PARTIES:	JUMITOGAD PTY LTD AND COLEMANS PRINTING PTY LTD AND PAGAL NOMINEES PTY LTD AND COLEMANS PROPERTIES 86 PTY LTD AND JUMITOGAD NOMINEES PTY LTD v ALLAN CHARLES GARRAWAY AND ELVA ANN McCALLUM AND CRIDLAND & BAUER PTY LTD AND JOHN MICHAEL GEORGE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	680 of 1990 (9028956)
DELIVERED:	26 October 1998
HEARING DATES:	25 February, and 24 March 1998
JUDGMENT OF:	Kearney J

CATCHWORDS

PROCEDURE – SUPREME COURT PROCEDURE – DISCOVERY

Discovery – documents inadvertently disclosed to opposing party - whether documents privileged – whether privilege waived

Supreme Court Rules 1987 (NT), r 29.11(c), 29.13
Attorney-General (NT) v Maurice (1986) 161 CLR 475, applied.
Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd (1997) 145 ALR 391, considered.
Craine v Colonial Mutual Fire Insurance Co Ltd (1920) 28 CLR 305, applied.
Commonwealth v Verwayen (1990) 170 CLR 394, applied.
Goldberg v Ng (1995) 132 ALR 57, referred to.
Hongkong Bank of Australia Ltd v Murphy [1993] 2 VR 419, referred to.
Director of Public Prosecutions v Kane (unreported, Supreme Court of New South Wales, 10 September 1997, Hunt J), considered.
Gardner v Irvin (1878) 4 Ex D 49, referred to.
O'Rourke v Darbishire [1920] AC 581, referred to.
Mulley v Manifold (1959) 103 CLR 341, referred to.
Commonwealth v Northern Land Council (1991) 30 FCR 1, referred to.
Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company (1882-83) 11 QBD 55, referred to.
Grant v Downs (1976) 135 CLR 674, applied.
Re Briamore Manufacturing Ltd (in liq) [1986] 1 WLR 1429, followed.
Guinness Peat Properties Ltd v Fitzroy Robertson Partnership [1987] 1 WLR 1027, followed.
Webster v James Chapman & Co (a firm) and others [1989] 3 All ER 939, followed.
Derby & Co Ltd v Weldon (No 8) [1991] 1 WLR 73, followed.
Great Atlantic Insurance Co v Home Insurance Co [1981] 1 WLR 529, followed.
English and American Insurance Co Ltd v Herbert Smith & Co (1987) 137 NLJ 148, followed.
Lord Ashburton v Pape [1913] 2 Ch 469, followed.
Key International Drilling Co Ltd and Ors v TNT Bulk Ships Operations Pty Ltd & Ors [1989] WAR 280, followed.
General Accident Fire and Life Assurance Corp Ltd v Tanter (the Zephyr) [1984] 1 WLR 100, followed
Nova Aqua Salmon Ltd Partnership v Non-Marine Underwriters (1994) 135 FSR 71, referred to.
Pizzey v Ford Motor Co Ltd (unreported, Court of Appeal, 26 February 1993) cited in *IBM Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413, referred to.

REPRESENTATION:

Counsel:

Plaintiffs:	T. J. Riley QC, with him P.E. Hack
First and Second Defendants:	A. H. Silvester

Solicitors:

Plaintiffs:	Hunt & Hunt
First and Second Defendants:	Ward Keller

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kea98027

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 680 of 1990 (9028956)

BETWEEN:

JUMITOGAD PTY LTD
First Plaintiff

AND

COLEMANS PRINTING PTY LTD
Second Plaintiff

AND

PAGAL NOMINEES PTY LTD
Third Plaintiff

AND

COLEMANS PROPERTIES 86 PTY LTD
Fourth Plaintiff

AND

JUMITOGAD NOMINEES PTY LTD
Fifth Plaintiff

v

ALLAN CHARLES GARRAWAY
First Defendant

AND

ELVA ANN McCALLUM
Second Defendant

AND

CRIDLAND & BAUER PTY LTD
Third Defendant

AND

JOHN MICHAEL GEORGE
Fourth Defendant

CORAM: KEARNEY J

REASONS FOR RULING

(Delivered 26 October 1998)

The application by the first and second defendants

On 16 February 1998 the first and second defendants (herein 'the applicants') sought by Summons, inter alia the following relief:

> "4. An order that pursuant to Rule 29.11(c) and 29.13 the Plaintiffs produce documents numbered 1.157, 1.158, 1.176, 1.182, 1.230, 1.247, 1.277 and 1.282 in the Plaintiffs' List of Documents dated 29 September 1997, to the First and Second Defendants for inspection."

Rule 29.11(c) provides that a party who objects to produce a document for inspection may be ordered "to do such act as the case requires". Rule 29.13 provides, inter alia, that when an objection to production is on the ground of privilege, the Court may inspect the document to decide whether it is privileged.

The application was argued together with other applications, on 25 February. Mr Silvester of counsel for the applicants informed me that an order for the production of documents 1.277 and 1.282 was no longer required, as the plaintiffs no longer claimed that those documents were privileged. The plaintiffs contended that the remaining 6 documents listed, were privileged from production; they had been specifically listed, with 4 others, in par3 of the plaintiffs' List of Documents, as documents "for which legal professional privilege [from production] is claimed".

On 24 March I ordered pursuant to r29.13 that those 6 documents be produced to me by the plaintiffs for inspection, for the purpose of deciding whether they were privileged. On 25 March the plaintiffs' solicitors produced the documents. Today I state the reasons for the order of 24 March and rule on whether the 6 documents should be produced for inspection by the defendants.

The general background

Mr Silvester submitted that the nature of the plaintiffs' claim in these proceedings was such that to prove their case they had to establish that the alleged negligent advice of the defendants had caused the loss which the plaintiffs claimed resulted therefrom: in its nature that loss was the loss of a pre-existing exemption from liability to pay capital gains tax (herein 'tax') on disposal of certain assets. The need for the plaintiffs to prove this causal link necessitated that the defendants in turn be enabled to trace the commercial and taxation history of the various Trusts, from the time the advice in question was given in 1986, until trial. Mr Hack of counsel for the plaintiffs did not seek to controvert this proposition, for the purposes of this application.

The plaintiffs had served their List of Documents in December 1991, and a more comprehensive List in September 1997. Mr Silvester submitted that inspection of documents in the second List disclosed that as a consequence of damage caused by a major fire in the plaintiffs' business premises in April

1987, a large insurance payment had been made to the plaintiffs, following which a dispute had arisen between the plaintiffs and the Commissioner of Taxation as to whether they were liable to pay tax, because the value of the assets accepted for the purpose of calculating the insurance pay-out was considerably more than their value established for the purposes of the transactions implemented in August 1986 following the advice complained of.

Mr Silvester dealt first with document 1.182 a document which although the plaintiffs claimed it to be privileged from production, was nevertheless physically included amongst the documents in the List subsequently produced by the plaintiffs for inspection by the applicants. The plaintiffs' solicitor Mr Morris, in his affidavit of 25 February 1998 explained the apparent contradiction: doc 1.182 had been "mistakenly included" amongst the documents produced , and the plaintiffs had had no intention to "waive privilege" in it. That explanation was not sought to be controverted.

Doc 1.182 is the reply of 2 March 1989 from Messrs Henderson Trout, solicitors, to doc 1.171, a letter of 16 February 1989 from Mr Hannay for which the plaintiffs make no claim of privilege. [His Honour referred to the nature of doc 1.171, and continued:]

The submissions

(a) The applicants' submissions

Mr Silvester made 3 submissions to support an order for the production of document 1.182.

(1) Neither document 1.182 nor 1.171, on their face, were documents brought into existence for the sole purpose of seeking, or being furnished with, legal advice by lawyers, or for the sole purpose of preparing for legal proceedings. In essence, this submission was that neither document was a communication of such a character that the plaintiffs were entitled to preserve its confidentiality, pursuant to the substantive principle of law known as 'legal professional privilege'; see *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, per Deane J. I may say immediately that it is crystal clear from inspection of both documents that they fall squarely within the former category of documents protected by legal professional privilege: the sole purpose of doc 1.171 is to seek legal advice, and the sole purpose of doc 1.182 is to furnish it.

(2) Mr Silvester submitted that since no claim for legal professional privilege had been made for the "source document" (doc 1.171), document 1.182 did not attract that privilege. I note that "source document" is the terminology used in *Attorney-General (NT) v Maurice* (supra); there the issue was whether privilege in 'source materials' (used in preparing a Claim Book, disclosed for use in an Aboriginal land claim) not disclosed, had been waived

by the waiver of any privilege in the disclosed Claim Book. This submission invokes the doctrine of waiver of material related to or associated with material in which privilege has already been waived. It is also known as 'waiver by implication' or 'associative waiver', as Dawson J put it in *Attorney-General (NT) v Maurice* (supra) at 497; his Honour noted that it was "a difficult area of the law", observing that "implied waiver may be required by fairness notwithstanding that it was not intended". See also Mason and Brennan JJ at 487-488 on waiver by imputation arising "when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege".

(3) Mr Silvester submitted that the plaintiffs had waived any privilege they had in document 1.182, the reply to the "source document" 1.171, by producing it for inspection by the defendants, in a context where they had already intentionally disclosed the "source document"; this is a variation of submission (2), adding the fact of disclosure of document 1.182. He submitted that in those circumstances it was *unfair* to deny the applicants access to the reply (doc 1.182), in light of their need properly to examine the "chain of causation between the alleged negligent advice [of 1986] and the loss [the court would] be asked to assume might one day occur." The subject matter of both documents 1.171 and 1.182 was part of the history of that causation.

As to ‘fairness’, the touchstone of any waiver in submissions (2) and (3), Mr Silvester relied on *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (1997) 145 ALR 391. This was not a ‘source document’ case. An accountant’s letter to the client for which privilege had *not* been claimed (unlike doc 1.182, a vital distinction), was discovered by the respondents, and produced to and inspected by the applicants’ solicitor. I observe that in those circumstances the applicants’ solicitor was entitled to assume that the letter (not patently privileged on its face) was produced as an unprivileged document. She requested a copy of it. This request was refused, on the basis that the respondents’ solicitor had *now* determined that the letter was subject to legal professional privilege, and had wrongly been included in the documents earlier made available for inspection; its privileged status had not been appreciated at that time by the respondents’ solicitor (unlike document 1.182 the present case), the solicitor having earlier considered each of the respondents’ documents to decide whether to claim privilege.

Goldberg J held in *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (supra) as follows: the letter was a privileged document, though not patently so on its face (unlike document 1.182, a solicitor’s legal advice); the critical issue was whether privilege in it had been waived; that issue was to be determined by reference to the express or implied intention of the respondents in producing the document, because waiver involved an intentional act with knowledge of the right to claim privilege; on the facts, there was an express

waiver - a sufficient deliberate and intentional disclosure of the document with that knowledge; even if there had been no express waiver, waiver would be imputed by operation of law in the circumstances, since the respondents' act rendered it unfair to the applicants to maintain the respondents' privilege. I respectfully agree with this analysis. As to what waiver involves, by way of intentional act plus knowledge, see *Craine v Colonial Mutual Fire Insurance Co. Ltd* (1920) 28 CLR 305 at 326, and *Commonwealth v Verwayen* (1990) 170 CLR 394. His Honour said at 403:

> "Recent cases have shown that waiver will be imputed where the person entitled to claim the privilege had performed some act which renders it unfair to another party that the privilege be maintained: *Attorney-General (NT) v Maurice* 69 ALR 31; *Goldberg v Ng* (1995) 132 ALR 57.

I note that in *Meltend v Restoration Clinics of Australia Pty Ltd* (supra) and in *Goldberg v Ng* (supra) the documents for which privilege was sought to be maintained, had been deliberately disclosed; in *Attorney-General (NT) v Maurice* (supra) the Claim Book had been deliberately disclosed, though its "source materials" had not been disclosed. In the present case, document 1.182 for which privilege is sought to be maintained, had been the subject of a claim of privilege, but was inadvertently disclosed. These factual distinctions are important.

His Honour also said at 404:

> "The question of fairness arises in my view where, due to an act of a party or his authorised agent, a document is disclosed to another party which is relevant to issues in the litigation. Is it fair to the party

> receiving the information that it cannot use the information in the proceeding? The accounts of the respondents are a relevant issue. If the respondents raise issue as to their accounts as para9 of the defence and amended cross-claim anticipates they will, are the applicants to shut out of their minds the information their solicitor obtained on inspection? Rogers J thought so in *Hooker Corp Ltd v Darling Harbour Authority* (1987) NSWLR 538, but in my view the doctrine of imputed waiver of privilege had undergone further development since that time.
>
> I am not suggesting that the existence of privilege or its maintenance is to be determined by a balancing exercise, that is, balancing the existence of the privilege and the right to maintain it against the significance or importance of the document. Such a suggestion was rejected in *Derby & Co Ltd v Weldon (No.8)* [1991] 1 WLR 73. Legal professional privilege is a substantive principle of law and not simply a rule of evidence: *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; 69 ALR 31. But once documents have been disclosed to an opposite party as part of the formal process of discovery and inspection, *in circumstances involving no criticism of that party*, I consider that fairness requires that that party be not disadvantaged in the use it can make of those documents.
>
> I am conscious that there is a power in the court to restrain a party by injunction from using information acquired in circumstances where such use would be a misuse of confidential information …
>
> … However, no proceeding has been taken to restrain the applicants from using the information obtained by [their solicitor]." (emphasis added)

All depends on the circumstances. I note, for example, that in *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419, a somewhat similar case to *Meltend Pty Ltd* (supra), where the plaintiff had inadvertently failed to claim privilege for a privileged document, it was held that there had been no intentional waiver of the privilege.

I note that *Meltend Pty Ltd* (supra) was *not* a case (as here) where privilege had already been claimed in the List for the document produced. As to what are "circumstances involving no criticism of [the inspecting] party",

Goldberg J referred at 406 to fraud, and cases where there was an "obvious mistake apparent to an inspecting party". The letter is significant in the present case.

In *Director of Public Prosecutions v Kane* (unreported, Supreme Court of New South Wales, 10 September 1997) Hunt CJ at CL said at p16:

> "… the very substantial distinction between a deliberate and an inadvertent disclosure of a privileged document raises the issue as to whether the consideration of fairness to which the two decisions of the High Court [*Attorney-General (NT) v Maurice* and *Goldberg v Ng*], are as easily applicable to the case of an inadvertent disclosure."

I respectfully agree. The present case is one of inadvertent disclosure.

Turning to the remaining 5 documents sought to be produced (p2), Mr Silvester submitted as follows.

In the plaintiffs' List there was only a "bald description" of these documents. It was not such as to show that they were privileged. I should say that I accept that; they are not described, for example, as 'professional communications of a confidential character for the purpose of getting legal advice'; see *Gardner v Irvin* (1878) 4 Ex D 49 at 53, per Cotton LJ. Assuming that the earlier submissions (pp6-7) succeeded, Mr Silvester submitted that one of the documents, 1.182, could now be seen *not* to be a privileged document; its inclusion in the List indicated the plaintiffs' "potentially light-hearted approach" to determining which of their listed documents were properly the

subject of a claim for legal professional privilege. That this was so was supported by the fact that the plaintiffs no longer sought to maintain a claim for privilege as regards 2 of the documents in the original List, numbers 1.277 and 1.282. I may say immediately that I am not persuaded by these submissions; see also *O'Rourke v Darbishire* [1920] AC 581 at 605 and 618.

Mr Silvester also raised the question of what it was to which these documents were relevant. Were they relevant to the plaintiffs' loss as later particularized, or to the taxation and business history of the Trusts? I may not have understood the thrust of this submission. I note that documents are discoverable only if they relate to a matter in issue between the parties, as to which see *Mulley v Manifold* (1959) 103 CLR 341 at 345, *Commonwealth v Northern Land Council* (1991) 30 FCR 1 at 23, and *The Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* (1882-83) 11 QBD 55 at 60, 62-63.

Mr Silvester conceded that if the List had been sworn to, and the documents described therein as to indicate that they clearly fell within the scope of the privilege, the applicants could not have gone behind the stated claim for privilege in the List. He submitted that since the List had not been sworn to and had been shown to be defective as regards some of the documents listed, in that they were irrelevant or privilege in them had been waived, it was appropriate that the Court inspect the documents to determine whether the

claim for privilege should be upheld. I consider that it is appropriate to inspect them under r29.13 in view of their limited description in the List.

(b) The respondents' submissions

Mr Hack made 5 submissions.

(1) The production of the privileged document 1.182 had been inadvertent and unintentional, and did not constitute a waiver of privilege. This case significantly differed in relevant facts from *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (supra), because there the letter was held to have been deliberately and intentionally disclosed, and it had *not* been the subject of a prior claim for privilege, because it had not then been appreciated that it was privileged. I accept that distinction.

(2) In any event, as to waiver by implication, no "unfairness" arose, since the plaintiffs' primary accounting records had been disclosed to the applicants, and document 1.182 was no more than a solicitor's opinion as to the legal consequences of the transactions detailed in those records.

(3) The terse description of the documents in the List, confirmed the claim for privilege; the claim should be regarded as conclusive, since the applicants had not demonstrated with reasonable certainty that the plaintiffs

had misconceived the nature and effect of the documents, in characterizing them as privileged. I reject this submission.

(4) The Court should not accept the applicants' invitation to apply r29.13 to inspect the documents, since no reason to doubt the plaintiffs' claim for privilege had been shown. I reject that.

(5) *Grant v Downs* (1976) 135 CLR 674 made it clear that legal professional privilege arises in relation to documents brought into existence for the sole purpose of being submitted to legal practitioners for advice *or* solely for use in legal proceedings. The applicants' submissions had proceeded on the basis that the privilege arose *only* in relation to the latter class of documents. In fact, the documents in question all fell within the *former* class of privileged documents, as was apparent, for example, from a perusal of documents 1.171 and 1.182. Mr Hannay was the accountant for the plaintiffs, and Messrs Henderson Trout their solicitors. These letters were therefore clearly privileged, as falling within the first 'limb' of *Grant v Downs* (supra). As to this submission, I note that Mr Silvester had referred to *both* classes of privileged documents described in *Grant v Downs* (supra). I accept that it is now clear, following inspection that the documents in question fall within the former class.

Conclusions

I have already expressed views on some of the submissions. Examination of the 6 documents shows that documents 1.176 and 1.182 are identical. Document 1.182 is clearly relevant to the taxation history of the Trust.

Where a party produces a document in its List, and it is inspected and copied, the party's privilege in the document will normally be taken to have been waived; see *Re Briamore Manufacturing Ltd (in liq.)* [1986] 1 WLR 1429. Special care is expected to be taken in relation to all aspects of the process of discovery; see *Guinness Peat Properties Ltd v Fitzroy Robertson Partnership* [1987] 1 WLR 1027 at 1044, per Slade LJ.

Where plaintiffs unintentionally or inadvertently release a privileged document to applicants, it may also be highly relevant to consider the manner in which the document came into the applicants' possession; see *Webster v James Chapman & Co (a firm) and others* [1989] 3 All ER 939 at 947. In that case, which turned on the law relating to confidential information, and *not* on whether privilege had been waived, Scott J said:

> "Suppose a case where the privileged document has come into possession of the other side because of carelessness on the part of the party entitled to keep the document confidential and has been read by the other party, or by one of his legal advisers, *without realising that a mistake has been made*. In such a case the future conduct of the litigation by the other party would often be inhibited or made difficult were he to be required to undertake to shut out from his mind the contents of the document. It seems to me that it would be thoroughly unfair that the carelessness of one party should be allowed to put the other party at a disadvantage.

> I do not think that this branch of the law is one where any firm rules as to how the balance should come down should be stated. It must be highly relevant to consider the manner in which the privileged document has come into the possession of the other side. It must be highly relevant to consider the issues in the action and the relevance of the document to those issues. It must be highly relevant to consider whether, under any Rules of the Supreme Court, the document ought in one way or another to have been disclosed anyway. All circumstances will have to be taken into account, as it seems to me, in deciding how the *balance* should be struck." (emphasis added)

In the present case, the contents of document 1.182, listed as privileged, were such that the applicants ought to have been aware on inspecting it that the plaintiffs did not intend to produce it to them. If legal professional privilege has been claimed, and not waived, no 'balance' of the type referred to by Scott J applies; see *Derby & Co Ltd v Weldon (No.8)* [1991] 1 WLR 73 at 99, where such an approach in the present context was described as 'nonsensical'. The reason is that legal professional privilege is a rule of law, and applies subject only to waiver.

The fact that the disclosure was inadvertent (as here) does not necessarily prevent it from constituting a waiver of privilege; see *Great Atlantic Insurance Co v Home Insurance Co* [1981] 1 WLR 529, and *English and American Insurance Co Ltd v Herbert Smith & Co* (1987) 137 NLJ 148 at 149. Vitally, for present purposes, inadvertent disclosure of a document for which privilege was claimed, does *not* constitute a waiver of privilege, if the applicants were aware, or ought to have been aware that the plaintiffs did not intend to produce the document to them; see *Lord Ashburton v Pape* [1913] 2 Ch. 469, and *Key*

International Drilling Co. Ltd and Ors v TNT Bulk Ships Operations Pty Ltd & Ors. [1989] WAR 280. This principle governs the resolution of the question whether document 1.182 should be produced. *Meltend Pty Ltd v Restoration Clinics of Australia Pty Ltd* (supra) is authority for the different proposition that privilege is lost in such a case if the document had *not* been the subject of a claim for privilege *before* production, were *not* aware, and ought *not* to have been aware, that the production had been inadvertent.

Mr Silvester relied on the fact that "source material" in the form of document 1.171 had been produced, as constituting a waiver of privilege in its reply, document 1.182. If a document for which privilege is waived (such as document 1.171) refers to, mentions, or is connected with another document, that other document may itself become liable to disclosure; see *General Accident Fire and Life Assurance Corp. Ltd v Tanter (the Zephyr)* [1984] 1 WLR 100, and my earlier observations. The rationale of 'associative waiver' is that the privilege-holder may not elect to show his hand, in part; it is considered to be unfair to allow reliance on legal professional privilege in those circumstances, since it would prevent scrutiny which could permit discovery of the true effect of the disclosed communication. However, the question of what amounts to a "connected document" is not clear. The rationale for 'associated waiver' does not indicate that, in relation to that doctrine, legal advice given in response to a request for it constitutes a 'connected document'. Even if doc 1.182 were a 'connected document', in the

present case I consider that the "clarity or understanding of [the source document, doc 1.171] voluntarily disclosed does not depend [on] or is not aided by the contents of the document in question", as it was put in *Nova Aqua Salmon Ltd Partnership v Non-Marine Underwriters* (1994) 135 FSR 71 at 74-75. I reject Mr Silvester's submission (2).

It is clear that there was no express waiver in the privilege claimed to attach to document 1.182; it is not contested that that document was disclosed inadvertently and unintentionally. The question is as to whether such a waiver should be imputed. As to that, I consider that this is a case where the production of document 1.182 for which privilege had been claimed, was an "obvious mistake which should have been apparent to an inspecting party", to adapt the words of Goldberg J in *Meltend Pty Ltd* (supra). A hypothetical reasonable solicitor would have realised that the production of document 1.182 was a mistake, and that is sufficient even though the inspecting solicitor failed to realize it; see *Pizzey v Ford Motor Co Ltd* (unreported, Court of Appeal, 26 February 1993) cited in *IBM Corp v Phoenix International (Computers) Ltd* [1995] 1 All ER 413 at 422-3. There was no unfairness in these circumstances, in denying the applicant access to doc. 1.182, I reject Mr Silvester's submission (3).

As to the remaining 5 documents sought to be produced, it is clear from examining them that they were brought into evidence for the sole purpose of

submission to legal advisers for advice; or of furnishing legal advice. They fall within the first class of documents in *Grant v Downs* (supra), are privileged from production on that basis, and no question of waiver of that privilege arises.

In summary, then, for the reasons indicated, I accept Mr Silvester's submission (1), and reject his submissions (2) and (3). These related to doc 1.182. I reject his submission in relation to the other 5 documents. I accept Mr Hack's submission (1) ; it is clear from inspection of the documents that they are privileged from production. That privilege has not been waived. In the result the application to produce the 6 documents to the applicants under r29.11(c).

Order accordingly.

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