FEDERAL COURT OF AUSTRALIA

Whittenbury v Vocation Limited (No 2) [2020] FCA 653

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| File number: | VID 434 of 2015 |
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| Judge: | **MIDDLETON J** |
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| Date of judgment: | 15 May 2020 |
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| Catchwords: | **CORPORATIONS** – discovery – claim of privilege by liquidators – powers of liquidators to assert and waive legal professional privilege  **PRACTICE AND PROCEDURE** – discovery – legal professional privilege – standing to claim privilege – whether liquidator has power to assert or waive privilege on behalf of company – costs follow the event – mixed outcome |
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| Legislation: | *Corporations Act 2001* (Cth)  *Federal Court Rules 2011* (Cth) |
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| Cases cited: | *Re Dallhold Investments Pty Limited* (1994) 53 FCR 339  *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261  *Lenning v Alexander Proudfoot Company World Headquarters* [1991] NSWCA 172 |
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| Date of hearing: | Determined on the papers |
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| Registry: | Victoria |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Corporations and Corporate Insolvency |
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| Category: | Catchwords |
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| Number of paragraphs: | 36 |
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| Solicitor for Cheryl Whittenbury: | Slater and Gordon |
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| Counsel for Vocation Limited: | Ms S Gory |
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| Solicitor for Vocation Limited: | Gilbert + Tobin |
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| Counsel for PricewaterhouseCoopers (A Firm): | Mr M C Garner |
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| Solicitor for PricewaterhouseCoopers (A Firm): | Herbert Smith Freehills |
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| Counsel for John S Dawkins: | Mr M Pesman SC |
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| Solicitor for John S Dawkins: | Baker McKenzie |
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| Counsel for Stephen J Tucker, Michelle K Trenenick and Douglas J Halley: | Mr Blazer |
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| Solicitor for Stephen J Tucker, Michelle K Tredenick and Douglas J Halley: | Allen & Overy |

ORDERS

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|  | | VID 434 of 2015 |
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| BETWEEN: | CHERYL WHITTENBURY  Applicant | |
| AND: | VOCATION LIMITED (ACN 166 631 330)  First Respondent  PRICEWATERHOUSECOOPERS  Second Respondent  MARK EDWARD HUTCHINSON (and others named in the Schedule)  Third Respondent | |
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| AND BETWEEN: | VOCATION LIMITED (ACN 166 631 330)  Cross-Claimant | |
| AND: | THE PARTNERS OF JOHNSON WINTER & SLATTERY  Cross-Respondent | |

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| JUDGE: | MIDDLETON J |
| DATE OF ORDER: | 15 May 2020 |

THE COURT ORDERS THAT:

1. On or before 4:00pm on 22 May 2020, the parties confer, and provide an agreed minute of order reflecting the reasons in this judgment, or if there is no agreement, brief written submissions as to the appropriate orders to make.

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

REASONS FOR JUDGMENT

MIDDLETON J:

# INTRODUCTION

1. By interlocutory application dated 20 December 2019, the Second Respondent (‘**PwC**’) sought orders pursuant to r 20.32 of the *Federal Court Rules 2011* (Cth) (the ‘**Rules**’) that unredacted copies of certain documents over which claims of privilege have been made by the First Respondent (‘**Vocation**’) be produced for inspection (‘**PwC’s Application**’). PwC’s Application was supported by the affidavit of Gregg Nicholas Rowan affirmed on 20 December 2019 (the ‘**December Rowan Affidavit**’).
2. On 26 February 2020, PwC filed written submissions in support of PwC’s Application (‘**PwC’s February Submissions**’).
3. On the return of PwC’s Application on 28 February 2020, the Court made orders, including orders substantially in the terms sought by PwC in PwC’s Application and in PwC’s February Submissions.
4. The orders made by the Court on 28 February 2020 differed only in two respects from the orders sought by PwC. First, the orders gave Vocation the ability to amend ‘Vocation’s Privilege List’, being the list of documents over which Vocation now maintains a privilege claim. Secondly, the orders carved out from production the 15 documents referred to in paragraph 6 of the affidavit of Holly Johanna Hurwood affirmed on 18 February 2020 (the ‘**Hurwood Affidavit**’) filed on behalf of the Fourth, Fifth and Sixth Cross-respondents to the Third Cross-claim, former non-executive directors of Vocation (the ‘**NEDs**’). The dispute between PwC, Vocation and the NEDs concerning whether an order for production of those documents should be made was to be deferred.
5. In addition to seeking inspection of certain documents, PwC now seeks an order that Vocation pay its costs of and incidental to PwC’s Application. In support of its costs application, PwC relies also on the further affidavit of Mr Rowan affirmed on 19 March 2020 (the ‘**March Rowan Affidavit**’).
6. The only remaining issues then in respect of PwC’s Application are the costs of that application and whether the production orders made on 28 February 2020 should also extend to 12 of the 15 documents referred to in paragraph 6 of the Hurwood Affidavit.
7. Both of these issues were agreed by the relevant parties could be dealt with by the Court on the papers.

# PRODUCTION OF DOCUMENTS FOR INSPECTION

1. As to the production of further documents the position is as follows.
2. Two of the 15 documents in question were included in Vocation’s original privilege list. In light of communications between PwC’s solicitors and Vocation’s solicitors following the hearing on 28 February 2020, PwC does not at this time press for production of those two documents.
3. In respect of the remaining 13 documents, which were not included in Vocation’s original privilege list, PwC’s position at the hearing on 28 February 2020 was that an order for production of those documents should be made.
4. Since the hearing on 28 February 2020, production of one of the remaining 13 documents, is no longer resisted, being JWS.508.002.2008.
5. This leaves the other 12 documents which were not included in Vocation’s original privilege list.
6. In my view, the liquidators of Vocation no longer maintain any privilege claim in respect of those 12 documents, and the evidence sought to be adduced by the NEDs cannot be deployed by them to establish a claim of privilege where the privilege holder itself no longer makes such a claim. The privilege is that of the company, not of the NEDs; the former non-executive directors have no standing to advance a privilege claim on behalf of Vocation which the company itself no longer advances.
7. At the hearing on 28 February 2020, the NEDs in seeking to provide evidence in support of Vocation’s privilege claim relied upon the fact that the liquidators simply did not oppose orders being made requiring Vocation or any of the other respondents or cross-respondents to produce those documents (rather than the liquidators’ position being that they did not press any privilege claim in respect of those documents). In their written submissions dated 18 March 2020, the NEDs relied on the distinction between not opposing production orders, on the one hand, and not pressing privilege claims, on the other.
8. PwC has made it clear that it seeks production of the remaining 12 documents not on the basis that privilege in those documents has been waived, but rather on the basis that the liquidators do not press a privilege claim in respect of any of those 12 documents, and the NEDs have no standing to press a privilege claim on behalf of Vocation.
9. In my view, it is essential for liquidators of Vocation to unequivocally claim the privilege. The NEDs have no standing or basis to claim the privilege.
10. Communications between a client (here, Vocation, the company) and that client’s legal advisor remain privileged at the instance of the client. The whole rationale of the privilege is to protect from compulsory disclosure confidential communications. If a client abandons, by not claiming (for whatever reason) the privilege, then the confidentiality is no longer to be maintained.
11. The liquidators of Vocation’s stated position was made clear by their Counsel on 28 February 2020:

*I need to make a clarification. It’s not correct that we don’t make a claim for privilege. The position is this. They’re documents over which there is a claim for privilege or there might be a claim for privilege, but the documents that we’re talking about are continuous disclosure advice documents in respect of which Vocation is not funded to press any claims. So in those circumstances, Vocation’s position is that it does not oppose an order for inspection, but we say there is a difference between not pressing a privilege claim and the position that Vocation has taken, which is, “we’re not funded to, and therefore don’t, oppose the order,” but we’ve not said that we don’t press privilege in respect of these documents.*

1. The liquidators of Vocation’s position is that they do not oppose an order for production of the 12 documents. In my mind, this means no claim to privilege has been made by or on behalf of Vocation. I fully understand the liquidators’ position, but if no claim is made to protect the privilege then inspection should follow and relevant documents must be made available in the interests of a fair trial.
2. I should make it clear that it cannot be doubted that liquidators are able to make a claim for legal professional privilege or to waive the privilege.
3. However, I am also of the view that liquidators must form a view that whatever action they take will be in the interests of creditors or the company. This has not occurred in this proceeding. The only basis for the liquidators of Vocation’s approach is they are ‘not funded to press any claims’ for privilege in respect of the 12 documents.
4. As to the role of liquidators in claims for legal professional privilege, in *Re Dallhold Investments Pty Limited* (1994) 53 FCR 339 at 347-348, Sackville J said:

*Although I do not wish to express a concluded view on the matter, I think it is doubtful whether a liquidator has power to assert or waive legal professional privilege, in respect of communications to and from the company, simply as a matter of course. It is, in my view, necessary to identify a source of power for the assertion or waiver of privilege, and for the liquidator to act pursuant to that power. In some cases the source will be a specific power conferred on the liquidator by s 477(2) of the* Corporations Law*, such as the liquidator’s power to bring or defend legal proceedings: s 477(2)(a). Once the liquidator becomes the litigant, his or her position appears to be no different in relation to compulsory process than that of any other litigant in the proceedings: see* Hartogen Energy Ltd (In liq) v Australian Gas Liqht Co *(1992) 36 FCR 557 at 566.*

*Alternatively, the liquidator’s powers may derive from the general language of s 477(2)(m). I do not think that the language of the section is necessarily of such breadth that the liquidator can assert or waive legal professional privilege without consideration of the particular circumstances. It seems to me that the better view is that s 477(2)(m) can be invoked only where the liquidator forms a judgment that it is or may be in the interests of creditors or the company to assert or waive legal professional privilege. Without being exhaustive, I think that the liquidator could form the necessary judgment on the ground that the assertion or waiver of privilege (as the case may be) would or might be of assistance in exercising or discharging the liquidator’s powers or duties. If, however, the liquidator does form that judgment, I think that s 477(2)(m) authorises the liquidator to assert or waive legal professional privilege.*

*In framing directions, it must be remembered that the liquidator is to use his or her own discretion in the exercise of the statutory powers and functions. Section 479(4) of the* Corporations Law *provides that, subject to the remainder of the Part:*

“the liquidator shall use his or her own discretion in the management of affairs and property of the company and the distribution of its property.”

*In my view, it is open to the liquidator both to assert and waive legal professional privilege on behalf of the company, provided the liquidator forms the view, in good faith, that to do so is or may be in the interests of creditors or of the company. …*

1. Whilst Sackville J did not express a concluded view, the observations he made are sound and in my view, correct. In the context of any liquidation, the liquidator has certain powers and duties, but these can only be exercised after a *bona fide* consideration of the options available. It may well be that a liquidator (for instance) may not make a claim of legal professional privilege to avoid needlessly protracting a liquidation – see s 480 of the *Corporations Act 2001* (Cth) (the ‘**Corporations Act**’). If a relatively aggrieved person is dissatisfied with a decision of a liquidator, there is an avenue to appeal such a decision: see s 1321 of the Corporations Act.
2. I should say, if a claim for legal professional privilege had been made by the liquidators of Vocation, I would have allowed evidence to be adduced by third parties to support the claim. However, as no claim has been made, I refuse leave for Vocation or the NEDs to rely on the Hurwood Affidavit and any submissions relating to the privilege issue.

# COSTS

1. I now turn to the issue of costs. PwC submits that the Court should order that Vocation pay the costs of and incidental to PwC’s Application, because it has had substantial success on that application, and costs should follow the event.
2. Vocation submits that the appropriate order is that each party bear their own costs. PwC was not, Vocation contends, ‘substantially successful’ in PwC’s Application. It was submitted that PwC had abandoned its claim for inspection of most of the documents (2,089 out of 3,378) that were in dispute. In respect of the documents that were subject to challenge in PwC’s Application, prior to the filing of PwC’s Application, Vocation had already confirmed in respect of approximately 25% of those documents that it did not oppose an order for production because it was not funded to do so. As to the balance of the documents that were the subject of a challenge in PwC’s Application, PwC has abandoned its challenge over two-thirds of those documents.
3. I accept the relevant facts as set out in the submissions of Vocation dated 30 March 2020 in paragraphs 6 to 22, which seem to me not to be in contention and need no rehearsal in these reasons.
4. The usual rule is that costs follow the event. As to where there is a mixed outcome, in *Dodds Family Investments Pty Ltd (formerly Solar Tint Pty Ltd) v Lane Industries Pty Ltd* (1993) 26 IPR 261 at 272, Gummow, French and Hill JJ explained:

*Where there is a mixed outcome in proceedings, the question of apportionment is very much a matter of discretion for the trial judge. Mathematical precision is illusory and the exercise of the discretion will often depend upon matters of impression and evaluation.*

1. The factors that may be taken into account include the time referable to the issues, the claims made by the moving party and the effect of the ultimate orders that are made: see *Lenning v Alexander Proudfoot Company World Headquarters* [1991] NSWCA 172.
2. From 8 August 2019, PwC’s position (as advised to Vocation) has consistently been that any legal professional privilege in the ‘Prospectus Advice’ and the ‘Disclosure and Announcement Advice’ has been waived by Vocation. That position was resisted by Vocation in correspondence from its solicitors, Gilbert + Tobin, from August 2019 until the evening before PwC filed its application on 20 December 2019. At the time, Gilbert + Tobin advised that Vocation was unable to fund opposition to an order for production of ‘Continuous Disclosure Advice’. In support of its application, PwC relied upon an affidavit prepared in the period before 20 December 2019 (and ultimately affirmed on 20 December 2019) by Mr Rowan. That affidavit was substantially in final form before Gilbert + Tobin advising on the evening of 19 December 2019 that Vocation had changed its earlier position, and would now neither consent to nor oppose the making of an order requiring production of the documents in Attachment F of Gilbert + Tobin’s 19 December 2019 letter (being the Disclosure and Announcement Advice). Vocation continued to resist production of documents relating to the Prospectus Advice until 7 February 2020, when Gilbert + Tobin advised that Vocation would no longer press privilege claims in respect the ‘Replacement Prospectus Advice’ documents.
3. There was still a need for PwC to proceed with its application seeking an order for production of a number of documents in light of the position taken by Vocation.
4. Following the filing of PwC’s Application on 20 December 2019, there were 780 documents comprising or relating to either the Prospectus Advice or the Disclosure and Announcement Advice, which were not included in Attachment F of Gilbert + Tobin’s 19 December 2019 letter, over which ultimately (and after PwC issued PwC’s Application) Vocation abandoned its privilege claims.
5. I accept that PwC in this context did not press its application for production of a number of documents over which Vocation claimed privilege. However, Vocation had not adduced any evidence in support of its privilege claims, or otherwise explained in any substantive way the basis for those privilege claims. The first time a substantive explanation of Vocation’s privilege claims was provided to PwC was on 12 February 2020.
6. PwC’s ultimate decision not to press for production of these documents resulted from it undertaking good faith negotiations with Vocation following the filing of PwC’s Application in circumstances where, following the service of Crispian Paul Lynch’s affidavit, sworn on 12 February 2020, PwC had the benefit of a substantive explanation for Vocation’s privilege claims. In this regard, it should be remembered that Vocation has (and has always had) the burden of establishing its privilege claims, which could not be discharged.
7. I consider that PwC has had substantial success on PwC’s Application. However, I do consider that I must take into account that there were good faith negotiations to reduce the disputation, and the fact that Vocation has maintained its privilege in respect of many documents. On this basis, Vocation should not pay all the costs of PwC’s application. Without mathematical precision, I consider that Vocation should pay 80% of the PwC costs. I do not propose to order those costs be paid forthwith – no basis has been argued for such an order – and I do not consider a separate taxation on this matter would be efficient or necessary.

# DISPOSITION

1. I will order that on or before 4:00pm on 22 May 2020, the parties confer, and provide an agreed minute of order reflecting these reasons, or if there is no agreement, brief written submissions as to the appropriate orders to make.

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| I certify that the preceding thirty-six (36) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Middleton. |

Associate:

Dated: 15 May 2020

SCHEDULE OF PARTIES

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|  | VID 434 of 2015 |
| Respondents |  |
| Fourth Respondent: | MANVINDER GRÈWAL |
| Fifth Respondent: | JOHN SYDNEY DAWKINS |
| **Second Cross Claim** |  |
| Cross Claimant | PRICEWATERHOUSECOOPERS (A FIRM) (ABN 52 780 433 757) |
| Cross Respondent | THE PARTNERS OF JOHNSON WINTER & SLATTERY |
| **Third Cross Claim** |  |
| Cross Claimant | PRICEWATERHOUSECOOPERS (A FIRM) (ABN 52 780 433 757) |
| Second Cross Respondent | MANVINDER GRÈWAL |
| Third Cross Respondent | JOHN SYDNEY DAWKINS |
| Fourth Cross Respondent | STEPHEN JOHN TUCKER |
| Fifth Cross Respondent | MICHELLE KIM TREDENICK |
| Sixth Cross Respondent | DOUGLAS JAMES HALLEY |
| Seventh Cross Respondent | VOCATION LIMITED (IN LIQUIDATION) (ACN 166 631 330) |
| **Fourth Cross Claim** |  |
| Cross Claimant | JOHN SYDNEY DAWKINS |
| Cross Respondent | THE PARTNERS OF JOHNSON WINTER & SLATTERY |
| **Fifth Cross Claim** |  |
| Cross Claimant | MARK EDWARD HUTCHINSON |
| Second Cross Respondent | MANVINDER GRÈWAL |
| Third Cross Respondent | JOHN SYDNEY DAWKINS |
| Fourth Cross Respondent | STEPHEN JOHN TUCKER |
| Fifth Cross Respondent | MICHELLE KIM TREDENICK |
| Sixth Cross Respondent | DOUGLAS JAMES HALLEY |
| Seventh Cross Respondent | VOCATION LIMITED (IN LIQUIDATION) (ACN 166 631 330) |
| **Sixth Cross Claim** |  |
| Cross Claimant | MARK EDWARD HUTCHINSON |
| Cross Respondent | THE PARTNERS OF JOHNSON WINTER & SLATTERY |
| **Seventh Cross Claim** |  |
| Cross Claimant | MANVINDER GRÈWAL |
| Cross Respondent | THE PARTNERS OF JOHNSON WINTER & SLATTERY |