'Whoops…' Inadvertent Disclosure and the Test for Implied Waiver in the Discovery Context Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101

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The case considered an interlocutory application by Cathay Pacific Australia Limited (Cathay Pacific) to maintain a common law claim for legal professional privilege over communications in certain documents. The documents were inadvertently disclosed to the Applicant, the ACCC, in the course of discovery.1

The ACCC commenced Federal Court proceedings against Cathay Pacific in 2009. It alleged that Cathay Pacific and other airlines contravened provisions of the Trade Practices Act 1974 (Cth) by engaging in 'price-fixing'.2 Cathay Pacific has sought to defend the action, and the matter is proceeding to trial.

INTRODUCTION

In the course of meeting the Respondent's discovery obligations, solicitors for Cathay Pacific, DLA Piper, provided the Applicant with a number of documents. In February 2011, the Applicant was provided with an email chain dated 22 September 2006 (22 September Communications), and a partially redacted email dated 20 September 2006 (20 September Communications). It was later pleaded that the production of these documents was inadvertent. DLA Piper had no instructions to waive privilege over the communications in those documents.[3]

It was not until 27 June 2012, when prompted by the Applicant, that DLA Piper realised that it may have disclosed privileged communications. By a letter of that date, the ACCC asked DLA Piper to confirm whether Cathay Pacific claimed privilege in respect of the 22 September Communications. DLA Piper confirmed

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1 Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [2], Buchanan J.

2 See: Trade Practices Act 1974 (Cth), ss 45, 45A. Ibid [1].

3 Ibid [3].

that it did. The following month, on 30 August 2012, the ACCC asked the same regarding the 20 September Communications. Again, DLA Piper confirmed that Cathay Pacific maintained its privilege over those communications.[4]

The pleadings identified that DLA Piper had always categorised near identical copies of the 22 September Communications as containing privileged communications. They were marked accordingly in the firm's databases. It did the same for the 20 September Communications: copies of the documents were marked as privileged, and accordingly, were not produced. [5]

The production of the 22 September Communications was explained as probably being the result of a 'document categorisation and production error'. The production of the 22 September Communication was the result of a similar oversight.[6]

Representatives of the ACCC inspected the disclosed documents, and viewed the privileged communications they contained. It accepted that unless privilege was waived, the communications in the documents were privileged. The critical issue was whether privilege had been waived.[7]

Was privilege waived?

THE DEFAULT POSITION REGARDING DISCOVERY

Parties to a litigious dispute have an ongoing obligation to discover all relevant documents that are, or have been, in the party's possession, custody or power.[8] This includes documents that include communications that would be subject to privilege.[9] However, if privilege is claimed, the discovering party may object to making the document available for inspection. It is usual practice then, if privilege is claimed over communications in a document, for the party in possession, custody or power of that document to refrain from providing it to opposing litigants.

At common law, a person entitled to maintaining a claim of privilege over communications may waive that privilege.[10] It should be noted that in this case, privilege was claimed at common law, as the proceedings which would invoke application of the *Evidence Act 1995* (Cth) had not yet commenced. At common

4 Ibid.
5 Ibid.
6 Ibid.
7 Ibid [4].
8 In WA, see: Rules of the supreme Court 1971 (WA), O 21 r 1(1). In the Federal Court, see: Federal Court Rules 2011 (Cth) (**FCR**), schedule 1, r 20.14.
9 See eg: FCR, r 20.02.
10 See: LexisNexis, Civil Procedure WA, 'Waiver of privilege', [26.4.7M] (2012) <www.lexisnexis.com.au>.

law, the waiver need not be made explicitly, it can be 'imputed' at law: *Goldberg v Ng* (1995) 185 CLR 83, 95, Deane, Dawson and Gaudron JJ.[11] In light of usual practice, the question for Buchanan J's consideration was whether, by making its disclosure, Cathay Pacific impliedly waived privilege.

BUCHANAN J'S DECISION

Citing *Mann v Carnell* (1999) 201 CLR 1 (*Mann*), Buchanan J recognised that, at common law, a person entitled to the benefit of privilege may waive it.[12] Further, it was recognised that waiver may be implied: 'What brings about the waiver is inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and the maintenance of confidentiality'.[13] Voluntary disclosure of documents is inconsistent with the maintenance of privilege of communications within those documents.

It was accepted by the ACCC that the disclosure of the privileged communications was inadvertent. The act of disclosure did not reflect any intent or instruction of Cathay Pacific.[14] In distinguishable cases, where the disclosure of privileged information was deliberate, the case of implied waiver is much stronger; see examples in *Mann*, [28]-[29].[15]

Citing statements in *Rio Tinto*, it was held that bringing a case that is in some way about the contents of confidential information would waive privilege. Similarly, privilege would be waived if the case lies open the confidential information to scrutiny.[16] Buchanan J distinguished cases where a party sees a way to turn confidential information into a forensic advantage, where it was disclosed inadvertently. In this case, nothing in the pleadings or in evidence exposed the content of the confidential communications for scrutiny. Accordingly, applying the reasoning of the Full Court in *Rio Tinto*, it was held that Cathay Pacific's inadvertent disclosure did not meet the usual test for waiver of privilege.[17]

Buchanan J considered[18] his own judgment in *CMA Corporation Limited v Rowe* (2010) 277 ALR 163 (*Rowe*). There, he considered *Metlend Pty Ltd v Restoration*

11 See also eg: Benecke v National Australia Bank (1993) 35 NSWLR 110

12 Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [14], Buchanan J; see: Mann v Carnell (1999) 201 CLR 1, [28]-[29].

13 Mann v Carnell (1999) 201 CLR 1, [29]; Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [14], Buchanan J.

14 Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [16], Buchanan J.

15 Ibid [17]. See further: Commissioner of Taxation v Rio Tinto Limited (2006) 151 FCR 341 (**Rio Tinto**), [61], the Full Court.

16 Applying Rio Tinto, [65]; see: Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [18]-[19], Buchanan J.

17 Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [18]-[20], Buchanan J.

18 Ibid [23]-[24].

Clinics of Australia Pty Ltd (1997) 75 FCR 511, where Goldberg J considered that 'once inspection has been allowed of a document listed in that part of an affidavit … in which privilege is not claimed', the privilege is waived. Buchanan J declined to follow Goldberg J for two reasons: 1) it was hard to reconcile with other cases on inadvertent disclosure,[19] and 2) Goldberg J advanced an incorrect test for waiver of privilege. Waiver requires more than mere inadvertent disclosure:[20] '[a] ppropriate regard must be paid to the quality of the conduct of the party entitled to claim privilege as well as to the practical significance of disclosure.'[21]

It was held that it is not appropriate to compare the privileged communications to the evidence of Cathay Pacific, to see if it would improve the ACCC's position. This approach would be destructive of the very privilege which was being claimed.[22]

So despite its disclosure, the Court found in favour of Cathay Pacific and maintained its claim of privilege. No doubt, with the delivery of this decision, a former DLA Piper graduate breathed a huge sigh of relief.

19 Cited in Rowe.
20 Australian Competition and Consumer Commission v Cathay Pacific Australia Limited [2012] FCA 1101, [25], Buchanan J.
21 Ibid.
22 Ibid [27].