



Supreme Court New South Wales

Medium Neutral Citation:	The Owners Strata Plan 87265 v Saaib [2020] NSWSC 21
Hearing dates:	24 January 2020
Decision date:	30 January 2020
Jurisdiction:	Equity
Before:	R A Hulme J
Decision:	<ol style="list-style-type: none">1. Uphold the claim by the Owners Corporation of client legal privilege in respect of the email communications caught by paragraph 3 of Mr Saaib's Notice to Produce of 20 December 2019.2. Mr Saaib's application to be permitted to inspect and copy the same is refused.
Catchwords:	CIVIL PROCEDURE – notices to produce – client legal privilege – whether documents privileged under s 119 Evidence Act 1995 (NSW) – communications between plaintiff and witness where witness is also defendant in contingent proceedings – implied obligation of confidentiality where dominant purpose of communications is obtaining evidence
Legislation Cited:	Competition and Consumer Act 2010 (Cth), Sch 2 – The Australian Consumer Law, s 18 Evidence Act 1995 (NSW) ss 117, 119, 131A Home Building Act 1989 (NSW)
Cases Cited:	Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd (1998) 81 FCR 526 AW v Rayney [2010] WASCA 161 Grant v Downs (1976) 135 CLR 674 Hastie Group Ltd v Moore [2016] NSWCA 305 Singtel Optus Pty Ltd v Weston (2011) 81 NSWLR 526; [2011] NSWSC 1083 Sugden v Sugden (2007) 70 NSWLR 301

Category: Procedural and other rulings

Parties: The Owners Strata Plan 87265 (Plaintiff)
Tony Saaib (Defendant)

Representation: Counsel:
N Kidd SC (Plaintiff)
S Lawrance with M Fernandes (Defendant)

Solicitors:
Mills Oakley
Centurion Lawyers Pty Ltd

File Number(s): 2016/382268

JUDGMENT

- 1 **HIS HONOUR:** This judgment concerns an issue of client legal privilege raised by the plaintiff in proceedings that are set down for hearing next week. I have determined that the plaintiff's claim should be upheld for the reasons set out herein.

The proceedings

- 2 The Owners of Strata Plan 87265 (the Owners Corporation) commenced proceedings on 20 December 2016 against Mr Tony Saaib and others contending, inter alia, that there were defects in their strata complex at Marrickville and that Mr Saaib, as the builder, was responsible. Mr Saaib denies that he was the builder. There is an assertion that documents suggesting he was the builder were the subject of forgery. This proceeding is identified by the file number 2016/382268.
- 3 Ms Irene Alexandrova was an insurance broker who was responsible for obtaining insurance on behalf of clients, including home warranty insurance under the *Home Building Act 1989* (NSW). She did so purportedly in respect of Mr Saaib for this particular building project.
- 4 Despite his denial, the Owners Corporation maintains that Mr Saaib was the builder. However, it has instituted a proceeding against Ms Alexandrova as a contingency in the event that its claim against Mr Saaib fails. It claims that she is liable for misleading and deceptive conduct in contravention of s 18 of *The Australian Consumer Law* (*Competition and Consumer Act 2010* (Cth), Sch 2) by representing to the insurer, or its agent, that she was authorised to make application on behalf of Mr Saaib when she was not. This proceeding was instituted on 30 July 2019 and is identified by the file number 2019/235463.
- 5 On 17 September 2019, Hammerschlag J set both proceedings down to be heard

together, commencing on 3 February 2020.

A Notice to Produce followed by a Notice of Motion

- 6 On 17 December 2019, Ms Alexandrova filed in the proceeding against her (2019/235463) an affidavit sworn by her but drafted by the solicitors for the Owners Corporation, Mills Oakley.
- 7 On 20 December 2019, Mr Saaib served a notice to produce in the proceeding against him (2016/382268) seeking (in paragraph 1) drafts of Ms Alexandrova's affidavit and (in paragraph 3) communications between Mills Oakley and Ms Alexandrova between 17 September 2019 and 17 December 2019.
- 8 The Owners Corporation has claimed privilege in respect of these documents and communications pursuant to ss 119 and 131A of the *Evidence Act 1995* (NSW) ('the Act').
- 9 By Notice of Motion filed on 20 January 2020, Mr Saaib moved for orders requiring production to the Court of the documents in paragraph 3 of the notice to produce and allowing Mr Saaib to inspect and copy them. He has not pressed for production of any draft affidavits falling within paragraph 1 of the notice.
- 10 There are presently two Divisional Vacation Duty Judges of the Court, Henry J and myself. By coincidence, her Honour will be the trial judge at the hearing commencing 3 February 2020. Accordingly, the matter was listed before me for hearing on 24 January 2020.

Generally as to privilege

- 11 It is uncontroversial that by virtue of s 131A of the Act, the claim for privilege is to be determined by reference to Pt 3.10 of the Act (specifically, Div 1 (ss 117-126)) and not the common law: *Singtel Optus Pty Ltd v Weston* (2011) 81 NSWLR 526; [2011] NSWSC 1083 at [27].
- 12 It is also uncontroversial that the Owners Corporation bears the onus of establishing the privilege: *Grant v Downs* (1976) 135 CLR 674 at 689; *Hastie Group Ltd v Moore* [2016] NSWCA 305 at [12]. In the latter case, Beazley P and Macfarlan JA referred (at [13]) to what had been said in the former (at 689) that, "it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual".
- 13 The Owners Corporation's claim of privilege is said to arise under s 119 of the Act. [1] That provision is in the following terms:

119 Litigation

Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:

(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made, or

(b) the contents of a confidential document (whether delivered or not) that was prepared,

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

- 14 Critical to the determination of the issue is whether the communications were "confidential". The definition in s 117(1) is pertinent:

117 Definitions

In this Division:

...

"**confidential communication**" means a communication made in such circumstances that, when it was made:

(a) the person who made it, or

(b) the person to whom it was made,

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

Submissions for Mr Saaib

- 15 Mr Lawrance, who appeared with Mr Fernandes for Mr Saaib, submitted that the documents in question are communications between Mills Oakley and Ms Alexandrova sent at a time when the Owners Corporation was suing her. The communications the subject of the claim were made between 17 September 2019 and 17 December 2019, subsequent to the proceeding having been commenced against her on 30 July 2019. [2]

- 16 Mr Lawrance referred to the fact that the affidavit of Ms Alexandrova was filed by her in the proceedings brought by the Owners Corporation against her. Accordingly, it was her evidence in the proceedings brought against her by the Owners Corporation. [3] The jurat indicates that the witness to the swearing of the affidavit was Mr Stirton, the solicitor for the entity that was suing her. It was said that this prompted Mr Saaib to issue the notice to produce. [4]

- 17 It was submitted that what was being sought was communications between parties who were opposed in litigation. [5]

- 18 Mr Lawrance relied upon *Sugden v Sugden* (2007) 70 NSWLR 301 and *AW v Rayney* [2010] WASCA 161 as authority for the proposition that communications between opposing parties, without more, is not sufficient to attract confidentiality such as could give rise to a claim of privilege. [6] I will return to these submissions.

The next point in the argument was that there was a complete absence of evidence in the material relied upon by the Owners Corporation that the communications were confidential. [7] That material comprises affidavits by Ms Wajiha Ahmed, a member of the strata committee of the Owners Corporation, and by Mr Luke Stirton of Mills Oakley. Claims by Mr Stirton that the communications with Ms Alexandrova were for the purpose of obtaining an affidavit from her to be relied upon in the case against Mr Saaib were submitted to be insufficient to establish an obligation of confidence. It might prove a purpose in terms of s 119 but did not prove confidentiality. [8]

20 The final point in the argument was that the evidence suggested the contrary to the Owners Corporation claim; namely that there was no obligation of confidence. An affidavit affirmed by Ms Ahmed on 9 November 2018, [9] which had been served upon Mr Saaib in the proceedings against him, included accounts of conversations between Ms Ahmed and Ms Alexandrova. They are conversations that took place on 29 September 2017, 4 and 19 October 2017, and 12 January 2018. The submission was that the Owners Corporation had positively deployed communications between the Owners Corporation and Ms Alexandrova concerning the same subject matter (the evidence she may be able to give against Ms Saaib). [10]

21 The same was said in relation to an email from the Secretary of the Owners Corporation to Ms Alexandrova on 12 April 2019. The email attached a draft affidavit for Ms Alexandrova to peruse. It had been drafted on the basis of various conversations up to that point. There was nothing in the email suggesting that Ms Alexandrova should keep it confidential. Further, the email and draft affidavit had been produced to Mr Saaib in response to a notice to produce filed on 26 March 2019. [11]

22 The Owners Corporation claimed privilege over that draft affidavit in response to the notice to produce of 20 December 2019, notwithstanding that it had already been produced to Mr Saaib pursuant to the earlier notice to produce. It was submitted that this demonstrated that such communications were not confidential. [12]

23 It was submitted that there was further support for this proposition within document 52 from the Owners Corporation's verified list of documents. [13] These were communications between Mills Oakley and an investigator. They included an account of a meeting between the investigator and Ms Alexandrova on 12 June 2019 in which there was discussion of the evidence she could provide in support of the case against Mr Saaib.

24 There was also correspondence between Mills Oakley and Ms Alexandrova including letters dated 2 and 4 December 2019. They specifically refer to the proceeding against her (2019/235463). They set out the Owners Corporation concern that Ms Alexandrova had told an investigator that she may leave the country and not turn up at court. Reference is also made to her being in the process of selling her home, giving rise to a

fear that she may attempt to frustrate enforcement of any judgment that may be obtained against her. It was submitted that this further demonstrated that the Owners Corporation and Ms Alexandrova were in a relationship of parties opposed in litigation. [14]

- 25 Mr Lawrance concluded by saying that he was not contending that communications between parties opposed in litigation can never be privileged. In this case, there was simply an absence of evidence that the communications were confidential and thus the Owners Corporation had failed to discharge its onus of establishing that proposition. [15]

Consideration

- 26 I accept the submission of Mr Kidd SC that the Owners Corporation's claim is, and always has been, primarily against Mr Saaib upon the assertion that he was the builder. If Mr Saaib's denial of being the builder is defeated, then the proceeding against Ms Alexandrova will become redundant. That proceeding was only instituted as a contingency in the event that the Owners Corporation's claim against Mr Saaib was to fail. [16]
- 27 Ms Wajiha Ahmed's affidavit of 21 January 2020 [17] indicates that she first made contact with Ms Alexandrova in about late 2017. Ms Alexandrova informed her of matters that Ms Ahmed considered could be material in the Owners Corporation case against Mr Saaib. It appears to be the case that from that point onwards Ms Alexandrova was regarded as a potentially important witness. Even after the proceeding was instituted against Ms Alexandrova, Ms Ahmed instructed Mills Oakley to pursue the finalisation of an affidavit from her for use as witness testimony in the proceeding against Mr Saaib.
- 28 Mr Stirton, an employed solicitor with Mills Oakley with day-to-day carriage of the matter on behalf of the Owners Corporation, provided an affidavit dated 22 January 2020. [18] He asserts that the intention of Mills Oakley has always been to call Ms Alexandrova as a witness in their client's case against Mr Saaib and to rely upon a signed affidavit by her if a finalised affidavit could be obtained. A subpoena to give evidence had been served upon her on or about 17 April 2019. Draft affidavits dated 1 November 2019 and 5 December 2019 were prepared after the proceeding had been commenced against her, but the intention of Mills Oakley had remained that she would be a witness for their client against Mr Saaib. The finalised affidavit dated 17 December 2019, which had been served upon Mr Saaib, represented the evidence it intended to rely upon in respect of her as a witness against him. [19]

Mr Stirton referred to a schedule of 18 chains of email communications between members of his firm and Ms Alexandrova between 18 September 2019 and 17 December 2019. Mr Stirton asserts in respect of the first 16 that, "the purpose of my email was to progress the obtaining of an affidavit from Ms Alexandrova to be relied upon by the plaintiff in its case against Mr Saaib". In respect of the last two, he asserts that, "the purpose of my email was to progress the filing and service of an affidavit from Ms Alexandrova to be relied upon by the plaintiff in its case against Mr Saaib". [20]

30 The judgment of Goldberg J in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526 at 563 supports the Owners Corporation case that the communications between Mills Oakley and Ms Alexandrova which were directed to obtaining a documented account of her potential evidence against Mr Saaib were confidential.

31 True it is that, as Mr Lawrance submitted, there is no evidence of an "express" obligation of non-disclosure. However, the evidence of Mr Stirton is sufficient to make out such an obligation by implication.

32 As a general proposition, communications between opposing parties to litigation are not confidential. However, as counsel for Mr Saaib accepted, *Sugden v Sugden* makes clear that the proposition is not absolute. In this case there are two separate, albeit related, proceedings. Ms Alexandrova is an opposing party in relation to the Owners Corporation in relation to one of them. In the other, she is not a party but she is a witness for the Owners Corporation. The communications in question are more (or completely) to do with her capacity as a witness.

33 The affidavit of Mr Stirton demonstrates that the communications between Mills Oakley and Ms Alexandrova were for the dominant purpose of the Owners Corporation being provided with professional legal services relating to a proceeding in which it was a party. The communications related to the obtaining of evidence to be used against the builder, Mr Saaib. Thus, I accept that there was an implied obligation not to disclose the content of those communications to Mr Saaib.

34 The fact that Ms Alexandrova's affidavit of 17 December 2019 was filed in the proceeding against her (2019/235463), as opposed to the proceeding against Mr Saaib (2016/382268), is not determinative. Given the joint hearing ordered by Hammerschlag J, it will be evidence in both proceedings.

35 There is some inconsistency in the conduct of the Owners Corporation disclosing to Mr Saaib other material concerning communications with Ms Alexandrova. The relevance of this in Mr Saaib's case was not to assert some kind of implied waiver of privilege. It was simply a submission that if the Owners Corporation did not feel bound by an obligation of confidentiality in relation to that material, it should not be implied that there was an obligation of non-disclosure in relation to the emails in question.

- 36 Counsel for Mr Saaib sought to characterise the disclosure of the other communications with Ms Alexandrova as the Owners Corporation having "deployed them against the builder". [21] It is difficult to see how the Owners Corporation could derive advantage, or Mr Saaib suffer disadvantage, from such disclosure having been made. The characterisation of "deployment" seems to have been inapt.
- 37 It may well be that the Owners Corporation could have asserted a claim of privilege and withheld the other communications. However, I do not believe that this sufficiently detracts from the implication of an obligation of non-disclosure in relation to the communications that are the subject of the claim.

Conclusion

- 38 I uphold the claim by the Owners Corporation of client legal privilege in respect of the email communications caught by paragraph 3 of Mr Saaib's Notice to Produce of 20 December 2019.
- 39 Mr Saaib's application to be permitted to inspect and copy the same is refused.

Endnotes

1. Letter by Mills Oakley 14 January 2020 annexed to affidavit of Maroun Draybi sworn 20 January 2020.
2. Tcpt 4.5.
3. Tcpt 4.20.
4. Tcpt 4.32-5.1.
5. Tcpt 5.17.
6. Tcpt 5-6.
7. Tcpt 5.21, 7.6.
8. Tcpt 7.30.
9. Exhibit 1.
10. Tcpt 7.35-7.49.
11. Exhibit 2; Tcpt 8.1.
12. Tcpt 8.9-8.20.
13. Exhibit 3.
14. Exhibit 4; Tcpt 8.22.
15. Tcpt 8.32.
16. Tcpt 9.23-9.33.
17. Exhibit A.
18. Exhibit B.
19. Exhibit B: Affidavit of Luke Stirton, 22 January 2020 at [4], [8]-[9], [12]; Tcpt 11.17-11.24.
20. Exhibit B: Affidavit of Luke Stirton, 22 January 2020.

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Decision last updated: 30 January 2020