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**Hodgson v Amcor Ltd; Amcor Ltd v Barnes (No 4) [2011] VSC 269**  
(16 June 2011)

Background

The matter for determination in this case was whether the plaintiff Mr Hodgson had waived client legal privilege over a letter of advice sent to him by his solicitor on 19 December 2000 (the 'Advice'), such that it could be adduced into evidence.

Mr Hodgson gave the Advice to Mr Trevor Barnes at a meeting in January 2001, in order that the latter could consider involvement in a business venture with Mr Hodgson. That meeting was also attended by Mr Hodgson's lawyer.

The other person in possession of the Advice was a Mr Hottes, who by the time of the trial was deceased. The defendant Amcor issued a subpoena to Mrs Hottes requiring her to produce a range of documents to the court, but Mrs Hottes sent them instead to Amcor's solicitors. Rather than immediately handing the documents over to the court or advising Mrs Hottes of her obligation to produce them to court, Amcor's solicitors examined the documents and listed them in a supplementary affidavit of documents dated 12 May 2011, which was then filed and served.

Onus of proof

The court held, on the authority of Rein AJ in *Sharjade Pty Ltd v RAAF Landings* [2008] NSWSC 151 that the party alleging waiver under s 122(2) of the Evidence Act carries the onus of establishing that the privilege has been waived (at [13]).

Justice Vickery declined to follow the judgment of Sundberg J in *Rio Tinto Ltd v Cmr of Taxation* [2006] FCA 1200 – where it was held that if a privileged document has been shown to a third party the privilege holder bears the onus of proving that this disclosure did not waive privilege – on the basis that Sundberg J's judgment cited no authority in support of the principle.

It was held, at [20], that the onus does shift to the party claiming privilege if that party calls into aid the matters referred to in s 122(5) of the Evidence Act, which provides that "A client or a party is not taken to have acted in a manner inconsistent with the client or party objecting to the adducing of evidence merely because" of a number of defined events. The burden shifts to the privilege holder in such a case because the facts surrounding the events listed under s 122(5) are likely to be known to the privilege holder alone.

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## Did the disclosure to Mr Barnes constitute waiver?

The Court found that Mr Hodgson's conduct in providing the Advice to Mr Barnes fell within the terms of s 122(5)(a)(i) and s122(5)(b), and that the disclosure was therefore not inconsistent with the maintenance of privilege.

Section 122(5)(a)(i) of the Evidence Act provides that a party is not taken to have waived privilege merely because the privileged material was disclosed in the course of a confidential communication. After inspecting the Advice, the Court found at [32] that since the disclosure of the Advice to Mr Barnes was likely to have carried an implied obligation that he not disclose its contents, the disclosure was a confidential communication and fell within the terms of the section.

Section 122(5)(b) of the Evidence Act provides that a party is not taken to have waived privilege merely because of 'a disclosure by a client to another person if the disclosure concerns a matter in relation to which the same lawyer is providing or is to provide, professional legal services to both the client and the other person'. The Court rejected Amcor's submission that the 'other person' must be a client of the lawyer in order to enliven the section. The judgment concluded, on the basis of the content of the Advice and other evidence, that at the meeting on 4 January 2001 Mr Hodgson's lawyer provided professional legal services to both Mr Hodgson and Mr Barnes in the nature of advice and discussion concerning the prospective business enterprise, notwithstanding the fact that there was no formal contractual relationship between Mr Barnes and the lawyer (at [42]).

## Did Amcor waive privilege by failing to act sooner?

The Court determined, at [61], that Amcor's inspection of the documents subpoenaed from Mrs Hottes was improper, since a subpoena requires production of documents to the court, not to a party. When Mrs Hottes delivered the documents to Amcor, the correct thing for Amcor to do would be either to deliver the documents to the court or to direct Mrs Hottes that she should deliver them to the court ([62]).

And while it may have been open to Mr Hodgson to seek an injunction in relation to the subpoenaed documents before Amcor sought to have them entered into evidence (when Amcor filed and served the Advice in its supplementary affidavit of documents, or when counsel for Amcor referred to the Advice in opening) the Court found that he was not obliged to do so. Indeed, such an injunction would not be capable of reversing the fact that Amcor had already been improperly inspected the documents ([63]-[72]).

The action taken by Mr Hodgson's lawyers was to object to the document being adduced into evidence through cross-examination. According to the judgment at [65], this was a perfectly practical and acceptable approach.

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The Court distinguished the judgment of *Grace v Grace* [2010] NSWSC 1514 in which it was held that the privileged party had inadvertently waived privilege by making the relevant documents available for inspection by the other party. Looking at the cases referred to by Brereton J in *Grace v Grace*, Vickery J observed, at [74]-[75], that the courts were only prepared to find waiver ‘in circumstances involving no criticism of [the inspecting] party’<sup>1</sup> or ‘in the absence of obvious mistake apparent to an inspecting party or fraud’.<sup>2</sup>

The judgment concluded that there was no loss of privilege merely because the document was inspected by Amcor; was filed and served in the Supplementary Affidavit of Documents; or was addressed by Amor in opening, in circumstances where the Advice has improperly come into the hands of Amcor.

Further, even if privilege were held to have been waived, the Court found that the Advice should be excluded from evidence via the operation of s 138 of the Evidence Act, which provides that evidence obtained improperly is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in this fashion. This conclusion took into account the gravity of the impropriety described, being one of the factors that may be taken into account pursuant to s 138(3).

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<sup>1</sup> *Meltend Pty Ltd & Rosenbaum v Restoration Clinics of Australia Pty Ltd & Marzola* [1997] 75 FCR 511.

<sup>2</sup> *Biseja Pty Ltd v NSI Group Pty Ltd* [2006] NSWSC 1497 at [14].

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