

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST

VCAT REFERENCE NO. BP1053/2015

CATCHWORDS

Retail tenancies – summons to former solicitors to produce documents – waiver of privilege

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| APPLICANT | Dependable Care Pty Ltd |
| RESPONDENT | O'Connor Assets Pty Ltd |
| FIRST JOINED PARTY | Westfarmers General Insurance Ltd t/as Lumley Insurance |
| SECOND JOINED PARTY | Joanne Tomada |
| WHERE HELD | Melbourne |
| BEFORE | Deputy President C Aird |
| HEARING TYPE | Directions hearing |
| DATE OF HEARING | 20 June 2017 |
| DATE OF SUBMISSIONS | From applicant – 28 June 2017, From respondent – 3 July 2017 |
| DATE OF ORDER | 1 August 2017 |
| CITATION | Dependable Care Pty Ltd v O'Connor Assets Pty Ltd (Building and Property) [2017] VCAT 1170 |

RULING

The applicant has waived privilege in the documents produced to the Tribunal by Mark White of White & Mason in compliance with a summons dated 1 June 2017 issued at the request of the first joined party on 6 June 2017

ORDERS

1. Mark White of White & Mason may make arrangements with the principal registrar to inspect the three boxes of documents produced to the Tribunal on 21 June 2017 ('the summonsed documents') providing such inspection is arranged to occur on or before 8 August 2017.

2. If Mark White objects to the parties inspecting any of the summonsed documents on the grounds that such documents were not required to have been produced in compliance with the summons, he should place such documents in the separate folder marked ‘Confidential documents from the file of White & Mason produced to the Tribunal pursuant to the summons dated 1 June 2017 issued at the request of the first joined party on 6 June 2017 – only to be released for inspection by an Order of the Tribunal’ (‘the Confidential Documents’).
3. **Before Mr White inspects the summonsed documents I direct the principal registrar to create a separate folder labelled Confidential documents from the file of White & Mason produced to the Tribunal pursuant to the summons dated 1 June 2017 issued at the request of the first joined party on 6 June 2017 – only to be released for inspection by an Order of the Tribunal’.**
4. The parties may make arrangements with the principal registrar after 8 August 2017 to inspect and take copies of the summonsed documents, except for the Confidential Documents.
5. If any party advises the principal registrar in writing they seek an order for an inspection of the ‘Confidential Documents’ I direct the principal registrar to schedule a half day directions hearing before a judicial member, if available.
6. Liberty to apply.
7. Costs reserved.
8. **I direct the principal registrar to send a copy of this order to Mark White, White & Mason Lawyers, Level 3, 517 Flinders Lane, Melbourne 3000 and by email to mdw@whiteandmason.com.au.**

DEPUTY PRESIDENT C AIRD

APPEARANCES:

| | |
|-------------------------|----------------------------|
| For Applicant | Ms M O’Sullivan of Counsel |
| For Respondent | Mr B Duke, solicitor |
| For First Joined Party | Mr R Andrew of Counsel |
| For Second Joined Party | Ms M O’Sullivan of Counsel |

REASONS

- 1 The applicant tenant, a provider of Supported Residential Services, entered into a lease with the respondent landlord, for premises in Geelong in 2011. During 2014 it notified the landlord of a number of instances of water ingress which the landlord and its insurer attempted to rectify over a period of some months. During the period October 2014 to April 2015 the landlord and its insurer carried out various repairs to the premises, which the applicant says were unsuccessful. In November 2014, and in the months following, the Department of Health and Human Services ('DHHS') suspended any new admissions to the facility for various periods, and on 23 June 2015 revoked the tenant's registration of the premises as a Supported Residential Facility, due to the premises being uninhabitable. The landlord and the insurer deny that the premises were uninhabitable.
- 2 The tenant contends that the premises were uninhabitable during the rectification period, and as such it was not obliged to pay rent. The landlord terminated the lease on 29 June 2015, which termination the tenant alleges was wrongful.
- 3 These proceedings were commenced by the tenant on 3 August 2015 seeking damages occasioned by the landlord's alleged wrongful termination of the lease. The landlord has a substantial counterclaim for damages arising from the tenant's alleged breaches of the lease, including non-payment of rent and replacement of equipment it claims was wrongly removed by the tenant. In May 2016 the landlord was given leave to join its insurer to this proceeding, as the first joined party. The insurer, relying on statements made to it by Paul Theo (aka Paul Tomado) who, it alleges, represented the tenant in making its claim on the Insurance Policy, alleges that damage to the premises were caused by the 'fraudulent and dishonest acts' of the tenant.
- 4 The proceeding is currently listed for a 25 day hearing commencing on 9 October 2017.
- 5 The tenant's claim for damages, as set out in paragraph 25 of its Points of Claim dated 31 July 2015, includes:
 - (e) Legal and accounting fees incurred in the Applicant having to deal with the Respondent and the Respondent's insurer and the insurer's agent and servants. ('legal fees')
- 6 In its Further and Better Particulars dated 20 February 2017, the particulars of the claim for legal fees are:

...based on amounts stated on invoices. Copies of the invoices are available for inspection upon request to the Applicant's solicitors..
- 7 On 7 June 2017, at the request of the insurer, a summons, dated 1 June 2017, was issued to Mark White of White & Mason Lawyers, the tenant's former solicitors, to produce to the Tribunal various documents including

the costs agreement with the tenant, all *emails, reports, sms messages, memos, briefs and letters which are referred to in* [the invoices discovered by the tenant in support of its claim for legal and accounting fees] *and a copy of all files notes, memos or records of all of the meetings and all of the telephone attendances referred to in* [the discovered invoices]

- 8 The summons was returnable at a directions hearing on 20 June 2017.
- 9 Mr White attended the directions hearing and said that he considered he was unable to comply with the summons as his file was subject to legal professional privilege and could not be produced to the Tribunal unless such privilege was waived by the tenant.
- 10 Mr Andrew of Counsel, who appeared on behalf of the insurer, submitted first, that the documents should be produced to the Tribunal in compliance with the summons. Further, that by including in its claim for damages a claim for the legal fees, there had been an implied waiver of privilege by the tenant. Ms Sullivan of Counsel, who appeared on behalf of the tenant, said that the tenant had not waived privilege and submitted that I should reject Mr Andrew's submission.
- 11 In the circumstances, I ordered Mr White to produce his file to the Tribunal the following day and made orders, to the effect that no orders would be made for the inspection of the summonsed documents until I had determined whether the tenant had waived privilege. Orders were made for the tenant and the insurer to file and serve submissions in support of their respective positions, and it was agreed that I would determine the question as to whether the tenant had waived privilege without hearing further from the parties.
- 12 Mr White attended the Tribunal on 21 July 2017 and produced three file boxes which he said comprised his file. As he had just retrieved them from archives, and had not had a chance to review them, he requested that, in the event I found privilege had been waived, he be given an opportunity to inspect the file before the parties.
- 13 The tenant and the insurer have filed written submissions, as ordered. The insurer also relies on the affidavit of its solicitor, Andrew Reiner Seiter dated 20 June 2017.
- 14 The tenant relies on an affidavit by its director, Joanne Tomada dated 28 June 2017 in which she affirms:
 5. On the basis of the review of each of these invoices, I am of the view that the emails, records, SMS messages, memos, briefs and letters referred to in those invoices, as well as the file notes, memos or records of all of the meetings and all of the telephone attendances, record confidential communications between [the tenant and its former solicitors]. Each of these communications were for the dominant purpose of obtaining legal advice during the course of the insurance claim to Lumley for water ingress damage to Geelong Lodge.

6. At no point have I intended, consented or authorised anyone to waive privilege in any of these communications.

HAS PRIVILEGE BEEN WAIVED?

- 15 The tenant contends that privilege over the file produced by White & Mason has not been waived. In its submissions it seeks orders that:
- (a) no orders as to its inspection of the documents by other parties be granted; or in the alternative
 - (b) orders that it have first right of inspection of the documents, to further consider whether it seeks to assert and maintain privilege over those documents, in whole or in part.
- 16 I was pressed by Ms Sullivan to make the alternative order at the directions hearing. Such an order was opposed by Mr Andrew. He submitted that the tenant had waived privilege, and it was therefore not appropriate it be given an opportunity to inspect the file to consider whether it maintained its claim for privilege.
- 17 The insurer contends in making the claim for legal fees the tenant has acted inconsistently with the retention of privilege or confidentiality in the summonsed documents. Further, that access to the summonsed documents is required so that it, and if necessary, the Tribunal can ascertain whether the legal fees were:
- (a) incurred as a result of the alleged wrongful termination of the lease
 - (b) were reasonably incurred and
 - (c) were charged at an appropriate rate.
- 18 For the reasons which follow I am satisfied that the tenant has waived privilege in the summonsed documents, and accordingly there is no reason to give the tenant an opportunity to inspect them before allowing the parties to inspect.

The tenant's contentions

- 19 I will consider each of the tenant's contentions that it has not waived privilege.

The summonsed documents are privileged and the tenant has acted consistently with the maintenance of privilege at all material times.

- 20 It is conceded by the insurer that the summonsed documents are privileged. The tenant maintains that there is no evidence that it has acted inconsistently with the maintenance of privilege and that this question needs to be determined by the facts of the case.

21 The tenant relies on *Osland v Secretary to the Department of Justice*¹ ('*Osland*') where the High Court confirmed that the appropriate test to determine whether privilege has been waived is the 'inconsistency test' set out in *Mann v Carnell*² ('*Carnell*'). In *Osland* the High Court³ held that there will be a waiver of privilege where the conduct of the party claiming the privilege is inconsistent with the maintenance of confidentiality which the privilege is intended to protect. At [49] the High Court said:

Whether, in a given context, a limited disclosure of the existence, and the effect, of legal advice is inconsistent with maintaining confidentiality in the terms of the advice will depend of the circumstances of the claim.

22 The insurer relies on what, it contends, and I accept, is an analogous situation in *Esso Australia Resources Pty Ltd & Anor v BHP Petroleum (Bass Strait) Pty Ltd*⁴ ('*Esso*') where the Victorian Court of Appeal⁵ held that the commencement of a proceeding which included a claim for damages in the nature of specified legal costs constituted an implied waiver of privilege. The Court stated:

12. The [Esso's] primary submission was that his Honour erred in concluding that the commencement by Esso of its counterclaim was inconsistent with the maintenance by Esso of confidentiality in the privileged documents. Esso argued that, having commenced its counterclaim it retained the 'right to elect whether to waive privilege over the relevant documents in order to prove aspects of its counterclaim or to maintain privilege in relation to them and thus risk failing to prove those aspects'. Esso contend that the mere fact that a matter had been put in issue in a proceeding by way of a pleading did not mean that the privilege inhering in a communication relevant to that issue was waived. According to the submission, an election to waive privilege 'is not necessarily made merely by bringing a claim'.

13 In our view, his Honour correctly treated the case as calling for an orthodox application of the principles clearly enunciated in *Carnell*. Applying *Carnell*, the issue which his Honour had to decide was whether Esso's conduct in pleading its claim for reimbursement of legal costs was inconsistent with the maintenance of confidentiality in documents relevant to that claim. If it was, privilege had been waived. If it was not, there was no waiver. Either way, no question of 'election' arose.

...

15. It could hardly be doubted that disclosure of Esso's privileged documents is required to enable justice to be done between itself and Esso. In its written submissions before the primary judge,

¹ [2008] HCA 37

² (1999) 201 CLR 1

³ Joint decision of Gleeson CJ, Gummow J, Heydon J and Kiefel J

⁴ [2007] VSCA 224

⁵ Maxwell ACJ and Chernov JA

Esso acknowledged that in order to succeed in its counterclaim it would need to prove in respect of each 'claimed expenditure' on legal costs that it was –

- a incurred as a result of the Longford incident;
- b made 'for the joint undertaking' within the meaning of the operating agreement;
- c reasonably incurred; and
- d not incurred as a result of Esso's gross negligence.

...

18. Esso's counterclaim puts in issue whether its expenditure on legal costs fell within the operating agreement and that in turn, depends on the nature and purpose of the legal work which occasioned the payments. The documents in question are plainly relevant to these issues. By making its claim for reimbursement, Esso made an assertion about the contents of the documents. Esso thereby laid the documents open to scrutiny. It would plainly be inconsistent for it now to maintain a claim for confidentiality in respect of them, even if we accepted the possibility that Esso might choose not to rely on the documents in the proceeding. [underlining added]

The tenant's claim for legal fees is supported by the invoices which is adequate for the hearing.

- 23 The tenant contends that the invoices provide sufficient evidence that the legal fees were incurred in relation to the insurance claim, and that the reasonableness of those costs can be dealt with by having those costs taxed. I disagree. It is difficult to conceive how the insurer, and ultimately the tribunal if the insurer contests the claim for legal fees, could be satisfied that the legal fees were reasonably incurred without a consideration of the summonsed documents. The suggestion that the invoices can be taxed at the conclusion of the hearing is inconsistent with the statements by the Court of Appeal in *Esso*. The tenant's claim for damages in the nature of legal expenses is not the same as a claim for legal costs of a proceeding, which ordinarily, if awarded, may be taxed.
- 24 In *Esso*, the Court of Appeal said, in relation to Esso's submissions that the question of costs should be dealt with in a manner similar to costs awarded at the conclusion of a proceeding:
 19. Nor do we doubt his Honour's decision to distinguish *Giannerelli v Wraith (No 2)* (Gianerelli) from the present situation. The claim by Esso is not analogous to the submission of a bill of costs for taxation.

Esso can be distinguished

- 25 The tenant asserts that *Esso* can be distinguished on the facts. In *Esso* the operating agreement include an exception to the requirement that legal

expenses were to be shared equally between the parties: *unless [the expenditure relates to] injury, loss, or damage...caused by the gross negligence of wilful misconduct by [Esso] in directing or supervising the Joint Undertaking.*

- 26 The tenant submits that in *Esso* the claim for legal expenses was a contractual claim which put into issue whether the work done fell within the contractual exceptions. Further, that in many ways the claim by Esso *has the hallmarks of the authorities where a client has sued a former solicitor for professional misconduct. The substance of the legal file is directly in issue, that is whether the advice was negligence. (sic)*
- 27 The tenant contends that in claiming reimbursement of the legal fees it has not put into issue the substance of the advice – it only claims the fees as loss and damage incurred in connection with the breach of lease claim. However, in my view, this is to misconceive the insurer’s position. It does not contend that the substance of the advice is in issue; rather that the reasonableness of the legal fees claimed is in issue and that such reasonableness can only be determined by having regard to the summonsed documents.
- 28 As with any claim for damages, the tenant’s claim for legal fees must be supported by relevant documents which prove the claim. The invoices alone are insufficient. It is necessary to consider the ‘source’ documents to determine whether the legal fees have been relevantly and reasonably incurred.
- 29 Further, it is, in my view, extraordinary to describe cases where clients have sued former solicitors as being similar to *Esso*. *Esso* was concerned with a claim for reimbursement of legal expenses said to have been incurred on behalf of a joint undertaking. Although gross negligence was alleged, and the Court of Appeal commented that it was one of the factors which would need to be proved for the claim to succeed, it was not a factor relevant to the question of whether privilege had been waived.

Whether the claim for legal fees is put into issue by the insurer’s allegation that the insurance claim is fraudulent.

- 30 The tenant submits that if the insurer’s contention is that the claim for legal fees has been put into issue by the allegation in its counterclaim that the insurance claim is fraudulent, then the proper course for the insurer is to establish no privilege exists on the basis of the crime/fraud or ‘improper purpose’ exception.
- 31 It is unclear to me why this has been raised by the tenant. The insurer simply asserts that the tenant has waived privilege by including in its claim for damage a claim for reimbursement of the legal fees.

Whether the summonsed refer to Paul Tomada is not relevant to the Tribunal's determination of privilege.

32 I agree.

33 In his affidavit dated 20 June 2017 filed in support of the application, Mr Seiter, solicitor for the insurer stated that the purpose of seeking to inspect the lawyer's file was twofold:

First, these documents are relevant to [the tenant's claim] for legal fees paid to White & Mason during the claim period;

Second, these documents will help to establish the fact, which [the tenant] denies that Mr Paul Theo, aka Mr Paul Tomada, acted at all material times as a manager and/or agent of [the tenant] in making the claim during 2014 and 2015.

34 If reliance on the documents to determine Mr Theo's role was the sole reason for the insurer seeking to inspect the lawyer's file it would be difficult to persuade me that privilege had been waived. Any issues concerning Mr Tomada's role in the circumstances leading to the termination of the lease are properly matters for evidence and cross-examination.

CONCLUSION

35 I find that in including in its claim for damages the claim for reimbursement of the legal fees, the tenant has waived privilege in the summonsed documents.

36 As indicated to the parties, I consider it appropriate that Mr White be given an opportunity to inspect his file before the parties are given an opportunity to do so. If there are any documents in the file which Mr White considers are not required to have been produced in compliance with the summons, he should place those documents in the separate folder, which I will direct the principal registrar to create marked 'Confidential Documents from the file of White and Mason produced to the Tribunal pursuant to the summons issued at the request of the first joined party – only to be released for inspection upon an Order of the Tribunal'. If any party advises the principal registrar they seek an order that the documents be made available for inspection, I direct the principal registrar to schedule a directions hearing so that the Tribunal can determine whether an order should be made allowing inspection.

37 The question of costs will also be reserved with liberty to apply.

DEPUTY PRESIDENT C AIRD