

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : ENGWIRDA and THE OWNERS OF QUEENS
RIVERSIDE STRATA PLAN 55728 [2021] WASAT
17

MEMBER : MR D AITKEN, SENIOR MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 9 FEBRUARY 2021

FILE NO/S : CC 732 of 2017

BETWEEN : JENNIFER ENGWIRDA
Applicant

AND

THE OWNERS OF QUEENS RIVERSIDE STRATA
PLAN 55728
Respondent

Catchwords:

Strata Titles Act 1985 (WA) (pre 1 May 2020) - Section 90 orders for inspection of records and documents of strata company excluding documents subject to legal professional privilege - Contention that strata company improperly claimed legal professional privilege - Tribunal to determine whether documents are actually privileged - Preliminary issue - Should the Tribunal determine whether the strata company has improperly claimed legal professional privilege for documents which have now been provided to the applicant with the claim for legal professional privilege waived

Legislation:

State Administrative Tribunal Act 2004 (WA), s 60, s 86, s 95, s 95(1), s 98, s 100, s 105

Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 43, s 90, Sch 5, cl 30(1)

Result:

Preliminary issued determined

Category: B

Representation:

Counsel:

Applicant : In Person

Respondent : Mr W Robinson

Solicitors:

Applicant : N/A

Respondent : Wotton + Kearney Lawyers (Perth)

Case(s) referred to in decision(s):

Engwirda and The Owners of Queens Riverside Strata Plan 55728
[2018] WASAT 15

Engwirda v The Owners of Queens Riverside Strata Plan 55728
[2019] WASCA 190

Schreuder v Murray [No 2] [2009] WASCA 145

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

1 This proceeding was commenced by an application lodged with the Tribunal by the applicant, Ms Jennifer Engwirda (**Ms Engwirda**) against the respondent, The Owners of Queens Riverside Strata Plan 55728 (**Strata Company**) under s 90 of the *Strata Titles Act 1985* (WA) (**ST Act**) on 1 May 2017, seeking an order that she be allowed to inspect the records of the Strata Company.

2 In the application Ms Engwirda also sought a number of other orders, which did not fall within s 90 of the ST Act and she withdrew the application in respect of those orders at an early stage of the proceeding.

3 Major amendments to the ST Act commenced operation on 1 May 2020. Under cl 30(1) of Sch 5 to the ST Act, a proceeding in the Tribunal under the ST Act commenced before 1 May 2020, such as this proceeding, 'must be dealt with as if the [*Strata Titles Amendment Act 2018* (WA)] had not been enacted', that is under the pre-amendment ST Act. All references to the ST Act in these reasons are to the pre-amendment ST Act.

Tribunal's decision

4 On 6 November 2017 the Tribunal (constituted by then President, Curthoys J) made the following final orders (**2017 orders**):

1. The Respondent is provide the Applicant with a USB containing electronic copies of the requested documentation (excluding those documents subject to legal professional privilege).
2. Before the Respondent provides the Applicant with the requested documentation by USB, the Applicant must provide written confirmation to the Respondent's lawyers (Wotton + Kearney) that it will:
 - (a) not use the information/documentation to contact individual Owners.
 - (b) not publish or disseminate the documentation to third parties; and
 - (c) ensure that the documentation is kept secure.
3. The above Order 2 does not prevent the Applicant from conducting appropriate communication with the Council of

Owners and at Council organised meetings in relation to the documentation provided.

4. Following receipt of the documentation from the Respondent, if the Applicant is still dissatisfied then the Applicant has liberty to make the appropriate application.
5. The Application is dismissed.
6. No order as to costs.

5 The Tribunal provided written reasons for that decision in ***Engwirda and The Owners of Queens Riverside Strata Plan 55728*** [2018] WASAT 15.

Court of Appeal's decision

6 Ms Engwirda applied to the Court of Appeal (WA) under s 105 of the *State Administrative Tribunal Act 2004* (SAT Act) for leave to appeal that decision.

7 The result of the appeal is set out in ***Engwirda v The Owners of Queens Riverside Strata Plan 55728*** [2019] WASCA 190 (**Court of Appeal's decision**), which was delivered on 28 November 2019.

8 The background to and the result of the appeal is summarised in the Court of Appeal's decision at [1]-[6] as follows:

- 1 The appellant is the proprietor of one of the 526 strata lots on Strata Plan 55728. The proprietors from time to time of all lots on that strata plan constitute the respondent strata company, which is incorporated by s 32 of the Strata Titles Act 1985 (WA) (Act).
- 2 The appellant sought, and was denied, an inspection of documents and records in the respondent's control or custody. She applied to the State Administrative Tribunal for an order allowing her to inspect any and all strata company records of the respondent.
- 3 The Tribunal ultimately ordered that the respondent provide the appellant with a USB containing electronic copies of the requested documentation, other than documents subject to legal professional privilege. The provision of a USB containing electronic copies of the documents was the respondent's preferred method of providing inspection of those documents. This order in effect gave the appellant the inspection which she sought in the Tribunal proceedings.

4 However, the provision of that inspection was subject to a condition to the effect that the appellant was required to provide an undertaking to the respondent's solicitors. The required undertaking was that the appellant would:

- (1) not use the information/documentation to contact other proprietors;
- (2) not publish or disseminate the documentation to third parties; and
- (3) ensure the documentation is kept secure.

There was an exception permitting the appellant to conduct 'appropriate communication with the Council of Owners and at Council organised meetings in relation to the documentation provided'.

5 A question of law which arises in this appeal is whether the Tribunal had power to require this undertaking as a condition for an order that documents in the respondent's control or custody be made available for the appellant's inspection.

6 In our view, the Tribunal exceeded its power in requiring the undertaking to be given. The orders requiring the undertaking should be set aside. A consequential order should be made releasing the appellant from the undertaking that she gave in order to inspect the requested documents.

9 The orders made by the Court of Appeal are set out at [164] of the Court of Appeal's decision as follows:

1. There is an extension of time to 26 September 2018 for the appellant to make application for leave to appeal from the orders (Orders) of the State Administrative Tribunal made 6 November 2017 in proceedings CC 732 of 2017.
2. The appellant has leave to appeal from the Orders.
3. The appeal is allowed.
4. Paragraphs 2 and 3 of the Orders are set aside.
5. The appellant's undertaking proffered pursuant to pars 2 and 3 of the Orders (as set aside under par 4 above) is released.

10 The result of the decision of the Court of Appeal is explained at [36]-[37] as follows:

36 What remains after the requirement for an undertaking is set aside are the orders of the Tribunal:

- (1) Requiring the respondent to provide the appellant with a USB containing electronic copies of the requested documentation (excluding those documents subject to legal professional privilege);
- (2) Giving the appellant liberty to make 'the appropriate application' if she is dissatisfied following receipt of documentation from the respondent.
- (3) Ordering that the appellant's application is dismissed.
- (4) Ordering that there be no order as to costs.

37 None of the grounds of appeal provide any arguable basis for setting aside or substituting these remaining orders. The first order noted at [36] above gives the appellant the inspection of the non-privileged documents she was seeking. To any extent that the USB provided does not contain the documents ordered by the Tribunal to be made available, the appellant's remedy is to seek to enforce the order in the manner described at [13]-[14] above. To the extent that the respondent seeks to bring itself within the exception in the first order in relation to privileged documents, it must first properly assert the claim by identifying the documents for which privilege is claimed and indicate the basis on which legal professional privilege is claimed in respect of those documents. To any extent that the appellant contends that the respondent is improperly claiming legal professional privilege, then she can exercise the liberty given by the second order to apply to the Tribunal for a determination by the Tribunal as to whether the documents are actually privileged. The third order should be construed as ordering that the application is otherwise dismissed, and to relate to aspects of the application arising otherwise than under s 90 of the Act (which were not ultimately pursued in the Tribunal). Section 81(7) of the Act would preclude the Tribunal from making some different costs order

11 [13]-[14] of the Court of Appeal's decision (which are referred to at [37] of that decision) are as follows:

13 A decision of the Tribunal under s 90 may be enforced under s 86 of the State Administrative Tribunal Act 2004 (WA) (SAT Act). The proprietor seeking to enforce the decision may file in the Supreme Court a certified copy of the decision, an affidavit as to the non-compliance with the decision and a certificate from a judicial member of the Tribunal that the decision is appropriate for filing in the Supreme Court.

14 On filing the above documents in the Supreme Court, the Tribunal's decision is taken to be a decision of the Supreme Court, and may be enforced accordingly. Disobedience of the decision by failing to make the document or record available for inspection is then a contempt of court by the strata company. The proprietor may request the court to deal with the strata company for the contempt.

12 Also, at [45], the following is stated about the issue of whether the materials on the USB which the Strata Company gave to Ms Engwirda are in full compliance with the 2017 orders:

45 The undertaking was provided. Ms Engwirda has been provided with the USB. There is some dispute as to whether the materials on the USB are in full compliance with the Tribunal's order. That is not a matter for determination in this appeal. This appeal solely concerns the condition imposed by the Tribunal for provision of the documentation on the USB. Ms Engwirda complains about the undertaking condition and seeks, by this appeal, to have the undertaking 'voided'. In substance that should be understood as seeking that this court make orders providing for the release and discharge of the undertaking. Ms Engwirda seeks to have access to the documentation without the burden of the undertaking.

Relief sought by Ms Engwirda from the Tribunal following the Court of Appeal's decision

13 On 20 April 2020 Ms Engwirda filed a submission with the Tribunal in which she seeks the following relief:

- The Strata Company be required to obtain the Tribunal's determination as to whether any documents withheld were actually privileged; and
- The Strata Company be required to provide electronic copies of all withheld documents which are not privileged.

14 The Tribunal listed that submission for a directions hearing, which was held on 26 May 2020 at which the Tribunal made orders for:

- the Strata Company to file with the Tribunal and give to Ms Engwirda a written statement identifying the documents which were not included on the USB referred to in order 1 of the 2017 orders on the grounds of legal professional privilege and indicating the basis

on which legal professional privilege was claimed in respect of each of those documents; and

- Ms Engwirda to file with the Tribunal and give to the Strata Company a written statement identifying the documents listed in the Strata Company's statement in respect of which the Ms Engwirda contends that the Strata Company has improperly claimed legal professional privilege and the basis for those contentions by Ms Engwirda.

15 The Strata Company filed with the Tribunal and gave to Ms Engwirda a written statement dated 12 June 2020 (**Strata Company's statement**) which lists 15 documents (**documents 1-15**) not included on the USB referred to in order 1 of the 2017 orders on the grounds of legal professional privilege.

16 The Strata Company's statement states that privilege was claimed over documents 1-15 'as they were documents containing or related to legal advice obtained by the [Strata Company] and/or its Strata Manager(s) / Agent(s)'. However, the Strata Company's statement further states that since the USB was prepared and provided to Ms Engwirda, documents 1-7 listed in the Strata Company's statement (**documents 1-7**) have been provided to Ms Engwirda and the Strata Company's claim for legal professional privilege has therefore been waived over these documents. The Strata Company's statement then states that the Strata Company maintains its claim for legal professional privilege over documents 8-15 listed in the Strata Company's statement (**documents 8-15**), because those documents 'contain legal advice obtained by the Strata Manager in relation to matters concerning [Ms Engwirda]'.

17 Ms Engwirda filed with the Tribunal and gave to the Strata Company a written statement dated 10 July 2020 in which Ms Engwirda contends that each of documents 1-15 are not privileged.

18 Ms Engwirda contends that, even though documents 1-7 have been provided to her, the Tribunal must determine whether or not the Strata Company has improperly claimed legal professional privilege for each of those documents.

Preliminary issue to be determined

19 The Tribunal has therefore decided to determine pursuant to s 60 of the SAT Act, entirely on the basis of written submissions filed by the parties, the following preliminary issue:

Is the task of the Tribunal in this matter to determine whether or not the Strata Company has improperly claimed legal professional privilege for each of documents 1-15, as contended by Ms Engwirda, or just documents 8-15, which the Strata Company has not provided to Ms Engwirda, as contended by the Strata company?

20 Each party has filed written submissions in relation to the preliminary issue.

Ms Engwirda's submissions

21 After stating what she believes to be the relevant background information and legal principles Ms Engwirda refers to the statement at [37] of the Court of Appeal's decision that she 'can exercise the liberty given by the second order to apply to the Tribunal for a determination by the Tribunal as to whether the documents are actually privileged'.

22 Ms Engwirda then submits that it is the task of the Tribunal to ensure that:

- It's decisions are correct;
- Strata disputes are resolved;
- Strata companies comply with the Strata Titles Act 1985 by promptly providing owners with the ability to inspect any and all strata records except those for which privilege is established;
- Pursuant to s 98 of the State Administrative Tribunal Act 2004, parties which mislead the Tribunal are held accountable;
- It gives proper consideration to apply s 95(1) of the State Administrative Tribunal Act 2004 after a party 'fails to comply with a decision' before issuing a certificate of appropriateness of enforcement;
- Pursuant to s 100 of the State Administrative Tribunal Act 2004, the President reports to the Supreme Court acts or omissions which would constitute a contempt of the court if a proceeding of the Tribunal were a proceeding in the Supreme Court when applicable.

23 Ms Engwirda then submits that the Tribunal must establish if privilege existed for each of the 15 documents in the Strata Company's statement and determine if grounds exist for it to:

- Apply s 95(1) of the State Administrative Tribunal Act 2004 to the orders made on 6 November 2017 and refer the matter for prosecution if non-compliance continues;
- Declare that William Robinson, Divij Vijayakumar and/or the respondent misled the Tribunal by its assertions in letters dated 7 December 2017 and/or 22 February 2019; and/or
- Report the respondent to the Supreme Court pursuant to s 100 of the State Administrative Tribunal Act 2004.

24 Ms Engwirda concludes by submitting that the preliminary issue must be answered in the affirmative, which the Tribunal takes to be a submission that the task of the Tribunal in this matter is to determine whether or not the Strata Company has improperly claimed legal professional privilege for each of the 15 documents described in the Strata Company's statement.

The Strata Company's submissions

25 After stating what it considers to be the relevant background information and legal principles the Strata Company makes the following submissions:

- The objective of s 43 and s 90 of the ST Act is for proprietors and mortgagees of lots to be able to inspect the documents listed in s 43. Ms Engwirda has been able to inspect documents 1-7 and the claim of legal professional privilege no longer prevents that.
- Accordingly, there is no longer a controversy with respect to documents 1-7.
- However, there remains a claim for legal professional privilege for documents 8-15. That claim prevents Ms Engwirda from inspecting those documents. The claims of privilege over those documents need to be determined to determine whether Ms Engwirda is permitted to inspect those documents.
- Ms Engwirda makes serious allegations of impropriety. However, the 'basal' complaint is that the Strata

Company may have claimed privilege over documents which are not actually privileged.

- It is uncontroversial that the Strata Company provided Ms Engwirda with a USB of documents on 14 December 2018. It has always been the position, as Ms Engwirda well knew, that documents claimed to be privileged were not included on the USB.
- On any objective view of the provisions to which Ms Engwirda has referred, they are not enlivened in circumstances where a party makes a claim for privilege which is later not upheld.
- Ms Engwirda is submitting that the Tribunal should determine whether documents 1-7 were previously privileged so that she can later submit that the Strata Company did not comply with the 2017 orders.
- The compliance or non-compliance with the 2017 orders was a matter for the Supreme Court of Western Australia in proceeding SAT 3 of 2019. Section 86 of the SAT Act requires a non-monetary order to be registered with the Supreme Court and its enforcement, and thereby determination of whether it has been complied with is a matter for the Supreme Court.
- In that proceeding Ms Engwirda alleged that the 2017 orders had not been complied with. The Strata Company submitted that it had complied with the 2017 orders. However, Ms Engwirda discontinued that proceeding.
- The only live controversy is whether documents 8-15 are privileged.

26

The Strata Company concludes by submitting that the preliminary issue ought to be answered as follows: The task of the Tribunal in this matter is to determine whether or not the Strata Company has improperly claimed legal professional privilege for documents 8-15.

The Tribunal's consideration

27 The consequence of the Court of Appeal's decision was that paragraphs (orders) 2 and 3 of the 2017 orders were set aside and Ms Engwirda was released from the undertaking which she had proffered pursuant to those orders.

28 The other orders in the 2017 orders remain in place. The Court of Appeal's decision, at [37], states that there was no arguable basis for setting aside or substituting orders 1, 4, 5 and 6 of the 2017 orders.

29 It is clear from the statements at [37] of the Court of Appeal's decision that this left only two possible tasks which might fall to the Tribunal to perform:

- First, to any extent that the USB provided does not contain the documents ordered by the Tribunal to be made available, Ms Engwirda's remedy is to seek to enforce the 2017 orders under s 86 of the SAT Act. That requires a certificate from a judicial member of the Tribunal that the 2017 orders are appropriate for filing in the Supreme Court.
- Second, to the extent that the Strata Company seeks to avoid providing documents to Ms Engwirda on the ground that those documents are legally professionally privileged Ms Engwirda can apply to the Tribunal for a determination as to whether the documents are actually privileged.

30 The Strata Company has pointed out in its submissions that Ms Engwirda took action under s 86 of the SAT Act to enforce the 2017 orders in the Supreme Court in proceeding SAT 3 of 2019, which she discontinued.

31 The only task which remains for the Tribunal to perform is the second task referred to in [29] above.

32 Legal professional privilege is a rule of substantive law. A person may invoke the privilege to resist giving information or producing documents that would reveal confidential communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or providing legal services

(including representation in legal proceedings): *Schreuder v Murray* [No 2] [2009] WASCA 145 at [58].

33 The purpose of a person, in this case the Strata Company, claiming legal professional privilege for a document in a proceeding is to avoid it being given to the other party, in this case, Ms Engwirda.

34 Documents 1-7 have been provided to Ms Engwirda by the Strata Company and the claim for legal professional privilege for them waived.

35 This proceeding under s 90 of the ST Act was commenced by Ms Engwirda to be allowed to inspect the records of the Strata Company. Ms Engwirda has now been able to inspect documents 1-7 and therefore she has obtained what she was seeking in her application under s 90 of the ST Act in respect of those documents.

36 The remaining task of the Tribunal after the Court of Appeal's decision is to determine whether any documents which have not been provided by the Strata Company to Ms Engwirda because the Strata Company claims legal professional privilege in respect of them are actually privileged. The only documents which fall into that category are documents 8-15.

37 That task does not include any of the things, described in [22] and [23] above.

Conclusion

38 For the reasons above the preliminary issue is determined as follows:

The task of the Tribunal in this matter is to determine whether the Strata Company has improperly claimed legal professional privilege for all or any of documents 8-15.

39 The Tribunal will determine that question entirely on the documents, pursuant to s 60 of the SAT Act, after giving the Strata Company and then Ms Engwirda, the opportunity to provide written submissions and any affidavits on which they wish to rely in support of their submissions.

Orders

The Tribunal will make the following orders:

1. The preliminary issue described in order 1 of the orders made by the Tribunal on 20 October 2020 is determined as follows:

The task of the Tribunal in this matter is to determine whether the respondent has improperly claimed legal professional privilege for all or any of documents 8-15 of the documents described in the respondent's statement dated 12 June 2020.

2. By 10 March 2021 the respondent must file with the Tribunal and give to the applicant:

- (a) written submissions which:
 - (i) properly and sufficiently describe each of documents 8-15 described in the respondent's statement dated 12 June 2020 (without revealing the contents of those documents); and
 - (ii) set out the facts relied upon by the respondent to establish the basis on which the legal professional privilege is claimed by the respondent in respect of each of those documents (but those facts should not be set out in such detail as would enable the contents of each document to be ascertained indirectly); and

- (b) any affidavits on which the respondent wishes to rely in support of its submissions.

3. By 9 April 2021 the applicant must file with the Tribunal and give to the respondent:

- (a) written submissions in response to the respondent's submissions; and
- (b) any affidavits on which the applicant wishes to rely in support of her submissions.

4. Subject to further order, the Tribunal will determine the issue described in order 1 above entirely on the

documents pursuant to s 60 of the *State Administrative Tribunal Act 2004* (WA) after 9 April 2021.

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

FM
Secretary

9 FEBRUARY 2021

JURISDICTION : STATE ADMINISTRATIVE TRIBUNAL

ACT : STRATA TITLES ACT 1985 (WA)

CITATION : ENGWIRDA and THE OWNERS OF QUEENS
RIVERSIDE STRATA PLAN 55728 [2021] WASAT
17 (S)

MEMBER : MR D AITKEN, SENIOR MEMBER

HEARD : DETERMINED ON THE DOCUMENTS

DELIVERED : 6 JULY 2021

FILE NO/S : CC 732 of 2017

BETWEEN : JENNIFER ENGWIRDA
Applicant

AND

THE OWNERS OF QUEENS RIVERSIDE STRATA
PLAN 55728
Respondent

Catchwords:

Strata Titles Act 1985 (WA) pre 1 May 2020 - Section 90 orders for inspection of records and documents of strata company excluding documents subject to legal professional privilege - Whether claim for legal professional privilege in respect of particular documents has been proved

Legislation:

State Administrative Tribunal 2004 (WA), s 60
Strata Titles Act 1985 (WA) (prior to 1 May 2020), s 90

Result:

Claim for legal professional privilege not proved
Respondent ordered to provide inspection of documents to applicant

Category: B

Representation:

Counsel:

Applicant : In Person
Respondent : Mr W Robinson

Solicitors:

Applicant : N/A
Respondent : Wotton + Kearney Lawyers (Perth)

Case(s) referred to in decision(s):

Carey v Korda [2012] WASCA 228
Engwirda and The Owners of Queens Riverside Strata Plan 55728
[2021] WASAT 17
Engwirda v The Owners of Queens Riverside Strata Plan 55728
[2019] WASCA 190
Schreuder v Murray [No 2] [2009] WASCA 145
Ziverts v City of Albany [2016] WASC 94

REASONS FOR DECISION OF THE TRIBUNAL:

Introduction

40 This proceeding concerns the entitlement of the applicant, Ms Jennifer Engwirda (**Ms Engwirda**) as an owner¹ of a lot in the strata scheme known as Queens Riverside to inspect the documents and records of the strata company of the strata titles scheme, The Owners of Queens Riverside Strata Plan 55728 (**Strata Company**), which is the respondent to the proceeding.

41 The proceeding has a long history, since it commenced under s 90 of the *Strata Titles Act 1985* (WA), as it then was, on 1 May 2017. The only remaining task of the Tribunal in the proceeding is to determine whether or not the Strata Company has improperly claimed legal professional privilege for eight documents.²

42 For the reasons which follow, I have decided that the Strata Company has not proved its claim for legal professional privilege in respect of those eight documents and Ms Engwirda is entitled to inspect those documents.

The disputed documents

43 The documents for which the Strata Company claims legal professional privilege, which Ms Engwirda disputes, are listed in a written statement dated 12 June 2020³ filed with the Tribunal by the Strata Company which describes the documents (**disputed documents**) as follows:

SCHEDULE OF DOCUMENTS		
	Description	Date
8.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	30 March 2017
9.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager /	30 March 2017

¹ Ms Engwirda owns 60% of her lot.

² The history of the proceeding and the decision explaining the remaining task of the Tribunal are set out in **Engwirda and The Owners of Queens Riverside Strata Plan 55728** [2021] WASAT 17 (**Engwirda**).

³ The Strata Company originally claimed legal professional privilege for 15 documents, but the Strata Company subsequently provided documents 1 - 7 to Ms Engwirda and waived its claim for legal professional privilege for those documents: **Engwirda** at [33] and [34].

	Agent)	
10,	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	6 April 2017
11.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	4 April 2017
12.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	4 April 2017
13.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	4 April 2017
14.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	4 April 2017
15.	Email chain between Jackson McDonald Lawyers and Colliers (the Respondent's Strata Manager / Agent)	4 April 2017

The issue for determination

44 The issue for determination is whether the disputed documents, which the Strata Company has not allowed Ms Engwirda to inspect on the ground that they are legally professionally privileged, are actually privileged.

45 Ms Engwirda is seeking an order by the Tribunal that the Strata Company provide electronic copies of the disputed documents to her.⁴ The Strata Company is only obliged to make its documents and records (other than documents subject to legal professional privilege) available for inspection by Ms Engwirda, but the Strata Company's preferred method of providing inspection of its documents by Ms Engwirda has been to provide to Ms Engwirda electronic copies of the requested documents.⁵ Therefore, if I decide that the Strata Company has not proved its claim for legal professional privilege in respect of all or any of the disputed documents, I will order the Strata Company to provide

⁴ *Engwirda* at [13].

⁵ *Engwirda v The Owners of Queens Riverside Strata Plan 55728* [2019] WASCA 190 at [3].

inspection of those documents to Ms Engwirda by giving her an electronic copy of those documents within the period of seven days.⁶

46 I decided that I should determine this issue on the documents, pursuant to s 60 of the *State Administrative Tribunal Act (2004)* (WA) and on 9 February 2021 I made orders requiring first, the Strata Company and then Ms Engwirda to file with the Tribunal (and give to each other) written submissions and any affidavits on which they wished to rely in support of their submissions. Each party filed written submissions. The Strata Company filed one affidavit and Ms Engwirda filed two affidavits. I have read and considered those submissions and affidavits before making my decision.

The legal principles regarding legal professional privilege

47 In *Schreuder v Murray [No 2]* [2009] WASCA 145 at [58], [59] and [60] Buss JA (with McLure JA agreeing) stated the following regarding legal professional privilege:

58 Legal professional privilege is a rule of substantive law. A person may invoke the privilege to resist giving information or producing documents that would reveal confidential communications between a client and his or her lawyer made for the dominant purpose of giving or obtaining legal advice or providing legal services (including representation in legal proceedings). See *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 [9] - [11] (Gleeson CJ, Gaudron, Gummow & Hayne JJ); *Esso Australia Resources Limited v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 [35], [61], [62] (Gleeson CJ, Gaudron & Gummow JJ), [167] (Callinan J).

59 Legal professional privilege comprises two categories, namely, legal advice privilege and litigation privilege. Legal advice privilege can be claimed in respect of information or documents which contain or reveal confidential communications between a client and his or her lawyer made for the dominant purpose of giving or receiving legal advice, whether or not litigation is subsisting or within the reasonable contemplation of the client. Litigation privilege can be claimed where litigation is subsisting or within the reasonable contemplation of the client, and applies to confidential communications passing between a lawyer and his or her client or between the lawyer and third parties, and

⁶ I consider the period of seven days to be reasonable, because the electronic copy of those documents is readily available to the Strata Company.

confidential information or documents brought into existence, for the dominant purpose of preparing for the litigation.

- 60 The person claiming legal professional privilege must prove that the information or documents in question are privileged. See *Grant v Downs* [1976] HCA 63; (1976) 135 CLR 674, 689 (Stephen, Mason & Murphy JJ).

48 In ***Carey v Korda*** [2012] WASCA 228 at [70] and [71] Murphy JA (with Martin CJ and Newnes JA agreeing) stated the following regarding what is required for the purposes of establishing a privilege claim:

- 70 Whilst the ultimate legal onus remains on the party claiming privilege, an evidential onus may be cast upon the party seeking inspection if the claim for privilege is 'apparently proper': *CTC Resources NL v Australian Stock Exchange Ltd* [2000] WASCA 19; (2000) 22 WAR 48 [33] - [34]. In that case the party claiming the privilege had, in affidavits, 'clearly address[ed] all the issues required for such a claim'. The court is not confined to considering a contentious affidavit of the party seeking inspection, and is entitled to look at any evidence before the court which may be capable of raising doubts as to the authenticity of the privilege claim: *CTC v Australian Stock Exchange* [39].

- 71 What is required, for the purposes of establishing a privilege claim, will vary depending on the nature of the document and the particular ground on which privilege is claimed: *Kadlunga Proprietors v Electricity Trust of South Australia* (1985) 39 SASR 410, 415. Thus, for example, if in an affidavit claiming privilege, a document were described as a confidential communication from the lawyer to the client, it would be readily capable of sustaining a claim for legal professional privilege on the ground that it was made for the dominant purpose of giving legal advice. On the other hand, eg, a claim would not, generally, be apparently proper if it involved a bare assertion of a protected dominant purpose, in relation to a document which, by the description given to it in the affidavit, had no apparent connection with giving or receiving legal advice or actual or anticipated litigation. Each claim will need to be considered on its merits. Also, the sufficiency of the evidence relied on by a party disputing the claim for privilege for the purpose of meeting its evidential onus will no doubt vary according to the ground of privilege claimed and the description of the document given.

49

In *Ziverts v City of Albany* [2016] WASC 94 at [6] - [8] Beech J (as he then was) stated the following regarding what is required for the purposes of establishing a privilege claim:

- 6 The person claiming legal professional privilege must prove that the information or documents in question are privileged. While the ultimate legal onus is on the party claiming privilege, an evidential onus may be cast upon the party seeking inspection if a claim for privilege is 'apparently proper'.
- 7 What is required for the purpose of establishing a privilege claim will vary depending on the nature of the document and the particular ground on which privilege is claimed. It may be proved by evidence as to the circumstances and context in which the communications occurred or in which the documents were brought into existence, the nature of the document, or by evidence as to the purposes of the person who made the communication, authored the document or procured its creation. A claim of privilege will not be established by verbal formula, or by mere assertion in general terms that communications were undertaken for the purpose of obtaining or giving legal advice without a statement as to the subject matter of the advice said to have been sought.
- 8 The purpose for which a document is put into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's author or the person who procured it is not necessarily conclusive. In determining whether a document was created for the dominant purpose of giving or obtaining legal advice or the provision of legal services, an appropriate starting point is to ask what was the intended use or uses of the document which account for its being brought into existence.

The Strata Company's submissions and evidence

50

The Strata Company has filed written submissions and an affidavit dated 10 March 2021 of Amy Cooper, senior strata manager of Colliers International (**Colliers**), which is the strata manager of the Strata Company.

51

The Strata Company submits that in the months prior to the commencement of this proceeding Colliers engaged Jackson McDonald Lawyers (Jackson McDonald) for advice in relation to matters the subject of disputes with Ms Engwirda and advice was sought from Jackson McDonald by Colliers, both in its own right and in its capacity as the strata manager for the Strata Company.

52 The Strata Company submits that each of the disputed documents contains advice given by Jackson McDonald to the Strata Company about disputes with Ms Engwirda and matters that became the subject matter of this and other proceedings.

53 The Strata Company submits that the disputed documents were created for the dominant purpose of giving advice in direct response to communications from Ms Engwirda and in relation to anticipated legal proceedings and Ms Engwirda is identified in each of those documents.

54 The Strata Company says that documents 11 to 15 of the disputed documents also contain legal advice in relation to other disputes between Ms Engwirda and Colliers / the Strata Company.

55 In her affidavit Ms Cooper identifies the disputed documents and states that each of them contains legal advice provided by Jackson McDonald to Colliers in relation to matters the subject of disputes with Ms Engwirda and in anticipation of legal proceedings. Ms Cooper says that each of the disputed documents contains legal advice given by Jackson McDonald to Colliers on matters the subject of this proceeding and that documents 11 to 15 of the disputed documents also contain legal advice which relates to other disputes between Ms Engwirda and Colliers or the Strata Company. I will examine the statements made by Ms Cooper in her affidavit in more detail later in these reasons.

Ms Engwirda's submissions and evidence

56 Ms Engwirda has filed written submissions, her affidavit dated 8 April 2021 and an affidavit of Susan Mary Evans dated 15 March 2021.

57 Ms Engwirda's submissions and affidavit contain many submissions and statements which are not relevant to the determination which I need to make to complete the task remaining for the Tribunal in this proceeding.

58 The submissions of Ms Engwirda which are relevant may be summarised as follows.

59 Ms Engwirda submits that the disputed documents do not qualify as privileged because the Strata Company was not a client of Jackson McDonald when the documents were created and the legal advice was provided for the benefit of Colliers, which waived the

privilege it held in respect of the documents by sharing the advice it received with the Strata Company.

60 Ms Engwirda submits that the Strata Company was not a client of Jackson McDonald until after 18 April 2017 and neither directly nor indirectly sought advice from Jackson McDonald regarding requests by owners of lots in the strata scheme to inspect the records of the Strata Company until this proceeding was commenced.

61 In her affidavit Ms Evans states that she served as the chairperson of the council of the Strata Company from 8 September 2015 until 6 September 2017. Ms Evans says that on 1 November 2016 a strata management agreement between the Strata Company and Colliers came into effect. Ms Evans has incorporated into her affidavit copies of various emails sent by Daniel Crotty (an employee of Colliers) to Ms Evans (and other persons who seem to be members of the council of the Strata Company at the time) and various emails sent by Ms Evans to Mr Crotty, all between 30 March 2017 and 4 April 2017. I will examine those emails in more detail later in these reasons.

62 Ms Evans has also incorporated into her affidavit a copy of an invoice from Jackson McDonald dated 28 April 2017 addressed to the Strata Company of care of Colliers, for professional services from 31 March 2017 until 21 April 2017. Ms Evans says that the council of the Strata Company disputed that the Strata Company was liable to pay for those services, which were obtained by Colliers voluntarily. Ms Evans says that the Strata Company did not become a client of Jackson McDonald until the council of the Strata Company signed a retainer agreement with Jackson McDonald on 19 April 2017.

The Strata Company has not proved its claim for legal professional privilege in respect of the disputed documents

63 From the statements in the cases, to which I have referred in [8] - [10] above it is clear that:

- The Strata Company must prove that the disputed documents are privileged.
- Whilst the ultimate legal onus remains on the Strata Company, if the claim of legal professional privilege is apparently proper, an evidential onus may be cast on Ms Engwirda.

- What is required for the purposes of the Strata Company establishing its privilege claim will depend on the nature of the disputed documents and the particular ground on which privilege is claimed.
- The purpose for which each of the disputed documents was brought into existence is a question of fact that must be determined objectively.
- An appropriate starting point is to ask what was the intended use or uses of each of the disputed documents, which account for it being brought into existence?

64 I will now consider the evidence provided by the Strata Company and Ms Engwirda, with those principles in mind.

65 In her affidavit Ms Cooper states that she is a senior strata manager employed by Colliers and then makes the following statements.

66 Ms Cooper states that she understands, based on advice from Wotton + Kearney Lawyers and Colliers' records, that the Strata Company and Colliers have been in various disputes with Ms Engwirda since 2017 and that the disputes between Ms Engwirda and Colliers have been variously against Colliers in its own right, and as representative or agent of the Strata Company.

67 Ms Cooper then states that Ms Engwirda has brought at least 10 proceedings against the Strata Company in the Tribunal and the Supreme Court and Ms Cooper provides details of some of those disputes.

68 Ms Cooper then states that Colliers engaged Jackson McDonald for advice in relation to matters the subject of the disputes with Ms Engwirda.

69 Ms Cooper then refers to the disputed documents and states that each of the disputed documents contains legal advice provided by Jackson McDonald to Colliers in relation to the matters the subject of the disputes with Ms Engwirda and in anticipation of legal proceedings.

70 Ms Cooper then states that each of the disputed documents contains legal advice given by Jackson McDonald to Colliers on matters the subject of this proceeding and that documents 11 to 15 also

contain legal advice which relates to other disputes between Ms Engwirda and Colliers or the Strata Company.

71 In her affidavit Ms Cooper says at the outset that the disputes between Ms Engwirda and Colliers have been both against Colliers in its own right, and in its capacity as the representative or agent of the Strata Company. Ms Cooper states that Colliers engaged Jackson McDonald for advice in relation to the disputes with Ms Engwirda and that the disputed documents contain legal advice provided by Jackson McDonald to Colliers in relation to the matters the subject of the disputes with Ms Engwirda. However, Ms Cooper does not say anything about whether that advice was given to Colliers in its own right or in its capacity as the strata manager of the Strata Company.

72 The copies of the emails between Ms Evans and Mr Crotty of Colliers between 30 March 2017 and 4 April 2017, which are incorporated into Ms Evans' affidavit, throw some light on the question of whether the legal advice sought and obtained by Colliers from Jackson McDonald during the period in which the disputed documents were created (being from 30 March 2017 until 6 April 2017) was for the Strata Company or for Colliers in its own right.

73 In an email sent by Mr Crotty to Ms Evans (and the other council members) at 11.46 am on 30 March 2017 he refers to attached correspondence from Ms Engwirda and another owner and states that Colliers require instructions before providing the information requested by Ms Engwirda and the other owner. Mr Crotty goes on to say that Colliers recommend that the council of the Strata Company seek legal advice on their obligation and whether the council can charge the owners for this information.

74 In an email sent by Ms Evans to Mr Crotty at 3.04 pm on 30 March 2017 Ms Evans says that the council is considering taking advice on the matter as considerable resources are currently being tied up.

75 In an email sent by Mr Crotty to Ms Evans (and the other council members) at 8.18 am on 4 April 2017 he says that, in light of the position being taken by the Queens Riverside action group and the correspondence and demand being levelled at Colliers, they sought legal advice from Jackson McDonald on how best to respond. Mr Crotty goes on to say that, moving forward, it is Colliers' recommendation that the council of the Strata Company engage

Jackson McDonald on behalf of the Strata Company to act for the Strata Company and provide legal advice to the Strata Company on the various issues that were arising. Mr Crotty says that the terms of engagement would be between the Strata Company and Jackson McDonald, with Colliers facilitating the giving of instructions from the council and passing on the required advice. Mr Crotty then requests that the council let Colliers know if they would like Jackson McDonald to act for the Strata Company and provide the Strata Company with a retainer document and costs disclosures.

76 In an email sent by Ms Evans to Mr Crotty at 10.18 am on 4 April 2017 Ms Evans says that engaging Jackson McDonald is a matter for discussion by the council and asks whether Mr Crotty, in the meantime, would be able to obtain some indication of costs.

77 As I have noted in [23] above, Ms Evans states in her affidavit that the Strata Company did not become a client of Jackson McDonald until the council of the Strata Company signed a retainer agreement with Jackson McDonald on 19 April 2017.

78 I accept the evidence of Ms Evans in her affidavit and make the following findings.

79 I find that Colliers became the strata manager of the Strata Company on 1 November 2016.

80 I find that Jackson McDonald was engaged by the Strata Company on 19 April 2017 to provide legal services to it, when a retainer agreement with Jackson McDonald was signed by the council of the Strata Company on that date.

81 I find that the legal advice sought and obtained by Colliers from Jackson McDonald between 30 March 2017 and 6 April 2017 in the disputed documents was advice for Colliers in its own right and not for the Strata Company.

82 I, therefore, find that the Strata Company has not proved, on the balance of probabilities, that any of the disputed documents (which are dated from 30 March 2017 to 6 April 2017) fall within either legal advice privilege or litigation privilege which can be invoked by the Strata Company against Ms Engwirda, in light of the fact that Jackson McDonald was not engaged to provide legal services to the Strata Company prior to 19 April 2017.

83 Accordingly, Ms Engwirda is entitled to inspect the disputed documents and, for the reasons explained in [6] above, I will make an order that the Strata Company provide inspection of those documents to Ms Engwirda by giving her an electronic copy of those documents within the period of seven days.

84 This decision completes the remaining task of the Tribunal in this proceeding.⁷

Order

For the reasons I have given, I will make the following order:

1. By 13 July 2021, the Strata Company must provide to Ms Engwirda inspection of the documents listed as documents 8 to 15 in the written statement dated 12 June 2020 filed by the Strata Company in this proceeding, by giving Ms Engwirda an electronic copy of those documents.

⁷ **Engwirda** at [29] - [31].

I certify that the preceding paragraph(s) comprise the reasons for decision of the State Administrative Tribunal.

MR D AITKEN, SENIOR MEMBER

6 JULY 2021