

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**CIVIL DIVISION**

**DOMESTIC BUILDING LIST**

VCAT REFERENCE NO. D768/2009

**CATCHWORDS**

Domestic Building – interlocutory application – legal professional privilege – communication between solicitor for party and potential witness in another proceeding – working documents and frats of proposed expert report in possession of potential witness - witness not to be called in current proceeding – privilege attaching

<b>APPLICANT</b>	Verve Constructions Pty Ltd
<b>RESPONDENT</b>	Karen Visser
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Senior Member R. Walker
<b>HEARING TYPE</b>	Interlocutory Application to determine claim of privilege
<b>DATE OF HEARING</b>	22 June 2011
<b>DATE OF ORDER</b>	27 June 2011
<b>CITATION</b>	Verve Constructions Pty Ltd v Visser (Domestic Building) [2011] VCAT 1191

**ORDER**

1. The Tribunal finds that the documents described in paragraphs 5(a),(c) and (d) of the attached reasons are subject to the legal professional privilege of the Respondent.
2. Costs reserved.

**SENIOR MEMBER R. WALKER**

**APPEARANCES:**

For the Applicant	Mr J. Forrest of Counsel
For the Respondent	Mr. B. Carr of Counsel

## REASONS

### The Proceeding

1. In this case, the Applicant (“the Builder”) seeks recovery of money said to be due to it with respect to building works carried out pursuant to a major domestic building contract that it entered into with the Respondent (“the Owner”). There is also a counterclaim by the Owner.
2. A major issue in the case relates to the quantity of rock removed from the site and a dispute as to how that is to be measured. The hearing will commence tomorrow.
3. The subcontractor that removed the rock is R.E.D.S. Concreting Pty Ltd (“REDS”). In related proceedings between the Builder and REDS, the Builder has engaged the services of an engineer, Mr Casamento who has given it advice and prepared a report for use in the related proceedings. It is unclear whether that report has been filed or served. Mr Casamento conducts his practise under the name T.M.C. & Associates (“TMC”). It does not appear that this is a corporate entity.

### Documents produced upon summons

4. As a result of the issue of summonses to witness by the solicitors for the Owner, a number of documents have been produced to the Tribunal. After examining these, counsel for the Builder, Mr Forrest, claims on behalf of the Builder that certain of these documents are the subject of legal professional privilege.
5. The Builder’s claim is with respect to four sets of the documents produced. These are:
  - (a) The file of TMC, which is a ring binder of documents containing Mr Casamento’s calculations, working documents and drafts of his report and of parts of the report;
  - (b) A letter dated 7 March 2011 from Thomson Lawyers on behalf of the Builder to a potential witness who had been summonsed to appear;
  - (c) A letter from Mason Sier and Turnbull, the solicitors for the Builder in the litigation against REDS, to the solicitors for REDS, enclosing by way of service TMC’s costing report and supplementary costing report and the Builder’s statement pursuant to r.6.35 of the Tribunal’s Rules. These documents were forwarded for the purpose of a Compulsory Conference to be held in that proceeding.
  - (d) An email from the Builder’s solicitors to a Director of REDS concerning instructions for a witness statement to be prepared for that Director for use in the present proceedings.

## **The Hearing**

6. The matter came before me for directions on 22 June 2011. Mr Forrest of counsel appeared for the Builder and Mr Carr of counsel appeared for the Owner.
7. Some submissions were made orally and I was informed that further written submissions would be made,

## **The applicable legal principles**

8. The principal authority relied upon by Mr Forrest is *Attorney General v. Maurice* [1986] HCA 80. That case concerned an aboriginal land rights claim. The claim was articulated in a Claim Book which, like a pleading, articulated the claim that was made but, unlike a pleading, went in considerable detail into the facts supporting the claim. Some limited use had been made of the book in an earlier proceeding concerning the same claim. When the matter was heard again de novo, access was sought by the other party to the book and also to the instructions and documents that were used in its production.
9. Since the purpose of the production of the Claim Book was for it to be served upon the other parties and filed in the proceeding it was not itself a privileged document. However the underlying documents were privileged and it was held that that privilege had not been waived
10. As to the underlying principles, Dawson J. said (in paragraph 7 of his judgment):
  - “7. The reason why the draft may be privileged before the document is completed was early explained in *Walsham v. Stainton* [1863] EngR 1075; (1863) 2 H. & M. 1, at p 4 [1863] EngR 1075; (71 ER 357, at p 358), upon the basis that, although after a pleading has been filed it becomes *publici juris*, the drafts "might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time". In the same way a letter to the other side in litigation which is drafted in a solicitor's office may be privileged before it is sent because it may reveal confidential communications between the solicitor and his client. Once it is sent, however, it ceases to be confidential and there is no privilege in it, not because privilege in the document is waived, but because no privilege attaches to it.
  8. When the claim book in this case reached final form or, at all events, when it was put to the use for which it was intended, it was not a confidential communication and not a privileged document. Legal professional privilege exists to secure confidentiality in communications between a legal adviser and his client but it can have no application in relation to a document the purpose of which is to communicate information to others. Of course, what is contained in such a document may reveal some confidential communication between a legal adviser and his client, but if it does do so and so waives privilege, the waiver is of the privilege in the anterior communication and not in the document itself. “

11. As to the question of waiver, Mason and Brennan JJ. Said (at [paragraph 11 of their judgment]):

“11. The limiting effect of legal professional privilege on the availability of evidence otherwise relevant is confined, inter alia, by the doctrine of waiver. A litigant can of course waive his privilege directly through intentionally disclosing protected material. He can also lose that protection through a waiver by implication. An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege. The holder of the privilege should not be able to abuse it by using it to create an inaccurate perception of the protected communication. Professor Wigmore explains:

"(W)hen his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder."

(Wigmore, Evidence in Trials at Common Law (1961) vol.8, 2327, at p.636). In order to ensure that the opposing litigant is not misled by an inaccurate perception of the disclosed communication, fairness will usually require that waiver as to one part of a protected communication should result in waiver as to the rest of the communication on that subject matter: see *Great Atlantic Insurance v. Home Insurance* (1981) 1 WLR 529; (1981) 2 All ER 485.”

### **Application to these documents**

12. Applying these principles to the present case:

- (a) It is clear that the file of TMC, is privileged because it "might disclose the precise character of confidential communications with the solicitor, by showing the alterations made from time to time". It contains the instructions to the proposed witness from the Builder's solicitor which in turn will reflect the instruction given by the Builder. There is no question of waiver of the privilege. It is not intended to file and serve any report from CRT in this proceeding, nor is it intended to call Mr Casamento to give evidence. If Mr Casamento is called he can be cross-examined as to the contents of his report and the basis upon which it is founded.
- (b) The letter dated 7 March 2011 from Thomson Lawyers to the potential witness who had been summonsed to appear is not privileged because, having been sent, it ceases to be confidential and no privilege attaches to it.
- (c) The letter from Mason Sier and Turnbull, to the solicitors for REDS, together with the enclosures was sent for the sole purpose of the Compulsory Conference to be held in the other proceedings. As such, it is of a confidential nature. It also has the protection of s.85 of the Victorian Civil and Administrative Tribunal Act 1998 and is not admissible in any proceedings before the Tribunal.

- (d) The email from the Builder's solicitors to a Director of REDS concerning instructions for a witness statement to be prepared for that Director for use in the present proceedings is clearly privileged. It is only a draft and not as such was not intended to be served. It was prepared for the sole purpose of the litigation. It would also reflect the instructions given by the Builder to its solicitor at the time the document was prepared.

**SENIOR MEMBER R. WALKER**