Federal Court of Australia

Australian Securities and Investments Commission v RI Advice Group Pty Ltd [2020] FCA 1277

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| File number(s): |  |
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| Judgment of: | **O'CALLAGHAN J** |
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| Date of judgment: | 4 September 2020 |
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| Catchwords: | **PRIVILEGE** – application for ruling under s 192A(b) of the *Evidence Act 1995* (Cth) – whether s 118 of that Act prevents plaintiff from adducing document at trial – document previously produced to plaintiff by defendant in response to notices under s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth)**EVIDENCE** – whether dominant purpose of providing legal advice proven – persons involved in creation of relevant document not called to give evidence – evidence in support of privilege given by solicitor retained after creation of relevant document  |
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| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) s 33*Corporations Act 2001* (Cth) ss 916A, 961B, 961G, 961H, 961J, 961L*Evidence Act 1995* (Cth) ss 118, 122, 122(2), 122(3)(a), 192A, 192A(b)*Federal Court of Australia Act 1976* (Cth) s 37M |
|  |  |
| Cases cited: | *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)* [2014] FCA 796*Attorney-General (NSW) v Melco Resorts & Entertainment Ltd* [2020] NSWCA 40*Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd* [2017] FCA 324*Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303*Friday v Minister for Primary Industry and Resources* [2020] FCA 984*Hancock v Rinehart* *(Privilege)* [2016] NSWSC 12*Martin v Norton Rose Fulbright Australia* [2019] FCA 1101*Perry v Powercor Australia Ltd* [2011] VSC 308*Powercor Australia Ltd v Perry* (2011) 33 VR 548*Seven Network Ltd v News Ltd* [2005] FCA 142*Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 1070*Quach v MLC Life Ltd (No 2)* [2019] FCA 1322 |
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| Division: | General Division |
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| Registry: | Victoria |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: |  |
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| Number of paragraphs: | 68 |
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| Date of hearing: | 10, 11 August 2020  |
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| Counsel for the Plaintiff: | Ms CM Kenny QC with Mr DJ Snyder and Mr GB Ayres |
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| Counsel for the First Defendant: | Dr CO Parkinson with Mr T Barry |
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| Solicitor for the First Defendant: | Gilbert + Tobin |
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| Counsel for the Second Defendant: | Mr L Young of Liam Young Legal |

ORDERS

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|  | VID 1170 of 2019 |
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| BETWEEN: | AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSIONPlaintiff |
| AND: | RI ADVICE GROUP PTY LTD (ACN 001 774 125)First DefendantJOHN DOYLESecond Defendant |

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| order made by: | O'CALLAGHAN J |
| DATE OF ORDER: | 4 September 2020 |

THE COURT ORDERS THAT:

1. Pursuant to s 192A(b) of the *Evidence Act 1995* (Cth), s 118 of that Act does not operate to prevent the following documents from being adduced in evidence at the hearing of this proceeding: documents bearing barcodes RIA.001.001.0965, ANZ.802.215.0403, ANZ.802.215.4951, ANZ.801.629.9250, DOY.0011.0004.0171, DOY.0011.0004.
0359 and DOY.0011.0004.0851; and Exhibit DJW-8 to the witness statement of Darren John Whereat dated 5 April 2018 as provided to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry.
2. The first defendant pay the costs of the application.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

O’CALLAGHAN J:

## Introduction

1. I have before me an application by the Australian Securities and Investments Commission (**ASIC**) for a ruling under s 192A(b) of the *Evidence Act 1995* (Cth) (**Evidence Act**) that s 118 of that Act does not operate to prevent various copies of a document called “the Third File Review” from being adduced in evidence at the hearing of this proceeding, set down for trial before Moshinsky J in March next year.
2. The Third File Review was created by the first defendant (**RI**). The relevant copies are documents numbered RIA.001.001.0965, ANZ.802.215.0403, ANZ.802.215.4951, ANZ.801
.629.9250, DOY.0011.0004.0171, DOY.0011.0004.0359 and DOY.0011.0004.0851, in addition to Exhibit DJW-8 to the witness statement of Mr Darren Whereat dated 5 April 2018, which was provided to the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry conducted by the Honourable KM Hayne AC QC (the **Royal Commission**).
3. Section 192A(b) of the Evidence Act relevantly provides that “[w]here a question arises in any proceedings, being a question about: … (b) the operation of a provision of this Act … in relation to evidence proposed to be adduced … the court may, if it considers it to be appropriate to do so, give a ruling or make a finding in relation to the question before the evidence is adduced in the proceedings”.
4. Section 118 of the Evidence Act provides:

**118 Legal advice**

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 made between the client and a lawyer; or

(b) a confidential communication made between 2 or more lawyers acting for the client; or

(c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;

for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

1. Whether the court should give a ruling under s 192A is discretionary, primarily involving considerations of case management: see generally *Australian Securities and Investments Commission, in the matter of Whitebox Trading Pty Ltd v Whitebox Trading Pty Ltd* [2017] FCA 324 at [20]-[29] (Gleeson J) and the authorities there cited.
2. The parties agreed that the giving of a ruling in this case would be consistent with case management principles, including s 37M of the *Federal Court of Australia Act 1976* (Cth). It is obvious that a ruling on the question will inevitably be required. It is self-evidently in the interests of the administration of justice that the ruling should thus be made sooner, not later.
3. It was also common ground that the question that arises (whether or not the Third File Review is inadmissible because it is subject to a valid claim to legal professional privilege) falls to be determined under the Evidence Act, not under the common law, because the question is whether it may be adduced in evidence at trial: see, eg, *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 54-55 [3] (Gleeson CJ, Gaudron and Gummow JJ).
4. The facts involve some unusual features. A version of the Third File Review (with the names of clients redacted to protect their confidentiality) was produced to the Royal Commission, without any claim to privilege, in April 2018 by Australia and New Zealand Banking Group Limited (**ANZ**), then RI’s parent company. That version was produced as Exhibit DJW-8 to the witness statement of Mr Whereat, which Mr Whereat provided to the Royal Commission in his capacity as ANZ’s General Manager of Aligned Licensees and Advice Standards. (RI was at that time an “Aligned Licensee” of ANZ.) It is still available on the Royal Commission’s website. ASIC also retains various other copies of the Third File Review, including because RI and ANZ produced copies of it, without objection, in response to notices to produce issued by ASIC. Further, ASIC has since briefed a compliance and accounting expert with a copy. She has expressed opinions based on it in a report, which has been filed in the proceeding.
5. The only material adduced by RI in support of its claim to privilege is hearsay and opinion evidence given by RI’s current solicitor, who was not RI’s solicitor at the relevant time (when the document was created). No explanation has been given, either by that solicitor or by anyone else, why RI’s current CEO, who was closely involved in the process that led to the creation of the Third File Review, was not called to say first-hand what the solicitor says second-hand. In my view, the evidence adduced on behalf of RI is insufficient to establish that the Third File Review was created for the dominant purpose of it receiving legal advice.
6. In any event, even if the evidence were sufficient, and I were satisfied that the Third File Review was created for the dominant purpose of RI receiving legal advice, by producing to ASIC four copies of it, without objection, in response to a notice to produce served by ASIC in November 2018, RI acted in a way that was inconsistent with its present objection to ASIC adducing the document in this proceeding (within the meaning of s 122(2) of the Evidence Act). Any privilege in it is therefore lost.
7. ASIC advanced a number of other grounds as to why privilege had been waived over the Third File Review by reference to other factual matters, but it is not necessary to deal with those other matters, or what the parties said about them.

## The proceeding and relevant facts

1. Until 30 September 2018, RI was a wholly-owned subsidiary of ANZ. Since that time, RI has been a wholly-owned subsidiary of IOOF Holdings Limited (**IOOF**).
2. RI is a financial services licensee and carries on a financial services business within the meaning of the *Corporations Act 2001* (Cth) (the **Corporations Act**).
3. The second defendant (**Mr Doyle**) engaged in providing financial product advice for the purposes of the Corporations Act.
4. Between May 2013 and June 2016, Mr Doyle was an authorised representative of RI within the meaning of s 916A of the Corporations Act, and thereby provided financial product advice on its behalf.
5. On 8 June 2016, ASIC issued to RI a notice to produce documents under s 33 of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**). The covering letter for the notice, which was addressed to Mr Darren Williams of ANZ, stated that ASIC would accept a valid claim of legal professional privilege as a reasonable excuse not to produce documents under the notice. The covering letter also said that “ASIC may accept, on a confidential basis, privileged information (or information that is claimed to be privileged) voluntarily. The terms on which ASIC may elect to accept such information are set out in ASIC’s standard agreement … a full copy of which is available from ASIC’s website”.
6. On 17 June 2016, Mr Williams produced the documents sought by ASIC, including a copy of the Third File Review, by attaching them to an email to Ms Phoebe Schafer of ASIC. The text of Mr Williams’ email included the following statements:

RI Advice Group Pty Ltd (‘RI Advice’) provides the enclosed documents to ASIC on a confidential basis in order to assist ASIC in the conduct of its investigations. RI Advice has sought to provide the Third File Review to ASIC in a manner which is consistent with the maintenance of legal professional privilege. The provision of documents to ASIC in response to the Notice is not a waiver of any legal professional privilege existing at the time of disclosure.

We understand, to the extent permitted by law and regulatory requirements, that ASIC will keep the contents of this letter and RI Advice’s response to the Notice confidential. If ASIC considers it necessary to disclose any part of this email (including its attachments) or the Notice to comply with any law, we request that reasonable notice be given to RI Advice prior to disclosure.

1. Later that day, Ms Schafer replied to Mr Williams in an email that said “Thank you [Mr Williams.] All documents received”.
2. After ASIC commenced a formal investigation into Mr Doyle and later RI, ANZ and RI produced to ASIC (among other documents) seven further copies of the Third File Review pursuant to notices issued by ASIC under s 33 of the ASIC Act.
3. ANZ produced documents now numbered ANZ.802.215.0403 and ANZ.802.215.4951 on 8 November 2019 in response to a notice to produce dated 23 November 2018, and ANZ.801.629.9250 on 22 May 2019 in response to a notice to produce dated 14 May 2019.
4. On 13 December 2018, RI produced the document now numbered RIA.001.001.0965 in response to a notice to produce dated 23 November 2018. Three other copies were produced by RI on 25 January 2019 in response to the same notice. Those copies are now numbered DOY.0011.0004.0171, DOY.0011.0004.0359 and DOY.0011.0004.0851. No claim to privilege (or confidentiality) was made in respect of any of these copies of the Third File Review. The documents RI produced on 13 December 2018 were not accompanied by a schedule identifying privileged documents. The documents produced on 25 January 2019 were accompanied by such a schedule, but it did not identify the Third File Review as privileged.
5. ANZ and RI also produced certain versions of the Third File Review within a larger “embedded document”. However, Mr Nicholas Kelton of ASIC deposed to technical difficulties in accessing these versions, and ASIC did not seek a ruling on their admissibility.
6. Before the commencement of this proceeding, ASIC briefed a compliance and accounting expert with the Third File Review. She relied on it, and has expressed opinions based on it, in a report of over 130 pages that ASIC has now filed.
7. On 31 October 2019, ASIC commenced this proceeding by way of an originating process and a concise statement, alleging that during the period in which Mr Doyle was an authorised representative of RI he engaged in conduct in contravention of ss 961B, 961G, 961H and 961J of the Corporations Act (collectively, **Best Interests Obligations**), and that RI contravened s 961L of the Corporations Act by failing to take reasonable steps to ensure that Mr Doyle complied with the Best Interests Obligations.
8. ASIC’s concise statement alleged that RI had conducted an initial review of Mr Doyle’s files in February 2015, a second review in June 2015, and a third later in 2015, each of which identified similar problems.
9. On 5 December 2019, Moshinsky J ordered that ASIC provide the defendants with all documents obtained by it during its investigation into the defendants which resulted in the bringing of this proceeding, including documents obtained pursuant to notices issued under the ASIC Act.
10. Eight days later, in compliance with that order, ASIC produced to the defendants the copies of the Third File Review in issue here.
11. On 20 December 2019, pursuant to the court’s orders, ASIC filed and served a statement of claim to take the place of the concise statement.
12. ASIC alleges in its statement of claim, as it alleged in its concise statement, that RI undertook a number of reviews of Mr Doyle’s files, including relevantly for present purposes, the Third File Review (in late July 2015).
13. ASIC alleges that each of the three reviews identified significant problems. In part because of those findings, ASIC alleges that, at various points in time, RI knew or ought to have known that there was a substantial risk that Mr Doyle was not complying with one or more of the Best Interests Obligations and that, in contravention of s 961L, RI did not take reasonable steps to address that risk and thereby to ensure that Mr Doyle complied with the Best Interest Obligations.
14. RI alleges in its defence filed and served on 6 March 2020 that the Third File Review is subject to legal professional privilege. RI says that, if its privilege claim is upheld, ASIC would have “contaminated” its compliance and accounting expert, so that she would then be unable to give evidence.
15. ANZ took no part in the hearing of this application, having informed ASIC that it did not consider that it had an interest in it. A solicitor appeared on behalf of Mr Doyle, but he played no part in the hearing of the application.

## RI’s evidence on this application

1. RI relies on two affidavits, each sworn by Ms Janet Whiting, a partner of Gilbert + Tobin. That firm has acted for RI since October 2019.
2. In her first affidavit, Ms Whiting relevantly deposed:

2. I make this affidavit from my own knowledge, and from an examination of the records of, or documents otherwise in the possession of RI, except where otherwise stated. Where I depose to matters based on information and belief, I believe those matters to be true.

…

22. The Third File Review was created in or around July 2015 as one result of a course of investigations by RI into Doyle.

23. At all times relevant to this investigation RI was a subsidiary of ANZ.

24. As this was before RI came to be owned by IOOF, and before my firm began acting on this matter, I have reviewed the materials produced to ASIC and taken instructions in order to understand the circumstances of the creation of the Third File Review.

25. The Third File Review was prepared pursuant to the Shared Services Arrangements with both RI and ANZ personnel involved, and in particular Ms Melinda Toomey, Senior Lawyer of ANZ. I understand that Ms Toomey departed ANZ in or around February 2018.

26. On 8 April 2020, following:

(a) the filing of RI’s defence on 6 March 2020, in which RI asserted its claim of legal professional privilege over the Third File Review; and

(b) receipt [of] a letter from ASIC dated 10 March 2020 seeking an explanation of the basis on which privilege was claimed by RI over the Third File Review,

I caused to be sent to ASIC a letter setting out what I had established of the circumstances of the creation of the Third File Review (8 April Letter).

1. The 8 April letter relevantly stated:

5. For ease of reference, and in order to demonstrate the privileged purpose for which the Privileged Documents were created, a summary of some relevant correspondence is set out below:

(a) On 14 July 2015, Melinda Toomey (Senior Lawyer, Corporate & Advice, ANZ) sent a confidential communication to Peter Ornsby (Senior National Manager – Advice & Operations, RI) (copying others) requesting a review of certain client files, for the dominant purpose of Ms Toomey providing legal advice in relation to Mr Doyle’s conduct and / or advice. The subject of the email was ‘Confidential and subject to legal professional privilege: Carringtons’, and contained various instructions by Ms Toomey to ensure that the privilege of all related correspondence was maintained.

(b) On 15 July 2015, Craig Davis (Manager – Advice Assurance, Northern, ANZ Global Wealth) sent an email to Ms Toomey (coping Lou Auditore (Advice Assurance Officer – Advice and Distribution / Advice Delivery / Advice Assurance, ANZ)) in response to the privileged communication referred to in paragraph (a) above. The subject of the email was marked ‘confidential and subject to legal professional privilege’.

(c) Later on 15 July 2015, Ms Toomey sent an email to Mr Davis and Mr Auditore (copying others) in response to the privileged communication referred to in paragraph (b) above, and asked Mr Auditore to familiarise himself with her instructions relating to the maintenance of legal professional privilege over all related correspondence. The subject of the email was marked ‘confidential and subject to legal professional privilege’.

(d) On 28 July 2015, Mr Auditore sent an email to Ms Toomey (copying others) in response to the privileged communication referred to in paragraph (c) above, providing a spreadsheet of his findings in response to Ms Toomey’s privileged request of 14 July 2015 (see paragraph (a) above). The subject of the email was marked ‘confidential and subject to legal professional privilege’.

(e) On 29 July 2015, Amanda Rockliff (Head of Advice Risk and Compliance, ANZ Global Wealth) forwarded the privileged communication referred to in paragraph (d) above, to Mr Davis (as he was not included in Mr Auditor[e]’s earlier email). The subject of the email was marked “confidential and subject to legal professional privilege”.

(f) The privileged spreadsheet prepared by Mr Auditore (see paragraph (d) above) in response to Ms Toomey’s privileged request (see paragraph (a) above) was subsequently consolidated into a combined spreadsheet, also incorporating the results of reviews conducted by RI in February and June 2015. This consolidated document was circulated on numerous occasions within ANZ between 30 July 2015 and 7 August 2015.

(g) On 24 August 2015, Ms Rockliff sent an email to Melinda Huggins (Acting Head of Advice Capability & Assurance, ANZ Wealth) attaching a copy of the combined spreadsheet referred to in paragraph (f) above. Ms Rockliff’s email refers, on 4 occasions, to the role of ANZ’s legal team in connection with the review and monitoring of Mr Doyle’s advice and / or conduct more generally.

(h) On 31 August 2015, Darren Whereat (Chief Executive Officer, RI) sent a letter to ASIC notifying it of a potential significant breach under s 912D Corporations Act 2001, arising from the conduct of Mr Doyle. The notice referred to previous reviews performed by RI, as part of its monitoring program, in relation to Doyle conduct. The letter referred to a ‘Third File Review’ conducted on 28 July 2015 which, inter alia, identified issues consistent with previous reviews performed by RI.

6. The above chronology illustrates clearly the Document was created, at the request of Ms Toomey, for the dominant purpose of her providing legal advice in connection with Mr Doyle’s conduct and / or advice, while he was an authorised representative of RI. The Document is therefore subject to a valid claim of legal professional privilege.

7. In addition, the further related correspondence summarised above, being the Privileged Documents (among others), were created for the dominant purpose of obtaining and / or providing legal advice in connection with the preparation of the Document, or otherwise in relation to monitoring of Mr Doyle’s conduct and / or advice while he was an authorised representative of RI. These Privileged Documents are therefore also subject to valid claims of legal professional privilege.

1. Ms Whiting’s first affidavit continued:

27. Paragraph 5 of the 8 April Letter sets out a chronology of facts and circumstances behind the creation of the Third File Review. I refer to and adopt the facts set out in paragraph 5 of the 8 April Letter.

28. In particular, I note, and believe, that:

(a) The Third File Review was requested by Ms Melinda Toomey in accordance with the Shared Services Arrangements;

(b) Ms Toomey requested the Third File Review in a communication, marked as confidential and privileged, which set out instructions for ensuring privilege was maintained and was sent to, amongst others, legal and investigations staff operating for the service of both RI and ANZ;

(c) Ms Toomey asked Mr Lou Auditore, Advice Assurance Officer, ANZ, in further email correspondence, which was also marked as confidential and privileged, to familiarise himself with her instructions related to maintaining privilege;

(d) Mr Auditore responded to Ms Toomey and others, again under cover of a communication marked confidential and privileged, attaching a document which was incorporated into the Third File Review;

(e) Ms Amanda Rockliff (Head of Advice Risk and Compliance, ANZ Global Wealth) sent an email to Melinda Huggins (Acting Head of Advice Capability & Assurance, ANZ Wealth) attaching a copy of the combined spreadsheet. Ms Rockliff’s email referred, on 4 occasions, to the role of ANZ’s legal team in connection with the review and monitoring of Doyle’s advice and / or conduct more generally;

(f) Mr Darren Whereat (Chief Executive Officer, RI) then sent a letter to ASIC on the conduct of Mr Doyle. The letter referred to, but did not attach, a ‘Third File Review’ conducted on 28 July 2015 which, inter alia, identified issues consistent with previous reviews performed by RI.

29. Based on the review of the documents, including those detailed above, together with the claims of privilege over the document made by RI as deposed to in this affidavit, the Third File Review was prepared for the sole purpose of legal advice, and was subject to legal professional privilege when created.

1. Ms Whiting’s second affidavit added this:

5. In providing legal advice to RI generally, and in preparing RI’s evidence in relation to the ASIC’s interlocutory application, I have spoken to several persons employed or authorised by RI (RI Personnel). These include:

(a) Brenda Cooke: Ms Cooke is a lawyer employed as Head of Legal – Corporate & Advice by IOOF Holdings Ltd, the holding company of RI (IOOF);

(b) Peter Ornsby: Mr Ornsby is Chief Executive Officer at RI.

## Legal principles

1. There was no dispute between the parties about the applicable legal principles in relation to legal professional privilege generally, and, in the view I take, no issue arises here about their application. So it is unnecessary to burden these reasons with a recitation of those well-known principles.
2. It is, however, necessary to say something about principles governing the question of proof.
3. Where there is no direct evidence of the dominant purpose of a document from the person who requested or commissioned it, the court is entitled more readily to infer that the information it contains was required for multiple purposes. As Robson J said in *Perry v Powercor Australia Ltd* [2011] VSC 308 at [72]:

The failure of the CEO to give evidence was not explained. I assume that the CEO at the time was Mr Shane Breheny who also prepared a witness statement for the Royal Commission. There was no suggestion that he was not available to give evidence by affidavit [or] otherwise. He instructed Ms Rands to carry out the investigation which was likely to involve her obtaining information from experts. I can only infer what his purposes were in obtaining the report. His failure to give evidence in circumstances where it is central to the establishment of the privilege does give rise to the inference that his evidence would not have assisted Powercor’s claim to privilege. As has been discussed, the plaintiffs seek to draw the inferences from the evidence that Powercor needed the information for multiple purposes and that legal advice from Ms Rands was not the dominant purpose. As the CEO failed to give evidence to rebut those inferences, the court is entitled to more readily draw those inferences [citing *Jones v Dunkel* (1959) 101 CLR 298].

1. That passage was approved on appeal in *Powercor Australia Ltd v Perry* (2011) 33 VR 548 at 553-554 [22] (Warren CJ, Nettle and Tate JJA) (“… given that the applicant bore the burden of establishing that the preparation of legal advice was the dominant purpose for which the Rands Reports were commissioned; and that, on the evidence, it was the CEO who directed Ms Rands to commission those reports, the purpose of the CEO was plainly of considerable importance. In those circumstances, the applicant’s failure to call the CEO … was bound to be regarded as significant”, citing *Payne v Parker* [1976] 1 NSWLR 191 at 201-202 (Glass JA); *Davies v Pyke* (2004) 10 VR 339 at 344 [16] (Buchanan JA)).
2. Brereton J emphasised the need for a party claiming privilege to do so by admissible direct evidence, not hearsay, in *Hancock v Rinehart* *(Privilege)* [2016] NSWSC 12 at [7], as follows:

To sustain a claim of privilege, the claimant must not merely assert it; but must prove the facts that establish that it is properly made. Thus a mere sworn assertion that the documents are privileged does not suffice, because it is an inadmissible assertion of law; the claimant must set out the facts from which the court can see that the assertion is rightly made, or in other words ‘expose … facts from which the [court] would have been able to make an informed decision as to whether the claim was supportable’. The evidence must reveal the relevant characteristics of each document in respect of which privilege is claimed, and must do so by admissible direct evidence, not hearsay.

(Footnotes omitted.)

1. That passage has been cited with approval in *Martin v Norton Rose Fulbright Australia* [2019] FCA 1101 at [54], [63] (White J); *Quach v MLC Life Ltd (No 2)* [2019] FCA 1322 at [8] (Griffiths J); *Friday v Minister for Primary Industry and Resources* [2020] FCA 984 at [24] (SC Derrington J); and *Attorney-General (NSW) v Melco Resorts & Entertainment Ltd* [2020] NSWCA 40 at [76] (Bathurst CJ, Bell P and Gleeson JA) (“any claim for privilege on the company’s behalf would generally have to have been made or supported by evidence on oath, which obviously requires an authorised officer of the company to give evidence in support of the claim: see *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 at [7] and [27] as to the need for claims of privilege to be supported by evidence on oath ‘so that the court can determine their sufficiency’”).
2. In *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No 4)* [2014] FCA 796 at [47]-[48], Beach J said this about the adequacy of the evidence in support of the application for privilege before him in that case:

[The senior associate at Corrs who swore the relevant affidavit] has no direct knowledge of the purpose for the creation of the various communications. He is at best several steps removed from the authors of the communications. First, Corrs were not the solicitors acting in the Transaction. Corrs are the solicitors now acting in this proceeding. Second, [he] cannot directly speak to the direct knowledge of Asahi in relation to the purpose for these communications. Third, he cannot directly speak to the direct knowledge of any of the third party advisers in relation to the purpose for the communications to which they were parties.

There are two aspects to his evidence which are said to support the privilege claims. First, [he] has reviewed the Documents and expressed views based on such a review. I do not consider that such analysis carries great probative value, particularly when one considers the more direct evidence that could have been given.

## RI has not proved its claim to privilege

1. ASIC submits that RI’s evidence is “wholly inadequate to establish that the Third File Review was subject to [legal professional privilege] when it was created”.
2. I agree.
3. Although Ms Whiting deposes that she has “reviewed the materials produced to ASIC and taken instructions in order to understand the circumstances of the creation of the Third File Review”, as ASIC submitted, she does not say from whom she received those instructions; whether or not they came from a person who was involved in the document’s creation; or what their content was.
4. It is obvious that Mr Peter Ornsby, RI’s current CEO, could give direct evidence of the circumstances in which the Third File Review was created. The 8 April letter asserts that on 14 July 2015, Ms Melinda Toomey (Senior Lawyer, Corporate & Advice, ANZ) sent a confidential communication to Mr Ornsby (then Senior National Manager – Advice & Operations, RI) (and copied to other unspecified people) requesting a review of certain client files. The inference that Mr Ornsby was thus closely involved in the process that led to the creation of the Third File Review is irresistible.
5. We know that Ms Whiting received instructions from Mr Ornsby, because she deposes to that fact in her second affidavit. But she goes no further than making the Delphic observation that “[i]n providing legal advice to RI generally, and in preparing RI’s evidence in relation to [ASIC’s] interlocutory application, I have spoken to … [inter alios] … Mr Ornsby”. With respect, that entirely begs the question: spoken to him about what? The decision not to call the most obvious candidate to give direct evidence about the critical question remains wholly unexplained. In those circumstances, it is to be inferred that his evidence would not have assisted RI’s case.
6. Ms Whiting’s evidence goes no further than deposing to her review of the documents and her summary of them in the 8 April letter. None of the documents referred to in that letter is produced or further explained.
7. Further, the precise role played by the in-house lawyer at ANZ (Ms Toomey) who requested the third review of Mr Doyle’s files is unclear, despite this being a matter that is important to the dominant purpose inquiry: see, eg, *Seven Network Ltd v News Ltd* [2005] FCA 142 at [4]-[5] (Tamberlin J).
8. For those reasons, it is not possible to determine the accuracy of Ms Whiting’s belief that “[b]ased on the review of the documents, including those detailed above, together with the claims of privilege over the document made by RI as deposed to in this affidavit, the Third File Review was prepared for the sole purpose of legal advice, and was subject to legal professional privilege when created”.
9. Accordingly, I reject RI’s claim that the Third File Review was privileged at the time of its creation. Compare *Perry v Powercor Australia Ltd* [2011] VSC 308 at [72] (Robson J); *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 at [7] (Brereton J); *Attorney-General (NSW) v Melco Resorts & Entertainment Ltd* [2020] NSWCA 40 at [76] (Bathurst CJ, Bell P and Gleeson JA).
10. ASIC advanced a number of other reasons why RI had not met its onus of proof. Without intending any disrespect to counsel on both sides and their detailed and helpful submissions about those additional contentions, it is not necessary to deal with them.

## Waiver

1. It is also not necessary to deal with the waiver question, but in case it matters, I will deal with the most glaring example of waiver upon which ASIC relies: RI’s production of the Third File Review to ASIC in response to the November 2018 notice to produce.
2. Section 122 of the Evidence Act 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 118, 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) ...

1. RI submitted that s 122(3)(a) cannot apply to its production of the Third File Review to ASIC in response to the November 2018 notice. That is so, it was submitted, because information can only be “disclosed” to someone once (citing *Tim Barr Pty Ltd v Narui Gold Coast Pty Ltd* [2008] NSWSC 1070 at [19] (Barrett J)), and the Third File Review was first disclosed to ASIC in June 2016. ASIC disputed the correctness of that proposition as a matter of law. In any event, it is unnecessary for me to decide whether s 122(3)(a) applies because, as the parties agreed, a finding that the Third File Review was knowingly and voluntarily produced to ASIC in response to the November 2018 notice will also be a basis for waiver under s 122(2).
2. In my view, the production, without objection, by RI to ASIC of multiple copies of the Third File Review in response to ASIC’s November 2018 notice to produce is as clear a case of waiver as one could imagine, short of an express waiver.
3. RI contended to the contrary on two grounds.
4. First, it relied on Ms Whiting’s hearsay evidence in her second affidavit that, according to “relevant RI personnel”, the omission of a claim to privilege in respect of the Third File Review was made “inadvertently in error”.
5. Absent evidence about the precise instructions given regarding production to ASIC, who provided those instructions, and how the “inadvertence” occurred, I cannot accept this submission. Compare, by way of example only, the evidence adduced in respect of the inadvertent disclosure referred to in *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* (2013) 250 CLR 303 at 309-310 [8]-[10] (French CJ, Kiefel, Bell, Gageler and Keane JJ).
6. The spectre of inadvertence was also raised by evidence given in Ms Whiting’s first affidavit about the volume of documents produced in response to the notice to produce, but even assuming that mistakes are more likely to be made when vast numbers of documents are discovered, the numbers here were nothing out of the ordinary (89 documents in the first tranche of documents produced, one of which was a standalone copy of the Third File Review, and 1,174 in the second, three of which were standalone copies of the Third File Review).
7. RI’s second contention concerns the email sent by Mr Williams of ANZ to ASIC on 17 June 2016, by which RI produced a copy of the Third File Review and other documents in response to a compulsory notice from ASIC dated 8 June 2016. The email said that the documents were being provided “on a confidential basis”, that RI had “sought to provide the Third File Review to ASIC in a manner which is consistent with the maintenance of legal professional privilege”, and that the provision of the documents to ASIC was “not a waiver of any legal professional privilege existing at the time of disclosure”. Later on 17 June 2016, Ms Schafer of ASIC replied to Mr Williams’ email, saying “Thank you [Mr Williams.] All documents received”.
8. As best I understand it, RI says that any subsequent provision of any other copy of the Third File Review – even after Mr Whereat exhibited it to his Royal Commission witness statement (without any mention of a claim to privilege) and the documents were produced to ASIC (again absent any claim to privilege) – must be taken to be subject to the purported claim to privilege made in Mr Williams’ email two years before.
9. I reject that contention. Quite apart from anything else, it flies in the face of what ASIC had told RI about the basis upon which it would accept documents in response to the notice to produce. As ASIC submitted:

In acting as it did, RI apparently disregarded the process which ASIC had stipulated in the June 2016 Notice for seeking to produce documents on a confidential basis. The cover letter for the June 2016 Notice referred to the possibility that ASIC might accept, on a confidential basis, privileged information voluntarily from RI, on terms as set out in ASIC’s standard agreement entitled ‘Voluntary confidential LPP disclosure agreement’. That agreement contained detailed provisions as to the basis on which ASIC would elect to accept voluntary disclosure of allegedly privileged material, and was drafted on the basis that it would be formally executed and witnessed. In short, ASIC had communicated the basis on which it might agree to production of privileged documents and RI apparently decided to attempt to bypass this process.

(Footnotes omitted.)

1. But in any event, I am not satisfied there is any relevant connection between the production via ANZ of documents in response to the June 2016 notice and the production by RI in response to the November 2018 notice.

## Disposition

1. Although it was not explained to me why ASIC seeks an order relating to multiple copies of the Third File Review, that is no reason not to make the order in the terms it seeks. Whether it is ultimately necessary for more than one copy of it to be adduced in evidence will be a matter for the trial judge.
2. I will accordingly make the order sought by ASIC. RI must pay the costs of the application.

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| I certify that the preceding sixty-eight (68) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice O’Callaghan. |

Associate:

Dated: 4 September 2020