**[2003] WASCA 112**

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| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL |
| **CITATION** | **:** | TEMWOOD HOLDINGS PTY LTD -v- WESTERN AUSTRALIAN PLANNING COMMISSION & ANOR [2003] WASCA 112 |
| **CORAM** | **:** | WHEELER J |
| **HEARD** | **:** | 25 MARCH 2003 |
| **DELIVERED** | **:** | 30 MAY 2003 |
| **FILE NO/S** | **:** | SJA 1135 of 2002 |
| **BETWEEN** | **:** | TEMWOOD HOLDINGS PTY LTD<br>Appellant<br><br>AND<br><br>WESTERN AUSTRALIAN PLANNING COMMISSION<br>First Respondent<br><br>DEPARTMENT OF PLANNING AND INFRASTRUCTURE<br>Second Respondent |

*Catchwords:*

Administrative law - Application under *Freedom of Information Act* - Legal professional privilege - Imputed waiver - Turns on own facts

*Legislation:*

*Freedom of Information Act 1992* (WA)

*Result:*

Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

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| Appellant | : | Mr J C Giles |
| First Respondent | : | Ms J C Pritchard |
| Second Respondent | : | Ms J C Pritchard |

*Solicitors:*

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| Appellant | : | Solomon Brothers |
| First Respondent | : | State Crown Solicitor |
| Second Respondent | : | State Crown Solicitor |

**Case(s) referred to in judgment(s):**

Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd (1966) 40 NSWLR 12
Derby & Co Ltd v Weldon (No 10) [1991] 2 All ER 908
Mann v Carnell (1999) 201 CLR 1; [1999] HCA 66

**Case(s) also cited:**

Benecke v National Australia Bank (1993) 35 NSWLR 110
BP Australia Pty Ltd v Nyram Pty Ltd [2002] FCA 1302
Fort Dodge Australia Pty Ltd v Nature Vet Pty Ltd [2002] FCA 501
Garratt's Ltd v Thangathurai [2002] NSWSC 39
Goldberg v Ng (1995) 185 CLR 83
Perpetual Trustees (WA) Ltd v Equuscoys Pty Ltd [1999] FCA 925
Re Doran Constructions Pty Ltd (In liq) (2002) 194 ALR 101
Re Real Estate and Business Agents Supervisory Board; Ex parte Cohen & Ors, unreported; SCt of WA (Scott J); Library No 980668; 17 November 1998

Southern Equities Corporation Ltd (In liq) v Arthur Andersen & Co (1997) 70 SASR 166

Telstra Corporation Ltd v BT Australasia (1998) 56 ALR 634

Temwood Holdings Pty Ltd v West Australian Planning Commission [2001] WASCA 298

The Commonwealth of Australia v Temwood Holdings Pty Ltd [2002] WASC 107

Wayne Lawrence Pty Ltd v Hunt & Ors [1999] NSWSC 1044

Woodside Petroleum Development Pty Ltd v H & R - E & W Pty Ltd, unreported; SCt of WA (Anderson J); Library No 970541; 3 October 1997

1 **WHEELER J**: This is an appeal from the decision of the Information Commissioner who refused the appellant access to certain documents on the ground that those documents are exempt from production under the *Freedom of Information Act 1992* ("the Act") by reason of cl 7 of Sch 1 to the Act. That clause reads:

> "(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.
>
> (2) …"

2 The appeal is brought against two respondents because of the relationship between those two bodies. The application for access under the Act was first made to the first respondent. The second respondent provides administrative support to the first respondent, the first respondent having either no, or almost no, staff of its own. Perhaps for that reason, it appears that the second respondent itself purported to make the decision in relation to the access application. No issue is taken in relation to that procedural irregularity, the proceedings both before the Information Commissioner and on the appeal being concerned with the substance of the claim for privilege.

3 The appellant accepts that the documents withheld contain advice which was subject to legal professional privilege, being advice from the Crown Solicitor's Office to the first respondent. However, it contends that that privilege has been waived by the first respondent.

4 There is a potential issue raised by the respondents, but not strongly pressed, in relation to the waiver question. It was suggested that there was an argument open to the effect that the Information Commissioner should not, pursuant to cl 7 of Sch 1, concern herself with questions of waiver. The reason for that suggestion was that the wording of the clause is concerned with whether matter would be privileged from production in any legal proceedings on the ground of legal professional privilege, notwithstanding that there may be no legal proceedings in existence. There is therefore a question of a somewhat hypothetical or abstract nature for the Information Commissioner to determine. Where an issue of privilege arises in the context of legal proceedings, issues of fairness arising from the whole of the context of the proceedings, will be relevant to the question of whether waiver should be imputed as a matter of law. Against that background, the respondents suggested that it appeared that the only question for the Information Commissioner was "Is this the sort

of document that ordinarily would be privileged from production by reason of legal professional privilege?"

5 It is not in my view necessary to deal with the submission as to the proper understanding of cl 7, since there was in my view no waiver of privilege in respect of these documents in any event. A finding to that effect is sufficient to uphold the Information Commissioner's decision.

6 The context in which the alleged waiver is said to have occurred is as follows. The documents in question, as I have noted, consist of legal advice. A reference to legal advice received by the first respondent was made by counsel for the first respondent during an contested hearing before me.

7 I was hearing, in September 2001, an application by the appellant alleging that the first respondent had committed a contempt of court. The appellant's argument in those proceedings was that the first respondent had refused to sign a plan of subdivision in order to put improper pressure on the appellant, to prevent the appellant from pursuing an appeal against a decision of the first respondent relating to town planning matters. It is asserted by the appellant that waiver of the privilege occurred by counsel for the respondent disclosing the purport or effect of the legal advice or by putting its state of mind - based on that legal advice - into issue at that hearing.

8 It is necessary to deal in a little more detail with the course of the argument before me on that occasion. The Information Commissioner found that the primary issue before me in September 2001 was whether the appellant's contempt proceedings were defective, and that the submissions made by counsel for the respondent were directed primarily to apparent procedural defects. In my view, an examination of the transcript of those proceedings bears out that finding. There was considerable discussion of the alleged procedural deficiencies. It was submitted by the first respondent that the appellant had failed to comply with O 55 and had failed to bring the application before the Full Court, and had further failed to specify the nature of the alleged contempt. Those submissions were developed. There were further subsidiary submissions to the effect that, even if there had been a proper contempt proceeding, the conduct alleged by the appellant could not have amounted to a contempt. There were submissions developed in some detail as to why the first respondent asserted that the conduct alleged was, in any event, proper and appropriate conduct. It was however, in the context of those submissions that the first reference to legal advice was made.

## The first reference

9 The first reference to legal advice was as follows. Counsel for the first respondent referred to a submission, made on behalf of the appellant, that counsel for the appellant could not conceive of a proper reason for the first respondent's conduct. In that context, counsel for the first respondent referred me to an annexure to an affidavit, which was a letter from a solicitor in the Crown Solicitor's Office to the appellant's solicitors. The substance of the letter is not set out in the transcript, although one sentence, quoted in the transcript reads:

> "The respondent [the first respondent to this appeal] has canvassed various options in order to attempt to resolve this matter"

10 It is clear from my response to counsel's reference to that letter, and the ensuing submissions, that the letter itself was to the effect that the first respondent considered that its conduct was appropriate because of the appeal (or the possible consequences of the appeal) which was then pending in the Full Court in relation to the first respondent's town planning decision. The submission of counsel for the first respondent was as follows:

> "There are, I think with respect, two arguments which can be put in favour of the position taken by the Commission. Before I mention those can I say this: this is of course the argument and the Commission is saying it's arguable that we, in fact, should not endorse the diagram while there is an appeal on foot. It's based, as you would be able to infer from the letter of Ms Thatcher [the solicitor in question in the Crown Solicitor's Office] on legal advice - and to some degree that is why I have not seen it necessary to produce an affidavit from the first respondent saying 'we have done this on the basis of legal advice', because in any event it is apparent from Ms Thatcher's letter, so that is the first point. The second point we make is it's an arguable situation. We are not at this point suggesting it's definitely right."

11 Counsel then went on to say what it was that was an "arguable situation"; that is, to develop the argument that the first respondent's conduct was appropriate in the circumstances.

## The second reference

12 Some pages later, there was a discussion, initiated by me, which was directed to the way in which the matter then before me should proceed, given that there appeared to be some obvious defects in the procedure adopted and given that I had on that occasion limited time to deal with the matter. In the context of trying to programme the further progress of the matter, I asked counsel for the first respondent whether he considered he might wish to file affidavits and the response which he made was:

> "If there was an allegation, a proper allegation, of contempt made I would envisage that the first respondent would file an affidavit which says little more than the decision not to indorse the diagrams has been based on legal advice."

13 Counsel for the appellant observed that if counsel for the first respondent wished to rely on the fact of legal advice, then it was his view that authority to which he referred, required that the advice be disclosed.

## The third reference

14 Shortly thereafter counsel for the first respondent said:

> "… although given my learned friend's comments I don't [think] he is going to be satisfied [with] that I can indicate that the position taken was on the basis of a letter of advice from my office."

## Subsequent proceedings

15 When the matter came back before me, there was no affidavit from the first respondent asserting that the position which it took was based on legal advice. Rather, submissions were made to me on behalf of the first respondent to the effect that the application was still procedurally defective, and to the effect that the act which allegedly constituted the contempt could not, viewed objectively, be said to have a tendency to interfere with the course of justice and further, to the effect that on no view of the evidence before me could I infer that there was an intention to interfere with the course of justice. During the course of his submissions on that occasion, counsel for the appellant reminded me that it had been asserted some days earlier that the actions of the Commission were "on the basis of legal advice", and noted that that advice was "not now produced, not relied on now that I have told my learned friend that he has

to produce it …". I was invited by counsel for the appellant to draw the inference that the advice would not be favourable to the first respondent's submission in that respect.

16 Those passages to which I have referred constitute the entirety of the references to legal advice during those proceedings. I dismissed the application of the appellant. The appellant appealed that dismissal to the Full Court, which dismissed the appeal based on the procedural defects in the appellant's application which had been identified. Those contempt proceedings were then at an end. It was sometime later that the appellant applied under the Act for access to a variety of documents including the legal advice in question.

## Legal principles

17 I turn briefly to the relevant legal principles, in order to explain why in my view the references made during the course of the contempt proceedings could not amount to a waiver of privilege. In ***Mann v Carnell*** (1999) 201 CLR 1; [1999] HCA 66, Gleeson CJ, Gaudron, Gummow and Callinan JJ considered the question of implied waiver or waiver "imputed by operation of law". Their Honours said at [29] that disputes as to implied waiver usually arise from the need "to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect." Where waiver is imputed, their Honours said:

> "This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege."

They observed:

> "What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality."

18 In considering imputed waiver of the sort alleged here - that is, waiver which is said to arise because of reference made to legal advice during the course of proceedings in open court - it is easy to imagine circumstances in which there would be a clear inconsistency between reference to the material and maintenance of the privilege. The most obvious example would be either a reading of the advice or a recounting

of its substance in open court. Since proceedings of that kind are open to the public at large, use of the legal advice in that way would plainly be inconsistent with any future maintenance of the privilege.

19 A partial or incomplete reference to the substance of the advice during the course of legal proceedings in open court, may also give rise to such waiver. Where part only of advice is referred to, for example during the course of submissions or evidence, the maintenance of the integrity of the proceedings and the need to ensure that the court is not misled by a reference which inadequately reveals the whole context of the advice, means that the party making partial reference to it may be compelled to reveal the whole. Again, because of the nature of proceedings in open court, a reference of that kind, together with the need to ensure the fairness of the proceedings, is necessarily inconsistent with future maintenance of the privilege.

20 However, it has never been the case that a mere reference to the existence of legal advice is inconsistent with maintenance of the privilege. It is in the area between disclosure of all or a portion of the content of legal advice, and mere reference to it, that difficulty arises.

21 A disclosure which was difficult to categorise was analysed with some care by Rolfe J in ***Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd*** (1966) 40 NSWLR 12. His Honour was concerned with the provision of the *Evidence Act 1995* (NSW), which provided that legal professional privilege (known under that Act as "client legal privilege") did not extend to prevent the adducing of evidence "if a … party has … disclosed to another person the substance of the evidence." There were two statements in particular which his Honour had to consider. One was a view expressed by a corporation in a Part B statement as to the likely outcome of certain litigation. The corporation asserted that on the basis of legal advice received, it would be successful. It went on to set out the corporation's views as to the likely outcome of the litigation, prefacing those views with the observations:

> "The views set out below have regard to the pleadings, the evidence available … and the advice of the barristers and the solicitors engaged …"

His Honour formed the view that what was set out in those passages was to be characterised properly as a statement of the corporation's view of the likely outcome of the litigation, rather than a statement of either the substance or effect of the legal advice received. Although it was true that

the views were formed relying, or at least relying in part, on legal advice, his Honour considered that at no point did the statement rise above a statement of the corporation's own view and, because it did not purport to state the advice, its substance or effect, it did not amount to a disclosure of the advice. His Honour contrasted those passages with a statement which appeared elsewhere in the Part B statement which read:

> "There is a dispute about the conversion ratio. Ampolex maintains that the correct ratio is 1 : 1 and has legal advice supporting this position."

His Honour held that those words amounted to a disclosure that the substance of the legal advice was that the correct ratio was 1 : 1 and therefore meant that there had been a waiver of privilege.

22 Rolfe J also considered with some care the English decision of ***Derby & Co Ltd v Weldon (No 10)*** [1991] 2 All ER 908, in which, collecting together a number of English authorities, Vinelott J drew a distinction between the situation where privileged material had been "deployed" in court and where it had not been deployed, but had merely been referred to. Rolfe J considered that in each case in which it had been suggested that material had been relevantly "deployed" it was necessary to analyse the question having regard to the matter in issue, and having regard to questions of fairness. That emphasis upon context, and upon the relevance of fairness to establishing whether material had relevantly been deployed or not, appears to me to be consistent with the passages in ***Mann v Carnell*** to which I have referred.

## Whether these references waived privilege

23 Turning to the issues in the present appeal, it seems to me clear enough that the mere assertion that the first respondent had taken the action which it had on the basis of legal advice would not suffice to waive privilege. The suggestion that the first respondent would, or might, file an affidavit to the effect that its decision had been based on legal advice seems to me to like effect. In any event no affidavit was ever filed. For those reasons, the second and third references to the legal advice cannot, in my view, give rise to a waiver of privilege.

24 The first reference requires analysis with more care. However, when one considers its structure, it appears to me that it falls into three parts. First, counsel advises the court broadly what the first respondent's "argument" is. It is then noted by counsel that I would be able to infer from the letter of Ms Thatcher that the first respondent's view was based

upon legal advice. The observation is then made that the first respondent accepts that it could not suggest at that stage that its position was "definitely right".

25 It seems to me that, taken as a whole, this passage does not purport to disclose the substance or the effect of the legal advice given to the first respondent. The acknowledgement that I would be able to infer that the first respondent's position was based on legal advice is in my view no more than a reference to the obvious factual conclusion which could be drawn from the circumstances that the first respondent had at all times been advised by the State Crown Solicitor's Office, and that a legal practitioner from that office appeared on the first respondent's behalf to make submissions in the proceedings before me. It is difficult to see how any conclusion could be drawn in those circumstances other than that the first respondent, as a public authority, had taken and considered legal advice and had based its position, at least in part, on the views expressed in that legal advice. The arguments which were put to me were not expressly stated to be the particular matters which were put to the first respondent in the legal advice. Nor should one necessarily infer that a strong connection would always exist between initial legal advice and submissions put at a later time in court. It may be that the advice initially given is refined or even changed over time.

26 It is my view that none of the references made by the first respondent to its legal advice would give rise to a waiver of privilege. I would therefore dismiss this appeal.