

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING & PROPERTY LIST

VCAT REFERENCE NO. BP161/2017

CATCHWORDS

Domestic building dispute – discovery – claim of legal professional privilege – claim of litigation privilege – claims disputed – assessment by Tribunal of a sample of the documents in dispute – s.118, s.119 *Evidence Act 2008* – requirement for evidence to support claims – Tribunal may inspect the sample documents – whether adjudication under the *Building and Construction Industry Security of Payment Act* is litigation within the meaning of s.119 of the *Evidence Act* – role of the architect – whether it acts as the owner’s agent for the purposes of s.118 of the *Evidence Act* – how the Tribunal should deal with chains of emails – whether privilege was waived – analysis of each document in the sample

APPLICANT

May Constructions (Residential) Pty Ltd
ACN 159 697 864

RESPONDENT

Creative Property Developments Pty Ltd
as trustee for the Creative Property
Developments Trust
ABN 17 207 098 249

WHERE HELD

Melbourne

BEFORE

Senior Member S. Kirton

HEARING TYPE

Interlocutory hearing

DATE OF HEARING

6 February 2019

DATE OF ORDER

9 April 2019

CITATION

May Constructions (Residential) Pty Ltd v
Creative Property Developments Pty Ltd
(Building and Property) [2019] VCAT 519

ORDER

1. I direct the principal registrar to record on the file that the final hearing of this matter shall not be before Senior Member Kirton.

SENIOR MEMBER S. KIRTON

APPEARANCES:

For the Applicant

Mr M. Roberts QC with Mr L. Stanistreet of
Counsel

For the Respondent

Mr R. Rozenberg of Counsel

REASONS

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BACKGROUND

1. This dispute arises out of a building development in Armadale. The respondent (Creative) is the owner of the property and the applicant (Maycon) is the builder. Bruce Henderson Architects (the Architect) was the project architect and is not one of the parties to this proceeding.
2. Creative has claimed privilege over a bundle of documents which passed between Creative's solicitors (Gadens) and the Architect. Maycon challenges the claim and this is the issue that has come before me for determination.
3. Directions were made in December 2018 which provided, in summary, that:
 - a. Creative would select and list 20 documents from Schedule 2 of the respondent's List of Documents,
 - b. Maycon would select and list 20 documents from Schedule 2 of the respondent's List of Documents,
 - c. Creative would provide copies of the selected documents ("the sample documents") to the Tribunal in a sealed envelope (note that as there was some overlap between the selections, a total of 36 documents make up the sample), and
 - d. the parties were then to file and serve any affidavits and written submissions in support of their contentions.
4. At the hearing, Creative was represented by Mr R Rozenberg of Counsel. It relies on an affidavit sworn by Adrian John Clifford dated 14 January 2019. When challenged by Maycon's counsel that this affidavit did not provide sufficient evidence of fact, Mr Rozenberg asked me to also have regard to two affidavits sworn at an earlier stage of the proceeding, namely Daniel Fasciani of the Architect sworn 24 February 2017 and Peter May of Maycon sworn 7 February 2017.
5. Maycon was represented by Mr M Roberts QC with Mr L Stanistreet of Counsel. It relies on an affidavit of Megan Calder affirmed 30 January 2019.

CREATIVE'S CLAIMS OF PRIVILEGE

6. Creative relies on two heads of privilege, commonly known as the "legal advice" privilege (as meant by section 118 of the *Evidence Act* 2008 (*Evidence Act*)), and the "litigation" privilege (section 119 *Evidence Act*), which are applicable in this Tribunal by virtue of section 106(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 (*VCAT Act*).

7. Creative says that all the sample documents are covered by litigation privilege, while 10 of them also fall within the advice privilege. The relevant provisions are as follows:

Section 106(1) VCAT Act

“... a person is excluded from ... producing a document in a proceeding if the person could not be compelled to ... produce the document in proceedings in the Supreme Court.”

Section 118 Evidence Act:

“Legal advice

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication made between the client and a lawyer;
or
- (b) a confidential communication made between two or more lawyers acting for the client; or
- (c) the contents of a confidential document (whether delivered or not) prepared by the client, lawyer or another person;

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

Section 119 Evidence Act:

“Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

- (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or
- (b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.”

8. In response to these claims of privilege, Maycon contends:
- a. Creative has not established the requisite factual basis for its privilege claims;
 - b. the documents are not protected by privilege; and

- c. if, contrary to (a) and (b) above, the Tribunal finds that some or all of the documents are privileged, such privilege has been waived by Creative.
9. In order to assess the claims of privilege, I have reviewed each of the sample documents. The process of considering the affidavit material provided, identifying relevant exhibits where these had not been identified during the hearing (including obtaining the exhibits to Mr May's and Mr Fasciani's affidavits from the Tribunal's archives), reviewing the authorities provided, identifying other authorities (on the issue of how to treat chains of emails - not addressed by Counsel), examining each of the sample documents (many of which included multiple documents), describing them for the purposes of this decision, applying the facts to each of them and providing my decision has occupied many hours. It is regrettable that due to the Tribunal's limited resources, and the complexity of the issues in dispute, an interlocutory decision such as this has the effect of holding up the progress of the proceeding. Parties are encouraged to bear in mind the Tribunal's obligation under s.98(1)(d) of the *VCAT Act* to "conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit".

WHAT FACTUAL BASIS HAS CREATIVE ESTABLISHED?

10. It is clear from the authorities that Creative, as the party asserting privilege, bears the onus of establishing the basis of its claim and must establish the facts from which the Tribunal can determine that the privilege is capable of being asserted¹. In other words, Creative must demonstrate that the documents were confidential documents prepared either by Gadens or the Architect for the dominant purpose of Gadens providing Creative or its agents with legal services relating to an actual or anticipated legal proceeding, or legal advice.
11. A two-step approach must be adopted in determining dominant purpose. The two steps are:
 - “(a) ascertaining the subjective purpose or purposes of the person or persons making or commissioning the communication in question;
 - (b) if the Court concludes that there was more than one purpose, at least one of which was a purpose capable of attracting legal professional privilege, to determine whether the party claiming the privilege has established that the privileged purpose was the dominant purpose, a determination that must be made objectively.”²

¹ *Tabcorp Holdings v Victoria* [2013] VSC 302 at [74] and the cases cited therein

² *Matthews v SPI Electricity* [2013] VSC 422 per AsJ Derham at [57]

12. Counsel for Maycon submitted that the evidence contained in the Clifford affidavit fails to sufficiently set out the basis of the claims of privilege, and therefore has not complied with the relevant requirements of Supreme Court rule 29.04(1)(d) by sufficiently stating the ground of privilege on which it relies. For example, “one would have expected the Clifford affidavit to contain a statement to the effect that he had read each of the documents and in each case set out in sufficient detail the basis for the claim to privilege”.

13. Maycon relies on the decision of Vickery J in *Hodgson v Amcor (No 2)* (emphasis added):

“... the grounds of the privilege claimed must be sworn in terms which identify the legal basis upon which the claim is made and provide a sufficient description of the elements of the document relied upon to support the claim made on that basis.”³

14. Mr Roberts also referred me to *AED Oil v Back (no.3)*, where Judd J held (omitting citations, emphasis added):

“The general principles applicable to claims for legal advice privilege are usefully set out in the judgment of Young J in *AWB Ltd v Cole & anor (No 5)*. The relevant principles, summarised by His Honour, are as follows:

‘(1) The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents, supported by argument or submissions’...’⁴

15. In *Matthews*, Derham AsJ took a similar approach, following the decision in *Powercor v Perry*⁵ that:

“the Court of Appeal emphasised the significance of the burden of proof to the outcome of the application...” and that “it was incumbent on the applicant to persuade [the court] to draw the inference that the applicant’s dominant purpose in commissioning the reports was a privileged purpose...”⁶

³ *Hodgson v Amcor Ltd; Amcor Ltd v Barnes & Ors* [2011] VSC 204 at [36]

⁴ [2010] VSC 403 at [29]

⁵ *Powercor Australia Ltd v Perry* [2011] VSC 308 at [51]

⁶ *Op. cit.* [63]

Should I inspect the sample documents?

16. As a preliminary point, Maycon contended that the Clifford affidavit is “unacceptably general” (being the phrase used in *AED Oil*) and on that basis, I should decline to even inspect the sample documents. Mr Roberts says that in the absence of any specific evidence about each document in the sample, I will be unable to form a view as to the dominant purpose for which each sample document was created.
17. I do not agree that I should not inspect the documents. I prefer the approach adopted by Judd J in *AED Oil*, where despite his finding that the evidence was unacceptably general, he nevertheless proceeded to inspect the documents. At paragraph 29 of his reasons (set out above in part), he continues citing *AWB v Cole* with approval, where Young J said (omitting citations, emphasis added):

“(12) The court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power. If the power is exercised, the court will need to recognise that it does not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege.”

18. Judd J continued at paragraph 34:

“The court may, of course, inspect documents. The content of a document may disclose the necessary characteristics to support a claim for privilege. The content may provide compelling evidence to support of a claim. For example, a letter of advice, on a solicitor’s letter head, addressed to a client, may speak for itself.”

19. Accordingly, I have inspected the sample documents and I have included their contents as part of the evidence provided by Creative in attempting to discharge of its onus of proof.

What is the evidence of fact?

20. Creative provided some evidence about the history of the dispute between the parties, by way of the Clifford affidavit, the May affidavit, the Fasciani affidavit and the pleadings. I note here that as I was not taken to any specific exhibits by Counsel for Creative, I have done the best I can to identify which exhibits to these affidavits support the facts contended by Creative. As I may have missed something, the factual summary below should not be considered to be determinative in any later hearing.
21. The deponents and the documents exhibited to their affidavits demonstrate the following sequence of events occurred:

- a. The parties entered into a contract dated 9 December 2013 whereby Maycon was to construct a mixed use development of residential apartments, retail shops and other commercial premises. The contract was a standard form Australian Institute of Architects/Master Builders Australia Major Works Contract, ABIC MW – 2008 H Vic⁷.
- b. On 15 September 2015 the Architect received payment claim 18 (“PC18”) undercover of a letter from Maycon which claimed an amount of \$448,556.27⁸.
- c. On 28 September 2015 the Architect issued progress payment certificate 18 (“PPC18”) which certified payment was due from Maycon to Creative in the sum of \$56,164.13. The reason for the reduction included liquidated damages and deductions for non-compliant and incomplete work⁹.
- d. Maycon disputed PPC18 and on or about 6 October 2015, it gave a notice of dispute under the contract disputing PPC18¹⁰.
- e. On 15 October 2015 Maycon issued progress claim 19 (“PC19”) claiming the sum of \$585,363.61¹¹.
- f. On 29 October 2015 the Architect issued progress payment certificate 19 (“PPC19”) which certified payment by Creative to Maycon in the sum of \$254,327.49. This amount included a deduction of liquidated damages and a reduced value of the cost of works completed¹².
- g. On 30 October 2015 Maycon issued a notice of intention to suspend works under the *Building and Construction Industry Security of Payment Act* (“SOP Act”)¹³. There is no mention in the notice of any foreshadowed adjudication application.
- h. Creative disputed the notice of intention to suspend works but nevertheless on or about 27 November 2015 paid the total amount claimed in PC19¹⁴. Mr May then appears to have agreed to not suspend the works unless 20 days’ notice was given¹⁵.
- i. The Architect says that it reached an agreement with Mr May on 23 December 2015 that the works could be separated into separable parts, on the basis that separable part 1, being the retail and commercial

⁷ Clifford affidavit exhibit AJC-1

⁸ Fasciani affidavit at paragraph 11, exhibit DF-4

⁹ Fasciani affidavit at paragraphs 12 – 13, exhibit DF-5

¹⁰ Part B of Maycon’s Points of Defence to Counterclaim dated 6 April 2018 at 20(c)

¹¹ Fasciani affidavit at paragraph 14, exhibit DF-6

¹² Fasciani affidavit at paragraphs 15 and 18, exhibit DF-7

¹³ Fasciani affidavit at paragraphs 20 – 22, exhibit DF-8

¹⁴ Angelatos affidavit at paragraph 21

¹⁵ Fasciani affidavit at paragraph 23

areas, would have practical completion certified on 23 December 2015 and separable part 2, comprising the residential areas, would be certified at a later date¹⁶. This occurred on 5 February 2016¹⁷. Mr May disputes the dates of practical completion of the works¹⁸.

- j. During the course of 2016 the parties continued to be in dispute, including in respect of unremedied defects¹⁹. Mr May agrees that “since practical completion, disputes have arisen between the parties as to whether there are construction defects”²⁰.
- k. On or about 4 February 2017 Maycon commenced these proceedings by making an application for an interlocutory injunction restraining Creative from having recourse to bank guarantees. The application was heard by the Tribunal on 17 March 2017 and determined on 13 April 2017²¹.
- l. Maycon alleges that in late 2015 and during the course of 2016 and 2017, it issued various notices of dispute under the contract including on 6 October 2015, 12 January 2016, 20 January 2016, 28 January 2016, 4 May 2017, 8 June 2017²².

What was Gaden’s role?

22. Mr Clifford’s evidence regarding Gaden’s involvement is as follows²³:

- a. At paragraph 15: “During the course of 2015, Creative contacted Gadens for the purposes of receiving legal advice and for the provision of professional legal services in relation to matters which ultimately became the subject of this proceeding.”
- b. At paragraph 16: “In particular, in or about September and October 2015 significant disputes had arisen in connection with May’s progress payment claims 18 and 19.”
- c. At paragraph 17: “From about this time and during 2016 and 2017, Gadens communicated with the Architect variously for the provision of legal advice, providing and receiving updates, providing or receiving information or queries in relation to disputes with Creative...”
- d. He describes the disputes with Creative at paragraph 17 as including

¹⁶ Fasciani affidavit at paragraph 35

¹⁷ Fasciani affidavit at paragraph 50; May affidavit at paragraph 4

¹⁸ May affidavit at paragraph 5

¹⁹ Fasciani affidavit at paragraph 51 – 61 and 62 – 68

²⁰ May affidavit at paragraph 6

²¹ *May Constructions (Residential) Pty Ltd v Creative Property Developments Pty Ltd* [2017] VCAT 484

²² Maycon's Points of Defence to Counterclaim dated 6 April 2018 at 11(c), 11(d), 11(h), 11(j), 11(k), 11(l), 11(m), 11(n) and 20(c)

²³ Clifford affidavit at paragraphs 15 –18

- “(a) payment matters in proceedings under the [SOP Act] - potential examples of communications or documents of this nature may be found at Doc ID Nos. 210, 171, 137 and 189;
- (b) issues relating to defective, non-compliant, and/or incomplete works – potential examples of communications or documents of this nature may be found at Doc ID Nos. 13, 95, 15, 51 and 43;
- (c) other matters the subject of these proceedings before the Tribunal including liquidated damages, security and practical completion – potential examples of communications or documents of this nature may be found at Doc ID Nos. 274, 275, 129, 88 and 82.”

LITIGATION PRIVILEGE

What is the appropriate test?

- 23. As submitted by Creative, the question whether litigation was contemplated or in prospect at the relevant time is one of fact; to be determined by reference to objective criteria²⁴.
- 24. It is not necessary that there be a decision to commence proceedings²⁵, nor that the commencement of proceedings be more probable than not – but there must be a real prospect of litigation as distinct from a mere possibility²⁶.
- 25. Creative contends that from around 30 October 2015, adjudication proceedings under the *SOP Act* were contemplated or in prospect and accordingly, any confidential communications and documents produced for the purposes of such litigation attract litigation privilege.

Are proceedings under the SOP Act covered by litigation privilege?

- 26. Mr Stanistreet relies on the decision of Macaulay J in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd*²⁷ that proceedings under the *SOP Act* are proceedings within the meaning of section 119 of the *Evidence Act*. I have no difficulty in accepting the correctness of His Honour’s decision in *Dura*.
- 27. However, the factual situation in the present case is not the same as that considered in *Dura*. That decision involved proceedings where an application to an adjudicator had actually been made and the documents in question were brought about “for the dominant purpose of enabling legal

²⁴ *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526 at 558

²⁵ *Ibid*, 559

²⁶ *Mitsubishi Electric Australia Pty Ltd v Victorian Work Cover Authority* [2002] VSCA 59 at [19]

²⁷ [2011] VSC 477

services to be provided to Hue for the adjudications under the *Security of Payments Act*²⁸.

28. In the present case, I have been provided with no evidence that an application to an adjudicator under the *SOP Act* was ever made, or even considered.

Does the factual evidence before me provide a basis for a claim for litigation privilege?

29. Creative's evidence, at its highest, is that:
- a. As at October 2015 claims for payment had been made and assessed under the contract and the progress claims refer to them as being made under the *SOP Act*. However there is no mention in the claims of any foreshadowed application for adjudication.
 - b. As at October 2015 a notice of intention to suspend had been given under the *SOP Act*. However there is no mention in the notice of any foreshadowed application for adjudication.
 - c. As at October 2015 the Architect, Creative and Maycon disagreed over the amounts due to Maycon under the contract in respect of liquidated damages, the value of the works completed, deductions for non-compliant and incomplete work.
 - d. There is no evidence before me of any application for adjudication under the *SOP Act* having been contemplated at that time. Instead, the evidence supports a conclusion that thoughts of an adjudication would have been unlikely. By November and December 2015, Creative had paid the disputed amounts referred to in the notice of suspension and Maycon had agreed not to suspend works without further notice.
 - e. Throughout 2016, the Architect, Creative and Maycon were in communication about alleged defects. These communications appear to have been carried out in accordance with the contractual procedures as they refer to notices been given under clause M15 of the building contract²⁹.
 - f. There is no evidence before me of an application for adjudication under the *SOP Act* having been considered throughout 2016.
 - g. Moreover, there is no evidence before me of any legal proceeding in any other forum having been considered throughout 2015 and 2016, until the application to the Tribunal to restrain recourse to the bank guarantees was issued in February 2017.

²⁸ Ibid [51]

²⁹ for example, Fasciani affidavit at paragraphs 53, 55, exhibits DF-26, DF-28

30. The evidence of Mr Clifford of Gaden's role (set out above) does not take the matter any further. His paragraph 15 may support a claim for legal advice privilege (which is discussed further below), but does not provide me with any information to indicate that the dominant purpose of communications made during the course of 2015 were for anticipated legal proceedings. Simply saying that there were communications and documents concerning matters in dispute which "ultimately became the subject of this proceeding" does not demonstrate that these communications and documents were prepared for the dominant purpose of anticipated proceedings. Mr Clifford does not even say that proceedings were anticipated. The fact that issues which arose during 2015 become issues in the proceeding (such as the recovery of PPC18³⁰ and the payment of PC19³¹) is not evidence that proceedings were contemplated or in prospect at the relevant time.
31. His paragraph 16 repeats that that the parties were in dispute about PPC18 and PPC19, which I have no difficulty in accepting. However this is not evidence that litigation was anticipated at that time. Instead, as set out above, the correspondence exhibited to Fasciani's affidavit indicates that the parties were following the contractual mechanisms in order to deal with their disputes. There is no indication that either party had considered commencing proceedings.
32. Mr Clifford's paragraph 17 may support a claim for legal advice privilege, but not for litigation privilege. He lists the issues in dispute in the present proceeding, and provides examples of certain documents which he says are related to each issue, but does not provide any evidence that these documents were confidential and were made "for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding ..., or an anticipated or pending Australian or overseas proceeding".
33. I have looked at each of the documents in the sample to see if any of them, on their face, provide any evidence that a referral to adjudication or any other form of litigation was anticipated. Other than the documents prepared for this proceeding, they do not. On the basis of the evidence before me, I am not satisfied that communications and documents produced for the purpose of preparing and lodging payment claims and preparing and providing payment schedules can be said to have been prepared for the dominant purpose of litigation. Adopting the wording of *Mitsubishi Electric* I do not have any evidence before me that that there was a real prospect of litigation as distinct from a mere possibility.
34. The words of Judd J in *AED Oil* could just as well be used to describe the evidence in this case (emphasis added):

³⁰ Part B of Creative's Points of Counterclaim dated 26 February 2018

³¹ Part C of Creative's Points of Counterclaim dated 26 February 2018

“The evidence in support of the claims for privilege is unacceptably general. It may be assumed that in some circumstances it is difficult, and may be burdensome, to prepare affidavit evidence to explain the circumstances in which each and every document was prepared and communicated and to explain why its content or part thereof is confidential. Had the claimants been required to press their claims to more than 1100 documents, or even 400 documents, a court may give more latitude in its requirement for detailed evidence supporting the claim. In the present case, there are only 17 documents... with the limited number of documents now in contention, the generality of the affidavit material was unacceptable. It is so general as to be of little assistance other than to state, is a broad proposition, the category into which the claimants would place each document.”³²

Do the “show cause notices” qualify for litigation privilege without further evidence?

35. Creative further relies on the finding in *Dura* that documents relating to the preparation of “show cause notices” may qualify for litigation privilege protection. As set out above, Maycon agrees that several notices of dispute were issued between October 2015 and June 2016. Counsel for Creative says that the notices themselves are evidence of anticipated litigation and referred me to Macaulay J’s conclusion:

“I reject *Dura*’s submissions that documents relating to the preparation of the show cause notices in this case do not qualify for the litigation privilege protection.”³³

36. However I do not accept that finding is applicable to the documents in the present case. As His Honour noted in *Dura* (emphasis added):

“The show cause notices in this case are the assertions of contractual wrongdoing which are the very foundation of the issues in dispute. Advice given about them, and even the formulation of them, go to matters which are at the very heart of this litigation. The preparation of them in September 2006, well after I have found that litigation was reasonably anticipated, were themselves critical steps taken towards the litigation.”³⁴

37. In the present case, as discussed above, I have no evidence before me to support the contention that as at 30 October 2015, or even up until practical completion, or even for the year thereafter, proceedings were anticipated under the *SOP Act* or under any other cause of action. Macaulay J’s findings turn on the fact that he found that litigation was reasonably anticipated when those documents were created.

³² Op. cit. [33]

³³ Op. cit. [61]

³⁴ Ibid. [54]

Conclusion on litigation privilege

38. In conclusion, I am not satisfied that litigation was contemplated or in prospect at either October 2015 or throughout 2016, in the sense that there was “a real prospect of litigation as distinct from a mere possibility”. Accordingly, litigation privilege is only able to maintained over those documents which were created for the purpose of this proceeding (which commenced in February 2017). I discuss and rule on each of the specific sample documents in the Schedule attached to these Reasons.

LEGAL ADVICE PRIVILEGE

39. The second argument put by Creative is that the Architect was acting as Creative’s agent when Gadens were providing legal advice to it and/or to Creative. The definition of “client” in section 118 extends to an “agent” of a client (s.117(1)(b)). The term “agent” is not defined.

Was the Architect acting as Creative’s agent?

40. Mr Clifford deposed at paragraph 17 of his affidavit: “From about [October 2015] and during 2016 and 2017, Gadens communicated with the Architect variously for the provision of legal advice, providing and receiving updates, providing or receiving information or queries in relation to disputes with Creative...”. The disputes were about matters including “payment matters in proceedings under the [SOP Act]”.
41. Creative submits that as the Architect was expressly empowered (and required) to act as Creative’s agent for giving instructions to Maycon on behalf of Creative (including in relation to defects rectification and to issue certificates or schedules in respect of payment matters), these communications are protected by advice privilege.
42. Creative relies on special condition 30 of the building contract, and said this applies to make the Architect the owner’s agent, at least for the purposes of dealing with progress claims and progress certificates. SC30 had the effect of deleting and replacing the original clause N5.1 and provides (emphasis added):

“Payment for the works

N5. Progress claims – procedure for architect

.1. The architect must assess the claim or a progress payment and issue to the contractor and to the owner ... a certificate or schedule that the whole of the amount mentioned in the claim (and if not the whole, then which parts thereof) is reasonably payable ... The architect must provide reasons if the certificate or schedule specifies an amount as being payable which is less than the amount claimed by the contractor.

The parties agree that any certificate or schedule issued by the architect under this clause N5.1 is issued on behalf of the owner to the contractor.”

43. In response, Maycon disputes that the Architect was acting as Creative’s agent for the purposes of s.117. Maycon agrees that SC30 amended the original clause N5.1 but says it did not alter clause A6.3, which provides:

“A6.3 Architect to administer contract

The architect is the owner’s agent for giving instructions to the contractor. However, in acting as assessor, valuer, or certifier, the architect acts independently and not as agent of the owner.”

44. As a result, when the Architect is giving instructions to Maycon, it acts as Creative’s agent, but when it is assessing, valuing or certifying the payment claims made by Maycon, it is not acting as Creative’s agent. Maycon says that clause A6.3 is consistent with the amended clause N5.1. N5.1 contains two paragraphs. The first (which does not mention the concept of agency) refers to the Architect assessing a claim for a progress payment and issuing a certificate or schedule. The second paragraph (which raises the notion of agency) refers to the issuing of the certificate or schedule only, not the assessing of the claim. In other words, both clauses N5.1 and A6.3 give the Architect a limited role as Creative’s agent when giving instructions or issuing certificates, but not when assessing claims made by Maycon.

45. Counsel for Maycon referred me to a number of authorities which address the role of an architect under common building contracts and under the *SOP Act*. I do not need to refer to them in detail here. It is not my role in this application to make a binding decision about the role of the Architect when exercising its various functions under the building contract. It would be inappropriate to do so, without detailed evidence and consideration of the appropriate manner in which to interpret the contract. For the purposes of this privilege dispute, it is sufficient to accept that an architect often “wears two hats” and to adopt the commonly accepted view that:

“An architect is not an arbitrator but does have ‘two different types of functions to perform. In many matters he is bound to act on his client’s instructions, whether he agrees with them or not; but in many other matters requiring professional skill he must form and act on his own opinion.’”³⁵

46. Creative urges me to look at the communications over which privilege is claimed to ascertain the nature of the function of the Architect when the communications were made, in order to determine their dominant purpose. Mr Stanistreet relied on *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd (No.4)*³⁶ per Beach J (emphasis added):

... A communication made by a third party advisor to a client’s lawyer if made for the requisite dominant purpose of the client obtaining legal advice from the lawyer will be privileged. Direct evidence of purpose can come from the third party advisor, the lawyer or the client. The purpose may also

³⁵ *Keating on Construction Contracts* (9th ed. 2012), 169

³⁶ [2014] FCA 796, [38]

be readily inferred given the directness of the communication from the third party advisor to the client's lawyer. Further, it is not necessary to ask whether the third party advisor was acting as the agent of the client, including in making the communication to the client's lawyer. The absence of such an agency does not deny the existence of the privilege attaching to the communication, although its presence may fortify it. In terms of the third party advisor status, the important characterisation is 'not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party' ..."

Conclusion on legal advice privilege

47. Counsel for Creative does not rely on the Architect being a third party. Instead, the privilege claims are made on the basis that the communications and documents involving Gadens and the Architect were made in circumstances where the Architect was acting as Creative's agent. Accordingly, I have examined each of the documents over which legal advice privilege is claimed to determine if, on their face, it is apparent that:
- a. the communication or document was confidential,
 - b. if it was a communication, it was made between Gadens and the Architect for the dominant purpose of Gadens providing legal advice to either Creative or the Architect,
 - c. if it was a document, it was prepared by the Architect, Gadens or another person for the dominant purpose of Gadens providing legal advice to either Creative or the Architect, and
 - d. the subject matter indicates that the Architect was acting as the agent of Creative, or that the advice was being given to the Architect in that role.
48. In considering whether the Architect was acting as Creative's agent, I have looked at the task being performed as described in the relevant communication. If the task relates to the Architect assessing, valuing, or certifying (i.e when it is forming or acting on its own opinion), I have decided that it is not acting as Creative's agent. I discuss and rule on each of the specific sample documents in the Schedule attached to these Reasons.

How should I deal with chains of emails?

49. Upon reviewing the documents it became apparent that many of them were made up of a sequence of emails, which in themselves were not privileged, but which had been attached to a first email, which may have been privileged. Counsel did not address me on how I should deal with these documents.
50. I will follow the approach of Macaulay J to treat each of the emails in the chain as a copy document prepared for the purpose of instructing a lawyer

(unless the evidence, including the document itself, says otherwise), with the result that emails which in their original form are not privileged (and may still be available through discovery) become privileged. He explained his reasoning as follows:

“I have previously held, in the circumstances of another case, that when sending an email to a lawyer to obtain legal advice, attaching and ‘forwarding’ the antecedent chain of emails amounted to making a copy of those previous emails for the dominant purpose of instructing the lawyer to give legal advice. Despite those previous emails not having been created for the dominant purpose of giving or obtaining legal advice, I held they were protected by privilege as being copies created for that purpose...

It follows that where a reproduction of a document in the form of an attached email chain or electronic file is purposefully incorporated into a communication that is made for the dominant purpose of seeking or giving legal advice, the attached copy forms part of that communication and is protected by client legal privilege.”³⁷

HAS PRIVILEGE BEEN WAIVED BY CREATIVE?

51. As a fall-back argument, Maycon contends that privilege has been waived by Creative. The submission is that since Creative has agreed that the Architect will perform the role of administering the contract and relies on the certificates produced by the Architect, its conduct is inconsistent with the maintenance of the privilege and an implied waiver has occurred.
52. I do not need to consider this argument any further, because I have determined that documents and communications produced when the Architect was acting in the role of assessor, valuer or certifier, are not privileged.

CONCLUSION

53. Of the sample documents, Creative’s claim for privilege is upheld in respect of documents 15, 25, 56, 75, 105, 107, 113, 171, 210 and 213, for the reasons set out in the attached schedule. Document 71 is privileged in part (as described in the schedule), and that part may be redacted and shielded from production.
54. Otherwise, Creative is required to produce the remaining sample documents, for the reasons set out in the attached schedule.
55. I do not propose to convert this conclusion into orders, unless the parties so require. However I will make an order, in accordance with order 4 made on 10 December 2018, that I shall not preside at the final hearing of this matter.

³⁷ *Cargill Aust Ltd v Viterra Malt Pty Ltd (No 8)* [2018] VSC 193 at [33] – [36]

SENIOR MEMBER S. KIRTON

SCHEDULE – CONSIDERATION OF THE SAMPLE DOCUMENTS

Notes:

- A. The names of parties to whom emails are cc'ed are not included in the document descriptions.
- B. The following abbreviations of names are used in the Schedule:

AC	Adrian Clifford of Gadens
AO	Alastair Oxbrough of Gadens
DF	Daniel Fasciani of the Architect
GM	Graham Morrison of the Architect
JC	John Chen of Maycon
JK	John Kehoe of Gadens
LR	Luke Renehan of Maycon
PM	Peter May of Maycon
PW	Patrick Walsh of Gadens

A. Creative's Sample Documents

<i>Document no.</i>	<i>Type of privilege claimed</i>	<i>Description of document</i>	<i>My findings</i>
25	Litigation	An email from AC to DF dated 13 February 2017 at 8:39 pm in respect of matters to do with the litigation then before VCAT.	Litigation privilege applies. This is a confidential communication between a lawyer acting for the client and another person, that was made for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
34	Litigation	An email from JK to DF dated 23 December 2015 at 3:44pm attaching a document containing draft wording for a letter to be sent from the Architect to Maycon.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party. On their face, the email and attached document appear to relate to matters of contract administration. I have no evidence of litigation being anticipated at that time.
43	Litigation	An email from JK to DF dated 19 September 2016 at 4:39pm, attaching a letter from Piper Alderman to Gadens.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party. On their face, the email appears to relate to matters of contract administration. I have no evidence of litigation being anticipated at that time. The letter from Piper Alderman is the Applicant's document and cannot be

			privileged.
51	Litigation	<p>An email sequence and an attached letter from Maycon addressed to “Limited Apartments”.</p> <p>The first email is dated 6 June 2016 at 6:30pm from Olivia Doherty on behalf of the Owners Committee Chairpersons to PM and DF.</p> <p>The second email is dated 7 June 2016 at 3:32pm from PM to Olivia Doherty.</p> <p>The third email is dated 8 June 2016 12:30pm from Damon Krongold at Beller Project Marketing to DF.</p> <p>The fourth email is dated 8 June 2016 at 12:43pm from DF to PW.</p> <p>The fifth email is dated 8 June 2016 at 1:20pm from PW to JK.</p> <p>The sixth email is dated 8 June 2016 at 5:08pm from AC to DF.</p> <p>The subject matter of the sequence of emails is defective work.</p>	<p>Litigation privilege does not apply. The first three emails are plainly not privileged as they are not confidential communications. The latter three emails on their face do not indicate they were prepared for the dominant purpose of litigation. They appear to relate to the responsibility for a particular defect. I have no evidence of litigation being anticipated at that time.</p>
56	Litigation	<p>An email sequence and attached document passing between AC, Counsel and DF, dated 22 February and 23 February 2017, in respect of matters to do with the litigation then before VCAT.</p>	<p>Litigation privilege applies. This is a confidential communication between a lawyer acting for the client and another person, that was made for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.</p>
71	Litigation	<p>An email sequence and attached documents. The first email is dated 10 March 2017 at 4:52pm from</p>	<p>The first email and letter from Piper Alderman and the sworn affidavit of Peter May are of course not</p>

		<p>Pei Yau at Piper Alderman to JK and AC, attaching a covering letter and the affidavit of Mr May sworn 10 March 2017 by way of service.</p> <p>The second email is dated 10 March 2017 at 5:03pm from AC to DF, in respect of matters to do with the litigation then before VCAT.</p>	<p>privileged as they are not confidential communications. The second email is privileged as it is a confidential communication between a lawyer and another person that was obviously made for the dominant purpose of the legal proceedings then on foot. I am satisfied that the part of document 71 which records the second email is privileged.</p>
75	Litigation and/or Advice	<p>Email from JK to DF dated 7 February 2017, in respect of matters to do with the litigation then before VCAT.</p>	<p>Litigation privilege applies. This is a confidential communication between a lawyer acting for the client and another person, that was made for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.</p> <p>I am not satisfied that legal advice privilege applies to this document, based on its contents. However as it is otherwise privileged, I will provide no further detail.</p>
82	Litigation	<p>This is a sequence of two emails. The first is from AO to DF dated 12 September 2016 at 10:38am.</p> <p>The second is from DF to AO at 11:30am.</p>	<p>Litigation privilege does not apply. On their face the emails do not indicate they were prepared for the dominant purpose of litigation. They appear to relate to a particular defect, in circumstances where I have found that there is no evidence of anticipated litigation at that time.</p>
93	Litigation	<p>This is a sequence of emails. The first is from DF to PW dated 19 February 2016 at 3:42pm.</p> <p>The second is from DF to PW at 4:14pm.</p> <p>The third is from JK to DF at 4:51pm.</p>	<p>Litigation privilege does not apply. The emails on their face do not indicate they were prepared for the dominant purpose of litigation. They appear to relate to management of defects under the contract, with no evidence of anticipated litigation at that time.</p>

		The subject matter of the emails is defective work.	
105	Litigation	Email from DF to AC dated 22 February 2017 at 4:40pm and email from AC to DF dated 23 February 2017 at 7:50am, in respect of matters to do with the litigation then before VCAT	Litigation privilege applies. This is a confidential communication between a lawyer acting for the client and another person, that was made for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
113	Litigation	This is a sequence of emails and an attached document. The first email is dated 15 March 2017 at 4:02pm from AC to DF. The second email is from AC to DF at 6:46pm and attaches a draft affidavit in respect of matters to do with the litigation then before VCAT	Litigation privilege applies. This is a confidential communication between a lawyer acting for the client and another person, that was made for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
126	Litigation	This is an email from JK to DF dated 2 February 2016 at 9:14am, in respect of the administration of the contract.	Litigation privilege does not apply. The email on its face does not indicate it was prepared for the dominant purpose of litigation. It appears to relate to the management of a notice of default given under the contract, with no evidence of anticipated litigation at that time.
164	Litigation and/or Advice	Email from AC to DF dated 22 December 2016 at 11:22am headed "Assessment of payment claim".	Litigation privilege does not apply. The email on its face does not indicate it was prepared for the dominant purpose of litigation. It appears to relate to the management of a final payment claim under the contract, with no evidence of anticipated litigation at that time. I am not satisfied that legal advice privilege applies as I do not accept that the Architect was acting as Creative's agent during this communication. The

			email refers to the assessment of a final payment claim, which is not covered by clause N5.1 of the contract. Instead, final claims are covered by clauses N11 – N15. Clause N15 defines the Architect’s role as an “assessment of all outstanding entitlements under the contract”. In carrying out its role as an assessor, clause A6 applies such that the architect acts independently and not as agent of the owner.
171	Litigation and/or Advice	<p>A sequence of emails and attached documents.</p> <p>The first is from LR to DF dated 25 June 2015 at 6:19pm.</p> <p>The second is from Simi Joseph at Charter Keck Cramer to JC dated 26 October 2015 at 11:53am.</p> <p>The third is from Simi Joseph to JC dated 27 October 2015 at 4:58pm.</p> <p>The fourth is from JC to Simi Joseph dated 27 October 2015 at 5:39pm.</p> <p>The fifth is from DF to Simi Joseph dated 28 October 2015 at 9:14am.</p> <p>The sixth is from PW to DF dated 5 November 2015 at 2:44pm.</p> <p>The first attached document appears to be a copy of page 10 of the contract.</p> <p>The second attached document appears to be the Architect Instruction No. 57.</p>	<p>Litigation privilege does not apply. The email on its face does not indicate it was prepared for the dominant purpose of litigation. It appears to relate to the management of a final payment claim under the contract, with no evidence of anticipated litigation at that time.</p> <p>I accept that legal advice privilege applies to the document as a whole. While the originals of each of the first five emails and the attached documents are not privileged in their original state, in this document they are copies attached to the sixth email, and the sixth email is a confidential communication prepared for the dominant purpose of Gadens providing legal advice to the Architect in circumstances where I accept the Architect was acting as Creative’s agent.</p>

189	Litigation and/or Advice	This is an email from JK to DF dated 18 December 2015 at 4:41pm, in respect of the administration of the contract.	<p>Litigation privilege does not arise. The email on its face does not indicate it was prepared for the dominant purpose of litigation. It appears to relate to the assessment of time under the contract and the SOP Act, with no evidence of anticipated litigation at that time.</p> <p>I am not satisfied that legal advice privilege applies. The email provides no indication as to whether it is a confidential communication between Gadens and the Architect for the dominant purpose of Gadens providing legal advice to the Architect, nor does the subject matter indicate that the Architect was acting as the agent of Creative at that time.</p>
210	Litigation and/or Advice	<p>This is a sequence of two emails. The first is from GM to PW dated 29 September 2015 at 4:34pm.</p> <p>The second is from PW to GM dated 30 September 2015 at 7:35am. The emails refer to the administration of the contract.</p>	<p>Litigation privilege does not arise. While the second email mentions the possibility that Maycon may seek adjudication under the <i>SOP Act</i>, I am not satisfied that either email was prepared for the dominant purpose of litigation. They appear to relate to the contents of PPC18.</p> <p>I am satisfied that legal advice privilege applies. The emails refer to events after PPC18 had been assessed and issued. I am satisfied that the communication was confidential, it was prepared for the dominant purpose of Gadens providing legal advice and that the Architect was acting as the agent of Creative at that time in seeking and receiving legal advice.</p>
213	Litigation	This is a copy of document 105.	
231	Litigation	This is an email from JK to DF dated 17 December	Litigation privilege does not arise. The email on its

		2015 at 5:37pm, in respect of the administration of the contract.	face does not indicate it was prepared for the dominant purpose of litigation. It appears to relate to the management of claims under the contract, with no evidence of anticipated litigation at that time.
239	Litigation	Email from DF to PW and JK dated 21 December 2015 at 4:49pm, requesting advice.	Litigation privilege does not arise. The email on its face does not indicate it was prepared for the dominant purpose of litigation. It appears to relate to the management of claims under the contract, with no evidence of anticipated litigation at that time.
246	Litigation	This is an email from JK to DF dated 4 February 2016 at 6:20pm, attaching a document containing draft wording for a response to be sent from the Architect to Maycon.	Litigation privilege does not arise. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party. On their face, the email and attached document appear to relate to matters of contract administration. I have no evidence of litigation being anticipated at that time.

B. Maycon's Sample Documents

<i>Document no.</i>	<i>Type of privilege claimed</i>	<i>Description of document</i>	<i>My findings</i>
13	Litigation and/or Advice	<p>A sequence of emails and attachments.</p> <p>The first email is dated 27 November 2013 at 4:34pm from PM to DF and attaches a document headed Potential Cost Savings & Notes Rev 2.</p> <p>The second is from canon@bh-architects.com to DF dated 29 October 2015 at 5:04pm. It refers to an attached image but that does not appear to be included in the document.</p> <p>The third is from DF to JC dated 29 October 2015 at 5:07pm and refers to attached AI-74. This does not appear to be included in the document.</p> <p>The fourth email is from LR to DF dated 30 October 2015 at 4:47pm and acknowledges receipt of AI-74.</p> <p>The fifth email is from DF to LR dated 30 October 2015 at 4:54pm and refers to AI-74.</p> <p>The sixth email in the sequence is a repeat of the email from canon@bh-architects.com followed by one page of plan details aA44-01 prepared by the Architect and a copy of the document headed Potential Cost Savings & Notes Rev.2.</p>	<p>Litigation privilege does not arise. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party. On their face, the email and attached documents appear to relate to matters of contract administration. I have no evidence of litigation being anticipated at that time.</p> <p>I am not satisfied that legal advice privilege applies. All the documents in the sequence, apart from the final email, are communications passing between the Architect and Maycon. They are not confidential and in their original form cannot be privileged. However in this document they have been copied and attached to the final email in the chain, the 29th, and this email is a communication between the Architect and Gadens. Nevertheless, the email provides no indication as to whether it is a confidential communication between the Architect and Gadens for the dominant purpose of Gadens providing legal advice, nor does the subject matter indicate that the Architect was acting as the agent of Creative at that time.</p>

	<p>The seventh is a copy of the third email.</p> <p>The eighth is a copy of the fourth email.</p> <p>The ninth is a copy of the fifth email.</p> <p>The tenth email is from LR to DF dated 4 November 2015 at 8:32am and refers to AI-74.</p> <p>The 11th email is from DF to LR dated 4 November 2015 at 10:18am and refers to AI-74.</p> <p>The 12th email is a further copy of the email from canon@bh-architects.com with no attachment.</p> <p>The 13th email is a copy of the third.</p> <p>The 14th email is a copy of the fourth.</p> <p>The 15th email is a copy of the fifth.</p> <p>The 16th email is a copy of the tenth.</p> <p>The 17th email appears to be a copy of the 11th email although the time is 10:19am and the reference to attachments is missing.</p> <p>The 18th email is from LR to DF dated 4 November 2015 at 3:28pm, referring to AI-74 and includes comments in red provided by DF.</p> <p>The 19th email is from DF to LR dated 4 November 2015 at 4:24pm, referring to AI-74 and is the covering email for the comments in red in the 18th email.</p> <p>The 20th email is from Peter George at Maycon to DF dated 15 May 2015 at 4:27pm and refers to</p>	
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	<p>RFI-120.</p> <p>The 21st email is from DF to Peter George dated 18 May 2015 at 9:50am and refers to RFI-120.</p> <p>The next document in the sequence is a document headed RFI No.134 issued by Maycon dated 4 June 2015.</p> <p>The next document is a one page drawing prepared by the Architect with handwritten markings concerning “SS Joints” dated 9.6.15.</p> <p>The next document is AI-36 issued by the Architect dated 9 June 2015.</p> <p>The next document appears to be an email from jobpacdc@maycon.com.au dated 8 May 2015 at 11:27am, subject: Structural Details. There is no recipient noted.</p> <p>The next document is the 22nd email, and it is from Natalie Lobato of the Architect to jobpacdc dated 12 May 2015 at 11:05am and refers to RFI-118.</p> <p>The 23rd email is from Eduard Kucherenko at Maycon to DF dated 18 May 2015 at 3:46pm and refers to RFI-118.</p> <p>The 24th email is from DF to EK dated 18 May 2015 at 4:22pm and refers to RFI 118.</p> <p>The 25th email is a copy of the email from jobpacdc@maycon.com.au dated 8 May 2015 at</p>	
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		<p>11:27am.</p> <p>The 26th email is a copy of the 22nd.</p> <p>The next document in the sequence is a noted up copy of a section of a plan headed, in handwriting, 27.5.15 Framing Set Out For SS Facade Columns.</p> <p>The next document in the sequence is the 27th email, from LR to GM dated 14 January 2016 at 5:20pm. It refers to stainless steel cladding.</p> <p>The 28th email is from DF to LR dated 15 January 2016 at 11:21 AM. It refers to stainless steel cladding.</p> <p>The last email in the chain, the 29th, is from DF to PW dated 7 April 2016 at 11:05am and attaches the correspondence described above.</p>	
15	Litigation and/or Advice	<p>An email from JK to DF dated 23 December 2015 at 3:44pm attaching a document relating to matters of contract administration.</p>	<p>Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.</p> <p>However I accept that legal advice privilege does apply to this email, as it is a confidential communication between Gadens and the Architect for the dominant purpose of Gadens providing legal advice to the Architect, and the subject matter indicates that the Architect was acting as the agent of Creative at that time.</p>

34	Litigation	Considered with Respondent's sample above	
35	Litigation	An email from JK to DF dated 5 February 2016 at 12:30pm attaching a document relating to defects	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
88	Litigation and/or Advice	<p>A sequence of emails relating to defects. The first email is from DF to PW dated 25 July 2016 at 2:25pm.</p> <p>The second is from PC to JK dated 23 August 2016 at 2:55pm.</p> <p>The third is from JK to DF dated 24 August 2016 at 5:02pm.</p> <p>The fourth is from DF to JK dated 30 August 2016 at 9:19am.</p> <p>The fifth email is from JK to DF dated 2 September 2016 at 12:20pm.</p>	<p>Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.</p> <p>I am not satisfied that legal advice privilege applies. The first four emails provide no indication as to whether they are confidential communications between the Architect and Gadens for the dominant purpose of Gadens providing legal advice to the Architect. None of the emails indicate that the Architect was acting as the agent of Creative at that time.</p>
93	Litigation	Considered with Respondent's sample above	
95	Litigation	<p>This is a chain of emails relating to defects. The first is from DF to PW dated 7 April 2016 at 11:05am.</p> <p>The second is from PW to GM dated 8 April 2016 at 10:39am.</p> <p>The third is from GM to PW dated 8 April 2016 at 12:23pm.</p>	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.

99	Litigation	<p>This is a sequence of emails relating to acoustics. The first is from DF to PM dated 18 December 2015 at 2:36pm.</p> <p>The second is from Kieren Almond at Maycon to DF dated 18 December 2015 at 3:43pm.</p> <p>The third email is from DF to Kieren Almond dated 18 December 2015 at 3:54pm.</p>	<p>These emails are not confidential communications. Litigation privilege does not apply.</p>
107	Litigation and/or Advice	<p>This is a sequence of two emails relating to contract administration matters. The first is from JK to DF dated 23 February 2016 at 1:14pm. The second is from DF to JK dated 23 February 2016 at 1:18pm.</p>	<p>Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.</p> <p>However I accept that legal advice privilege does apply to this document, as it is a confidential communication between Gadens and the Architect for the dominant purpose of Gadens providing legal advice to the Architect, and the subject matter indicates that the Architect was acting as the agent of Creative at that time.</p>
129	Litigation	<p>This document is an email from JK to DF dated 14 January 2016 attaching a draft letter from the architect to Maycon.</p>	<p>Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.</p>
137	Litigation and/or Advice	<p>This is a sequence of two emails wherein Gadens request information from the Architect. The first is from PW to DF dated 20 November 2015 at 6:51pm. The second is from DF to PW dated 23</p>	<p>Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian</p>

		November 2015 at 8:55am.	<p>proceeding, in which the client is a party.</p> <p>I am not satisfied that legal advice privilege applies. The emails provide no indication as to whether they are confidential communications between the Architect and Gadens for the dominant purpose of Gadens providing legal advice. Neither of the emails indicate that the Architect was acting as the agent of Creative at that time.</p>
140	Litigation	This document is a sequence of emails concerning payments made to Maycon. The first is from PW to DF dated 20 November 2015 at 6:51pm. The second is from DF to PW dated 23 November 2015 at 8:55am.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
231	Litigation	Considered with Respondent's sample above.	
246	Litigation	Considered with Respondent's sample above.	
261	Litigation	An email from JK to DF dated 10 December 2015 at 3:55pm concerning practical completion.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
265	Litigation	A sequence of emails concerning practical completion. The first is from DF to PW dated 4 February 2016 at 1:06pm. The second is from JK to DF dated 4 February 2016 at 3:23pm. The third is from GM to JK and DF dated 4 February 2016 at 3:37pm.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
266	Litigation	An email from DF to PW dated 19 November	Litigation privilege does not apply. There is no

		2015 at 11:00am and an email from PW to DF dated 19 November 2015 at 12:43pm, regarding inspections.	evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
268	Litigation	This document is an email from DF to JK dated 17 December 2015 at 9:58am and an email from JK to DF dated 17 December 2015 at 10:41am, regarding practical completion.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
274	Litigation	This document is a sequence of emails. The first is an email from canon@bh-architects.com to DF dated 18 December 2015 at 10:39am. The second is from DF to JK dated 18 December 2015 at 10:42am. The third is from PW to DF dated 18 December 2015 at 12:08pm. The reference is 'near PC'.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.
275	Litigation	This document is a sequence of emails. The first three emails are the same as document 274. The third email is from DF to PW dated 18 December 2015 at 12:20pm.	Litigation privilege does not apply. There is no evidence that this document was prepared for the dominant purpose of the client being provided with professional legal services relating to an Australian proceeding, in which the client is a party.