Federal Court of Australia

Roberts-Smith v Fairfax Media Publications Pty Limited (No 29) [2022] FCA 218

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| File numbers: | NSD 1485 of 2018NSD 1486 of 2018NSD 1487 of 2018 |
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| Judgment of: | **ABRAHAM J** |
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| Date of judgment: | 11 March 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for orders requiring the production of certain documents and for leave to inspect, uplift and copy those documents – legal professional privilege – waiver – issue waiver – whether the conduct of the respondents is inconsistent with the maintenance of privilege – privilege not waived over any associated material – application dismissed  |
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| Legislation: | *Evidence Act 1995* (Cth) ss 128, 133 |
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| Cases cited: | *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500*Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475*AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30*Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 341*Gartner v Carter* [2004] FCA 258*Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 *Legal Services Commission v JHW* [2012] SASCFC 47; (2012) 223 A Crim R 534*Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1*New South Wales v Betfair Pty Ltd*[2009] FCAFC 160;(2009) 180 FCR 543*Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275*Roberts-Smith v Fairfax Media Publications Pty Limited (No 23)* [2021] FCA 1460*Roberts-Smith v Fairfax Media Publications Pty Limited (No 25)* [2021] FCA 1558*Southern Equities Corporation Ltd (In liq) v Arthur Anderson & Co* (1997) 70 SASR 166*TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208*Verde Terra Pty Ltd v Central Coast Council (No 2)* [2020] NSWLEC 10 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 53 |
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| Date of hearing: | 4 March 2022  |
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| Counsel for the Applicant: | Mr B McClintock SC with Mr M Richardson SC and Mr P Sharp |
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| Solicitor for the Applicant: | Mark O’Brien Legal |
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| Counsel for the Respondents: | Mr N Owens SC |
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| Solicitor for the Respondents: | MinterEllison |
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| Counsel for the Commonwealth: | Ms C Ernst |
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| Solicitor for the Commonwealth: | Australian Government Solicitor |

ORDERS

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|  | NSD 1485 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITHApplicant |
| AND: | FAIRFAX MEDIA PUBLICATIONS PTY LIMITED (ACN 003 357 720) (and others named in the Schedule)First Respondent |
|  | NSD 1486 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITHApplicant |
| AND: | THE AGE COMPANY PTY LIMITED (ACN 004 262 702) (and others named in the Schedule)First Respondent  |
|  | NSD 1487 of 2018 |
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| BETWEEN: | BEN ROBERTS-SMITHApplicant |
| AND: | THE FEDERAL CAPITAL PRESS OF AUSTRALIA PTY LIMITED (ACN 008 394 063) (and others named in the Schedule)First Respondent |

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| order made by: | ABRAHAM J |
| DATE OF ORDER: | 11 MARCH 2022 |

THE COURT ORDERS THAT:

1. The applicant’s interlocutory application, dated 2 March 2022, is dismissed.
2. The applicant is to pay the respondents’ costs of this application, to be agreed or assessed.

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

REASONS FOR JUDGMENT

ABRAHAM J:

1. In August 2018, Mr Roberts‑Smith commenced proceedings in this Court seeking damages for alleged defamatory publications by Fairfax Media Publications Pty Ltd, The Age Company Pty Ltd, The Federal Capital Press of Australia Pty Ltd and certain journalists. The substantive hearing is currently occurring before Besanko J, with the respondents presenting their case.
2. The applicant served a notice to produce on the respondents on 1 March 2022, seeking:

1. One copy of all documents evidencing and/or recording communications between the Respondents' legal representatives and Person 4's legal representatives to the effect that if Person 4 agreed to willingly give evidence at the trial in relation to Darwan, the Respondents would adopt the forensic positions under s128 of the Evidence Act 1995 (Cth) in respect of his evidence as set out in the letter from Minter Ellison to Bennett+Co dated 7 February 2022 (the **Forensic Positio**n).

2. One copy of all documents evidencing and/or recording communications between the Respondents' legal representatives and Person 4's legal representatives which evidence and/or record any negotiations which resulted in and/or led to the Forensic Position as set out in the said Minter Ellison letter.

3. One copy of any file note of discussions between the Respondents' legal representatives and Person 4's legal representatives which evidence and/or record any negotiations which resulted in and/or led to the Forensic Position as set out in the said Minter Ellison letter.

4. One copy of all documents evidencing and/or recording any legal advice (and any document referred to therein) given to the Respondents by any of their legal representatives concerning and/or referring to the Forensic Position.

5. One copy of any document evidencing or recording any legal advice (and any document referred to therein) given to the Respondents by any of their legal representatives concerning and/or referring to the Forensic Position.

6. One copy of any document evidencing or recording any instructions given by the Respondents to their legal representatives to ascertain if Person 4 would agree to willingly give evidence in these proceedings about the Darwan mission.

1. On 2 March 2022, the respondents served on the applicant an objection schedule claiming legal professional privilege over 10 documents (including attachments). The applicant seeks production to the Court and inspection of those 10 documents and attachments. Each of the documents are said to respond to category 2 of the notice to produce.
2. On that same day, the respondents produced to the Court a letter, dated 7 February 2022, from the respondents’ solicitors (MinterEllison) to those acting for Person 4, a witness in the proceedings (the 7 February 2022 letter), which had been the subject of an earlier notice to produce. The significance of this letter to this application is made clear below.

## Material relied on

1. The applicant read an affidavit of Monica Helen Allen, one of his solicitors, sworn 2 March 2022, which annexes the notice to produce and objection schedule.
2. The respondents read the affidavit of their solicitor, Peter Llewellyn Bartlett, sworn 3 March 2022. Mr Bartlett, inter alia, claimed legal professional privilege over the 10 documents and the attachments thereto, which are listed in the objection schedule, on the basis that the documents are confidential communications made by the respondents’ legal representatives for the dominant purpose of the respondents obtaining evidence for use in these proceedings. Mr Bartlett deposed that the circumstances of those communications were as follows:
3. they were engaged in for the sole purpose of communicating with Person 4's legal representatives about Person 4’s involvement in the proceedings and potential evidence in these proceedings;
4. the documents are communications between the respondents’ legal representatives and Person 4’s legal representatives in circumstances where the proceedings are on foot, and were made with a view to obtaining evidence from Person 4 to be used in the proceedings and to obtain information from Person 4 which may result in the obtaining of evidence to be used in the proceedings;
5. the documents were confidential communications;
6. the communications were exchanged between the respondents’ legal representatives and Person 4’s legal representatives on the expectation that they would remain confidential as between the respondents’ legal representatives and Person 4’s legal representatives; and
7. the communications were not shared with anyone other than the respondents and their legal representatives, Person 4 and his legal representatives.
8. The respondents also claim legal professional privilege over the attachments to the 10 documents identified in the objection schedule on the basis that they are either: (i) attachments to privileged and confidential communications; (ii) confidential communications in their own right; or (iii) attachments to, and form part of, the privileged and confidential communication.

## Chronology

1. On Thursday, 24 February 2022, the applicant served a notice to produce on the respondents which sought documents disclosing any arrangement or agreement between the respondents and Person 4. In response, the respondents produced an objection schedule describing a single document, being the 7 February 2022 letter, from the respondents’ solicitors to Person 4’s solicitor. That document was subject to a claim for privilege. On Sunday, 27 February 2022, the applicant served an application seeking to inspect the 7 February 2022 letter and in effect challenge the claim for privilege. On Monday, 28 February 2022, Person 4 commenced giving evidence. Besanko J heard the application later that day and upheld the claim for privilege.
2. In the course of examination in chief, Person 4 was asked a question in relation to events at Whiskey 108. In response to that question, Person 4 took an objection pursuant to s 128 of the *Evidence Act 1995* (Cth). After hearing brief submissions, Besanko J considered that there were reasonable grounds for the objection. Person 4 was then asked whether he would be willing to answer the question with the protection of a certificate. Person 4 indicated that he was unwilling to answer the question. Besanko J then heard submissions from Person 4’s counsel on the question of whether the Court should compel Person 4 to answer the question in relation to Whiskey 108. Person 4’s counsel tendered two medical reports. The respondents’ Senior Counsel indicated that they would not seek to have Person 4 compelled to give evidence. His Honour adjourned the matter to 1 March 2022.
3. On Tuesday, 1 March 2022, during submissions on whether Person 4 should be compelled to give evidence under s 128(4) of the Evidence Act, the following sequence of events occurred. Besanko J asked counsel for Person 4 for an assurance that the Court had all relevant evidence put before it, in a context where s 128(4)(b) of the Evidence Act refers to an interests of justice consideration. Initially, counsel for Person 4 stated that to his knowledge there was no additional evidence, and the submissions proceeded. The following exchange occurred:

HIS HONOUR: … I asked for an assurance from counsel for that all relevant evidence has been put before the court bearing in mind the circumstance that although the respondents have not withdrawn the question, they are not asking me to exercise the power in section 128(4). Now, [counsel for Person 4], do you understand what I’ve said?

[COUNSEL FOR PERSON 4]: I would like to clarify that. When you say “an assurance that all relevant material is before the court”, could I just be sure what your Honour is asking. And I apologise for doing so. I just want to make sure that I understand it.

HIS HONOUR: I’m asking you to give me an assurance that you have put forward all relevant evidence in the context of this application.

[COUNSEL FOR PERSON 4]: In terms of the medical evidence, in particular?

HIS HONOUR: I’m not asking you. I’m not specifying that, [counsel for Person 4].

[COUNSEL FOR PERSON 4]: Yes. Your Honour, I’m not in possession, to my knowledge, of any additional evidence that would bear on the question, that is, in a position that I – as I said yesterday, I wish I had had evidence on certain matters about foreign law, but I don’t, and I don’t have any additional materials, on my knowledge, that would bear on the issue.

HIS HONOUR: There’s nothing further you wish to put forward?

[COUNSEL FOR PERSON 4]: No. I don’t have anything further I might deploy or might not deploy. I’ve put forward the evidence that I have.

HIS HONOUR: There’s nothing further that you feel you have an obligation to put forward?

[COUNSEL FOR PERSON 4]: Not that I’m aware of your Honour, no.

HIS HONOUR: All right. Thank you.

[COUNSEL FOR PERSON 4]: All the information that I have is in those reports

HIS HONOUR: All right. …

1. At the conclusion of those submissions, and before any ruling could be given, Senior Counsel for the respondents requested an adjournment so he could confer with counsel for Person 4. Following the adjournment, counsel for Person 4 stated that:

Having had a chance to consider it, there is a matter that I didn’t understand at all was relevant. I now - I don’t accept that it is, but I don’t want [t]here to be any doubt about my answer to your Honour and about the grounds under which this is being fought. I’ve sought limited permission from the respondents to hand up to your Honour a letter.

1. Counsel for Person 4 produced the 7 February 2022 letter. Neither he, nor the respondents, made any claim for privilege. The letter was marked Exhibit P4-3.
2. On 1 March 2022, the applicant served on the respondents the further notice to produce, which is the subject of this application. On 2 March 2022, the respondents produced the letter of 7 February 2022 in response to that notice, and the objection schedule.

## Legal principles

1. The principles relevant to a claim for legal professional privilege were summarised in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 23)* [2021] FCA 1460 at [37]-[46], and expanded upon in respect to waiver of privilege in *Roberts-Smith v Fairfax Media Publications Pty Limited (No 25)* [2021] FCA 1558 (*Roberts-Smith (No 25)*) at [18]-[26]. It is unnecessary to repeat them here.

## Submissions

1. Although the applicant’s submission was twofold, being *first*, that privilege does not attach to the documents as a result of fraud, and *second*, that privilege has been waived by the respondents’ conduct, it is the latter that was primarily the focus of attention. The applicant filed written submissions in support of this application, although they only addressed the issue of waiver.
2. In that regard, the applicant submitted that the respondents have waived any claim for privilege by producing to the Court and relying on the 7 February 2022 letter. Both Person 4 and the respondents have produced the 7 February 2022 letter to the Court and it has been admitted into evidence, without any claim for privilege. It is submitted that the document in question, on its face, sets out an agreement or arrangement between the respondents and Person 4 under which the respondents and Person 4 would “collude so that he would give evidence on one issue only (alleged war crimes in Darwan in September 2012) but would be enabled to avoid giving evidence in relation to another issue, that is, events in a village called Kakarak and an assault on a compound called Whiskey 108 in that village in April 2009”. This, it is submitted, is in a context where the respondents have always maintained through their amended defence, outlines of evidence and cross-examination of the applicant, that Person 4 committed a murder at Whiskey 108.
3. The applicant referred to the chronology of events which leads to this application. Against that background, it is submitted that the communications over which privilege is claimed can only relate to the arrangements or the agreement pursuant to which Person 4 would give evidence as ultimately described in the 7 February 2022 letter. The applicant submitted that there is an issue waiver concerning the existence and content of any agreement, arrangement or understanding between the respondents and Person 4. This was intended to extend to the manner in which Person 4 would give his evidence and the position the respondents would adopt whilst he gave his evidence. It was submitted that the production of the 7 February 2022 letter, absent any claim for privilege, constituted a waiver of any associated material, which it was said, would include correspondence of the kind listed in the objection schedule. The applicant referred to and relied on *Roberts-Smith (No 25)* at [17]-[26], [57]-[58] and [71].
4. It was submitted that it is inconsistent for the respondents, who permitted Person 4 to deploy the 7 February 2022 letter and “to rely upon evidence of the forensic agreement concerning the collusive manner in which Person 4’s evidence would be led, to resist production to the Applicant of the communications that passed between the Respondents and Person 4, which culminated in the forensic agreement”. Having waived their privilege in support of Person 4’s claim to an entitlement to refuse to give evidence about the Whiskey 108 mission (during the s 128 argument), the respondents laid open the forensic agreement recorded in the 7 February 2022 letter to scrutiny. The unfairness is said to lie in the applicant’s inability to test the circumstances of the making of that agreement, the propriety of the arrangement and Person 4’s evidence that he was unsure whether any such forensic agreement was actually made and agreed upon. The applicant contended the agreement was relevant to the credibility of the witness. The applicant also referred to aspects of Person 4’s cross-examination as to his knowledge of the arrangement. The applicant submitted that the respondents had used the undertaking, as it has been fulfilled by them in their conduct of the evidence of Person 4, including in respect to the s 128 application.
5. In respect to the submission that the material was not privileged on the basis of “fraud upon justice”, the applicant referred to *Southern Equities Corporation Ltd (In liq) v Arthur Anderson & Co* (1997) 70 SASR 166 (*Southern Equities*) at 174, *Gartner v Carter* [2004] FCA 258 (*Gartner*) at [123]-[130] and *Attorney-General (NT) v Kearney* [1985] HCA 60; (1985) 158 CLR 500 at 514. It was submitted that this undertaking was a “private side deal” between the respondents and the witness which, if concealed (which was the respondents’ original position), would have had the effect of sidelining both the Court and the applicant from the process, which it was submitted amounted to fraud upon justice within the meaning of that concept as discussed in those authorities. It was submitted that when Besanko J ruled against the submission, he did not have the benefit of the letter of 7 February 2022. It was submitted this basis of the application did not need to be determined if the Court concluded that waiver had occurred.
6. The respondents contended that there was nothing improper about the undertaken given, and that Besanko J had already ruled on the issue of fraud, rejecting the submission. The respondents detailed why they said that was so. The respondents submitted that when Besanko J determined this issue, and rejected the submission, he did so on the assumption that the communication was of a similar type to the letter of 7 February 2022. It was submitted that argument was considered by Besanko J on the basis of an assumption that the letter contained some agreement or arrangement, and nothing about the content of the letter (which was unknown to Besanko J), alters that. It was submitted that the 7 February 2022 letter could not ever constitute a fraud on justice because it does not relate to the content of the witness’ evidence in terms of its truth or falsity; the letter only has the potential to limit the topics upon which he will be compelled to answer questions from the respondents and does not, in any way, limit the questions the applicant might ask in cross-examination. It was submitted that there is no impropriety, in the context of a civil proceeding, with a party making decisions about what questions to ask a witness, about what forensic position they will take in relation to objections that are taken to a question that is asked, and in relation to, generally, the topics upon which they will lead evidence from particular witnesses. It was also submitted that there is nothing improper if those forensic decisions of the respondents are communicated to the legal representatives of a witness.
7. It was submitted that privilege has not been waived by disclosure of that communication, given the circumstances in which the letter was deployed. The respondents submitted that the only matter which is relevant is that the undertaking was given, not anything preceding that (assuming there is such material). What has been disclosed in the letter is the forensic position the respondents will adopt if Person 4 adopts a particular position in relation to the giving of his evidence. The respondents, in no way, put their state of mind in issue by allowing Person 4’s counsel to disclose the 7 February 2022 letter. In the circumstances, the respondents permitted Person 4’s counsel, if he considered it appropriate, to put that letter before Besanko J to ensure that his Honour had all relevant information when making the interests of justice determination.
8. The respondents took issue with the contention that the undertaking given by them could affect the credit of the witness. They submitted that the letter reflected no more than the respondents’ forensic position. It was submitted that the undertaking does not add anything, given it is a matter for the Court to decide what would occur, and that there was nothing in the undertaking that altered that, or prevented the applicant from cross-examining the witness on the topic of Whiskey 108. The communication of 7 February 2022 was made after the deadline that Besanko J had set for any subpoenaed witness to bring an application to be excused from compliance and, therefore, Person 4 was to be a witness (not having made an application). The respondents accepted that at the conclusion of the hearing the applicant would advance a submission that the assessment of Person 4’s evidence and credit is affected by this undertaking. It was submitted that issues of credibility related to the question of fairness at large. It was accepted there would also be a submission advanced as to whether inferences ought to be drawn against the respondents for the forensic decisions made in respect to Person 4’s evidence.

## Consideration

1. Although it was submitted that the issue of privilege in the 7 February 2022 letter is an alternate submission only needing to be addressed if I do not accept that privilege has been waived, in my view it is appropriate to refer to it at the outset. If the communication is not privileged, the issue of waiver does not apply.
2. On 28 February 2022, Besanko J, after hearing submissions, concluded that the letter of 7 February 2022 was privileged and the applicant had not satisfied him that the document came within the fraud exception. It is plain from a reading of the submissions that the nature and type of document was hypothesised on by the applicant in founding the submissions as to fraud. His Honour did not consider it necessary to inspect the document. The applicant’s request to this Court to reconsider that ruling, even on the basis of an alternative submission, is premised on the fact that the document has now been produced. It is troubling that I am being asked, in effect, to reconsider Besanko J’s ruling in a context where it appears he was not asked to do so. That said, it is sufficient for the purposes of this application to observe that nothing about the content of the document, bearing in mind the principles referred to in *Southern Equities* at 174 and *Gartner* at [123]-[130], would lead me to a different conclusion than that reached by Besanko J. As noted above, the applicant did not advance any detailed submission as to this aspect of their case.
3. Turning to the issue of waiver.
4. The Court must consider whether there is any inconsistency between the respondents’ conduct in waiving privilege in respect to the letter of 7 February 2022 and the maintenance of its claim of privilege over the documents sought by the applicant. The test applied to determine the scope of any waiver of associated material is whether the material that the party has chosen to release from privilege represents the whole of the material relevant to the same issue or subject matter, in the manner explained in *AWB Ltd v Cole (No 5)* [2006] FCA 1234; (2006) 155 FCR 30 (*AWB (No 5)*) at [164]-[165] citing *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475 (*Maurice*) at 482, 484, 488 and 498–499. The issue is whether the production of the document impliedly waives privilege in associated material: *Roberts-Smith (No 25)* at [57].
5. As the respondents correctly submitted, the circumstances of this application are different from those which arose in *Roberts-Smith (No 25)*, and that decision does not dictate the outcome of this application. Rather, each case must be assessed on its own facts: *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; (2006) 151 FCR 341 at [45], [61]; *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 (*Mann v Carnell*) at [28]-[29]. Questions of waiver are matters of fact and degree: *Osland v Secretary, Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at [49]. The applicant bears the onus in establishing waiver: *New South Wales v Betfair Pty Ltd*[2009] FCAFC 160;(2009) 180 FCR 543 at [54]. I return to consider *Roberts-Smith (No 25)* in more detail below.
6. The letter of 7 February 2022 was produced to the Court during submissions in respect to Person 4’s objection to giving evidence in answer to a question about Whiskey 108. In particular, the interests of justice limb of s 128(4)(b) of the Evidence Act was being considered, in the circumstances described above at [8]-[12]. The letter was produced by counsel for Person 4, with the respondents having waived privilege to enable that to occur. It was deployed in the submission with the purpose of advancing the witness’ position. The letter would not have been produced in the manner it was, if it were otherwise. That the letter was initially produced in answer to a question by the trial judge to Person 4’s counsel in respect to the interests of justice aspect of s 128(4), does not alter that.
7. The letter was separately produced by the respondents, at a later time, in response to the notice to produce the subject of this application. This was plainly against the background of the letter having been produced by Person 4’s counsel during the earlier submission.
8. The terms of the 7 February 2022 letter are relevantly, as follows:

We refer to the above-mentioned proceedings.

As you are aware, the Respondents filed an Outline of Evidence on behalf of Person 4 in May 2019.

As is set out in the Outline of Evidence, we anticipate that your client can give relevant evidence in relation to two missions the subject of these proceedings: (a) a mission to Whiskey 108 on 12 April 2009 (**Whiskey 108**); and (b) a mission to Darwan on 11 September 2012 (**Darwan**).

If your client agrees to willingly give evidence at trial in relation to Darwan; we undertake to adopt the following forensic positions under s 128 of the Evidence Act 1995 (Cth) in respect of his evidence.

*First*, in relation to Darwan:

1. we agree not to oppose a submission by your client under s 128(1)(a) that the evidence may tend to prove that he has committed an offence against or arising under Australian law; and
2. we agree not to oppose a submission by your client under s 128(2) that there are reasonable grounds for the objection.

If the Court determines that there are reasonable grounds for such an objection, then in accordance with the position outlined above, your client would then give the evidence willingly with the protection of a certificate issued under s 128(3)(b)(i).

*Secondly*, in relation to Whiskey 108:

1. we agree not to oppose a submission by your client under s 128(1)(a) that the evidence may tend to prove that he has committed an offence against or arising under Australian law;
2. we agree not to oppose a submission by your client under s 128(2) that there are reasonable grounds for the objection; and
3. if the Court determines that there are reasonable grounds for such an objection, and your client does not willingly give the evidence with the protection of a certificate issued under s 128(3)(b)(i), we agree not to ask the Court to require your client to give the evidence under s 128(4) of the *Evidence Act*.

Please let us know if you would like to discuss any aspect of the above.

1. It is the content of the communication, the fact that an undertaking had been given by the respondents to Person 4 as to their approach to his evidence on the condition that he give evidence willingly in respect to the Darwan events, which was relied on by Person 4 in his s 128 submission, supported or facilitated by the respondents. The subject-matter over which waiver has occurred is evidence of the existence and content of that undertaking. Indeed, the applicant’s submission acknowledges as much, as he submitted that it is inconsistent for the respondents, who permitted Person 4 to rely on “evidence of the forensic agreement”, to resist production of the communications culminating in the agreement.
2. As noted above, the applicant relied significantly on *Roberts-Smith* *(No 25),* in support of his submission that privilege has been waived, and that he is, therefore, entitled to any associated material. However, the factual circumstances that arose for consideration in that case, are significantly different to those in this current application. In *Roberts-Smith* *(No 25),* the applicant had on foot an application for leave to issue a subpoena to a witness, Person 56, in a context where leave had already been previously refused. On that application, the respondents would be required to explain the timing of the application and the circumstances in which it was made, and to that end relied on an affidavit of their solicitor which, inter alia, was directed to those issues. The affidavit referred to the solicitor’s state of mind and reasoning process, and was being deployed by the respondents to advance their application as to why leave to issue a subpoena to Person 56 should be granted at the late stage of the proceedings. The applicant relied particularly on [71] in *Roberts-Smith (No 25)*, which discussed the concept of associated material in that case. However, that paragraph cannot be divorced from its context. Shortly thereafter, I concluded at [73] (emphasis added): “*Given the nature of the application, and the use to be made of the material already disclosed*, the waiver goes beyond recording the terms of the agreement and includes the circumstances associated with its making”. The conclusion in *Roberts-Smith (No 25)* necessarily depended on the particular circumstances of that case.
3. The issue to be decided is whether the use in these legal proceedings of one document, the letter of 7 February 2022, impliedly waives privilege in any associated documents that might exist.
4. The applicant submitted the conduct of the respondents in claiming privilege over the documents in the objection schedule was inconsistent with deploying the letter of 7 February 2022, but does not explain why that is so. Rather, the submission appears to presuppose an entitlement to the associated material. However, simply because a document has been used, and in doing so privilege is waived in respect to that communication (in this case, the letter of 7 February 2022), it does not necessarily follow that the privilege has been waived in associated documents: see for example, *AWB (No 5)* at [164], [165], and see [133]. The applicant also contended that, by the respondents relying on the “evidence of the forensic agreement”, this laid open the forensic agreement recorded in the 7 February 2022 letter to scrutiny. Again, there was no real explanation as to why that was so. As best as can be ascertained, the applicant relies on unfairness which was said to arise from his “inability to test the circumstances of the making of that agreement, the propriety of the arrangement and Person 4’s evidence that he was unsure whether any such forensic agreement was actually made and agreed upon”.
5. Given that submission, it is important to recall that the unfairness talked of in *Mann v Carnell* is not some overriding principle of fairness operating at large, as explained at [29]:

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.

1. The reasoning behind implying waiver in associated documents (as it is in respect to a partly disclosed document) is based on the possibility of the document (or part thereof) being misleading or misunderstood so as to create an inaccurate impression, which would render its use unfair: see for example *AWB (No 5)* at [165]-[166]; *Maurice* at 482, 488, 489; *Legal Services Commission v JHW* [2012] SASCFC 47; (2012) 223 A Crim R 534 (*JHW*) at [73].
2. Given the content of the 7 February 2022 letter, there is no suggestion in the submissions that the subject-matter of the communication in any way is misleading, inaccurate as to the terms of the undertaking or in any way apt to create an inaccurate perception, absent what was said to be associated material. There is no suggestion by the applicant that the letter of 7 February 2022 does not contain the whole of the content of the undertaking. It was not suggested to Besanko J at the time that the letter was deployed, that it could not be relied on in the manner sought. Nor is that submission advanced now.
3. Although it might be understandable that the applicant wishes to have access to any material underlying the undertaking, it is not immediately apparent how the use of the letter of 7 February 2022 gives rise to any issue waiver as to the circumstances of its making, let alone on the basis of an investigation as to its propriety. There is no submission directed to the issue of inconsistency of conduct, as to why that is so, or why in the circumstances in which the “evidence of the forensic agreement” was used in this case in relation to the evidence of Person 4, such matters are in issue in the substantive proceedings. Person 4 has given evidence. More particularly (and in light of the circumstances referred to in the preceding paragraph), it has not been articulated how the respondents’ reliance on the correspondence of 7 February 2022 in this case, is inconsistent with the claim for privilege over the documents sought. Unlike *Roberts-Smith (No 25)*, the significance of the timing and circumstances of the events, or the respondents’ state of mind, have not been put in issue by the use of the communication.
4. Turning then to the submission as to credibility. Although the respondents attempted to minimise the content of the undertaking, submitting that the Court may have nonetheless forced Person 4 to give evidence and that the applicant was not prevented from asking any questions of him in cross-examination about Whiskey 108, properly considered, the terms of the undertaking are advantageous to the respondents. Indeed, so much is plain to the respondents, which is the reason that the undertaking was given to the witness. That is, the party who was calling the witness would not ask the Court to require the witness to give evidence as to Whiskey 108 under s 128(4). The undertaking was given to Person 4 before he gave evidence. Person 4 gave evidence in that context. The respondents also carried out the undertaking, after Person 4 fulfilled the condition of willingly giving evidence in respect to Darwan.
5. In relation to matters of credibility, the applicant submits that the circumstances in which the evidence is given affect the witnesses’ credibility, and it is plain from the submissions advanced (acknowledged by the respondents), that at this stage it is expected that such a submission will be advanced by the applicant in closing submissions. The respondents deny that this arrangement or undertaking has that effect. That is a matter for the trial judge. It is sufficient for present purposes to approach this issue on the basis that, generally speaking, if a witness gives evidence in a context where there is some arrangement, agreement, inducement or even an undertaking in place between a witness and the party calling them, that fact may be capable of affecting the assessment of the witnesses’ evidence. That general observation does not say anything about these proceedings. Whether that is so in a particular case, and if so, in what manner, is dependent on a number of considerations including, inter alia, the nature of the arrangement, agreement, inducement or undertaking, the content of the witnesses’ evidence, and other evidence in a trial. It is not for this Court to decide or consider those matters on this application.
6. All that said, it is the terms of the undertaking under which Person 4 gave evidence which is relevant to any such assessment. That is the basis on which he gave evidence.
7. More importantly, the applicant’s submission as to credibility is not directed to the issue of establishing any inconsistency of conduct by the respondents, but rather focuses on an assertion of general unfairness.
8. Similarly, in that context, during the applicant’s submissions, reference was made to some aspects of Person 4’s cross-examination as to his knowledge of the terms of the undertaking. He was cross-examined on communications he had with his solicitor, over which I was informed he has waived privilege, at least in respect to aspects of that in relation to the undertaking. That is a different legal relationship than that to which this notice to produce is directed. It might be thought that Person 4’s state of knowledge in respect to what was communicated by his solicitor can be sought by processes directed to the solicitor.
9. The submissions relied on by the applicant suffer from failing to focus on and grapple with the relevant question of inconsistency of conduct.
10. In my view no relevant inconsistency of conduct has been established by the applicant.
11. This matter was referred to me for determination in the context where the applicant submitted that there was a possibility that the documents in the objection schedule may need to be examined to resolve the issue. The respondent submitted that the focus of the inquiry is on their conduct and whether it is inconsistent with the maintenance of the privilege. However, if I formed the view that having regard to the documents was relevant, there was no objection to compelling the respondents to provide them to enable that to occur.
12. This matter involved the application of legal professional privilege at common law. The Court has the power to examine documents with the essential purpose of doing so “to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege”: *AWB (No 5)* at [44(12)]. “[I]n many instances the character of documents the subject of the claim will illuminate the purpose for which they were brought into existence”: *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674 at 689. I note that in respect to the position of inspection of the documents to determine if waiver is established, in *JHW* at [81], the Supreme Court of South Australia (Court of Criminal Appeal), in obiter comment, observed:

We commented earlier that we had not been referred to any decision in which, on a question of waiver, the Judge had inspected the material in which in respect of which privilege was asserted. We doubt whether the Judge had power to do so. But even if the Judge did, we do not agree that relevant unfairness could be identified by the Judge finding material within the privileged material that might assist an attack on the statement in question.

1. And see also *JHW* at [60] and [75].
2. At [5] of that judgment, the Court identified the “two main issues” on that appeal, as the competence of the appeal and the correctness of the judge’s order. Whether the judge inspected the documents is ultimately not an issue that goes to the “correctness” of the order. Prior to the passage recited above, the Court at [65] concluded that “the Judge has erred in not focussing on the question of whether there was an inconsistency between releasing the statements, in the circumstances of the release, and the maintenance of a claim of privilege over documents created in the course of preparing the statements, bearing in mind any considerations of fairness that might arise”. The Court was concerned about how the material was used, with the primary judge there having examined the material in detail to consider whether or not it would be “useful” for the party to have the privileged material (see for example, the last sentence at [81]). As noted in [81], no authority in relation to inspection on a question of waiver was cited to the Court, and nor did the Court cite any authority for the proposition. The Court’s reasoning appears to be based on the nature of the focus of the inquiry to determine if privilege has been waived. However, with respect to the Court, it is not readily apparent why an examination of the documents may not, depending on the circumstances of the case, illuminate whether there is an inconsistency of conduct. Although the common law applies in this application (noting that South Australia also applies the common law in respect to legal professional privilege), I note that s 133 of the Evidence Act provides that the Court can inspect a document to determine any question which arises under Pt 3.10 of that Act (which relates to privileges). It follows that, generally speaking, it is recognised that the circumstances in which it may be of assistance to inspect the documents the subject of a privilege claim are very broad.
3. Until *TerraCom Ltd v Australian Securities and Investments Commission* [2022] FCA 208 (*TerraCom*), which was delivered today, *JHW* had not subsequently been considered in any relevant way (noting that it was applied in the first instance decision of *Verde Terra Pty Ltd v Central Coast Council (No 2)* [2020] NSWLEC 10 at [87] without any analysis and in circumstances where a party had requested the Court not to inspect the documents). Suffice to say I agree with the views of Stewart J expressed in *TerraCom*.
4. If waiver over associated material has been established, there can be no issue that a document can be examined to determine if, in fact, it falls within the scope of the waiver.
5. There was no issue raised by the parties on my power to inspect the documents. Indeed, there was no objection from either party to me inspecting the documents, if I considered it appropriate to take that course. In that context, I have inspected the documents which has only served to confirm my conclusion that there is no relevant inconsistency in conduct established by the applicant, so as to imply waiver in any associated documents.

## Conclusion

1. For the reasons above, the application is dismissed.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Abraham. |

Associate:

Dated: 11 March 2022

**SCHEDULE OF PARTIES**

|  |  |
| --- | --- |
|  | NSD 1485 of 2018NSD 1486 of 2018NSD 1487 of 2018 |
| Respondents |  |
| Second Respondent: | NICK MCKENZIE |
| Third Respondent: | CHRIS MASTERS |
| Fourth Respondent: | DAVID WROE |