QCAT

Queensland Civil and Administrative Tribunal

CITATION:	*Graham v Queensland Racing Integrity Commission* [2017] QCAT 124
PARTIES:	Darrel William Graham (Applicant) v Queensland Racing Integrity Commission (Respondent)
APPLICATION NUMBER:	OCR174-16
MATTER TYPE:	Occupational regulation matters
HEARING DATE:	9 February 2017 29 March 2017
HEARD AT:	Brisbane
DECISION OF:	**Senior Member O'Callaghan**
DELIVERED ON:	18 April 2017
DELIVERED AT:	Brisbane
ORDERS MADE:	**1. The application for further disclosure of documents is dismissed.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – PRIVILEGE – CLIENT LEGAL PRIVILEGE – where legal advice received by two government entities – whether the relevant communications attract privilege – whether a common interest privilege applies – whether privilege waived *Queensland Civil and Administrative Tribunal Act* 2009 (Qld), s 21(2), s 21(3) *Racing Act* 2002 (Qld), s 6, s 40. *Racing Integrity Act* 2016 (Qld) Australian Harness Racing Rules, r 188A, r 189, r 190, r 191. *Buttes Gas and Oil Co. v Hamner (No 3)* [1981] QB 223 *Esso Resources Ltd v FCT* (1999) 201 CLR 49

GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd [2000] FCA 593
Spotless Group Ltd v Premier Building and Consulting Pty Ltd (2006) 16 VR 1

APPEARANCES & REPRESENTATIVES

APPLICANT:	Darrel William Graham represented by Mr Murdoch QC, instructed by Mr O'Connor of O'Conner Ruddy & Garrett
RESPONDENT:	Queensland Racing Integrity Commission represented by Mr Forbes of Lander & Rogers, Mr Kelly and Mr Knight of Queensland Racing Integrity Commission
OTHER:	Racing Queensland, represented by Mr Anderson QC

REASONS FOR DECISION

[1] Darrel Graham is a harness racing trainer. A horse he trained, Mafuta Vautin, won a race on 30 May 2015 at Albion Park. A pre-race urine sample collected from Mufuta Vautin was found to contain Cobalt (a performance enhancing substance) in excess of the threshold permitted under the then *Australian Harness Racing Rules* (the Rules).[1]

[2] Following a stewards inquiry he was charged with, and found guilty of, breach of rule 190(1), which requires that a horse be presented for any race free of any prohibited substance.

[3] Mr Graham was disqualified for 15 months. The decision was confirmed by the Queensland Racing Integrity Commission (QRIC) on internal review. Mr Graham has applied to QCAT to review that decision.

[4] This decision relates to an interlocutory application by Mr Graham for provision of further documents from QRIC in the review proceedings.

Background

[5] Mr Graham indicates in his review application that he intends to challenge the finding of substantiation of the charge and the sanction imposed.

[6] He says he will argue that the certificates of analysis, upon which QRIC rely to prove the presence of cobalt, do not possess evidentiary value or

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[1] The Rules as in force from 13 October 2014, r 188A(2)(k). The relevant threshold for Cobalt was subsequently lowered by amendments approved 5 September 2016.

establish an offence, because the certification procedure was for a number of reasons materially flawed, as further particularised in his application.[2]

[7] The Rules provide, in effect, that an initial certificate of analysis which certifies the presence of a prohibited substance is *prima facie* evidence of the presence of that substance;[3] and that if a second certificate of analysis confirms the presence of that prohibited substance, then the two certificates are conclusive evidence of the presence of that prohibited substance.[4] If taken from a horse at a meeting, they are further conclusive evidence that the horse was presented for race not free of prohibited substances.[5].

[8] The Rules however further provide that the certificates do not possess evidentiary value or establish an offence '*where it is proved that the certificate procedure… was materially flawed*'.[6]

[9] One of Mr Graham's arguments is that the second certificate of analysis is inadmissible because the analyst who signed the certificate and the laboratory from which it issued did not have the requisite approval from the controlling body, as required by the Rules, to:

a) Perform confirmatory analysis of samples; and

b) Issue certificates of analysis in relation to a confirmatory test.

[10] QRIC filed a bundle of documents with the Tribunal in accordance with s 21(2) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld) (QCAT Act), which requires it as the decision-maker to provide to the Tribunal:

> (b) any document or thing in the decision-maker's possession or control that may be relevant to the tribunal's review of the decision. [7]

[11] The QCAT Act goes on to provide:

> If the tribunal considers there are additional documents or things in the decision-maker's possession or control that may be relevant to the tribunal's review of the reviewable decision, the tribunal may, by written notice, require the decision-maker to provide the documents or things. [8]

[12] Mr Graham considered there were additional documents in QRIC's possession or control and applied under s 21(3) for the Tribunal to require the provision of those documents.

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2 Application to review a decision, filed 28 September 2016; Annexure to Form 23 Application to review a decision, filed 28 September 2016.
3 The Rules, r 191(1).
4 The Rules, r 191(2).
5 The Rules, r 191(3).
6 The Rules, r 191(7).
7 QCAT Act, s 21(2)(b).
8 QCAT Act, s 21(3).

[13] The application for provision of further documents was resolved during the course of the hearing on 9 February, save for four documents.[9] They are:

(i) a letter from Racing Queensland (RQ) to the Racing Science Centre (the RSC) dated 6 November 2015;

(ii) an email from the RSC to RQ dated 6 November 2015;

(iii) a letter from the RSC to RQ dated 14 December 2015;

(iv) a letter from RQ to the RSC dated 30 December 2015.

[14] QRIC claims legal professional privilege over the documents. It declined to produce documents (i) and (ii) and produced redacted versions of (iii) and (iv).

[15] QRIC says the documents refer to legal advice obtained by the RSC and RQ.

[16] The RSC, at the time the correspondence was created, was part of the Department of National Parks, Recreation, Sport and Racing (the Department). Since the establishment of QRIC on 1 July 2016 pursuant to the *Racing Integrity Act* 2016, it is now part of QRIC. RQ was, at the time of the correspondence, the trading name of the Queensland All-Codes Racing Industry Board. Since the amendments to the *Racing Act* 2002 in 2016, it is now the trading name of the Racing Queensland Board.[10] However, the integrity functions of RQ are now invested in QRIC.

[17] Accordingly, although QRIC was not a party to the correspondence it says that any privilege that existed in the hands of the RSC now extends to the documents in QRIC's possession.

[18] Mr Graham does not contest that proposition if the documents are found to be privileged.[11] He says however, there is no privilege attaching to the documents.

[19] RQ also claims privilege over the documents.

[20] RQ, although not a party to these proceedings, was invited to make and made submissions opposing the disclosure of the documents.

[21] The application for disclosure was set down for an oral hearing on 9 February, and a further oral hearing was held to address the questions of privilege. It was agreed by the parties that QRIC file a sealed copy of the documents in unredacted form which I have inspected. The parties and RQ relied on their written and/or oral submissions. QRIC also relied on an

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9 The documents identified in the miscellaneous application as 1, 2, 3(iv) and 3(vi), 4, 5, 6, and 7 were not pressed by Mr Graham at the conclusion of the 9 February hearing.

10 *Racing Act* 2002, s 6.

11 Oral Submissions at the Hearing on 29 March 2017.

affidavit of Simon Stephens from the RSC. RQ relied on an affidavit of Allan Lonergan of RQ. I accepted the affidavits, noting the objections to parts of the affidavits from Counsel for Mr Graham.[12]

Should the Tribunal order the documents be produced?

[22] I have inspected the four documents over which privilege is claimed. The proceedings are only at a preliminary stage. I will assume for the purposes of this application that the documents may be relevant to the Tribunal's review of the decision.

[23] The issue is whether I should exercise my discretion under s 21(3) to require the documents production despite the claim of privilege.

[24] If the documents and the redactions properly attract legal professional privilege then it would, in my view, be appropriate to refuse the application for production.

[25] '*Legal professional privilege*' attaches to confidential communications between a client and the clients legal advisor, if made for the dominant purpose of the provision of legal advice.[13]

[26] Mr Stephens of the RSC's evidence was that in about mid-2015 it came to the attention of the RSC that the laboratories undertaking the confirmatory testing were not accredited under the *Racing Act* 2002.

[27] RQ and QRIC say the RSC (through the Department) and RQ sought to obtain legal advice on the issues relating to the certification of facilities and urine testing procedures and protocols.[14]

[28] The advice was provided separately. It was on the same issue and from the same legal counsel.[15]

[29] The documents (i) and (ii) and the redacted parts of (iii) and (iv) refer to and are about that advice.

[30] Mr Graham says the documents should be produced for two reasons.

[31] Firstly the four documents are not privileged because the documents sought were not brought into the existence for the purpose of obtaining legal advice or giving it. He says the legal advice had already been obtained.

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12 A word and one paragraph of Mr Stephens' affidavit were struck out, two paragraphs of Mr Lonergan's affidavit were not read. Other objections were noted as relevant to the weight to be given to certain statements.

13 *Esso Resources Ltd v FCT* (1999) 201 CLR 49 at 73.

14 Affidavit of Allan Richard Lonergan, paras [14]-[16]; Affidavit of Simon James Stephens, paras [13]-[16].

15 Affidavit of Simon James Stephens, para [23].

[32] He says the purpose of these documents was to create and put in place approvals by RQ of the RSC and its analysts for the purposes of conducting confirmatory testing.[16]

[33] Mr Graham says the four documents were intended to be used as evidence in disciplinary proceedings and as such do not attract privilege.

[34] The documents record the legal advice obtained by RQ and the RSC. They refer to the content of confidential communications between RQ, the RSC and legal advisors in relation to the legal effect of the process for testing urine samples. It is accepted that the outcome of the testing process could be used in the prosecution of disciplinary charges (including against Mr Graham) under the relevant racing rules (in this case the Rules).

[35] It is apparent, as stated by Mr Lonergan and Mr Stephens,[17] that the advice was sought because of concerns to ensure compliance with statutory requirements in relation to testing.

[36] The advice attracts legal professional privilege. I do not agree with Mr Graham that the protection is lost in the recommunication of the advice in the documents (unless it is otherwise waived).

[37] As was said in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*:

> It follows, in my view, that a document which records the substance of a privileged communication between client and legal adviser is itself protected, by the privilege, from disclosure unless the privilege has been waived. [18]

[38] The reproduction in another document of an original communication that is subject to legal professional privilege does not deprive the second document of the protection, notwithstanding that the copied or subsequent document was not specifically created for the dominant purpose of the obtaining of legal advice or for use in litigation.[19]

[39] Accordingly, if Mr Graham is suggesting that any legal advice recorded in the pieces of correspondence is not privileged because those specific documents in which it was contained were not created for the purpose of legal advice, I reject that argument. The documents (being the letters and email themselves) are not privileged, but the advice is. The production of documents (i), (ii) and the redacted parts of (iii) and (iv) would disclose privileged information.

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16 Submissions, para [20].

17 Affidavit of Allan Richard Lonergan, paras [14] and [15]; Affidavit of Simon James Stephens, para [14].

18 [2000] FCA 593 citing the High Court decision of *Mann v Carnell* (1999) 168 ALR 86.

19 *Spotless Group Ltd v Premier Building and Consulting Pty Ltd* (2006) 16 VR 1, at [23].

[40] This position is subject, of course, to the possibility that the privilege has otherwise been waived. This is Mr Graham's second argument. He says any privilege attaching to the evidence has been waived on two bases:

a) By the disclosure by both RQ and the RSC (the Department) of the advice to each other in the relevant correspondence; and

b) The intent of the creation of, and exchange of, the documents was to establish evidence to be put in the public domain.

Was privilege waived by the disclosure by RQ and the RSC to one another?

[41] RQ and QRIC say there has been no waiver of the privilege by the disclosure of the advice between RQ and the RSC because both RQ and the RSC (and consequently QRIC) are able to claim '*common interest privilege*' with respect to the advice.

[42] If privileged information is shared between parties with a sufficient common interest there is no waiver of the privilege.

[43] QRIC and RQ refer to the principle as formulated by Lord Denning in *Buttes Gas and Oil Co. v Hamner (No 3)*:

> There is a privilege which may be called a "common interest" privilege. That is a privilege in aid of anticipated litigation in which several persons have a common interest. It often happens in litigation that a plaintiff or defendant has other persons standing alongside him — who have the self-same interest as he — and who have consulted lawyers on the self-same points as he — but these others have not been made parties to the action. Maybe for economy or for simplicity or what you will. All exchange counsel's opinions. All collect information for the purpose of litigation. All make copies. All await the outcome with the same anxious anticipation — because it affects each as much as it does the others…
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> In all such cases I think the courts should — for the purposes of discovery — treat all the persons interested as if they were partners in a single firm or departments in a single company. Each can avail himself of the privilege in aid of litigation. Each can collect information for the use of his or the other's legal adviser. Each can hold originals and each make copies. And so forth. All are the subject of the privilege in aid of anticipated litigation, even though it should transpire that, when the litigation is afterwards commenced, only one of them is made a party to it. No matter that one has the originals and the other has the copies. All are privileged. [20]

[44] QRIC (and RQ) say that at the time of obtaining the advice, they shared a common interest in the advice about the legal efficacy of the process of testing of samples by the RSC and the litigation with respect to the results of testing.

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[20] [1981] QB 223, at 243.

[45] They say that the relevant documents exchanged that advice and relate to the implementation of the recommendations made in the legal advice.

[46] Mr Graham says the parties cannot claim common interest privilege in respect of the exchange of advice.

[47] He says RQ and the RSC could not share a common interest in any litigation that may arise from the testing of the sample by the RSC. He says the RSC is not, and cannot be, a party to these review proceedings and was required to be an independent laboratory. He says it could not have had any interest in any of the litigation which might follow any disciplinary action being taken by the regulator.

[48] Mr Graham also says that the proposition that RQ and the RSC could be (as Lord Denning said) treated as if they were partners in a single firm or department in a single company is unsound.

[49] He says the legislation at the requisite time required the laboratory to be independent from the control body. He referred to s 40 of the then *Racing Act* 2002 (Qld) which prescribed:

> **40 Obligation to enter into agreement about scientific and professional services**
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> A control body must enter into an agreement with an accredited facility, independent of the control body, for the provision of integrated scientific and professional services—
>
> (a) for analysing things relating to licensed animals for the presence of drugs and other substances; and
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> (b) for related matters. [21]

[50] In relation to these arguments, I accept the submission of RQ that the statutory independence of RQ and the RSC does not mean that they cannot have a common interest in the advice. It is not necessary for the parties not to be independent for them to have a common interest in the advice. The parties can be unrelated but for their common interest in the legal advice.[22]

[51] I also accept that it is not fatal to the claim for common interest privilege that the RSC was never going to be a party to the litigation. The privilege attaches to the advice that was obtained in anticipation of the litigation.

[52] As Mr Stephens deposes,[23] the parties both had an interest in the advice about the integrity of the sample testing process. The sharing of the advice was in respect of that common interest, namely the legal effect of the testing

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21 *Racing Act* 2002 (Qld) (current as at 1 July 2014).

22 As is made clear by the examples provided by Lord Denning in *Buttes Gas and Oil Co. v Hamner (No 3)* [1981] QB 223, at 243.

23 Affidavit of Simon James Stephens, para [17].

process. This was at the time when litigation was anticipated involving that process.

[53] I find the privilege attaching to the advice in the documents was not waived by the disclosure of it between RQ and the RSC because they shared a common interest privilege.

Was privilege waived because the documents were created and exchanged with the intent of establishing evidence to be put in the public domain?

[54] Mr Graham says alternatively that any privilege attaching to the advice was waived when the four items of correspondence recording the advice were exchanged for the clear purpose of putting in place documents that could be used as evidence of approval of the RSC and its analysts. Rule 191(1) of the Rules concerns certificates *'from a person or drug testing laboratory approved by the Controlling Body'*, in this case RQ.

[55] He says it is clear that the intent of the correspondence was that it be used in the public domain to prove the approval of the analysts and the RSC to perform confirmatory tests. He says that by putting the references to the legal advice in the documents for this purpose both parties made the choice to waive any privilege attaching to that advice.

[56] RQ and the RSC say this argument should be rejected. They say there is no evidence of such an intent and it should not be inferred without any evidence.

[57] I accept it is not apparent on the material put before me (including the affidavits and noting that I have seen the documents in question) that the documents were created for that purpose. I also agree with the submission of Counsel for RQ that regardless of any intent, privilege attaching can only be waived when an act is taken inconsistent with the claim of privilege.

[58] The exchange of the correspondence referring to that advice between RQ and the RSC was not an act inconsistent with that privilege. The parties had a common interest in the subject of the advice.

[59] The legal representative of QRIC also pointed out that when directed to lodge documents pursuant to s 21, QRIC took steps consistent with the claim of privilege. It did not produce documents (i) and (ii) nor the redacted privileged parts of (iii) and (iv).

[60] I am satisfied that the claim for legal professional privilege should be upheld. In those circumstances I do not consider the documents (i) and (ii) should be produced, nor an unredacted version of documents (iii) and (iv). The application for an order under s 21(3) of the QCAT Act that those documents be provided to Mr Graham is refused.