Issue Waiver – Doctrine or Heresy?

by Justin Gleeson

THE FULL FEDERAL COURT held on 24 July 1998 (by majority) in litigation between Telstra and BT[1] that a party loses the entitlement to rely upon client legal privilege if, by reason of some conduct on the part of the privilege holder, it would be unfair to the other party, in a way which goes to the integrity of the legal process, for the privilege to be maintained. More specifically, the Full Court held that where a party asserts a cause of action an element of which is the state of mind of the party (including the quality of the party's assent to a transaction), the party loses privilege in respect of legal advice which the party had, before or at the time of the relevant events, material to the formation of that state of mind.

The majority reached this decision under Section 122 (1) *Evidence Act 1995* (Cth): in the circumstances, the privilege holder has impliedly consented to the loss of the privilege. The logic of the majority's decision would also mean that privilege is waived at common law in these circumstances.

The issue arose in this case on a motion challenging the adequacy of BT's discovery. The loss of privilege was found to arise from the pleading by BT under sections 52 and 82 of the *Trade Practices Act 1974*, taken together with witness statements filed on behalf of BT (but not yet read in evidence) which showed that officers of BT claimed to have believed representations to the effect of those pleaded by BT, notwithstanding that they received legal advice during the critical negotiations which could bear on their state of mind.

Beaumont J dissented in the Full Court. He held that no consent by BT could be implied at this stage of the proceedings: the legal advice received by BT may bear upon the question of reliance but had not yet been shown to be central to that issue. He left open the possibility that during the course of the trial circumstances would indicate an unfairness in BT's insistence upon its right to claim privilege[2].

At first instance, Sackville J had held that consent within Section 122 (1) did not extend to a consent imputed against the will of a party and that there was no consent by BT in this case[3].

The majority Full Court decision was the subject of an appeal to the High Court which was fully argued in December 1998. Before judgment could be delivered, the matter was settled between the parties. The terms included a withdrawal of the appeal.[4]

In argument, a number of the justices of the High Court asked questions which indicated a disquiet about the majority Full Court decision. Criticisms levelled at the majority decision included:

(a) Client legal privilege has been recognised in a series of High Court decisions[5] as a fundamental right and not merely a rule of evidence. The privilege is regarded as so important that it prevails over the conflicting public interest in all relevant evidence being available. Its supremacy is recognised by the fact that an accused in a criminal trial is not entitled to obtain material the subject of the privilege even if that could avoid an unjust conviction[6]. The fact that a party may succeed on an issue tendered by it, notwithstanding that it has used the privilege to keep back from the opposing party and the court evidence of communications which if received might have destroyed its case, is but another example of the supremacy accorded by the courts to the privilege.

(b) The law should not impose a waiver or impute a consent to loss of privilege as an automatic consequence of the party tendering an issue which makes legal communications relevant; rather, the privilege holder should have the choice, at its own peril, whether to maintain the privilege or expressly to waive it: if the privilege holder chooses to maintain the privilege, the court may be left in the position where it concludes that the privilege holder has not discharged the onus of proof which it bears on that issue. A similar view had been expressed by McHugh J sitting as a single judge in a taxation of costs dispute.[7]

Arguments which might be put in response to these criticisms of the majority Full Court decision include:

(1) The majority Full Court decision does not cut across the proposition that there must be a voluntary and deliberate act by the privilege holder before the privilege can be lost. The privilege holder is not required to tender the issue for the court which necessarily has bound up within it the content of privileged communications; but if it chooses to do so then a known consequence which the law imposes in respect of such voluntary and deliberate conduct is the loss of the privilege.

(2) The decision in *Wentworth v Lloyd*[8] establishes that it is not open to the court to draw an inference adverse to the case of a privilege holder merely from the fact that the privilege has been claimed. While that decision remains intact, the non-privilege holder is in a precarious position in these cases. It may be that through the skill of the cross-examiner the witnesses called by the privilege holder will seem to be telling only a part of the story, such that although the court does not draw inference against the privilege holder merely from the fact that the privilege is claimed, nevertheless the court says that the evidence before it is insufficient to discharge the burden of proof. However, it may equally be the case that the privilege holder's witnesses present impressively and the cross-examiner's lack of access to the documents recording the privileged communications results in an ineffective cross-examination: the court may be left with the only conclusion being that although it knows it does not have all the relevant evidence, the evidence before it is plausible and not specifically shown to be inaccurate so that the verdict must be in favour of the privilege holder. To overturn the majority Full Court decision would mean that at least in some cases a privilege holder will obtain a decision which is unjust in circumstances where it has been allowed both to tender the issue and to use the privilege so as to withhold relevant evidence from the court. This is a form of approbation and reprobation which the courts should not countenance, not only because it will lead to unjust results in individual cases, but also because it represents an encouragement to parties and their advisers deliberately to craft evidence which is misleading through its incompleteness.

In New South Wales, there is no binding decision at appellate level on this point. There is a 1939 decision of the Full Court *obiter* with the leading judgment given by Jordan CJ: *Thomason v Campbelltown Council*[9].

At first instance in *Ampolex v Perpetual Trustee Co (Canberra) Limited*[10] , Giles J, applying the common law of privilege, reached a result similar to that of the majority Full Court in BT in holding that a party asserting an estoppel was required to make discovery of legal advice which, on the evidence, was likely to have contributed to the state of mind asserted as part of the estoppel case. There was no dispute in this case as to the correctness of *Thomason*.

In *Standard Chartered Bank v Antico*[11] Hodgson J considered that the principle in *Thomason* may have been too widely stated. Hodgson J reformulated the proposition more narrowly as follows: if a party, by pleadings or evidence, expressly or impliedly makes an assertion about the content of confidential communications between that party and a legal adviser, then fairness to the other party may mean that this assertion has to be taken as a waiver of any privilege attaching to the communication.

There may be a difficulty in teasing out when it is that a party impliedly makes an assertion (especially a negative one) about the content of a privileged communication. Assume that a party in an action under Section 52 of the *Trade Practices Act 1974* asserts that it was led to enter an agreement by reason of statements made by the other party about the legal rights that would pertain under that agreement. Assume that there is evidence that the party asserting it was mislead received advice from lawyers at the time the agreement was entered which might concern this very topic. Has the party asserting misleading conduct thereby made any implied assertion about the content of privileged communications? That party might say to the court that it simply makes no assertion one way or the other as to what was in the privileged communications or whether they had any bearing upon the state of mind which it otherwise asserts. The other party may submit that it has established, from other evidence, that there is a real prospect that the legal advice concerned the very subject matter upon which the former party was asserting misrepresentation; and that the former party must impliedly be making a negative assertion about those privileged communications; i.e. asserting that they do not in any way qualify the state of mind otherwise being asserted. How is this to be resolved?

In the earlier (unanimous) Full Federal Court decision of *Adelaide Steamship Co Ltd v Spalvins*[12], *obiter* on this point, the issue waiver cases had been reformulated in this way: privilege is waived or lost where in order to establish a particular right, claim or defence a party needs to show that legal advice did or did not have a particular character, for example, that it did not address or properly address a matter which, if addressed or properly addressed, would defeat or call into question the right or claim asserted; in this sense, the privilege holder has put in issue the very advice received.

Do the formulations in *BT, Antico* or *Adsteam* differ in result? Take as an example the principle laid down by the High Court in *Garcia v National Australia Bank*.[13] A third party mortgagor could plead that she or he had entered a transaction not understanding its terms or effect in circumstances where the lender knew, or was put on notice, that the mortgagor's spouse may not have provided a full explanation of the transaction to the mortgagor. Assume that the mortgagor in fact received competent, independent and disinterested legal advice prior to entering the mortgage. Assume that the mortgagor does not refer to the existence or content of that legal advice in her or his pleading or witness statements. The legal advice, being relevant, is a discoverable document. Can it properly be placed in Part 2 with the privileged documents?

The defendant is in the difficult position of not being able to plead the content of the advice as an affirmative

defence until the advice has been obtained. It cannot be obtained until there has been an act on the part of the privilege holder amounting to a loss of privilege. With difficulty, this could be accommodated as a waiver under the *Antico* or *Adsteam* approach. It can be accommodated readily as a waiver under the approach of the majority in *BT*.

There are a number of decisions of single judges of states other than New South Wales which take a broad approach to issue waiver consistent with the majority in *BT*. These are decisions on the common law of privilege. They include *Hong Kong Bank v Murphy*[14] (the plaintiff pleaded that it entered an assignment not knowing it involved a breach of trust on the part of another party, thereby waiving privilege in the contents of legal advice received by the plaintiff prior to executing the assignment agreement and bearing on its validity); *Pickering v Edmunds*[15] (the plaintiff pleaded it had entered an agreement in a mistaken belief induced by the defendant that an earlier agreement was illegal and enforceable, thereby waiving privilege in legal advice which the plaintiff received before entering that earlier agreement); and *Wardrope v Dunne*[16].

In the United States, a majority of federal appellate circuits have taken a broad view of the issue waiver doctrine along the lines of the majority in *BT*[17]. A narrower decision is that of the Court of Appeals for the 3rd Circuit in *Rhone-Poulenc Inc v Home Indemnity Insurance Company*[18], which held that privilege is waived only when the party asserts a claim or defence and attempts to prove it by disclosing or describing the client/attorney communication.

Where practically does this leave counsel?

First, as a matter of authority, a single judge of the Full Federal Court should follow the majority decision in *BT* giving the doctrine of issue waiver a wide scope. A single judge in New South Wales is not bound by any appellate decision. Due weight would be given to the *obiter* of the Full Court in *Thomason*, and to the formulation of Giles J in *Ampolex* and the apparently narrower formulation of Hodgson J in *Antico*. In some cases, the difference between the last two formulations may be material.

Second, there is a fair prospect that, if the matter is brought again to the High Court, the doctrine of issue waiver, at least in its broadest formulation, will be overturned: what will be left will be the formulation of *Antico* or *Adsteam* or something even narrower.

Third, where counsel settles a pleading which asserts the client's state of mind on a matter to which legal advice may have contributed, or more broadly makes assertions where fairness would require that the opposing party be entitled to inspect otherwise privileged communications to test the assertions, then the client should be advised that such a pleading, either by itself or when followed up by statements or affidavits or when pursued at the trial, will either as a matter of law result in the loss of privilege in relevant legal communications or as a matter of practicality require the client later to waive the privilege or run the peril of failing to discharge the burden of proof.

Fourth, if counsel is required to advise at the stage of discovery or to settle statements or affidavits, a decision needs to be taken whether the effect of the pleading has been to cause a loss of the privilege; and if not whether the client's interests are best served by, on the one hand, maintaining the privilege and thus keeping secret privileged documents and crafting witness statements or affidavits so as not to refer to privileged material or, on the other hand, making a disclosure of such material and addressing it in the statements or affidavits.

Fifth, if counsel is acting for the non-privilege holder, at the stage of discovery or statements or affidavits being filed, counsel may need to advise whether a motion for further discovery should be filed in the event that the other party maintains its claim to privilege.

Sixth, at the trial itself, if privilege has not been previously waived or held to be waived, it will be a task of cross-examining counsel to manoeuvre the other party's witnesses to a point where the continued retention of the privilege makes the claim asserted by the privilege holder implausible in the court's eyes, forcing the other party to waive privilege at the late stage (with possible consequences for adjournment, costs and additional cross-examination of witnesses) or to go to judgment with a risk that the judge will find the burden of proof has not been satisfied. It may also be that in the course of the trial the skill of the cross-examiner is such that the court (as contemplated in *Antico*) requires the privilege holder to state what precisely it is that the privilege holder asks the court to find in respect to the content of the privilege communications. A waiver may then be held to occur.

It is the writer's view that authoritative recognition of a broad doctrine of issue waiver would be consistent with the policy underlying the privilege; would simplify the task of counsel; and would render decisions of the courts more just.

1. *Telstra Corporation Limited and Anor* v *BT Australasia Pty Limited and Anor* (1998) 156 ALR 634 especially at 647-8
2. ibid at 639
3. *BT Australasia Pty Limited* v *State of NSW and Another* (No. 7) (1998) 153 ALR 722 especially at 739-741
4. A separate question for consideration in the appeal was whether the Evidence Act or the common law of waiver applied at the stage of discovery. Subsequent decisions hold that it is the common law: *Northern Territory of Australia* v *GPAO* (1999) 161 ALR 318 at 324; *Esso Australia Resources Ltd* v *The Federal Commissioner of Taxation* (1998) 159 ALR 664 at 676
5. Commencing with *Baker* v *Campbell* (1983) 153 CLR 52
6. *Carter* v *Northmore, Hale, Davy and Leake* (1995) 183 CLR 121
7. Giannarelli v Wraith [No. 2] (1991) 171 CLR 592 at 605
8. (1864) 10 HL Cas 589 at 590-592; 11 ER 1154 at 1154-5
9. (1939) 39 SR (NSW) 347 at 358-9 , followed by Asprey JA in *Barilla* v *James* (1964) 81 WN (Pt 1) (NSW) 457
10. (1995) 37 NSWLR 405 at 411-5
11. (1995) 36 NSWLR 87 at 93-5
12. (1998) 152 ALR 418 at 427
13. (1998) 155 ALR 614 at 623-5
14. [1993] 2 VR 419
15. (1994) 63 SASR 357
16. [1996] 1 Qd R 224
17. *United States* v *Bilzerian* 926 F. 2d 1285 (1991 2nd Circuit); *United States* v *Woodall* 438 F.2d 1317 (1970 5th Circuit); *Lorenz* v *Valley Forge Insurance Co.* 815 F. 2d 1095 (1987 7th Circuit); *Sedco International SA* v *Cory* 683 F. 2d 1201 (1982 9th Circuit); *Hearn* v *Rhay* 68 FRD 574 (E.D. Wash. 1975)
18. 32 F.3d 851 (1994). Note, however, that in subsequent decisions in the 3rd Circuit *Rhone-Poulenc* has not been read broadly: *Glenmede Trust Company* v *Thompson* 56 F.3d 476 (1995) and *Livingstone* v *North Belle Vernan Borough* 91 F.3d 515 (1996)