure C d) Annexure D e) Annexure E	[LPP]	6 December 2022
29	Email from James William to Yuen Gi Ko entitled “RE: [the Council] - DMF Invoicing [CC-AUSTRALIA.FID116807]”	[LPP]	20 December 2022
<i>Category 4</i>			
38	Email from Chris McLaughlin to Julia Mauro and Melissa Barmettler and Dania Ahwang entitled: “RE: Maritime Fees -	[LPP]	20 April 2015

	Carpentaria Contracting - Torres Strait Island Regional Council” Attachment entitled: a) Maritime Fees — Toll Marine Logistics — Torres Strait Island Regional Council		
27	[see above for Category 1]	[LPP]	6 December 2022
28	[see above for Category 1]	[LPP]	6 December 2022
<i>Category 5</i>			
27	[see above for Category 1]	[LPP]	6 December 2022
28	[see above for Category 1]	[LPP]	6 December 2022
<i>Category 10</i>			
28	[see above for Category 1]	[LPP]	6 December 2022
29	[see above for Category 1]	[LPP]	20 December 2022

- [9] On 7 June 2023, the Council provided a Supplementary List of Documents, with a Part 2 which relevantly provided as follows:

Document Number	Description of Document	Basis of the [Privilege] Claim ...	Date
<i>Category 7</i>			
45	Funding Agreement — TORRES STRAIT ISLAND REGIONAL COUNCIL vs. SEA SWIFT PTY LTD (with redactions)	Litigation privilege, Common interest privilege over redactions	27 May 2021

- [10] The six documents in dispute are numbered 26, 27, 28, 29, 38 and 45. The issues which require resolution are concerned with whether the documents attract legal professional privilege and, in respect of Document 45, a Litigation Funding Agreement, whether the Council was entitled to redact parts of that document. In relation to Document 29, there is a further issue concerning alleged waiver of privilege.

Relevant legal principles

- [11] There was no substantive dispute about the relevant legal principles. Fundamentally, as was observed by the plurality in *Eso Australia Resources Ltd v Federal*

Commissioner of Taxation,² “[l]egal professional privilege (or client legal privilege) protects the confidentiality of certain communication made in connection with giving or obtaining legal advice or the provision of legal services...”.³

- [12] The Council accepts as correct, the following principles which were outlined in *Sea Swift*’s written submissions:
- (a) legal professional privilege protects confidential communications brought into existence for the dominant purpose of obtaining or giving legal advice (“legal advice privilege) or for the conduct of, or use in, existing or anticipated litigation (“litigation privilege”);⁴
 - (b) the concept of legal advice is fairly wide and extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context;⁵
 - (c) the “dominant” purpose is the “ruling, prevailing or most influential purpose”;⁶
 - (d) hence, in the context of litigation privilege, the mere fact that a document may prove of use in or in connexion with supervening litigation does not qualify the document as a privileged document;⁷
 - (e) the dominant purpose is a question of fact to be determined objectively,⁸ as at the time the document came into existence;⁹
 - (f) 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;¹⁰
 - (g) evidence of the document maker’s intention is not irrelevant but is not conclusive of the purpose;¹¹
 - (h) if there are two purposes of a communication which are of “equal weight”, legal professional privilege does not attach to the communication;¹²
 - (i) if a document would have been prepared irrespective of the purported legal advice purpose or litigation purpose, the dominant purpose test will not be satisfied;¹³

² (1999) 201 CLR 49.

³ *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 (*Esso*) at 64 [35] per Gleeson CJ, Gaudron and Gummow JJ.

⁴ See the discussion in *Esso* at [2], [35] and [61]. See also *Grant v Downs* (1976) 135 CLR 674 (*Grant v Downs*) at 677 per Barwick CJ.

⁵ *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 (*Cole*) at 44–46 [44].

⁶ *Commissioner of Taxation (Cth) v Spotless Services Ltd* (1996) 186 CLR 404 at 416; *Commissioner of Taxation (Cth) v Pratt Holdings Pty Ltd* (2005) 225 ALR 266 (*Pratt*) at [30(7)].

⁷ *Grant v Downs* at 678.

⁸ *Talbot v Boyd Legal (A Firm)* [2020] QSC 185 (*Talbot*) at [79]; *Cole* [109]–[110] and the authorities cited therein.

⁹ *Barnes v Commissioner of Taxation* (2007) 242 ALR 601 at 602 [5] cited in *Santos Ltd v Fluor Australia Pty Ltd (No 3)* (2021) 9 QR 353 (*Santos v Fluor*) at 369 [32].

¹⁰ *Cole* at 44–46 [44].

¹¹ *Talbot* at [79]–[83] and [90], and the authorities cited therein.

¹² *Sparron v Apand Pty Ltd* (1996) 68 FCR 322 at 328; *Pratt* at [30(8)].

¹³ *Pratt* at [30(8)].

- (j) in *Baker v Campbell*,¹⁴ Dawson J relevantly observed:
- “... there is no privilege for documents which are the means of carrying out, or are evidence of, transactions which are not themselves the giving or receiving of advice or part of the conduct of actual or anticipated litigation.”¹⁵
- (k) the party asserting the claim to privilege bears the onus to establish facts giving rise to it¹⁶ and must do so by admissible direct evidence;¹⁷
- (l) the Court is not bound to accept a party’s assertions about a claim to privilege;¹⁸
- (m) the Court may examine the document to assess the privilege claim and it may draw inferences from the document itself.¹⁹
- [13] From the often-cited judgment of Young J in *AWB Ltd v Cole (No 5)*,²⁰ the following relevant principles may also be identified:
- (a) the onus to establish the claim of privilege, may be discharged by evidence as to the circumstances and context in which a communication occurred or a document was created or by evidence as to the purposes of the person who made the communication, authored the document, or procured its creation;
- (b) the onus is not discharged by mere assertion;
- (c) legal professional privilege may protect the disclosure of documents that record legal work carried out by the lawyer for the benefit of the client, such as collations and chronologies;
- (d) 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;
- (e) legal professional privilege may attach to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client.

¹⁴ (1983) 153 CLR 52.

¹⁵ Ibid at 122–123. This has been cited in *Watkins v State of Queensland* [2008] 1 Qd R 564 at [79];

¹⁶ *Grant v Downs* at 689; *McIlwraith McEacharn Operations Ltd v CE Heath Underwriting and Insurance (Australia) Pty Ltd (No 2)* [1995] 1 Qd R 363 (*McIlwraith*) at 371; *Queensland Local Superannuation Board v Allen* [2016] QCA 325 (*QLSB v Allen*) at [51]. See also the requirement in r 213(3) of the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR).

¹⁷ *Hancock v Rinehart* [2016] NSWSC 12 at [7] cited in *Santos v Fluor* at [32].

¹⁸ *Grant v Downs* at 689; *McIlwraith* at 371.

¹⁹ *Eso* at 70 [52]; *Dye v Commonwealth Securities Ltd (No 5)* [2010] FCA 950 at [32]; *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd* [2013] QSC 82 (*Aquila*) at [5]; *Grant v Downs* at 677; *State of Queensland v Allen* [2012] 2 Qd R 148 at [6]; *QLSB v Allen* at [50].

²⁰ (2006) 155 FCR 30 at 44–46 [44].

Document 26

- [14] Document 26 is described as a “Letter from Clyde & Co to [the Council] entitled “Re: Torres Strait Island Regional Council v Sea Swift Pty Ltd (Federal Court of Australia proceeding QUD 439/2021)”. Document 26 is dated 6 December 2022.
- [15] The Council’s List of Documents indicates that Document 26 responds to Category 1 of the Disclosure Order. That is, it is said to be a document recording or evidencing the decision and any reasons for the decision to issue the Invoices, including instructions to Clyde & Co referred to in paragraphs [6] and [24] of the affidavit of Mr James William sworn on 28 March 2023.
- [16] Mr James William is the Chief Executive Officer of the Council. He deposed in his affidavit as follows:

“6. I am the person who decided on behalf of [the Council] to issue the invoices for Default Maritime Fees (Decision). I instructed Clyde & Co, the lawyers acting for [the Council] in relation to its dispute with Sea Swift (which, I emphasise, is not limited to this proceeding relating to the Default Maritime Fee invoices), to render those invoices on behalf of [the Council].

...

24. On the basis of the information available to me, in December 2022 I considered that there was a basis for concluding there had been non-compliant reporting by Sea Swift of its uses of the [Facilities] during the period from 1 July 2014 to 30 June 2018. Accordingly, on 20 December 2022 I instructed Clyde & Co to issue Default Maritime Fee invoices on behalf of [the Council].”

- [17] Mr Maurice Thompson is a partner of Clyde & Co. By his affidavit sworn 27 March 2023, Mr Thompson relevantly deposed:²¹

“Having received instructions from Mr William on the issuance of the Default Maritime Fee invoices on 20 December 2022, on my instruction, Mr Ko sent the Default Maritime Fee invoices, under cover of a letter dated 21 December 2022, together with a table summarising the Default Maritime Fee invoices, both under cover of an email to HSF dated 22 December 2022, at 0013HRS (Victorian time). A copy of the email dated 22 December 2022, along with the attachments, which include the Default Maritime Fee invoices, the cover letter dated 21 December 2022 and the table summarising the Default Maritime Fee invoices appear at page 818 of ‘MJT-1’.”

- [18] The letter from Clyde & Co to Sea Swift dated 21 December 2022 relevantly stated:

“...

We compared the logbooks dating from 1 July 2014 to 30 June 2018 that Sea Swift provided as part of the Discovery Documents, against what was self-reported by Sea Swift previously. That comparison has

²¹ Affidavit of Maurice John Thompson sworn 27 March 2023 at [27].

evidenced numerous instances of under-reporting of calls by Sea Swift to our client's moorings and/or landing facilities. In short, our analysis has evidenced that Sea Swift submitted 253 inaccurate/non-compliant self-reporting forms during that period (Noted Under-Reporting). Such under-reporting is in clear breach of Sea Swift's self-reporting obligation.

The attached summary table details the Noted Under-Reporting, and the actual number of calls Sea Swift made to our client's moorings and/or landing facilities as evidenced by the logbooks.

Accordingly, further to our client's letter to Sea Swift dated 15 April 2015 and supported by the information contained in the logbook extracts provided as part of the Discovery Documents, our client hereby levies a Default Maritime Fee for each inaccurate/non-compliant self-reporting form submitted by Sea-Swift. That amounts to a total of 253 Default Maritime Fee invoices, totalling AUD 66,543,146.37, inclusive of GST.

Where logbooks were not provided, notwithstanding the Court Order, and noting the frequency in which the self-reporting forms were inaccurately completed and submitted (or not) to our client, it is not unreasonable for our client to expect that there will have been further examples of inaccurate/non-compliant self-reporting. Our client reserves the right to levy additional Default Maritime Fees if the production of further documentation by Sea Swift should evidence any further inaccurate/non-compliant self-reporting.

TAKE NOTICE that Sea Swift Pty Ltd has seven (7) days to appeal each Default Maritime Fee invoice in writing addressed to Maurice Thompson (Maurice.Thompson@clydeco.com) and Yuen Gi Ko (YuenGi.Ko@clydeco.com). Any such appeal must be submitted with what Sea Swift asserts is a complaint self-reporting form, supporting vessel manifest and any further documentation said to invalidate the issuance of the Default Maritime Fee. Our client reserves its right to take legal action in respect of the Noted Under-Reporting and any additional inaccurate/non-compliant self-reporting."

[19] I observe in passing that the extract from the letter dated 21 December 2022 refers to Clyde & Co having performed a "comparison" and "analysis". There was no evidence before me as to whether the comparison or analysis had been disclosed by the Council. There was no argument before me as to whether the comparison or analysis attracted a valid claim of privilege or whether any claim to privilege had been waived in consequence of the 21 December 2022 letter. It was accepted by the parties that these were not live issues before me.

[20] Mr Thompson swore a separate affidavit for the purpose of the dispute about privilege. By that affidavit, he deposed:

"Document 26 is a letter from Clyde & Co (signed by me) to [the Council] giving legal advice to [the Council] concerning the review of the documents produced by Sea Swift pursuant to orders in the Preliminary Discovery [Proceeding]. The letter also addresses matters

relevant to the Anticipated Substantive Proceedings. [The Council] asserts legal advice privilege and litigation privilege over Document 26.”

- [21] The “Anticipated Substantive Proceedings” are described by Mr Thompson as proceedings to “recover unpaid fees and charges from Sea Swift” which “may be necessary to commence” if the dispute between the parties cannot be resolved. Sea Swift’s submissions noted that no such proceedings (“the Debt Recovery Proceedings”) have been commenced by the Council against Sea Swift.²² The Council explains that situation as follows. When it commenced the Judicial Review Proceedings, Sea Swift sought an interlocutory injunction restraining the Council until further order from acting on, or taking any further step in reliance on, the Invoices. On 8 February 2023, the Council provided an undertaking not to take any steps to commence a proceeding for recovery of the amounts owing under the Invoices before the resolution of the Judicial Review Proceedings without giving Sea Swift 30 days’ notice.²³ On that basis, Sea Swift did not pursue its claim for interlocutory relief. Mr William relevantly deposed:

“The issuance of the letter of demand and the [Invoices] was done in furtherance of the objective of, subsequently, commencing proceedings in the Federal Court for the recovery of the standard Maritime Fees and, alternatively, the Default Maritime Fees. Issuing the [I]nvoices was a precursor to this further step. That further step has not yet been taken, for reasons including the fact that this application for review has been commenced by Sea Swift. By this application, Sea Swift has also threatened to seek injunctive relief if [the Council] seeks to commence such a proceeding.”

- [22] There are some matters of context that appear from the affidavit of Mr William.²⁴ As at in or around 6 December 2022, there had been a long-standing dispute spanning several years between the Council and Sea Swift in relation to whether Sea Swift had been fully and accurately reporting its usage of the Facilities. The dispute had led the Council to form the view that Sea Swift had been less than transparent and cooperative with the Council in the discharge of its self-reporting obligations. The Preliminary Discovery Proceeding was commenced by the Council because it had concluded that Sea Swift had refused to produce documents which would have enabled the Council to verify the accuracy of Sea Swift’s self-reporting. Mr William deposed:²⁵

“... the objective of the Preliminary Discovery Application was to obtain information from Sea Swift so that [the Council] could determine whether to commence a proceeding for recovery of the standard Maritime Fees from Sea Swift and, if non-compliant self-reporting was revealed through the information obtained, an alternative claim for the Default Maritime Fees payable for the relevant period.”

²² Outline of argument of the Applicant at [16].

²³ Affidavit of Maurice John Thompson sworn 27 March 2023, exhibit bundle at 1099.

²⁴ Affidavit of James William sworn 28 March 2023, particularly at [7], [16] and [21].

²⁵ Ibid [21(f)].

[23] Sea Swift made the following submissions in relation to Document 26:

- (a) by indicating that Document 26 responds to Category 1, the Council has indicated that it is a document recording or evidencing the decision or reasons for the decision to issue the Invoices, which was a decision made by Mr William;
- (b) whilst Document 26 is correspondence from the Council's lawyers, Clyde & Co, it is apparent that Clyde & Co was involved in the tasks of collating information to include in the Invoices, and rendered and issued those Invoices;
- (c) those tasks were not legal in nature, and did not involve the giving of legal advice;
- (d) documents which are the "means for carrying out" business transactions are not privileged;
- (e) to the extent that Document 26 was brought into existence for the dominant, or equally weighted, purpose of issuing the Invoices, legal professional privilege would not subsist in those documents;
- (f) the Court ought not be satisfied that the Council has established that Document 26 was:
 - (i) brought into existence for the dominant purpose of giving legal advice and/or for use in anticipated litigation;
 - (ii) not brought into existence for the dominant or equally weighted purpose of issuing the Invoices.

[24] The parties invited me to read, and I have read, Document 26.

[25] I make the following findings about Document 26:

- (a) Document 26 is not accurately described as a document recording or evidencing a decision or reasons for the decision to issue the Invoices;
- (b) Document 26 is accurately described by the Council's written submissions as being a letter from Clyde & Co to the Council providing legal advice;
- (c) having read Document 26, its intended use was to give legal advice to the Council;
- (d) I infer from the content of Document 26 that it was brought into existence for the dominant purpose of giving legal advice;
- (e) Document 26 was not brought into existence for the dominant, or equally weighted purpose, of issuing the Invoices;
- (f) Document 26 is the subject of a valid claim to legal professional privilege.

Document 27

[26] Document 27 is described as an "Email _from Maurice Thompson to James William entitled 'Legal professional privilege: [the Council] v Sea Swift' Attachment entitled: a) 2022 12 06— Letter to [the Council] re DMF invo(11724989.1)". Document 27 is dated 6 December 2022.

[27] The Council's List of Documents indicates that Document 27 responds to Categories 1, 4 and 5 of the Disclosure Order. That is, it is said to be a document:

- (a) recording or evidencing the decision and any reasons for the decision to issue the Invoices, including instructions to Clyde & Co referred to in paragraphs [6] and [24] of the affidavit of Mr James William sworn on 28 March 2023;
- (b) recording or evidencing consideration of the legality of a Default Maritime Fee or the decision to issue the Invoices;
- (c) considering, recording or evidencing the quantum or calculation of the Invoices (including any workpapers, calculations or underlying source documents prepared used or relied upon to calculate the amounts described in the Invoices).

[28] Mr Thompson deposed:

“Document 27 is an email I sent to Mr James William, the CEO of [the Council], attaching Document 26, drawing Mr William's attention to a matter that had been repeated in the letter that was relevant to the Anticipated Substantive Proceedings. [The Council] asserts litigation privilege over Document 27.”

[29] Sea Swift noted in its submissions that the attachment to Document 27 is described differently to Document 26. The attachment to Document 27 is described as “Letter to [the Council] re DMF invo(11724989.1).” Sea Swift submits that it is apparent, given Mr Thompson's evidence, and the description provided, that Document 27 concerns the Invoices.

[30] Sea Swift made the following submissions in relation to Document 27:

- (a) by indicating that Document 27 responds to Category 1, the Council has indicated that it is a document recording or evidencing the decision or reasons for the decision to issue the Invoices, which was a decision made by James William;
- (b) whilst Document 27 is correspondence from the Council's lawyers, Clyde & Co, it is apparent that Clyde & Co was involved in the tasks of collating information to include in the Invoices, and rendered and issued those Invoices;
- (c) those latter tasks were not legal in nature, and did not involve the giving of legal advice;
- (d) documents which are the “means for carrying out” business transactions are not privileged;
- (e) by indicating that Document 27 responds to Category 5, the Council has indicated that the document considers, records or evidences the quantum or calculation of the amounts described in the Invoices;
- (f) to the extent that Document 27 was brought into existence for the dominant, or equally weighted, purpose of issuing the Invoices, legal professional privilege would not subsist in those documents;

- (g) the Court ought not be satisfied that the Council has established that Document 27 was:
 - (i) brought into existence for the dominant purpose of giving legal advice and/or for use in anticipated litigation;
 - (ii) not brought into existence for the dominant or equally weighted purpose of issuing the Invoices.

[31] The parties invited me to read, and I have read, Document 27.

[32] I make the following findings about Document 27:

- (a) Document 27 is not accurately described as a document:
 - (i) recording or evidencing a decision or reasons for the decision to issue the Invoices;
 - (ii) recording or evidencing consideration of the legality of a Default Maritime Fee or the decision to issue the Invoices;
 - (iii) considering, recording or evidencing the quantum or calculation of the Invoices (including any workpapers, calculations or underlying source documents prepared used or relied upon to calculate the amounts described in the Invoices);
- (b) Document 27 is accurately described by the Council's written submissions as being a covering email from Mr Thompson of Clyde & Co to Mr William attaching Document 26 and restating a matter stated in Document 26;
- (c) having read Document 27, its intended use was to attach legal advice to the Council;
- (d) Document 27 was brought into existence "in connection with giving ... legal advice";²⁶
- (e) the dominant purpose of Document 27 was to provide legal advice to the Council;
- (f) Document 27 was not brought into existence for the dominant, or equally weighted, purpose of issuing the Invoices;
- (g) Document 27 is the subject of a valid claim to legal professional privilege.

Document 28

- [33] Document 28 is described as an "Email from Maurice Thompson to James William entitled 'Legal professional privilege: [the Council] v Sea Swift' Attachment entitled: a) Annexure A b) Annexure B c) Annexure C d) Annexure D e) Annexure E". Document 28 is dated 6 December 2022.

²⁶ See *Esso* at 64 [35].

[34] The Council's List of Documents indicates that Document 28 responds to categories 1, 4, 5 and 10 of the Disclosure Order. That is, it is said to be a document:

- (a) recording or evidencing the decision and any reasons for the decision to issue the Invoices, including instructions to Clyde & Co referred to in paragraphs [6] and [24] of the affidavit of Mr James William sworn on 28 March 2023;
- (b) recording or evidencing consideration of the legality of a Default Maritime Fee or the decision to issue the Invoices;
- (c) considering, recording or evidencing the quantum or calculation of the Invoices (including any workpapers, calculations or underlying source documents prepared used or relied upon to calculate the amounts described in the Invoices);
- (d) recording or evidencing consideration of when to issue the Invoices and the length of the appeal period to be prescribed.

[35] Mr Thompson deposed:

“Document 28 is an email sent by Mr Yuen Gi Ko, a solicitor employed by Clyde & Co assisting me with this matter, to Mr William and Ms Julia Maurus of [the Council]. There were several annexures to Document 26 that inadvertently had not been attached to the covering email (Document 27). By Document 28, Mr Ko rectified that oversight and attached the annexures. Accordingly, as with Document 26, Document 28 concerns the review of documents produced by Sea Swift pursuant to orders in the Preliminary Discovery Application and sets out information relevant to the Anticipated Substantive Proceedings. [The Council] asserts legal advice privilege and litigation privilege over Document 28.”

[36] Sea Swift made the following submissions in relation to Document 28:

- (a) it is apparent that Document 28 is an email with five attachments;
- (b) it is not apparent that the covering email does anything more than attach the Annexures;
- (c) Sea Swift emphasised that it is not said that Mr Ko provided legal advice in the email;
- (d) Mr Thompson also does not depose to:
 - (i) what Annexures A to E are;
 - (ii) when Annexures A to E were created, by whom and for what purpose;
- (e) because Annexures A to E are not described with any specificity in Mr Thompson's evidence or the List of Documents, it is not apparent whether the documents have otherwise been referred to and should have been otherwise disclosed in the List or Supplementary List of Documents;
- (f) by indicating that Document 28 responds to Category 1, the Council has indicated that the document records or evidences the decision or reasons for the decision to issue the Invoices, which was the decision of James William;

- (g) by indicating that Document 28 responds to Category 5, the Council has also indicated that the document considers, records or evidences the quantum or calculation of the amounts described in the Invoices;
- (h) whilst Document 28 is correspondence from the Council's lawyers, Clyde & Co, it is apparent that Clyde & Co was involved in the tasks of collating information to include in the Invoices and rendered and issued the Invoices;
- (i) those tasks were not legal in nature, and did not involve the giving of legal advice;
- (j) documents which are the "means for carrying out" business transactions are not privileged;
- (k) to the extent that Document 28 was brought into existence for the dominant, or equally weighted, purpose of issuing the Invoices, legal professional privilege would not subsist in those documents;
- (l) the Court ought not be satisfied that the Council has established that Document 28:
 - (i) was brought into existence for the dominant purpose of giving legal advice and/or for use in anticipated litigation;
 - (ii) was not brought into existence for the dominant or equally weighted purpose of issuing the Invoices.

[37] The parties invited me to read, and I have read, Document 28.

[38] I make the following findings about Document 28:

- (a) I accept Mr Thompson's evidence as set out at [35] of these Reasons;
- (b) I am satisfied that Mr Thompson's description of Document 28 is accurate;
- (c) Document 28 is an email sent by Mr Ko, a solicitor employed by Clyde & Co, to Mr William and Ms Julia Maurus of the Council attaching five annexures referred to in Document 26 but which, through inadvertence, were not attached to Document 26 or Document 27, the covering email which attached Document 26;
- (d) Document 28 is not accurately described as a document recording or evidencing:
 - (i) a decision or reasons for the decision to issue the Invoices;
 - (ii) consideration of the legality of a Default Maritime Fee or the decision to issue the Invoices;
 - (iii) consideration of when to issue the Invoices and the length of the appeal period to be prescribed.
- (e) by reason of the evidence outlined in [22] of these Reasons, which I accept, as at in or around the time that Document 28, including its annexures, was brought into existence, the Debt Recovery Proceedings were anticipated;

- (f) having read Document 28, whilst the annexures contain calculations relevant to the Default Maritime Fees, those calculations were provided as part of, and for the dominant purpose of providing, legal advice;
- (g) the annexures are properly described as collations carried out by the Council's lawyers for the benefit of the Council in that they were referred to in, and were necessary annexures to, the legal advice;
- (h) having read Document 28, the intended use of Document 28 was to form part of legal advice rather than for use in any anticipated litigation;
- (i) the dominant purpose of Document 28 was to provide legal advice to the Council;
- (j) Document 28 was not brought into existence for the dominant, or equally weighted, purpose of issuing the Invoices;
- (k) Document 28 is the subject of a valid claim to legal professional privilege.

Document 29

- [39] Document 29 is dated 20 December 2022 and is described as an "Email from James William to Yuen Gi Ko entitled 'RE: [the Council] — DMF Invoicing [CC-AUSTRALL4.FID116807]'."
- [40] The Council's List of Documents indicates that Document 29 responds to Categories 1 and 10 of the Disclosure Order. That is, it is said to be a document:
 - (a) recording or evidencing the decision and any reasons for the decision to issue the Invoices, including instructions to Clyde & Co referred to in paragraphs [6] and [24] of the affidavit of Mr James William sworn on 28 March 2023; and
 - (b) recording or evidencing consideration of when to issue the Invoices and the length of the appeal period to be prescribed.
- [41] Mr Thompson deposed:

"Document 29 is an email from Mr William to Mr Ko, copied to me, giving instructions consequent upon the advice contained in Documents 26 and 28 concerning matters relevant to the Anticipated Substantive Proceedings. [The Council] asserts litigation privilege over Document 29."
- [42] Sea Swift submits that it is apparent that this is the same set of instructions deposed to by Mr William, that is, the instructions from Mr William to Clyde & Co to render and issue the Invoices.
- [43] Sea Swift submits:
 - (a) the fact that lawyers at Clyde & Co issued the Invoices and were instructed to issue the Invoices does not cloak communications about their issue, with legal professional privilege;
 - (b) the Court ought not be satisfied that the Council has established that Document 29 was brought into existence for the dominant purpose of

anticipated litigation, and that it was not brought into existence for the dominant, or equally weighted, purpose of issuing the Invoices;

- (c) that any privilege which subsisted in Document 29 has been waived by Mr William deposing that on 20 December 2022, he instructed Clyde & Co to issue the Invoices which is inconsistent with maintaining the confidentiality of the communication.

[44] The parties invited me to read, and I have read, Document 29.

[45] I make the following findings in relation to Document 29:

- (a) Document 29 is accurately described by Mr Thompson and falls within Category 1 of the Disclosure Orders;
- (b) I am not satisfied that Document 29 falls within Category 10;
- (c) Document 29 does not contain any reference to legal advice. Its reference to “as per previous email”, would objectively appear to be a reference to an email of Mr Ko sent on Tuesday 20 December 2022 which sought instructions but did not communicate legal advice;
- (d) Document 29 was prepared for the dominant purpose of providing instructions to issue the Invoices;
- (e) I do not accept that the dominant purpose of Document 29 was for use in or for the conduct of anticipated litigation;
- (f) Document 29 is not subject to a valid claim of legal professional privilege.

[46] Alternatively, legal professional privilege may be waived, expressly or by implication. Whether privilege has been waived is an objective test, having regard to whether the actions of the party are inconsistent with the maintenance of confidentiality which the privilege is intended to protect.²⁷ Waiver can occur in circumstances where there has been reference to a confidential communication in an affidavit.²⁸ I find that, had Document 29 otherwise been the subject of a valid claim of legal professional privilege, privilege in the document was waived by paragraph 24 of Mr William’s affidavit.

Document 38

[47] Document 38 is dated 20 April 2015 and is described as an “Email from Chris McLaughlin to Julia Mauro and Melissa Barmettler and Dania Ahwang entitled ‘RE: Maritime Fees - Carpentaria Contracting - Torres Strait Island Regional Council’ Attachment entitled: a) Maritime Fees — Toll Marine Logistics — Torres Strait Island Regional Council”.

[48] Document 38 is said to respond to Category 4. That is, it is said to be a document recording or evidencing consideration of the legality of a Default Maritime Fee or the decision to issue the Invoices.

²⁷ *Mann v Carnell* (1999) 201 CLR 1 at 13.

²⁸ *ASIC v Park Trent Group Properties Group Pty Ltd* (2015) 105 ACSR 565 at 577 [46].

- [49] Mr Thompson describes Document 38 as “... an email dated 20 April 2015 from Chris McLaughlin, the Executive Manager of Corporate Services of [the Council] to Julia Mauro, Legal Officer of [the Council], Melissa Barmettler, the Executive Manager of Financial Services of [the Council] and Dania Ahwang, Chief Executive Officer of [the Council].” Mr Thompson deposed to no other detail or facts concerning the email or its content. He did not depose to the circumstances and context in which the communication occurred or the document was created. He did not depose to the purpose of Mr McLaughlin authoring the email or making the communication. He merely deposed “[The Council] asserts legal advice privilege over Document 38”.
- [50] Document 38 is dated some 7 years prior to the date of issue of the Invoices. At the time the email was sent:
- (a) Mr Chris McLaughlin:
 - (i) was the Council’s “Executive Manager of Corporate Services”;
 - (ii) had responsibilities which included managing teams in the Council’s Corporate Services department including Human Resources, Information Technology and Legal Services;
 - (iii) attended the Council’s meetings as Council’s legal advisor;
 - (iv) gave legal advice on various issues affecting the Council to the Council;
 - (v) was admitted as a solicitor and held a practising certificate issued by the Queensland Law Society;
 - (b) Ms Melissa Barmettler was the Council’s “Executive Manager of Financial Services”;
 - (c) Mr Dania Ahwang was the Council’s “Chief Executive Officer”;
 - (d) Ms Julia Mauro:
 - (i) was admitted as a solicitor and held a practising certificate issued by the Queensland Law Society;
 - (ii) was a “Legal Officer” at the Council.
- [51] Mr Ko deposed, on information and belief from Ms Mauro, that in his role as Executive Manager of Corporate Services, Mr McLaughlin regularly provided independent legal advice to [the Council] and that his legal advices and opinions were not subject to any change, amendment and/or approval by any persons.
- [52] As to the position of in-house legal advisors:
- (a) in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd*,²⁹ Boddice J explained at that legal professional privilege:

“ ... may still attach, provided the claim relates to a qualified lawyer acting in the capacity of an independent professional legal adviser. Independence is crucial, as an important feature of inhouse lawyers is that at some point the chain of authority will result in a person who is

²⁹ [2013] QSC 82 at [8].

not a lawyer holding authority, directly or indirectly, over the inhouse lawyer. The relevant question for consideration is whether the advice given is, in truth, independent.”

- (b) it is also an “essential element of the establishment of the privilege that at the relevant time the employee was performing legal work”.³⁰

[53] Sea Swift opposed the court receiving and reading Document 38 on the basis that the Council had not filed an affidavit which established a claim to privilege.

[54] Rule 213 of the *Uniform Civil Procedure Rules 1999* (Qld) relevantly provides:

“213 Privilege claim

- (1) This rule applies if—
 - (a) a party claims privilege from disclosure of a document; and
 - (b) another party challenges the claim.
- (2) The party making the claim must, within 7 days after the challenge, file and serve on the other party an affidavit stating the claim.
- (3) The affidavit must be made by an individual who knows the facts giving rise to the claim.”

[55] The common law recognises that the Court may examine documents to resolve questions of privilege.³¹ Section 133 of the *Evidence Act 1995* (Cth) confers a statutory discretion upon a court to inspect documents for the purpose of determining privilege. In that context, in *Tabcorp Holdings Limited v State of Victoria*,³² Sifris J relevantly observed:

“[95] Both parties noted the discretion conferred on the Court under s 133 of the *Evidence Act 2008* (Vic) to inspect documents for the purpose of determining the question of privilege.

[96] Section 133 provides:

‘If a question arises under this Part relating to a document, the court may order that the document be produced to it and may inspect the document for the purpose of determining the question.’

[97] With regard to the exercise of this discretion, however, a party claiming privilege cannot delegate to the Court the task of establishing that the privilege exists. Adequate materials must be put before the Court to allow the claim to be entertained. As Tobias JA said in *Bailey v Director-General, Department of Land and Water Conservation* (2009) 74 NSWLR 333:

³⁰ *Australian Hospital Care (Pindari) Pty Ltd v Duggan (No 2)* [1999] VSC 131 at [81] cited in *Aquila* at [9].

³¹ See *Grant v Downs* at 688–689.

³² [2013] VSC 302.

‘...the power under s 133 to inspect documents cannot be used as a substitute for admissible evidence to support the various elements necessary to establish privilege so that if evidence in respect of any one of those elements is missing, the gap cannot be filled by an inspection of the documents.’

[98] In the absence of adequate substantiating evidence, the utility of inspecting the documents is also questionable, as examination of the terms of the documents alone may not answer the question of whether or not they were brought into existence for the dominant purpose of providing or receiving legal advice.”

[56] In my consideration, a similar approach to that outlined by Sifris J is warranted in relation to the exercise of the common law discretionary power to inspect documents. It is the responsibility of the party claiming privilege to provide enough evidence for the claim to be entertained and the power of inspection is not to be used as a substitute for evidence.³³

[57] In relation to Document 38, Sea Swift submits that:

- (a) whilst the Council claims legal advice privilege, Mr Thompson does not depose to Document 38 as containing any request for advice, or providing advice, or extracting the content of advice;
- (b) there is nothing in Mr Thompson’s evidence that indicates Document 38 was created for the dominant purpose of giving or obtaining legal advice;
- (c) the Court ought not be satisfied that the Council has established that Document 38 was created for the dominant purpose of giving or obtaining legal advice.

[58] I accept Sea Swift’s submissions that there is an absence of adequate substantiating evidence to support the claim of privilege. Mr McLaughlin had multiple roles and there is an absence of any evidence as to the nature of the communication, and the circumstances and context in which it occurred. I have exercised my discretion not to receive and read Document 38.

[59] I find that Document 38 is not the subject of a valid claim to legal professional privilege.

Document 45

[60] On 6 June 2023, the Council advised Sea Swift that Document 45 was “redacted to protect certain confidential information.” On 7 June 2023, the Council advised that “Legal professional privilege and common interest privilege are claimed over the redacted parts ...as they may tend to reveal [the Council’s] likely legal strategies.”

[61] Document 45 is a redacted version of the Litigation Funding Agreement entered into between the Council and its litigation funder. The Council asserts litigation privilege and common interest privilege over the redacted parts of Document 45. The Council resisted disclosure of the redacted parts on the basis that they might reveal the Council’s legal strategies in the Debt Recovery Proceedings and included

³³ *Cargill Australia Limited & Ors v Viterro Malt Pty Ltd & Ors (No 8)* [2018] VSC 193 at [43].

commercially sensitive confidential information. Ultimately, in the event that there existed any doubt about whether the redacted parts were privileged, the Council sought confidentiality orders.

[62] Mr Thompson relevantly deposed:

“In particular, and without in any way waiving ... privilege:

- (a) redacted clauses 1.2(b) and (c) concern budget allocation and conditions of funding relating to aspect of the Preliminary Discovery Application and Anticipated Substantive Proceedings;
- (b) redacted clause 2 concerns the funding consequences arising from the certain procedural steps in the Anticipated Substantive Proceedings;
- (c) redacted clause 8.2 concerns distribution of moneys that may be recovered in Anticipated Substantive Proceedings;
- (d) redacted clause 13.2 concerns circumstances going to Aristata’s right to terminate the Funding Agreement;
- (e) redacted definition on page 15 contains legal advice provided by Clyde & Co to [the Council] concerning the Anticipated Substantive Proceedings;
- (f) redacted definition on page 16 is relevant to and concerns clause 13.2, as to which see above;
- (g) redacted Schedule 2 sets out bases for calculation of Aristata’s return in the event of a recovery in Anticipated Substantive Proceedings;
- (h) redacted clause 4.1 of Schedule 4 concerns rates payable to Clyde & Co in respect of various aspects of the Preliminary Discovery Application and Anticipated Substantive Proceedings;
- (i) redacted Schedule 5 sets out a budget, and allocates sums to various aspects of the Preliminary Discovery Application and Anticipated Substantive Proceedings;
- (j) redacted Schedule 6 concerns the manner in which legal fees may be tracked and allocated against certain aspects of the Preliminary Discovery Application and Anticipated Substantive Proceedings.”

[63] It is common ground that there is no general principle that legal professional privilege attaches to Litigation Funding Agreements in their entirety. The Council submits that where disclosure would potentially reveal “War Chest” information, information about the legal strategy to be adopted in relation to litigation or otherwise confer a tactical advantage on the other party, parts of a Litigation Funding Agreement may be withheld from production. In support of that submission, the Council relied upon *Marshall v Prescott*³⁴ and *Green v CGU Insurance Ltd*.³⁵

[64] The parties invited me to read, and I have read, the redacted parts of Document 45.

³⁴ [2013] NSWCA 152 at [77] and [85].

³⁵ *Green in his capacity as liquidator of Arimco Mining Pty Ltd (in liq) v CGU Insurance Ltd* [2008] NSWSC 390 at [26].

- [65] Sea Swift ultimately submitted that I should consider whether each redacted part revealed matters concerning legal strategy in respect of anticipated proceedings, concerned tactical information or revealed “War Chest” information.
- [66] In *Marshall v Prescott*,³⁶ Barrett JA³⁷ recognised that the law might not compel a litigant to disclose a Litigation Funding Agreement to the extent that it contained information indicating the size of any “War Chest” to be made available to the litigant, which information might indirectly provide an insight into the litigant’s legal strategy, particularly as to seeking or agreeing to terms of settlement.
- [67] On my reading of the redacted parts of Document 45, they do not expressly identify or reveal the legal strategy to be adopted in relation to the Debt Recovery Proceedings. However, they do contain information which would provide an insight into the Council’s legal strategy or plan of action because they concern the confidential circumstances surrounding the availability of funding, its amount and extent.
- [68] There may be some doubt as to whether the redacted provisions are properly the subject of a claim to legal professional privilege. However, I am satisfied that the Litigation Funding Agreement was intended to be kept confidential except where disclosure was ordered by a court.³⁸ I have formed the view that to require the Council to disclose the redacted parts of the Litigation Funding Agreement would place the Council in a disadvantaged position compared to that of an ordinary litigant. In my view, disclosure of the redacted parts of the material is not conducive to the proper administration of justice and I am prepared to make confidentiality orders in relation to the redacted clauses of the Litigation Funding Agreement so as to not require the Council to reveal such clauses to Sea Swift.

Orders

- [69] For the reasons I have provided, I make the following declarations and orders:
- (a) The court declares that Documents 26, 27 and 28 in the respondent’s List of Documents served pursuant to the order of Justice Applegarth dated 17 April 2023 are the subject of valid claims of legal professional privilege.
 - (b) The court declares that Documents 29 and 38 in the respondent’s List of Documents served pursuant to the order of Justice Applegarth dated 17 April 2023 are not the subject of valid claims of legal professional privilege.
 - (c) The court declares that the redacted parts of Document 45 in the respondent’s supplementary List of Documents served 7 June 2023 are the subject of valid claims of confidentiality and are not required to be disclosed.
 - (d) The court orders that by 4pm on Wednesday 19 July 2023, the respondent is to electronically produce Documents 29 and 38 to the solicitors for the applicant.
 - (e) I will hear the parties as to costs.

³⁶ [2013] NSWCA 152 at [85].

³⁷ With whom McColl and Ward JJA agreed.

³⁸ Clause 6.5 of the Funding Agreement.