

## ***Absolute Analogue Inc v Sundance Resources Ltd [no 2] [2011] WASC 243***

(10 August 2011)

### Background

The plaintiffs sought an order allowing them to inspect a range of documents over which the defendant claimed client legal privilege. The Court accepted at [11]-[13] that the documents in question were confidential communications made for the purpose of giving instructions and obtaining legal advice, and were thus protected by client legal privilege. The question for resolution in this matter was whether the defendant had waived privilege over the documents.

### Waiver - disclosure of the email

A director of the defendant received an email from the defendant's solicitor, which stated:

'Attached is the consultancy agreement for [the second plaintiff] amended pursuant to the handwritten comments we received from you.

Please note that [the second plaintiff] only needs to give a 2 month notice period whereby [the defendant] must give a 6 month notice period for termination. Do you want us to amend the agreement in this regard so that the termination periods are equal?'

The director forwarded the email to the second plaintiff with the statement: 'For your review and comments'.

It was common ground that the defendant waived privilege in the email and the attached consultancy agreement when it sent them to the second plaintiff, but the plaintiffs argued the disclosure also effected a waiver of privilege over the instructions given to the defendant's solicitors to draw the consultancy agreement.

The Court applied the authorities of *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 [164]; *Nea Karteria Maritime Co Ltd v Atlantic & Great Lakes Steamship Corp (No 2)* [1981] Com LR 138; *R v Secretary of State for Transport; Ex parte Factortame* (1997) 9 Admin LR 591; and *Fulham Leisure Holdings Ltd v Nicholson Graham & Jones* [2006] EWHC 158 (Ch) to find that the scope of the waiver was limited to the issue or transaction that has been partially disclosed. In this case, waiver extended to the email, the attached consultancy agreement and the handwritten instructions mentioned in the email. Waiver did not extend to instructions given by the defendant to its solicitor on previous or subsequent occasions ([23]).

The judgment suggests that the scope of the waiver would have been wider if the email and attachment had purported to represent the whole of the instructions given or the advice received between the defendant and its solicitors in relation to the consultancy agreement, or if those other instructions or advice were necessary to put the email, attached consultancy agreement or handwritten comments in context or to ensure that their disclosure was not misleading ([23]).

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The *CLPWatch* website is maintained by the Federal Litigation Section of the Law Council of Australia. The aim of the site is to keep legal practitioners up to date on cases affecting Client Legal Privilege

The site can be found at [www.lawcouncil.asn.au/sections/federal-litigation/clpwatch/](http://www.lawcouncil.asn.au/sections/federal-litigation/clpwatch/)

## Waiver – asserting a different agreement

The plaintiffs argued that the defendant was not entitled to maintain privilege over instructions and advice regarding the preparation of the consultancy agreement because – by pleading that the true agreement was different to the one contended for by the plaintiffs – the defendant impliedly made an assertion about the contents of its communications with its solicitors.

The judgment rejected this argument with the aid of the authority of *Paragon Finance Plc v Freshfields* [1999] 1 WLR 1183 (*‘Paragon’*). The judgment in *Paragon* determined that when a client brings proceedings against its former lawyers it asks the court to adjudicate on questions arising from their confidential relationship and thereby brings that confidential relationship into the public domain. By bringing such an action the client impliedly waives privilege over confidential communications between themselves and their former lawyers. However, the client does not thereby waive privilege over communications with its current lawyers, since it has done nothing to bring that confidential relationship into the public domain.

Following this reasoning, the Court determined at [29] that the defendant’s denial of the agreement alleged by the plaintiffs exposed to scrutiny the communications between the defendant and the plaintiffs; but did not expose to scrutiny the communications between the defendant and its solicitors.

It was concluded at [25] that the defendant did not, by pleading its defence, expressly or impliedly waive client legal privilege over the instructions it gave to its current solicitors and the advice it received.

The full text of this decision can be found here:

<http://www.austlii.edu.au/au/cases/wa/WASC/2011/243.html>

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