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Owners Corporation RP003605 v Chung (Owners Corporations) [2015] VCAT 238 (27 February 2015)

Last Updated: 17 March 2015

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

OWNERS CORPORATIONS LIST

VCAT REFERENCE NO.OC2350/2013

CATCHWORDS

Discovery – records of owners corporation – communications by and from solicitors – legal professional privilege – whether privilege waived – [Owners Corporations Act 2006 s 146\(1\)](#) – [Victorian Civil and Administrative Tribunal Act 1998 s 80\(3\)](#).

APPLICANT:	Owners Corporation RP003605
RESPONDENT:	Mona Chung
WHERE HELD:	55 King Street, Melbourne
BEFORE:	Senior Member A Vassie
HEARING TYPE:	Interlocutory application for discovery
DATE OF HEARING:	23 February 2015
DATE OF ORDER:	27 February 2015
DATE OF REASONS:	27 February 2015
CITATION	Owners Corporation RP003605 v Chung (Owners Corporations) [2015] VCAT 238

ORDER

1. The respondent's application for an order for further discovery is dismissed.
2. The respondent shall pay the applicant's costs of the application for further discovery to be assessed by the Costs Court on the standard basis on the County Court scale.

SENIOR MEMBER A VASSIE

APPEARANCES:

For Applicant

Mr B McCullagh of Counsel

For Respondent

Mr R Seifman of Counsel

REASONS FOR DECISION

1. Owners Corporation RP003605 affects land at 9 Monomeath Avenue, Toorak. Mona Chung is the owner of unit 2 at that address. On the land is a ramp that would assist a disabled person to gain access to unit 2. The owners corporation alleges that the ramp is on common property. Ms Chung alleges that the ramp is part of unit 2. The ramp was already on the land when she purchased unit 2.
2. In proceeding OC2350/2013 the owners corporation has sought an order that Ms Chung remove the ramp or permit it to be removed. In proceeding No OC2830/2014 Ms Chung has counterclaimed for declarations that the ramp is part of unit 2 or that the owners corporation had approved the ramp.
3. On 23 February 2015 I heard an application, in both proceedings, by Ms Chung for an order that the owners corporation give further discovery. Her application was supported by an affidavit dated 4 July 2014 filed in proceeding OC2350/2013. The affidavit by the owners corporation manager which allegedly gave insufficient discovery was also filed in proceeding OC2350/2013. I have therefore treated the application as having been made in that proceeding only, and my decision and these reasons for it are given in that proceeding only.
4. The issue that arises for decision upon the application is whether the owners corporation is entitled to withhold inspection of documents for which it claims legal professional privilege.
5. Part 2 of the owners corporation's affidavit of documents, sworn by its manager on 12 August 2014, lists 36 documents which were communications between the owners corporation's solicitors, LFS Legal, and either the owners corporation or its manager between 11 June 2013 and 7 August 2014. The deponent swore that those documents were prepared for the sole or dominant purpose of the owners corporation's obtaining of legal advice. That evidence was not challenged. In the affidavit the owners corporation objected to produce those 36 documents for inspection because they were privileged. They are documents to which legal professional privilege would ordinarily attach.
6. In her affidavit Ms Chung deposed, and the owners corporation did not dispute, that the owners corporation manager had sent to her a copy of a memorandum of advice by Mr Free of LFS Legal dated 10 April 2013 in relation to the dispute about the ramp. So no legal professional privilege had been claimed in respect of that document.
7. [Section 146\(1\)](#) of the *Owners Corporations Act 2006* provides:
146. Availability of records

(1) The owners corporation, on request by a lot owner, a mortgagee of a lot, a purchaser of a lot or the representative of a lot owner or mortgagee or purchaser of a lot, must make the records of the owners corporation required to be kept under this Division available to that person for inspection at any reasonable time, free of charge.

The communications for which the owners corporation claims privilege are part of the records of the owners corporation.

8. Provisions such as [s 146\(1\)](#) are not to be construed as abrogating a right to claim legal professional privilege, in the absence of clear words or necessary implication to that effect.^[1] There are no such clear words in [s 146\(1\)](#) and nothing that would imply an intention to abrogate the privilege. So, despite the breadth of language in [s 146\(1\)](#), an owners corporation is not obliged to make available for inspection by a lot owner any document to which, vis-à-vis that lot owner, the owners corporation has a good claim to legal professional privilege. Mr Seifman, who appeared on behalf of Ms Chung, did not dispute that proposition. Rather, his arguments were that, first, the owners corporation had waived the privilege, and secondly, in the circumstances of

the case the Tribunal ought to exercise a power given to it under [s 80\(3\)](#) of the *Victorian Civil and Administrative Tribunal Act 1998* (the VCAT Act 1998) to require the production of a document despite the law relating to legal professional privilege.

9. Section 80 of the VCAT Act 1998 provides:

80. Directions

- (1) The Tribunal may give directions at any time in a proceeding and do whatever is necessary for the expeditious or fair hearing and determination of a proceeding.
- (2) The Tribunal's power to give directions is exercisable by any member.
- (3) The Tribunal may give directions under this section requiring a party to produce a document or provide information in a proceeding for review of a decision despite anything to the contrary in section 106(1) or the rule of law relating to privilege or the public interest in relation to the production of documents.

Section 106(1) is not presently relevant.

10. Conduct by a person who would otherwise be entitled to a privilege may amount to waiver of the privilege. An implied waiver will arise where:

... the party entitled to the privilege makes an assertion (express or implied), or brings a case, which is either about the contents of the confidential communication or which necessarily lays open the confidential communication to scrutiny and, by such conduct, an inconsistency arises between the act and the maintenance of the confidence, informed partly by the forensic unfairness of allowing the claim to proceed without disclosure of the communication.^[2]

11. Mr Seifman submitted that the provision of Mr Free's memorandum of advice dated 10 April 2013 constituted a waiver of legal professional privilege not only for that document but for all further communications between LFS Legal and the owners corporation or its manager. Mr Seifman cited a recent decision of a Federal Court judge, *Krok v Commissioner of Taxation*.^[3] In that case the taxpayer Mr Krok was resisting an allegation that arrangements of his financial affairs were a sham and were not for the purpose of securing a legitimate taxation advantage. To resist that allegation he relied upon his having obtained written advice from three lawyers. In his evidence he made a partial disclosure of the gist of that written advice, contending that he had made the arrangements in question because the advice was that he should do so. But he objected to the Commissioner's request to see the advice so that the Commissioner could test whether it was indeed along the lines that Mr Krok had alleged. The judge regarded that attempt to secure a forensic advantage as being manifestly unfair. He held that the partial disclosure of the advice was inconsistent with the confidentiality that would otherwise attach to the communications recording the advice, so that the privilege that would otherwise attach to those communications had been waived.
12. That case is nothing like the present case. The owners corporation has not disclosed the gist or substance of any of the 36 documents for which it has claimed privilege. It does not seek to use them for any forensic advantage. All it has done is to disclose an earlier document and waive privilege in respect of it. No case was cited to me, and I am aware of none, that would support the proposition that the waiver of privilege in respect of one document amounts to a waiver of privilege of all other documents to which, by their confidential nature, privilege would attach. I do not accept the submission that there has been a waiver of legal professional privilege for the 36 documents for which that privilege has been claimed.
13. The prevailing view^[4] is that s 80(3) of the VCAT Act applies only when VCAT is exercising its review jurisdiction, not when, as in the present case, VCAT is exercising its original jurisdiction. The prevailing view is founded, in part, on legislative history: provisions in the *Administrative Appeals Tribunal Act 1984*.^[5] All of the cases in which the effect of s 80(3) has arisen for decision in VCAT proceedings have involved the exercise of the review jurisdiction. If the prevailing view is correct, s 80(3) cannot assist Ms Chung. There has been no decision of a superior court, so far as I am aware, as to whether it is correct. Moreover, it is arguable that in s 80(3) the phrase 'requiring a party to produce a document' is independent of the phrase 'in a

proceeding for a review of a decision' so that the power to require production of a document is not confined to a proceeding for review of an administrative decision. Nevertheless I consider I should follow the prevailing view and hold that s 80(3) does not confer any power to make an order in the present proceeding that would require the owners corporation to produce a document which attracts legal professional privilege.

14. In case the prevailing view, which I am following, is wrong, I shall consider the arguments that Mr Seifman put to support a submission that the power under s 80(3) to make such an order should be exercised.
15. First, he pointed to the fact, to which Ms Chung deposed and which the owners corporation did not dispute, that the owners corporation has levied all unit owners, including Ms Chung, for a contribution towards the cost of this proceeding and the cost of defending Ms Chung's counterclaim. Moreover, it threatened to deny her voting rights at a general meeting of members if she did not pay the fees levied. She paid them, reluctantly. The submission was that it was unjust to require her to pay towards the cost of legal advice and at the same time to object to her inspecting that advice.
16. One can understand Ms Chung being piqued by that state of affairs, but in my opinion that state of affairs does not disentitle the owners corporation from maintaining its claim to legal professional privilege. It and Ms Chung are adversaries in litigation. She is entitled to inspect any document in the owners corporation's records in which she and the other members have a common interest, but the 36 documents in question in this application are not of that kind. I accept the submission of Mr McCullagh, who appeared for the owners corporation, that in striking a levy to pay for the costs of these proceedings the owners corporation had no choice but to levy the lot owners in the way that by law it is required to do, namely, upon each in accordance with lot liability.^[6] The piquant situation of Ms Chung having partially funded the owners corporation's costs of proceedings against her may be addressed at the conclusion of the proceedings if she is in a position to make or oppose an application for costs.
17. Secondly, Mr Seifman submitted that the manager had been guilty of deceptive behaviour towards Ms Chung and that it should be required to produce the documents for that reason. The deception was said to have been made in an email sent by the manager to Ms Chung on 6 November 2013,^[7] in response to Ms Chung's request for all documents that had been supplied to members of the owners corporation committee in relation to the ramp. In that email the manager wrote. 'You have been included in all correspondence regarding the ramp'. That statement was not correct because Ms Chung had not been included in the correspondence to and from LFS Legal, with the exception of Mr Free's memorandum of advice of 10 April 2013.
18. I do not regard the manager's error as significant. It would have been better and more accurate if the manager had said 'You have been included in all correspondence regarding the ramp except correspondence to and from LFS Legal since 11 June 2013, which you are not entitled to see because it is privileged'. But there was no evidence that the error caused Ms Chung any particular detriment. Had it been open to me to make an order requiring production of the privileged documents, I would not have done so merely because that error had occurred.
19. For the above reasons the owners corporation was and is entitled to withhold from inspection the 36 documents itemised in [Part 2](#) of its affidavit of documents. Ms Chung's application for an order for further discovery is dismissed.
20. Each party made an application for costs in the event that it was successful. In making her application Ms Chung was attempting to gain a forensic advantage by having access to the owners corporation's legal advice. The attempt has failed. In my view it is fair to depart from the general rule^[8] that parties to a VCAT proceeding should bear their own costs. I shall order Ms Chung to pay the owners corporation's costs of the application, to be assessed on the standard basis.

SENIOR MEMBER A VASSIE

[1] Pearce and Geddes, *Statutory Interpretation in Australia*, 8th edition, para 5.33; *The Owners – Strata Plan No 7402 v Eastmark Holdings Pty Ltd* [2013] NSWCA 221 at [20].

[2] *DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384; (2003) 127 FCR 499 at [58].

[3] [2015] FCA 51 (6 February 2015).

[4] *Pizer’s Annotated VCAT Act*, 4th edition, para [VCAT.80.120] and the cases cited therein.

[5] *Treverton v Transport Accident Commission* (1998) 14 VAR 150; *Stone v Vero Insurance Ltd* [2006] VCAT 1564 at [21].

[6] [Owners Corporations Act 2006 s 24\(2\)](#).

[7] Exhibit MC8 to the affidavit of Ms Chung sworn on 4 July 2014.

[8] VCAT Act s 109(1), (2), (3).
