VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO BP1497/2016

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Legal professional privilege – waiver of privilege; Costs – security for costs – delay.

APPLICANT	Belcon Enterprises Pty Ltd (ACN 145 060 635)
FIRST RESPONDENT	Shaq Industries Pty Ltd (ACN 085 309 388)
SECOND RESPONDENT	Makshaq Pty Ltd (ACN 163 920 705)
THIRD RESPONDENT	Raman Shaqiri
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING TYPE	Directions Hearing
DATE OF HEARING	21 June 2018
DATE OF ORDER	5 July 2018
CITATION	Belcon Enterprises v Shaq Industries (Building and Property) [2018] VCAT 1048

ORDER

1. The Second Respondent (including its director, Stefce Kutlesovski) must make further discovery and production of all advice and communications passing between it (him) and:

   (a) The First and Third Respondents;

   (b) *DSA Law*; and

   (c) *Griffin Law Firm*

   which is addressed to Stefce Kutlesovski or makes reference to Stefce Kutlesovski (**'the Discovered Documents'**).

2. Insofar as the Discovered Documents provide advice as to the merits or case strategy of the litigation, the Second Respondent is at liberty to redact those parts of the Discovered Documents, pending further order of the Tribunal.

3. The Second Respondent's application that the Applicant pay security for costs is dismissed.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	Mr J Forrest of counsel
For the First Respondent	Mr P Adami of counsel
For the Second Respondent	Mr B Carew of counsel
For the Third Respondent	Mr P Adami of counsel

REASONS

1. The Applicant was the owner of a residential apartment complex located in Braybrook, Victoria, comprising 13 residential apartments (**'the Property'**). The Applicant alleges that the First and Second Respondents constructed the apartment complex. It claims against those two companies and the director of those companies, the Third Respondent.

2. The Applicant's claim is couched in terms of breach of contract, negligence and misleading and deceptive conduct. The claim includes an allegation that the Second Respondent demanded and received monies which were not due under the relevant building contract. The amount claimed exceeds $2 million.

3. The Second Respondent (**'Makshaq'**) denies the claim made against it. It alleges that it had no contractual relationship with the Applicant, nor did it perform any works at the Property (**'the Works'**) or receive any money as payment for the Works. It contends that the Third Respondent, while a director of both Makshaq and First Respondent, allowed the Applicant to use the bank account of Makshaq to receive payments and make payments in respect of the Works. It says this arrangement was done to assist the Applicant to complete the Works.

4. Makshaq further contends that this arrangement was unbeknown to its co-director; namely Mr Stefce Kutlesovski (or Makshaq's board) at the relevant time.

5. Up until February 2018, Makshaq was legally represented by *DSA Law*, the solicitors who were also acting on behalf of the First and Third Respondents. On 27 February 2018, the Tribunal heard an application by Makshaq to vacate the hearing date of 30 April 2018, and make other procedural orders. At that directions hearing, the Tribunal was advised that Makshaq was now separately legally represented by *Griffin Law Firm.* This was because of a perceived conflict of interest if *DSA Law* continued to act for all respondents.

6. In support of the application to vacate the hearing date (amongst other orders sought), Makshaq filed an affidavit of Stefce Kutlesovski sworn on 27 February 2018. In that affidavit, Mr Kutlesovski deposes to not having had any knowledge of the proceeding until he was advised of the proceeding by Mr Griffin of *Griffin Law Firm* on 2 February 2018. The application to vacate the hearing date was ultimately successful and the hearing was vacated.

7. On 21 June 2018, the proceeding was listed before me to hear several interlocutory applications. Those applications included an application by the Applicant that the respondents discover and produce all advice and communications passing between *DSA Law* and *Griffin Law Firm* and the respondents and Mr Kutlesovski in relation to the issues in

dispute in this proceeding. Makshaq opposes that application on the ground that such documents are exempt from production because they are covered by legal professional privilege.

8. The directions hearing on 21 June 2018 also included an application by Makshaq that the Applicant provide security for costs.

9. After the 21 June directions hearing, I reserved my determination of those two applications. What follows, are my findings and reasons in respect of those two remaining applications.

DISCOVERY AND PRODUCTION OF SOLICITORS' FILES

10. The Applicant seeks discovery and production of the solicitor-client files pursuant to the Tribunal's powers to regulate its own procedure,[1] and its powers under s 81 of the *Victorian Civil and Administrative Tribunal Act 1998* to order non-party discovery.

11. As indicated above, Makshaq's defence rests, in part, on the contention that it did not enter into any contractual relationship with the Applicant or do any work for the Applicant and that its only involvement in the building project was that its bank account was used by the Applicant and the First Respondent in order to assist the Applicant to complete the Works. It is said that this arrangement was undertaken without the knowledge of Mr Kutlesovski, who is and was at all relevant times, a director of Makshaq. In other words, Makshaq contends that the Third Respondent, namely, Raman Shaqiri, who was a co-director at the relevant time entered into that arrangement without the knowledge of the other director, Stefce Kutlesovski. In his affidavit, Mr Kutlesovski deposes to the following:

> 3. I became aware of this proceeding on the Friday, 2 February 2018 from my solicitor Jamie Griffin ("**Mr Griffin**"). Prior to that date I had no knowledge that Makshaq was involved in this proceeding in any capacity. I have had no discussions with lawyers other than Mr Griffin regarding the proceeding at any stage.
>
> 4. Mr Griffin was informed of the proceeding by Raman Shaqiri.
>
> …
>
> 6. I am advised by my solicitor and verily believe that he has received various documents from DSA Law since becoming aware of the matter. The earliest of those documents is a letter dated 7 July 2016 from DSA Law to Mr Shaqiri. That letter is not addressed to Makshaq, and

[1] Sections 80 and 98 of the *Victorian Civil and Administrative Tribunal Act 1998*.

nor did it include the registered office or principal place of business of Makshaq at the time.

7. In or around late October 2016, Mr Shaqiri and I utilised the services of DSA Law and Mr Stynes in respect of an unrelated matter. At the time of engagement I was concerned as to the appointment of the firm and previous dealings that they may have had with Mr Shaqiri.

8. I asked Mr Stynes directly if he had been involved or was involved with Mr Shaqiri and he advised that he had another minor matter which he could not tell me about due to privilege. This advice was confirmed in an SMS to me on 4 November 2016. I believe now that the matter he referred to was this proceeding before the Tribunal.

9. At no time whilst he was acting in respect of the other matter did he advise me of this proceeding or seek any import or instruction from me.

…

12. The Applicant seeks an order that Makshaq and its director, Mr Kutlesovski, discover and produce what are effectively its solicitor-client files held by *DSA Law* and *Griffin Law Firm* relating to this proceeding. Makshaq opposes production of its solicitors' files on the ground that they contain confidential communications and are protected by legal professional privilege.

13. Mr Forrest of counsel, who appeared on behalf of the Applicant, concedes that communications passing between Makshaq and *DSA Law* and the First Respondent and *DSA Law* were made for the dominant purpose of giving or obtaining legal advice with the provision of legal services and ordinarily, would be protected from disclosure by legal professional privilege. However, Mr Forrest contends that by providing Mr Kutlesovski's affidavit to the Tribunal and to the Applicant's solicitors and by referring to it in the course of the directions hearing on 27 February 2018, the *respondents* have waived privilege over all communications passing between them and Mr Kutlesovski and *DSA Law* and *Griffin Law Firm* in relation to the issues in dispute in this proceeding.

14. Mr Forrest referred to and relied upon the High Court of Australia decision in *Mann v Carnell*,[2] where the joint judgment of Gleeson CJ, Gaudron, Gummow and Callinan JJ set out the principles relating to waiver of privilege at common law:

> [28] At common law, a person who would otherwise be entitled to the benefit of legal professional privilege may waive the privilege. It

[2] [1999] 168 ALR 86.

> has been observed that "waiver" is a vague term, used in many senses, and that it often requires further definition according to the context. Legal professional privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality, and who may relinquish that entitlement. It is inconsistency between the conduct of the client and maintenance of the confidentiality which effects a waiver of the privilege….
>
> [29] Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to her barrister and related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, when necessarily informed by considerations of fairness, perceive, between the conduct of the client and the maintenance of the confidentiality; not some overriding principle of fairness operating at large.[3]

15. Mr Forrest points to the fact that Mr Kutlesovski's affidavit was voluntarily and deliberately provided to the Tribunal and the Applicant during the directions hearing. He contends that the affidavit was relied upon in support of Makshaq's contention that:

    (a) Mr Kutlesovski was not informed of the proceeding;

    (b) Mr Kutlesovski was not informed about circumstances relating to the use of Makshaq's bank account (or invoices which it issued to the Applicant); and

    (c) a fraud had been committed against Makshaq.

16. Mr Forrest submitted that it would be unfair to the Applicant if production of all communications passing between the respondents and Mr Kutlesovski and *DSA Law* and *Griffin Law Firm* was not ordered.

[3] Ibid, 94.

In particular, Mr Forrest argued that a failure to produce those documents would deprive the Applicant of its ability to test the veracity and truthfulness of the allegations made in the affidavit by reference to the communications.

17. Mr Carew of counsel, who appeared on behalf of Makshaq, argued that the reference to communication between Makshaq or Mr Kutlesovski and either *Griffin Law Firm* or *DSA Legal* was expressed in the negative. In other words, Mr Kutlesovski merely deposes to the fact that he did not receive any advice as to the commencement of this proceeding. This is said to be distinguishable from a situation where a client expressly refers to advice received. Mr Carew submitted that in those circumstances, it cannot be said that Makshaq or Mr Kutlesovski's conduct is inconsistent with maintaining confidentiality.

FINDINGS

18. It is immaterial whether the reference to solicitor-client communication is expressed positively or in the negative. The net effect of what is deposed to in the affidavit is that Mr Kutlesovski contends that he was first given legal advice about the proceeding on 2 February 2018. It is this allegation of fact which is relied upon as part of the defence raised by Makshaq.

19. In my view, reliance upon this communication is inconsistent with maintaining confidentiality of Makshaq's solicitor-client communications. Clearly, the allegation that Mr Kutlesovski, as a director of Makshaq, was not informed by its past and present solicitors of the proceeding until 2 February 2018 is a material factor that is in issue in the proceeding. I consider that it would be unfair if disclosure were not ordered. In particular, a failure to disclose would allow Makshaq to, on one hand, rely upon the communication (that it was not advised of the proceeding and related matters) while on the other hand, shield any scrutiny of that allegation by claiming legal professional privilege.

20. As noted by Mr Forrest, it was open for Mr Kutlesovski to confine his evidence to a statement that he was not aware of the proceeding and related matters until 2 February 2018. However, the affidavit went further and bolstered that contention by deposing to communication with the past and present solicitors acting on behalf of Makshaq. As indicated above, I am of the view that a reference to such solicitor-client communication constitutes conduct which is inconsistent with maintaining privilege over such communication.

SCOPE OF WAIVER

21. The Applicant seeks production of the entire files of *DSA Law* and *Griffin Law Firm*. In my view, the extent of waiver does not go that far. I do not consider that it is necessary for all communications prior to 2

February 2018 as between Makshaq and *DSA Law* and *Griffin Law Firm* need to be produced to alleviate any unfairness that might be occasioned by non-disclosure. The allegation and the communication relied upon focuses solely on Mr Kutlesovski being aware of the existence of the proceeding. Although the affidavit refers to the invoices referred to in the Applicant's *Points of Claim*, that reference is not made in the context of any communication with the solicitors.

22. Further, I do not accept that a waiver of legal professional privilege by Makshaq extends to waive privilege held by the First and Third Respondents. Moreover, to the extent that there is joint privilege held over any of the documents in question, there is no evidence suggesting that either the First Respondent or the Third Respondent also waived privilege. In those circumstances, documents over which joint privilege is held do not fall within the width of the waiver.[4]

23. Consequently, I find that the extent of the waiver is limited to advice and communications between Makshaq (including Mr Kutlesovski as its director) and *DSA Law* and *Griffin Law Firm* concerning notice of the proceeding. It does not extend to communications or advice concerning matters at large. In other words, it extends to all advice and communications passing between *DSA Law* and *Griffin Law Firm* on the one hand, and Makshaq (including Mr Kutlesovski as director of Makshaq) on the other hand, that touches upon the question: *when did Mr Kutlesovski become aware of this proceeding?*

24. In my view, restricting the order in that manner balances any unfairness occasioned by maintaining confidentiality against the policy considerations that warrant the protection of privileged communication.

THIRD PARTY DISCOVERY

25. Insofar as the application seeks non-party discovery against *DSA Law*, *Griffin Law Firm*, the Applicant contends:

> As privileged [sic] has been waived, each of DSA Law and Griffin Law Firm should be ordered pursuant to section 81 to produce their communications to the Tribunal also.[5]

26. Apart from the contention that privilege has been waived, no other reasons were given or submissions made as to why the Tribunal should exercise its discretion under s 81 of the *Victorian Civil and Administrative Tribunal Act 1998.* Moreover, none of the non-parties appeared.

27. In my view, it is premature to seek an order for non-party discovery against Makshaq's past and present solicitors, given that the documents

[4] *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122, 134.
[5] Paragraph 33 of the Applicant's submissions dated 25 May 2018.

sought to be discovered may well be the same documents discovered and produced through the ordinary discovery process. This factor, of itself, weighs against the Tribunal exercising its discretion under s 81 of the *Victorian Civil and Administrative Tribunal Act 1998* to order non-party discovery.[6]

28. In any event, without further submissions specifically addressing the Tribunal's discretion to exercise its powers under s 81 of the *Victorian Civil and Administrative Tribunal Act 1998*, I decline to order non-party discovery at this stage.

29. Having said that, I make no determination, at this stage, that the application under s 81 of the *Victorian Civil and Administrative Tribunal Act 1998* be dismissed. The Applicant is at liberty to re-agitate that application if it forms the view that further discovery by Macshaq is deficient.

SECURITY FOR COSTS

30. Makshaq seeks an order that the Applicant provide security for costs of the proceeding in the amount of $37,251.90. This amount comprises both past and future legal costs. The application is opposed, principally on the ground of delay.

31. Makshaq contends that there is clear evidence that the Applicant does not have the ability to pay a costs order, should Makshaq be successful in defending the claim made against it. In its submissions filed in support of its application for security for costs, Makshaq contends:

> 4. Makshaq puts at the forefront of the application the question of Belcon's ability to pay. It has only $10 in paid up capital. The Personal Property Securities Register records the fixed and floating charge of National Australia Bank (the financier for the subject development) in respect of all present and after acquired property, and a number of other securities standing behind that charge. Any assets of Belcon are encumbered. By letter dated 26 March 2018 Makshaq's solicitors raised the issue of capacity to pay on a costs order; the reply by letter dated 4 April 2018 did nothing to assuage Makshaq's concerns.

32. The affidavit material filed in support of the security for costs application indicate that the Applicant owns no real property and that its assets are otherwise encumbered.[7] Mr Forrest submitted that there is insufficient evidence to support the contention that the Applicant would be unable to meet an adverse costs order. In particular, although the affidavit material in support of the application points to the assets

[6] *Foundry Supermarket Pty Ltd v Da Vinci Foundry Pty Ltd* [2011] VCAT 364, [14].
[7] Affidavit of Jamie Griffin dated 1 May 2018.

of the Applicant being encumbered, that evidence does not mean that the Applicant has no equity in those assets or that it does not derive income. In my view, the evidence in support of the contention that the Applicant would be unable to meet an adverse costs order is sparse and not persuasive.

33. Nevertheless, I consider it unnecessary to determine that question, given the inordinate delay in bringing the application.

34. This proceeding was first issued on 16 November 2016. The application for security for costs was filed on or about 1 May 2018, although there is correspondence from *Griffin Law Firm* to the Applicant's solicitors dated 26 March 2018, raising the question of security for costs. Since the commencement of the proceeding, there have been numerous appearances before the Tribunal, which include a compulsory conference, several directions hearings and interlocutory applications. Moreover, pleadings have closed and discovery has, by and large, been completed. Importantly, the matter is listed for hearing to commence on 29 October 2018, after already having been vacated and relisted on two earlier occasions.

35. In *The Oswal matters – application for security for costs*,[8] Sifris J considered the significance of delay in bringing an application for security for costs. His Honour stated:

> 34. Delay is usually an important factor, and often a decisive factor in deciding whether to order security and in particular security for past costs. The main reason is that by such delay, the defendant has permitted the plaintiff, during the period of the delay, to incur costs, and often substantial costs, that may not have been incurred had the application been made promptly. If a plaintiff proceeds on the assumption that no such application will be made, it may be harsh and unfair to require security for such past costs. There are, of course, or may well be, other considerations which will excuse delay or balance the assumed and presumed prejudice that inevitably arises out of such delay.

36. His Honour considered several authorities concerning the question of delay in bringing a security for costs application and concluded:

> 44. For present purposes, the relevant principles that emerge from this necessarily brief review of the authorities, are in my view the following:
>
> (a) Delay in making an application for security for costs, or further security for costs, is a most important and often critical factor, essentially because it unfairly allows a plaintiff to proceed

[8] [2016] VSC 52.

and incur costs on the assumption that no application is to be made.

(b) Delay is more significant, and often critical, in relation to security for past costs although it may also be a relevant factor in relation to security for future costs.

(c) Prejudice to a plaintiff is assumed and presumed because of the delay. However, each side may adduce evidence in support of, or against, such prejudice.

(d) Despite delay, security may be granted for past costs (in whole or in part) where it is established that there is some conduct that negates the prejudice, harshness, or oppression, that is otherwise apparent when there is a delay in substantial costs have been incurred. The Court retains a broad discretion which requires all relevant facts and circumstances to be taken into account. Each case must be decided in accordance with its own peculiar fax and circumstances.

37. Makshaq concedes that there has been delay in bringing the application for security for costs. However, it submits that up until 2 February 2018, the respondents were retained by the same legal representatives (*DSA Law*). It further contends that the proceeding has been delayed because of the Applicant failing to comply with procedural orders.

38. It is not clear how these factors explain why it has taken Makshaq more than 18 months to issue its application for security for costs. Further, I note that Makshaq was represented from the beginning of the proceeding. The mere fact that new solicitors were engaged in February 2018 is, in my view, immaterial to question of delay.

39. In my opinion, the delay in making this application for security for costs is inordinate and fatal to the application. In the absence of any reasonable explanation for the delay, I consider that it would be unfair to now order security for costs, including security for future costs and I decline to do so.

SENIOR MEMBER E. RIEGLER