SUPREME COURT OF QUEENSLAND

CITATION:	*Charleville RSL Memorial Club Inc & Anor v Sheapalm Pty Ltd* [2009] QSC 193
PARTIES:	**CHARLEVILLE RSL MEMORIAL CLUB INC** (first plaintiff) and **STATE OF QUEENSLAND** (second plaintiff) **v** **SHEAPALM PTY LTD (ACN 010 146 228)** (defendant)
FILE NO:	11739 of 1998
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	24 July 2009
DELIVERED AT:	Brisbane
HEARING DATE:	19 February 2009
JUDGE:	Daubney J
ORDER:	**1. That the first plaintiff disclose to the defendant:** **(a) the report of McLarens Toplis dated 26 May 1997;** **(b) the report of McLarens Toplis dated 19 June 1997; and** **(c) the report of McLarens Toplis dated 22 September 1997** **2. The first plaintiff pay the defendant's costs of and incidental to this application**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – GROUNDS FOR RESISTING PRODUCTION – LEGAL PROFESSIONAL PRIVILEGE – WHAT CONSTITUTES – FOR PURPOSES OF OR IN CONTEMPLATION OF LITIGATION – where the first plaintiff's premises were destroyed by fire – where the first plaintiff's insurer engaged loss assessors to investigate whether the fire was caused by the fault of the defendant – where the solicitor for the first plaintiff received reports from the loss assessors – where the defendant sought

disclosure of the reports and the plaintiff resisted disclosure – whether legal professional privilege applied to the reports.

Barnes v Commissioner of Taxation [2007] FCAFC 88, applied
Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission (2002) 213 CLR 543, considered
Grant v Downs (1976) 135 CLR 674, considered
GSA Industries (Aust) Pty Ltd v Constable (2002) 2 Qd R 146, followed
Mitsubishi Electric Pty Ltd v Victorian WorkCover Authority (2002) 4 VR 332, considered
Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd (1985) 3 NSWLR 44, distinguished
Orica Australia Pty Ltd v Limit (No 2) Ltd [2008] VSC 247, considered
Pratt Holdings Pty Ltd v Commissioner of Taxation (2004) 136 FCR 357, applied
Sydney Airports Corp Ltd v Singapore Airlines Ltd [2005] NSWCA 47, considered
Trade Practices Commission v Sterling (1979) 36 FLR 244, considered
Wheeler v Le Merchant (1881) 17 Ch D 675, considered

COUNSEL:	J Bell for the first plaintiff
	K Holyoak for the defendant
SOLICITORS:	McCullough Robertson Lawyers for the first and second plaintiff
	Barry & Nilsson Lawyers for the defendant

[1] On 13 May 1997, the first plaintiff's premises were destroyed by fire. The first plaintiff has sued the defendant, a contractor which had been performing welding works at the premises, alleging that the fire was caused by the fault of the defendant.

[2] The first plaintiff's insurer, GIO Corporate Insurance ("GIO"), engaged loss assessors to investigate the matter, namely Mr Greg Bickle of McLarens Toplis and Mr Murray Nystrom of McLarens (Forensic) Pty Ltd. Mr Bickle has sworn an affidavit, to which he exhibits a diary note of a discussion he had on 19 May 1997 with Mr Haynes, the relevant GIO claims controller, in which Mr Bickle was given certain instructions about indemnifying the first plaintiff, and in which he was

instructed to contact Mr Tony Cotter, a solicitor who was then a partner of the firm known as Allen Allen & Hemsley, with a view to ascertaining whether Mr Cotter would accept instructions from GIO with respect to the fire.

[3] It would seem, from affidavits of Mr Cotter filed before me, that on 19 May 1997 he was approached by Mr Bickle with respect to acting for GIO and the first plaintiff in relation to the fire. It also appears that there was a meeting between Mr Cotter, Mr Bickle and Mr Nystrom on 20 May 1997. Neither Mr Bickle nor Mr Cotter now has any specific recollection of that meeting.

[4] On 22 May 1997, Mr Cotter had a telephone discussion with Mr Haynes. In the second of his affidavits, Mr Cotter confirmed that by the time of this discussion, Mr Bickle had already approached him about acting for GIO and the first plaintiff, and that those instructions were confirmed by Mr Haynes on 22 May 1997.

[5] After that phone call on 22 May 1997, Mr Cotter wrote to GIO confirming his firm's instructions to act. This letter states, *inter alia*:

> "**1. YOUR INSTRUCTIONS AND OUR ROLE**
>
> You are the Industrial Special Risks insurer of Charleville RSL Memorial Club Inc.
>
> On the evening of 13 May 1997, a fire totally destroyed the Club's premises. Policy liability under your policy is not in issue.
>
> From the initial investigations of your adjusters and forensic experts, there is a strong suggestion that the fire may have developed from welding performed by the employees of a sub-contractor on the site, Alpine Refrigeration, whose liability insurer is QBE Insurance Limited.
>
> You have instructed us to advise you on your prospects of recovery against Alpine Refrigeration and to act for you in pursuing that recovery.
>
> ...

4. THE NEXT STEP

> In accordance with your instructions, we have formally appointed McLarens Toplis and McLarens (Forensic) to report directly to us in relation to their investigations. As soon as their reports are to hand, we will forward copies to you.
>
> We understand from Mr Bickle of your adjusters that he has had preliminary discussions with QBE Insurance Limited, which has indicated its preparedness to meet with us to discuss the matter once its own investigations have been completed. We anticipate that that may take place late next week. Once more definite arrangements have been made, we will notify you."

[6] On 22 May 1997, Mr Cotter also wrote to Mr Bickle at McLarens Toplis in the following terms:

> "We refer to the writer's recent discussions with your Mr Bickle and confirm that we act on behalf of GIO Corporate Insurance, the Industrial Special Risks insurer of Charleville RSL Memorial Club Inc.
>
> The insured's Club premises were destroyed by fire on the evening of 13 May 1997. We understand that policy liability is not in issue, although there is the suggestion that recovery may possible.
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> We have been instructed by our client to advise it in relation to its prospects of recovery and pursuing that course if appropriate. To enable us to advise our client on those aspects, we would appreciate receiving your assistance in investigating the circumstances of the fire on our behalf. Once your investigations have been completed, would you please report directly to us in duplicate."

[7] Mr Cotter subsequently received three reports from McLarens Toplis. The defendant has sought, and now applies for an order for, disclosure of those McLarens Toplis reports. The first plaintiff resists disclosure, contending that legal professional privilege applies to each of the reports. The basis for that claim to privilege is the following, sworn to by Mr Cotter:

> "7. I subsequently received from McLarens Toplis the three reports which are the subject of the Defendant's Challenge. To the best of my knowledge and belief, those reports were prepared for the dominant, if not sole, purpose of complying with the instructions contained in my letter of 22 May 1997, namely to report on the results of that firm's investigations into the circumstances of the fire so that I could in turn advise GIO in relation to its prospects of recovery in respect of that loss and pursue the appropriate course."

[8] For completeness, I note that Mr Graham Andrews, manager of the first plaintiff, had on 28 February 2000 sworn an affidavit for the purpose of *UCPR* r 213 claiming privilege over the documents (including the relevant McLarens Toplis reports) referred to in that affidavit, saying:

> "2. I object to produce the documents set forth in Part 2 of the List of Documents annexed hereto and marked with the letter 'A' on the grounds that the said documents are privileged, being confidential communications between myself and my solicitors, relating solely to the conduct of the case on behalf of the Plaintiff, or are documents brought into evidence by the Plaintiff's solicitors or their agents for the sole purpose of this litigation, or in anticipation of it."

[9] The starting point for resolution of the present dispute is the proposition that the protection of legal professional privilege applies to:

> "A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection."[1]

[10] More recently, in *Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission*,[2] Gleeson CJ, Gaudron, Gummow and Hayne JJ said:[3]

> "It is now settled that legal professional privilege is a rule of substantive law which may be availed of by a person to resist the giving of information or the production of documents which would reveal communication between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or the provision of legal services, including representation in legal proceedings."

[11] As Holmes J (as her Honour then was) noted, by reference to authority, in *GSA Industries (Aust) Pty Ltd v Constable*[4] the onus lies on the party asserting the privilege to establish the facts giving rise to it, and "the Court is not bound by the parties' assertions". In that regard, and particularly when it comes to determining whether the party claiming the privilege has demonstrated the requisite purpose, it is

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1 *Grant v Downs* (1976) 135 CLR 674 per Barwick CJ at 677.
2 (2002) 213 CLR 543.
3 At 552.

instructive to note the observations of the Full Federal Court in *Barnes v Commissioner of Taxation*[5]:

> "The authorities emphasise the need for focused and specific evidence in order to ground a claim for legal professional privilege. In *Kennedy v Wallace* (2004) 142 FCR 185 at 189, Black CJ and Emmett J reiterated the principles that verbal formulae and bare conclusory assertions of purpose are not sufficient to make out a claim for privilege: see also *National Crime Authority v S* (1991) 29 FCR 203 at 211 (per Lockhart J); *Grant v Downs* (1976) 135 CLR 674 at 689 (per Stephen, Mason and Murphy JJ). Where possible the Court should be assisted by evidence of the thought processes behind, or the nature and purpose of advice being sought in respect of, each particular document. The fact that generalised evidence is not challenged in cross-examination does not mean that such evidence must be accepted, particularly when it is as manifestly inadequate as it is in this case. As in *Kennedy v Wallace*, mere general assertions of the purpose of creation of the documents are insufficient to discharge this onus. Even though in that case some evidence as to the purpose of particular records was adduced, Allsop J at 216 considered that the onus had not been discharged because the evidence did not permit a conclusion to be drawn as to the *dominant* purpose of the creation of any particular document or entry in a document. Simply to show that *one* purpose for creation of the document was to obtain legal advice or assistance is not good enough."

[12] Legal professional privilege is usually considered as arising under two general headings – "advice privilege" and "litigation privilege". I should say here that it is unnecessary, for the purposes of this case, for me to engage in the debate as to whether these are two separate heads of privilege or two applications of one unified doctrine of legal professional privilege.[6]

[13] In the present case, of course, the communications over which privilege is claimed were not between the client and its legal adviser, but between a third party, the loss assessors, and the legal adviser. That circumstance raises particular considerations.

[14] In the context of 'advice privilege", the availability of the privilege in respect of documents authored by a party other than the client which are provided to the

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4 (2002) 2 Qd R 146 at [11].
5 [2007] FCAFC 88 at [18].
6 As identified, for example, in *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357 by Finn J at [8] – [9].

lawyer for the dominant purpose of the lawyer providing legal advice to the client was considered at some length by each of Finn J and Stone J in *Pratt Holdings Pty Ltd v Commissioner of Taxation*. In *Mitsubishi Electric Pty Ltd v Victorian WorkCover Authority*,[7] Batt JA observed in passing[8] that advice privilege "is not available where one of the parties to the communication is a third party who is not the agent of the client for the purpose of the communication". His Honour's observation was undoubtedly sourced in the following statement by Cotton LJ in *Wheeler v Le Marchant*:[9]

> "Their case is put, as I understand it, in this way: It is said that as communications between a client and his legal advisers for the purpose of obtaining legal advice are privileged, therefore any communication between the representatives of the client and the solicitor must be also privileged. That is a fallacious use of the word "representatives". If the representative is a person employed as an agent on the part of the client to obtain the legal advice of the solicitor, of course he stands in exactly the same position as the client as regards protection, and his communications with the solicitor stand in the same position as the communications of his principal with the solicitor. But these persons were not representatives in that sense. They were representatives in this sense, that they were employed on behalf of the clients, the Defendants, to do certain work, but that work was not the communicating with the solicitor to obtain legal advice. So their communications cannot be protected on the ground that they are communications between the client by his representatives and the solicitor. In fact, the contention of the Respondents come to this, that all communications between a solicitor and a third person in the course of his advising his client are to be protected. It was conceded there was no case that went that length, and the question is whether, in order fully to develop the principle with all its reasonable consequences, we ought to protect such documents ... [I]t is not necessary, in order to enable persons freely to communicate with their solicitors and obtain their legal advice, that any privilege should be extended to communications such as these."

[15] In *Pratt Holdings Pty Ltd v Commissioner of Taxation*, however, each of Finn J and Stone J disavowed the notion that the availability of advice privilege for a communication from a third party necessarily turns on the nature of the relationship between the third party and the client. In that case, the client had received advice from its lawyer in relation to a balance sheet reconstruction on financing, and then

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7 (2002) 4 VR 332.

8 At [9].

asked an accountant to prepare a report valuing its losses. The client received this report and forwarded it to the lawyer. The Commissioner of Taxation later sought access to the report. The client claimed legal professional privilege in respect of the report on the basis that it was prepared for the dominant purpose of obtaining legal advice. Finn J considered that the accountant was not the client's "agent" for the purpose of obtaining legal advice, but then said:[10]

> "41 To deny that a third party is an agent in such circumstances does not, though, provide a sufficient or principled reason for denying privilege to the documentary communication (or contents) it has authored. The important consideration in my view is not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party. If that function was to enable the principal to make the communication necessary to obtain legal advice it required, I can see no reason for withholding the privilege from the documentary communication authored by the third party. That party has been so implicated in the communication made by the client to its legal adviser as to bring its work product within the rationale of legal advice privilege."

[16] Stone J's conclusions were as follows:

> "102 I am satisfied from this survey of the Australian decisions that have considered the *Wheeler* principle that this Court is not bound either by authority of considerations of comity to dismiss the present appeals because PW was not the agent of Pratt when it created the documents in question. In my view the present issue must be decided by the application of principle, eschewing formalistic approaches and concentrating on substance.
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> 103 The history of legal professional privilege shows that the courts have been willing and able to adapt the doctrine to ensure that the policy supporting the doctrine is not sabotaged by rigid adherence to form that does not reflect the practical realities surrounding the application of privilege. The complexity of present day commerce means that it is increasingly necessary for a client to have the assistance of experts, including financial experts such as accountants, in formulating a request for legal advice and in providing legal advisers with sufficient understanding of the facts to enable that advice to be given. This much was recognised by Taylor LJ in *Balabel*.
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> 104 The complexity of commercial arrangements is matched by increasing volume, complexity and technicality in the law: taxation legislation now runs to many volumes, encompassing nearly two

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9 (1881) 17 Ch D 675 at 684-685.

10 At [41].

> thousand provisions; corporations and securities legislation is similarly mammoth. A company that wishes to obtain legal advice as to its obligations under such legislation may well need to rely on experts to assist it in instructing its legal advisers. This is not only true of commercial arrangements but may also extend to scientific and technological complexities. To take a purely hypothetical example, suppose the manufacturer of lip salve requests its lawyer to advise as to the health and manufacturing standards with which it must comply. The lawyer is aware that among the legal requirements that may be relevant are regulations applicable to skin care products. In such a case scientific advice may be required as to whether lips are skin. These are issues that did not arise in simpler times.
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> 105 The coherent rationale for legal professional privilege developed by the High Court does not lend itself to artificial distinction between situations where that expert assistance is provided by an agent or alter ego of the client and where it is provided by a third party. Nor, in my view, should the availability of privilege depend on whether the expert opinion is delivered to the lawyer directly by the expert or by the client. Provided that the dominant purpose requirement is met I see no reason why privilege should not extend to the communication by the expert to the client. This approach is consistent with the High Court's ruling in *Daniels* (see [84]) that legal professional privilege protects communications and therefore prevents the disclosure of information or documents that would reveal communications protected by the doctrine.
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> 106 I do not accept that this approach would lead to uncontrollable extension of the privilege. The difficulties in proving the relevant purpose should not be underestimated. Advice as to commercially advantageous ways to structure a transaction are extremely unlikely to attract privilege because the purpose in putting the advice together will, in most cases, be quite independent of the need for legal advice. Even if the parties have in mind that the advice will be submitted to a lawyer for comment, the purpose is unlikely to be the **dominant** purpose. Determining the dominant purpose underlying a communication may be difficult but no more so than many questions that come before courts. Courts would need to take into account exactly what function was served by the expert advice and whether it was really required in order to instruct the legal advisers fully. Obviously if the third party is an agent of the client and the client has the requisite purpose the determination is comparatively simple. Similarly if the material sought by the lawyer is required for litigation it is not difficult to determine the chain of authority and to find the requisite purpose; see, however, [90]. Ultimately the question is one of fact and the onus is on the person seeking privilege protection to establish the case."

[17] It is unnecessary for me to determine the present matter under the heading of "advice privilege", however, because the first plaintiff put its claim for privilege

squarely under the rubric of "litigation privilege". The first plaintiff's counsel submitted:

> "The first plaintiff submits that the Toplis reports constitute communications and documents passing between the first plaintiff's solicitor and a third party that were made or prepared when litigation was anticipated, for the purposes of the litigation with a view to obtaining advice to it or evidence to be used in it or information which may result in the obtaining of such evidence."

[18] In that regard, the first plaintiff clearly cast these reports as falling within the following of the classes of documents identified by Lockhart J in *Trade Practices Commission v Sterling*[11] as one of those to which legal professional privilege extends:

> "(e) Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence. See *Wheeler v Le Marchant* (1881) 17 Ch D 675; *Laurenson v Wellington City Corporation* (1927) NZLR 510, and *O'Sullivan v Morton* (1911) VLR 70.

[19] The first question, then, is whether the McLarens Toplis reports were made or prepared when litigation was at least anticipated (there obviously having been no litigation commenced at the time). The general test for this question is whether there is a real prospect, as distinct from a mere possibility, of litigation, noting that the prospect does not have to be more likely than not.[12] The first plaintiff asked me to infer from what it described as "objective circumstances" that litigation was reasonably anticipated or in contemplation at the time of the preparation of the reports. Those circumstances were said to include:

(a) That the first plaintiff had, through its initial inquiries, identified that there was a "strong suggestion" that the defendant was responsible for causing the fire that destroyed its premises;

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11 (1979) 36 FLR 244 at 245-246.

12 See generally *Mitsubishi Electric Pty Ltd v GWA* (supra) per Batt JA at [19]. See also the observation of Holmes J in *GSA Industries* (supra) at [41] that "mere possibility of litigation will not suffice".

(b) That the first plaintiff had engaged solicitors to act for it in the matter and had instructed the solicitors to advise it "on [its] prospects of recovery against Alpine Refrigeration and to act for [it] in pursuing that recovery"; and

(c) That Mr Cotter then requested McLarens Toplis to provide the reports in circumstances where "policy liability is not in issue" to enable him to advise in relation to the "prospects of recovery and pursuing that course of action if appropriate".

[20] It was submitted that it can be inferred from these facts that the first plaintiff and its solicitors anticipated that legal proceedings may be necessary to recover against the defendant.

[21] The defendant, on the other hand, submitted that the evidence put before me by the first plaintiff failed to discharge the onus of establishing that, at the time of production of the reports, there was a real prospect, rather than a mere possibility, of litigation. The defendant submitted that, at highest, the first plaintiff's evidence was equivocal because, for example, at the time of the commissioning of the reports there was nothing more than a "strong suggestion the fire may have developed from welding performed by" employees of the defendant, leading to a conclusion that litigation was not, at that time, realistically anticipated but rather what was being undertaken was an appraisal. This position is fortified, it was argued on behalf of the defendant, by the statement in the letter of instruction that "there is the suggestion that recovery may [be] possible". The defendant submitted that the material discloses that there was a two step process involved – investigation of the cause of the fire, followed by consideration and advice on recovery (which may or may not involve litigation).

[22] The first plaintiff's case in this regard is not assisted by the virtually complete absence of evidence on this point. Indeed, as I have already mentioned, counsel for the first plaintiff was driven to found the first plaintiff's argument on matters of inference. Nor is the Court assisted by subjective assertions as to the anticipation of litigation. As Evans M said in *Orica Australia Pty Ltd v Limit (No 2) Ltd*:[13]

> "Subjective opinions from clients and lawyers that litigation is likely are of no assistance if the bases for those opinions are not exposed so that the court may evaluate them. Litigation lawyers live in joyful anticipation and contemplation of litigation. Clients bruised by the harsh realities of commerce may be unduly pessimistic. The circumstances at the time of the creation of a document for which privilege is claimed must be evaluated objectively ... ."

[23] That is not to say, however, that there may not be cases in which inferences may appropriately be drawn for the purposes of satisfying this test. In *Nickmar Pty Ltd v Preservatrice Skandia Insurance Ltd*,[14] Wood J[15] said that, in the circumstances of that case, and even putting to one side the evidence of the relevant party as to his subjective expectation, his Honour had "no difficulty in objectively inferring that litigation could reasonably be anticipated in the case of the suspicious claim, arising out of a fire said to have caused considerable damage to commercial premises and stock." The evidence before his Honour in that case, however, was significantly more extensive than that put before me. For example, evidence in that case was led from the loss assessor who deposed to having formed the opinion that the fire was of a suspicious nature and the bases for having formed that opinion. In the present case, beyond the affidavits of Mr Cotter (which really, did nothing more than exhibit correspondence and effectively subjectively swear the issue) no further or primary evidence has been put before me on behalf of the first plaintiff from which I

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13 [2008] VSC 247 at [30].
14 (1985) 3 NSWLR 44.
15 At 55-56.

can properly draw the inferences relied on. It seems to me, therefore, that the first plaintiff has failed to discharge the onus which rested on it to satisfy me to the necessary degree that, at the time the McLarens Toplis reports were produced, litigation was anticipated.

[24] Even if I am wrong about that, and it can be said, by inference from the correspondence, that litigation was anticipated at the time, it seems to me that the first plaintiff has not on any view established that the dominant purpose for the production of the reports was for use in, or for advising on, such anticipated litigation.

[25] In *GSA Industries*, Holmes J observed:[16]

> "Whether a purpose was dominant is a question to be determined objectively. The intention of the document's maker, or, it follows, the person who authorised its production, cannot be conclusive of purpose. Nor is the fact that the report was ultimately furnished to solicitors for advice decisive of the purpose for which it was obtained. "The test is anchored to the purpose for which the document was brought into existence; the use to which a document is put after it is brought into existence is immaterial." In similar vein is this passage from the judgment of Lee J in *McIlwraith McEacharn*: "Merely because counsel's advices are given or advices are given by a solicitor with respect to a document does not of itself mean that the document came into existence for the sole purpose of being submitted to legal advisers for legal advice or for use in litigation." That reasoning remains apposite to a dominant-purpose test."

[26] In *Sydney Airports Corp Ltd v Singapore Airlines Ltd*[17] Spigelman CJ, with whom Sheller JA and Campbell AJA agreed, said:[18]

> "The test of "dominant purpose" has been expressed in terms of "clear paramountcy" (see *Waugh v British Railways Board* [1980] AC 521, at 543; *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332, at 336-337[10]). As the High Court said in a different context:
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> > In its ordinary meaning, dominant indicates the purpose which was the ruling, prevailing, or most influential purpose. *[Federal Commissioner*

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16 At [28].
17 [2005] NSWCA 47.
18 At [7].

> *of Taxation v Spotless Services Ltd* (1996) 186 CLR 404, at 416 (Brennan CJ, Dawson, Toohey, Gaudron, Gummow and Kirby JJ).]"

[27] The solicitors' correspondence in the present case makes it clear, in my view, that, even if litigation was anticipated at the time of the production of the reports, that was only one of the purposes for which the reports were commissioned and produced. It seems to me, as was submitted on behalf of the defendant, that the situation here is similar to that discussed by Holmes J in *GSA Industries*,[19] namely that a two step process was envisaged – the obtaining of the loss assessor's report for the purpose of seeking to establish the cause of the fire (there being at the time no more than a "strong suggestion that the fire may have developed from welding performed by" the defendant), and then, as a second step, and depending on the outcome of the investigation into the cause of the fire, advice on and pursuit of recovery against the defendant. In those circumstances, it seems to me that the second of those purposes cannot properly be described as having been clearly paramount, and therefore the "dominant purpose".

[28] Accordingly, I consider that the first plaintiff has not established its claim for privilege in respect of the McLarens Toplis reports.

[29] It is ordered:

(1) That the first plaintiff disclose to the defendant:

  (a) the report of McLarens Toplis dated 26 May 1997;
  (b) the report of McLarens Toplis dated 19 June 1997, and
  (c) the report of McLarens Toplis dated 22 September 1997.

(2) The first plaintiff pay the defendant's costs of and incidental to this application.

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[19] At [30].