

## EXPERT REPORTS: PRIVILEGE AND WAIVER OF PRIVILEGE

This paper is intended to summarize principles by which the NSW Supreme Court will determine whether or not communications between lawyers and experts have attracted or lost client legal privilege in the context of actual or pending litigation.

It is not uncommon in litigation today for solicitors to demand that all documents associated with any expert report served by an opponent – such as letters of instruction and correspondence between expert and lawyers, working papers, draft reports, and copies of those documents retained by the expert – be produced for inspection on the grounds that either the documents cannot be not privileged, or that privilege has been waived by reason of service of the final draft of the report.

The objective of such demands is to obtain documents which enable a cross-examiner to probe the process of formation of an expert opinion, and particularly to explore whether or not the expert has been inappropriately “primed” in his or her evidence by the retaining solicitor or any other person.

The documents associated with the preparation of an expert report generally fall into the following broad categories:

- A. Letters of retainer and other documents containing or describing the offer and acceptance of the retainer to provide expert opinion evidence, the terms and scope of the retainer, the general obligations of the expert, the requirements as to provision of the opinion/report, attendance at conferences, attendance at Court and similar logistical matters, and copies of such documents (I will refer to these as “*retainer documents*”).
- B. Documents setting out the facts which are to be assumed by the expert, the factual contentions of various persons (including the litigation opponent) and any additional facts which the expert is invited to take into account in forming an opinion or preparing a report, and copies of such documents (“*factual foundation documents*”).
- C. Working documents, such as calculation sheets, field notes, work sheets, aides memoire, spreadsheets, photocopied documents from expert texts etc, created by the expert before or during the preparation of the report, and copies of such documents (“*working papers*”).
- D. Documents recording communications between the expert and the retaining solicitor involving analysis, criticism or elaboration of draft or final reports, and copies of such documents (“*discussion documents*”).
- E. Documents recording communications between the expert and other experts (including experts retained by the opposing party), or third persons (“*third party documents*”).

The decisions of Australian superior courts concerning privilege are not always easy to reconcile. This is partly due to the fact that the sections in the *Evidence Act 1995* (NSW) dealing with parliament describes as “*client legal privilege*” are not identical to the common law rules concerning *legal professional privilege* – although judges have interpreted the Evidence Act in the light of common law principles. In the Federal Court, the common law rules apply to privilege disputes arising in pre-trial procedures. In the Supreme Court, the *Evidence Act 1995* governs pre-trial procedures. It should be noted that in January 2009, section 122 the *Evidence Act* was amended to explicitly restate the common law test for implied waiver of privilege.

It is also worth noting that Judges have found it necessary to draw attention to common misconceptions amongst practitioners concerning the right to claim privilege for documents associated with expert reports: in particular, the misconception that “... *once an expert’s report is tendered, everything the expert has been given or has considered becomes admissible.*”

Judgments in several recent cases<sup>1</sup> in the New South Wales Supreme Court provide some guidance in relation to these issues. Recent papers delivered by Justice Allsop (President of the Court of Appeal) Justice Hamilton (who guided the introduction of the new Civil Procedure Rules), Justice Campbell and Justice McDougall provide very helpful analyses of this area of the law. Those papers can be found at the Lawlink website –  
([http://www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/pages/SCO\\_speeches](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_speeches))

I will first set out in a little detail the current state of the law in New South Wales relating to privilege for documents associated with expert reports then make comment on some recent decisions.

## LEGAL PRINCIPLES

### (a) Applicable legislation

In the New South Wales Supreme Court and District Court, the *Evidence Act 1995*, not the common law, governs the question of privilege in circumstances where inspection of documents is sought before trial under the *Uniform Civil Procedure Rules 2005*.

Rule 1.2 of the UCPR provides that words and expressions in the Rules have the meaning set out in the Dictionary. The Dictionary defines the expression “*privileged document*” to mean a document that contains privileged information. “*Privileged information*” is defined, relevantly, as meaning any information of which evidence could not by virtue of the operation of Division 1 of Part 3.10 of the *Evidence Act 1995* be adduced in the proceedings over the objection of any person. Division 1 of Pt 3.10 of the *Evidence Act* includes sections 117 and 119 (set out below).

<sup>1</sup> *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 per White J; *ML Ubase Holdings Co Limited v Trigem Computer Inc* [2007] NSWSC 859 per Brereton J; *Artistic Builders Pty Limited v Nash & Others* [2009] NSWSC 102 per Hoeben J.

Rule 1.9 of the UCPR applies to production of a document<sup>2</sup> on subpoena, pursuant to a notice to produce under rule 34.1 and to questions asked in the course of an “examination” before the court. Subrule 1.9(3) permits an objection to production on the ground of “privilege”. Subrule 1.9(4) precludes compulsory production until such objection has been overruled.

Rule 21.11 of the UCPR requires production for inspection within 14 days of non-privileged documents and the service of a notice concerning claims for privilege in answer to a notice to produce.

Section 117 relevantly provides:

**confidential communication** means a communication made in such circumstances that, when it was made;

- (a) the person who made it, or
- (b) the person to whom it was made,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

**confidential document** means a document prepared in such circumstances that, when it was prepared;

- (a) the person who prepared it, or
- (b) the person for whom it was prepared ,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

The word “**client**” is defined to include a person who engages a lawyer.

Section 118 deals with “legal advice privilege” and need not be addressed here.

Section 119 provides:

*119 Litigation*

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or
- (b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an

<sup>2</sup> But **not** inspection of subpoenaed documents – see *Casaniti v Paragalli* [2006] NSWSC 160; *Carbotech-Australia Pty Ltd v Yates* [2008] NSWSC 1151 – in respect of which the common law rules have been held to apply.

anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

The question of whether privilege in documents associated with an expert report has been waived by service of the report depends on whether sections 122 and 126 of the *Evidence Act* would permit such evidence to be adduced notwithstanding s 119. This question is affected by the proposition that a document which is required by court directions to be served on another party is disclosed, "*under compulsion of the law*" within the meaning of s 122(2)(c): *Akins v Abigroup Ltd* [1998] 43 NSWLR 539 at 552; *Dubbo City Council v Barrett* [2003] NSWCA 267.

Since January 2009, section 122 relevantly provides:

**122 Loss of client legal privilege: consent and related matters**

- (1) This Division does not prevent the adducing of evidence given with the consent of the client or party concerned.
- (2) Subject to subsection (5), this Division does not prevent the adducing of evidence if the client or party concerned has *acted in a way that is inconsistent with the client or party objecting to the adducing of the evidence* because it would result in a disclosure of a kind referred to in section 18, 119 or 120.
- (3) Without limiting subsection (2), a client or party is taken to have so acted if:
  - (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person, or
  - (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party.
- (4) The reference in subsection(3)(a) to a knowing and voluntary disclosure does not include a reference to a disclosure by a person who was, at the time, an employee or agent of the client or party, or of a lawyer of the client or party, unless the employee or agent was authorised to make the disclosure.
- (5) A client or party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of the evidence merely because:
  - (a) the substance of the evidence has been disclosed:
    - (i) in the course of making a confidential communication or preparing a confidential document, or
    - (ii) as a result of duress or deception, or
    - (iii) under compulsion of law, or
    - (iv) if the client or party is a body established by, or a person holding an office under, an Australian law -- to the Minister, or the Minister of the Commonwealth, the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held, or

- (b) of a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing, or is to provide, professional legal services to both the client and the other person, or
  - (c) a disclosure to a person with whom the client or party had, at the time of the disclosure, a common interest relating to the proceeding or an anticipated or pending proceeding in an Australian court or a foreign court.
- (6) This Division does not prevent the adducing of evidence of a document that a witness has used to try to revive the witness's memory about a fact or opinion or has used as mentioned in section 32 (Attempts to revive memory in court) or 33 (Evidence given by police officers).

Section 126 of the *Evidence Act* deals further with the loss of privilege. It provides:

**126 Loss of client legal privilege: related communications and documents**

If, because of the application of section 121, 122, 123, 124 or 125, this Division does not prevent the adducing of evidence of a communication or the contents of a document, those sections do not prevent the adducing of evidence of another communication or document if it is reasonably necessary to enable a proper understanding of the communication or document.

Note. Example:

A lawyer advises his client to understate her income for the previous year to evade taxation because of her potential tax liability "as set out in my previous letter to you dated 11 August 1994". In proceedings against the taxpayer for tax evasion, evidence of the contents of the letter dated 11 August 1994 may be admissible (even if that letter would otherwise be privileged) to enable a proper understanding of the second letter.

**(b) Judicial decisions**

At common law, the concept of "communications" is central to all aspects of privilege.

"Legal professional privilege is concerned with communications, either oral, written or recorded, and not with documents per se." (*Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501).

The *Evidence Act*, which describes the relevant privilege as "client legal privilege", extends the protection beyond the common law to include *uncommunicated* documents. Under section 119(b) of the *Evidence Act*, privilege may exist in an uncommunicated confidential document which is prepared for the dominant purpose of the client being provided with professional legal services relating to an actual or pending proceeding.

***Australian Securities and Investments Commission v Southcorp Ltd* (2003)**

The leading judgment of Lindgren J in *Australian Securities and Investments Commission v Southcorp Ltd* (2003) 46 ACSR 438 summarizes the state of the

relevant common law rules concerning privilege in communications between lawyers and experts, for the purpose of interlocutory proceedings in the Federal Court (at [21]):

- (1) Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of his or her opinion to be used in the anticipated litigation attracts client legal privilege: cf *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 246; *Interchase Corp Ltd (in liq) v Grosvenor Hill (Qld) Pty Ltd (No 1)* [1999] 1 Qd R 141 at 151 per Pincus JA, at 160 per Thomas J.
- (2) Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Interchase*, per Pincus JA; *Spassked Pty Ltd v Cmr of Taxation (No 4)* (2002) 50 ATR 70 at [17].
- (3) Documents generated unilaterally by the expert witness, such as working notes, field notes, and the witness's own drafts of his or her report, do not attract privilege because they are not in the nature of, and would not expose, communications: cf *Interchase* at 161–2 per Thomas J.
- (4) Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to in (1) and (2) above, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents; cf *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 481 per Gibbs CJ, at 487–8 per Mason and Brennan JJ, at 492–3 per Deane J at 497–8 per Dawson J; *Goldberg v Ng* (1995) 185 CLR 83 at 98 per Deane, Dawson and Gaudron JJ, at 109 per Toohey J; *Instant Colour Pty Ltd v Canon Australia Pty Ltd* [1995] FCA 870; *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89 at [46].
- (5) Similarly, privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents; *Interchase* at 148–50 per Pincus JA, at 161 per Thomas J.
- (6) It may be difficult to establish at an early stage whether documents which were before an expert witness influenced the content of his or her report, in the absence of any reference to them in the report: cf *Dingwall v Commonwealth of Australia* (1992) 39 FCR 521; *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* (1998) 83 FCR 397 at 400; *ACCC v Lux* at [46].

***Re Southland Coal Pty Limited (Receivers and Managers Appointed) (In Liq)***

Justice Austin conveniently summarized the general principles of client legal privilege – that is to say, statutory privilege – in *Re Southland Coal Pty Limited (Receivers and Managers Appointed) (In Liq)* (2006) 203 FLR 1 at para [14]. In relation to communications with experts, the following points are important:

- (a) Legal professional privilege (and by parity of reasoning, client legal privilege) is a rule of substantive law involving the rights of a litigant, not a mere technical rule of evidence, and the relevant sections of the Act must be interpreted accordingly.
- (b) Assessing a claim for privilege under section 119 is a two step procedure. The first step is to be satisfied that the communication or contents satisfy the requirements of the Act. The second is for the court to be satisfied that the production of the document would result in the disclosure of a confidential communication or of confidential content of a document.
- (c) The party claiming privilege bears the onus of establishing the basis of the claim and this must be done by adducing evidence which, on the balance of probabilities, demonstrates such a basis.
- (d) “Purpose” is a question of fact which is to be determined objectively on proper evidence. A mere assertion, particularly by a person who did not make the communication, that the dominant purpose exists is likely to be objected to. Cross-examination may be permitted to enable the Court to assess the factual basis of the claim..
- (e) The Court is entitled to take into account that a person who could have given direct evidence of purpose has not been called by the party asserting the privilege.
- (f) The Court may inspect the documents and, where the judge hearing the application is not the trial judge, the Court should not hesitate to do so.

***New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd***

In *New Cap Reinsurance Corporation Ltd (in liq) v Renaissance Reinsurance Ltd* [2007] NSWSC 258 White J was required to determine in the context of a contested discovery application under the UCPR whether or not correspondence between an expert witness and the solicitors for the plaintiffs, who retained the expert, should be produced for inspection. The opposing party sought an order for production by the plaintiffs of documents which:

- (a) Record request from KPMG to Henry Davis York as solicitors for the plaintiffs for instructions in relation to the preparation of the report;

- (b) Record instructions from or on behalf of Henry Davis York as solicitors for the plaintiffs, to KPMG in relation to the preparation of the report; and
- (c) Constitute notes and/or working papers of KPMG relating to the preparation of the report.

It was established that the working papers remained in the possession of the expert, and were not in the possession power or control of the solicitors or client. Therefore, White J was not required to consider privilege in respect of the KPMG's working papers in category (c). Nor was he required to determine whether copies of draft reports retained by the expert were privileged.

The defendant contended that draft reports prepared by KPMG and provided to the solicitor for comment were not privileged. If they were privileged, it was contended that any privilege had been waived, by reason of the disclosure of the final report for the express purpose of its being used by as evidence for in the litigation.

His Honour examined the current state of the law of privilege as it affects documents associated with expert reports in the new statutory context created by the UCPR. Relevant parts of his analysis may be summarized as follows:

- (1) The dominant purpose for which a *final* expert's report or final witness statement is brought into existence would presumably be for the purpose of being laid before the Court as the witness' evidence. Prima facie, it would not be privileged (*Attorney-General (NT) v Maurice* at 480). However, *draft reports, and notes used in preparing a report, may stand at a different position, particularly where the expert has been retained by the party's solicitors and it is expected that the party's lawyers will advise on the contents of, and settle the form of, the report.* There is nothing improper in such a course. It is not inconsistent with the expert's paramount duty being the duty to the Court and not to the client retaining him or her.
- (2) *It will be a question of fact, to which the expert may be required to put his or her oath, as to whether any draft reports prepared and kept by him, and working notes prepared by him or his staff, were brought into existence for the dominant purpose of the plaintiffs being provided with professional legal services.* If they were prepared for the dominant purpose of a draft report being submitted for advice or comment by the plaintiffs' lawyers, then they would be privileged under s 119. However, if they were brought into existence for the dominant purpose of the expert forming his or her opinions to be expressed in the final report, then it could be arguable that they were not made for the dominant purpose of the plaintiffs being provided with professional legal services relating to the proceedings.
- (3) The expression "professional legal services" is not defined. Odgers, *Uniform Evidence Law*, 7th ed, (2006) Sydney, Lawbook Co. at para 1.3.10720, suggests: "Since providing a client with professional legal services includes representing the client in legal proceedings, it is likely that a document

prepared for use in such legal proceedings by the client's lawyer will be privileged." However, to be privileged the document must be prepared for the dominant purpose of the client being provided with professional *legal* services.

- (4) If an expert prepares a draft report, or notes for the report, with the dominant purpose of a *draft report (whether the precise draft then prepared by the expert or an intended later draft) being furnished for comment or advice by the lawyer*, then it is privileged. If not, it is not. Often, an expert witness retained by a lawyer for a party will prepare a draft report with the intention and purpose that it will set out the evidence which he or she expects to give, but also with the intention and purpose of its being considered and commented on by the party's lawyers. If the latter purpose is dominant, the document so produced is privileged. If not, it is not privileged.
- (5) In the case of claims for privilege over working notes and expert's draft reports not communicated to a client's lawyer, the same practical outcome may be reached in many cases whether the privilege is claimed at common law or under s 119 of the *Evidence Act*. However, the analysis of the claims must proceed on different paths.
- (6) Whether the same documents *in the hands of the expert* are produced for the same dominant purpose will be a different question, the resolution of which may depend upon the expert's oath. *Instructions in relation to draft reports, or requests for such instructions, are also privileged* under s 119(b) as they were brought into existence for the dominant purpose of the client being provided with professional legal services in connection with the proceedings."

His Honour then went on to consider waiver of privilege. His analysis included the following:

- (7) The party claiming privilege contended that there could be no waiver of privilege by service of the expert's report because the report was served pursuant to an order requiring its service. The disclosure of the report was therefore not voluntary (*Akins v Abigroup Ltd* (1998) 43 NSWLR 539; *Sevic v Roarty* (1998) 44 NSWLR 287; *Dubbo City Council v Barrett* [2003] NSWCA 267).
- (8) The consequence of the expert report having been served under compulsion of law is that the plaintiffs have not knowingly and voluntarily disclosed to another person the substance of that evidence. That is, if the plaintiff chose not to read or rely upon the report, then the defendant could not tender it.
- (9) The question whether *privilege in draft reports and prior communications between the plaintiffs' solicitors and the expert, and related documents, is waived by "compulsory" service* depends upon whether or not the final report

disclosed the substance of the prior communications. The question is whether privilege has been waived impliedly.

- (10) Justice White accepted that *at common law*, a party will be taken to have waived privilege, even though he or she did not subjectively intend to do so (*Chen & Ors v City Convenience Leasing Pty Ltd & Anor* [2005] NSWCA 297 at [29]-[33])<sup>3</sup>. The principle (now explicit in the amended form of section 122 since Justice White's judgment) is that:

It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege ... 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 waiver is 'imputed by law' ... 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. (*Mann v Carnell* (1999) 201 CLR 1 at [28] and [29]).

- (11) There are many cases in which it has been held that privilege in material provided to an expert is not lost merely because the expert is called, or the expert's report is served. In *Bourns Inc v Raychem Corporation* [1999] 3 All ER 154, Aldous LJ said (at 166-167):

Service of a witness statement, whether it be a statement of an expert or a witness to fact, waives privilege in that statement. ... mere reference to a document does not waive privilege in that document: there must at least be reference to the contents and reliance. In the present case there was no reference and no reliance therefore no waiver.

In *Dingwall v Commonwealth of Australia* (1992) 39 FCR 521, Foster J, referring to *Attorney-General (NT) v Maurice*, said (at 524):

I have come to the view, upon a close consideration of the judgments in *Maurice's* case that it cannot be regarded as authority for a wide principle that, whenever documents are sent to a potential witness as part of material being placed before him in order that he may provide a report of an expert kind to be used as evidence in a case, that those documents, *ipso facto*, although they had the protection of legal professional privilege, necessarily would lose it because of the doctrine of waiver. *Maurice's* case does not go as far as that. It requires, certainly, that there be an indication that the documents were used in the preparation of the evidentiary document in a way that could be said to influence the content of that document.

The same principle was applied by Mansfield J in *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd (No 2)* (1998) 83 FCR 397 at 400; 156 ALR 364 at

<sup>3</sup> The NSW Court of Appeal in *Chen v City Convenience Leasing Pty Ltd* [2005] NSWCA 297 concluded that this was so even though section 122(4) deals explicitly with both *implied and express* consent.

367, and by Nicholson J in *Australian Competition and Consumer Commission v Lux Pty Ltd* [2003] FCA 89 at [46].

In *Thomas v State of New South Wales* [2006] NSWSC 380, McClelland CJ at Common Law held that service of an affidavit attaching an advice of counsel, which in turn referred to certain medical reports, waived privilege in the medical reports because they influenced the content of the advice (at [17]). The same principle was applied by Young J in *AWB Ltd v Cole* [2006] FCA 1234 at [168]-[178] in holding that disclosure of the substance of legal advice impliedly waived privilege over associated material as the publication of the legal advice was inconsistent with the maintenance of confidentiality over such material which underpinned the advice.

- (12) The judge hearing the privilege argument is entitled to inspect the documents for which privilege is claimed in order to consider whether such documents may have influenced the content of the report (see eg. *Integral Energy Australia v EDS (Australia) Pty Ltd* [2006] NSWSC 971) but there are limits to whether this is a useful exercise. It is impossible, as a matter of practice, and inappropriate, as a matter of principle, for a judge to approach that question in the same way as a party might wish to do so if preparing a cross-examination of the expert.

Justice White also took into account observations of Harper J in *Linter Group Ltd v Price Waterhouse* [1999] VSC 245 at [16]:

I accept for these purposes the sworn statement by Mr Sawyer that that opinion is a mere draft. As such it would only be of relevance to the first defendant if it could be shown that it differed from Mr Spencer's witness statement, *not because Mr Spencer had had a genuine change of opinion but because he was motivated by a desire simply to improve the plaintiffs' case*. Such would of course be entirely improper; but an expert is surely permitted, indeed to be encouraged, to change his or her mind, if a change of mind is warranted ... *experts should not be inhibited by fear of exposure of a draft from changing their minds when such change is warranted by the material then before the expert*.

- (13) The question is not merely whether it could be said that the privileged materials were used in such a way that they could be said to influence the content of the report, *but whether it could be said that they influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials*, such as, where it would be unfair for the party to rely on the report without disclosure of those materials. Where an expert's report is submitted to a party's legal advisers so as to be put into a form which will ensure that it is admissible, it can be said that the privileged communications between the expert and the lawyers have influenced the content of the report, in the sense of its form, although not in the sense of the formulation of the substantive opinions expressed by the expert. Likewise, privileged communications between an expert and the party's lawyers whereby material information is provided to the

expert in the form of assumptions or documents may well influence the content of the report. However, an expert's report is required to state what material and assumptions are relied on. Use of a final report, which refers to such materials and assumptions, is not inconsistent with maintaining confidentiality in the communications which produced the final product.

Having considered the documents in respect of which privilege is claimed, Justice White did not consider that it could be said that they influenced the content of the final report in such a way that the service or use of the report would be inconsistent with maintaining confidentiality in the privileged materials.

***ML Ubase Holdings Co Limited v Trigem Computer Inc* [2007] NSWSC 859**

Several months after judgment in *New Cap Reinsurance* decision, Brereton J delivered judgment in *ML Ubase Holdings Co Limited v Trigem Computer Inc* [2007] NSWSC 859. It appears that the decision of White J in *New Cap Reinsurance* decision was not drawn to the attention of Brereton J.

The two judgments are not entirely consistent.

In the course of his final judgment in *ML Ubase Holdings*, Brereton J set out his reasons for upholding a claim of privilege raised during the hearing in respect of documents produced on subpoena by the party who had briefed an expert witness. The relevant documents comprised email correspondence between the party's solicitor and the expert and also the draft witness statements of the expert. The solicitor deposed that those documents comprised his privileged communications as solicitor with the expert witness, concerning the content of his affidavit and the settling of that affidavit.

It is important to note that the solicitor's evidence was not challenged or contradicted.

His Honour pointed out that the party claiming privilege bears the onus of establishing the basis of the claim, but once that claim is established, the onus of proving that privilege has been lost by waiver shifts to the party who asserts that there has been a waiver.

Brereton J refused access to the draft reports and the correspondence, concluding that the documents were the subject of client legal privilege under section 119 of the *Evidence Act 1995*. They were confidential communications between the solicitor for a party, and the expert witness for the dominant purpose of the party being provided with professional legal services relating to the proceedings. He then held that the applicant had not discharged the onus of establishing that that privilege had been waived under the *Evidence Act*.

Brereton J referred to "the not infrequently heard proposition that once an expert's report is tendered, everything the expert has been given or has considered becomes admissible." He stated "... *that in my opinion is not the law now, if it ever was.*"

He noted that service of an expert's report does not, without more, disclose the substance of the contents of the letter of instructions. It is not the law that invariably once an expert report becomes evidence all the documents giving rise to its creation are or should be available for inspection (citing with approval *Tirango Nominees Pty Ltd v Dairy Vale Foods Ltd* (1998) 156 ALR 364, per Mansfield J at 368).

In respect of waiver of privilege for associated documents, Brereton J referred to the test in s 126 of the *Evidence Act*, that the waiver of privilege which occurs when an expert report is served extends to an associated document where that document "is reasonably necessary to enable a proper understanding of the [expert report]" (*Towney v Minister for Land and Water Conservation for New South Wales* (1997) 147 ALR 402, per Sackville J). Brereton J agreed with Sackville J that s 126 could not be read as simply incorporating the common law test in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475, (at 413). However, the expression in s. 126 – "proper understanding" – was by no means a narrow one, and includes a "complete or thorough understanding or appreciation of the character, significance or implications of that document."

Brereton J concluded:

"[45] ... In my opinion, service and tender of an expert witness' report in proceedings does not constitute a waiver of the privilege which attaches to communications between the expert and the solicitors who instructed him or her, save to the extent that those communications are associated documents reasonably necessary to an understanding of the report. "Proper understanding" of a document or communication will sometimes, but not always require that documents to which it responds or refers be available. It may very likely be so when the primary document contains a summary or excerpt from an earlier communication, or responds to questions which are not themselves restated in it. But I do not accept that "a proper understanding of the communication or document" involves an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. The test is concerned with the *comprehensibility* of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary."

[46] Accordingly, for the purposes of s 126, one starts by looking at the substantive document (made admissible under s 122 or another of the applicable sections) and asking whether, in order to understand it thoroughly, it is necessary to know what is in the associated material."

The judgment of White J in *New Cap Reinsurance* was cited with apparent approval by Campbell JA in *Ingot Capital v Macquarie Equity* [2008] NSWSC 25 at [19].

In *Cadbury Schweppes Pty Limited v Darrell Lea Chocolate Shops Pty Limited* [2008] FCA 323, both *New Cap Reinsurance* and *ML Ubase Holdings* were cited with

approval by Heery J in the Federal Court. His Honour considered a claim of legal professional privilege raised in relation to a subpoena served on an expert witness. The subpoena sought the production of documents recording communications between the expert and the instructing solicitors.

Heery J upheld the claim of privilege, stating:

“[3] There is a clear line of authority which establishes that draft documents and other communications of a like nature with an expert witness proposed to be called in litigation are privileged under s 119(b) whatever may have been the position at common law: *Natuna Pty Limited v Cook* [2006] NSWSC 1367; *New Cap Reinsurance Corporation Limited (in liq)* [2007] NSWSC 258; and *ML Ubase Holdings Co Limited v Trigem Computer Inc* [2007] NSWSC 859.

He cited with approval the statement of principle by Brereton J in *ML Ubase Holdings* (ibid, at [45]).

***Artistic Builders Pty Ltd v Nash and Ors* [2009] NSWSC 102**

In *Artistic Builders Pty Ltd v Nash and Ors* [2009] NSWSC 102 Hoeben J determined questions of waiver of privilege under section 122 in its recently amended form. His Honour’s judgment appears to be the first local decision in which the amended form of the section has been considered.

The relevant applications were not for access to the contents of communications between lawyers and retained experts. However, the decision is useful because it indicates what is necessary to show that a party has act “inconsistently” in respect of confidential communications, thereby waiving privilege.

As expected, the effect of the amendment of section 122 was to align the provision more closely with the common law test for loss of privilege as set out in *Mann v Carnell* (1999) 201 CLR 1. The critical test of “inconsistency” focuses on the litigation conduct of the party, not upon “intention” – presumed or actual.

## APPLICATION TO CLASSES OF DOCUMENTS

- (1) To the extent that retainer documents merely set out the terms and conditions under which the expert is retained, or arrangements for conferences or court attendances, privilege can be claimed, although the information in them is of little forensic significance. To the extent that such documents contain information on which any opinion is based, they are not privileged.
- (2) Draft reports *sent to and retained by the retaining solicitor* by any expert for the dominant purpose of them being considered and commented upon by that solicitor are privileged. Copies of draft reports *retained by the expert*, if created by the expert for the dominant purpose of being used in connection with the anticipated comments by the solicitor, or as a record of the process of obtaining those comments, should be treated as privileged. The expert may be required to confirm this dominant purpose on oath, if the claim of privilege is contested.
- (3) As for *working papers* created by any expert in the course of preparing a report, instructions need to be taken from the expert as to the dominant purpose of their creation. If working papers were brought into existence for the dominant purpose of submission to the solicitor for consideration and comment they are privileged. Generally working papers will have been created for the dominant purpose of enabling the expert to form or justify an opinion, not for the purpose of submission to a lawyer. However, it is possible that during preparation of a report an expert might create, for example, a set of "discussion points" to be raised with the solicitor. Such a list would normally be privileged.
- (4) Documents containing the solicitor's instructions to any expert in relation to *draft reports*, and documents containing requests by any expert for such instructions in relation to *draft reports* will usually be privileged. There is a distinction between communications concerning the form and content of a draft report (that is, "discussion documents" relating to or involving a critique, discussion or analysis of the report) and instructions as to the facts which the expert should assume to be true. Documents containing the latter information – which I have described as "factual foundation documents" – and copies of those documents, are not privileged and will normally be disclosed by the expert under the Code of Conduct.
- (5) In relation to *waiver of privilege*, service of a witness statement/expert report waives privilege in that statement/report. But that waiver does not necessarily result in implied waiver of all associated documents. The mere fact that an expert has referred to another document (such as a communication with the solicitor) in an expert report does not waive privilege in that other

document/communication. For privilege to have been waived there must *at least* be reference in the served report to the *contents* of the other document and *reliance* upon the contents of the other document.

- (6) Implied waiver of privilege in an associated document will occur by reason of service of the final report under the *Evidence Act*, if its production is reasonably necessary to enable the other party to gain a proper understanding of the report if a claim of privilege in respect of that document would be "unfair" by reason of an inconsistency between relying on the report whilst maintaining the privilege in the associated documents.
- (7) A judge may look at documents in order to form a view whether or not its production is reasonably necessary to enable the other party to gain a proper understanding of the report.
- (8) The mere fact that a document (for example, containing a solicitor's comments on a draft report) may have influenced the expert in forming the opinion expressed in the final report, even inducing the expert to change his or her opinion, does not mean that privilege in that other document has been waived. It is proper and even desirable for an expert's opinions to be challenged and for an expert to change his or her opinion to reach a final, honestly held view. However, if the contents of a document are relied upon for the purpose of *forming a step in the reasoning or enabling the expert to form an opinion in the report*, it would be normally be inconsistent with the service of the report, or unfair, not to disclose the associated document. I think this would often mean that "third party documents", that is communications with other experts and third parties, would require disclosure.
- (9) The expert's statement under the UCPR identifying the documents upon which he or she has relied for the purpose of forming an opinion will often identify documents in respect of which privilege may be been waived by service of the report. An expert will normally waive privilege in a privileged associated document if the contents of the associated document are disclosed and the expert is shown to have relied upon those contents.
- (10) The party claiming privilege has the onus of showing that privilege attaches to documents. A party claiming that privilege has been waived has the onus of proving the waiver.

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