SUPREME COURT OF QUEENSLAND

CITATION:	*Oceltip Pty Ltd v Noble Resources Pte Ltd & Ors* [2018] QSC 317	
PARTIES:		
	Applicant:	**OCELTIP PTY LTD ACN 124 757 197**
		AND
	First Respondent:	**NOBLE RESOURCES PTE LTD (NOW KNOWN AS COFCO INTERNATIONAL SINAPORE PTE LTD)**
		AND
	Second Respondent:	**MIDDLEMOUNT COAL PTY LTD ACN 122 348 412**
		AND
	Third Respondent:	**RIBFIELD PTY LTD ACN 080 772 283**
		AND
	Fourth Respondent:	**GLOUCESTER (SPV) PTY LTD ACN 145 498 380**
FILE NO/S:	SC No BS3899/15	
DIVISION:	Trial Division	
PROCEEDING:	Application	
DELIVERED ON:	14 September 2018	
DELIVERED AT:	Brisbane	
HEARING DATE:	14 September 2018	
JUDGE:	Bond J	

[1] HIS HONOUR: This case concerns the conduct of the first respondent ("Noble") in dealing with a marketing royalty payable pursuant to a "Restated Noble Royalty Deed", in relation to the Middlemount Mine, near Emerald. The plaintiff ("Oceltip") and Noble, and other entities, were parties to the Restated Noble Royalty Deed. By the terms of that deed, Oceltip was granted a valuable pre-emptive right over a particular marketing royalty. The marketing royalty is a reference to royalty payable in relation to the activities in the mine.

[2] The combination of clauses in the Restated Noble Royalty Deed were significant, and they may be briefly, and at a high statement of generality, described as operating in this way:

(a) they prohibited Noble from assigning, or otherwise dealing with the marketing royalty without obtaining Oceltip's written consent;

(b) they obliged Noble if it wanted to assign the marketing royalty, to give notice to Oceltip, which would permit it to exercise the pre-emptive right in relation to the marketing royalty within a specified time period;

(c) they permitted Noble to assign to a related body corporate, without complying with those constraints, provided the related body corporate entered into an agreement with Oceltip, which gave Oceltip the pre-emptive right in the event the assignee ceased being a related body corporate; and

(d) they provided constraints on waiver rights.

[3] Oceltip had two directors at material times. At some time prior to 13 July 2010, Noble approached Mr Tinkler, one of the two directors of Oceltip, to obtain a waiver by Oceltip of its pre-emptive right. Ultimately, Noble obtained a waiver deed, signed by Mr Tinkler on behalf of Oceltip. However, communications that occurred between the time of first approach and the time they obtained the deed, reveal that Noble initially sought to obtain – as one might well imagine – the deed signed by both the directors of Oceltip.

[4] Oceltip's case is that the waiver deed was signed without the knowledge or consent of its other director, Mr Higgins. There is a great deal of complexity in the issues that arise in the case. However, for present purposes, it is only necessary to deal with one aspect of that complexity. Relevant to the case is Noble's argument that Oceltip is estopped from contending that the waiver deed was not binding on Oceltip, and was not on the proper construction of the Restated Noble Royalty Deed, writing signed by Oceltip. So relevantly – and this proposition would operate as a complete defence to the other issues that found Oceltip's claims for relief in the case – Noble says that Oceltip is estopped from contending that the waiver deed was not binding on it. The way in which Noble gets to that proposition is a matter of some complexity.

[5] Presently, it suffices to quote paragraphs 36 through to 43 from the second further amended defence of Noble:

> 36. Oceltip represented to Noble Marketing that the Waiver Deed was validly executed by Oceltip and was binding upon Oceltip (Waiver Deed Representation).
>
> **Particulars**
>
> Noble Marketing repeats and relies upon paragraphs 10(f)(iv), 12(c), 12(ca), 12(d), 12(e), 16(a) and 17 above and the particulars to paragraph 17.
>
> 37. In reliance upon the Waiver Deed Representation, Noble Marketing believed the Waiver Deed to be validly executed and effective to bind Oceltip from 28 July 2010.
>
> **Particulars**
>
> Noble Marketing repeats and relies upon paragraphs 10(f)(iv), 12(c), 12(ca), 12(d), 12(e) and 17 above and the particulars to those paragraphs.
>
> 38. The material allegations of fact pleaded by Oceltip in paragraphs 13, 14, 15, 16(a) and 19A to 19G of the Second Further Amended Statement of Claim were known to, our ought reasonably have been known to, Oceltip from no later than August 2010.
>
> **Particulars**

Oceltip's knowledge, or that it ought reasonably to have known, is inferred from the matters pleaded in paragraphs 13, 14, 15, 16(a) and particulars (i) to (v) of paragraph 19C of the Second Further Amended Statement of Claim and from the following matters:

A. ASX announcement issued by Gloucester Coal Ltd, dated 4 August 2010, titled "Gloucester to acquire Noble's interests in the Middlemount Joint Venture and announces an underwritten equity raising of A$410 million" (which is Exhibit NMT-9 to the Tatasciore Affidavit);

B. ASX announcement issued by Gloucester Coal Ltd, dated 4 August 2010, titled "Noble Group announces the disposal of interest in Middlemount Coal Pty Ltd" (which is Exhibit NMT-10 to the Tatasciore Affidavit);

C. ASX announcement issued by Gloucester Coal Ltd, dated 29 September 2010, titled "FIRB Approval for Acquisition of Interest in Middlemount Assets" (which is Exhibit NMT-11 to the Tatasciore Affidavit); and

D. ASX announcement issued by Gloucester Coal Ltd, dated 29 September 2010, titled "Gloucester Coal Ltd Completes Acquisition of Interest in the Middlemount Joint Venture" (which is Exhibit NMT-12 to the Tatasciore Affidavit).

39. In the period between execution of the Waiver Deed on 28 July 2010 and 18 November 2013, including after Oceltip knew of the matters in paragraph 38 above, Oceltip:

(a) did not dispute the validity of the Waiver Deed;

(b) did not assert that the First Transaction was undertaken in breach of the terms of the Restated Noble Royalty Deed;

(c) did not assert that the Deed of Assignment was in breach of the terms of the Restated Noble Royalty Deed;

(d) did not object to the payment of the Marketing Royalty in the manner pleaded in paragraphs 19 and 28(b) above.

Particulars

Letter from HWL Ebsworth, on behalf of Oceltip, to Noble Marketing, dated 18 November 2013.

40. By failing to assert that the First Transaction (to the extent that it involved dealing in any way with the Marketing Royalty) was in breach of the terms of the Restated Noble Royalty Deed, Oceltip encouraged Noble Marketing to assume that Oceltip had validly waived its rights under the Restated Noble Royalty Deed (the Assumption).

41. Oceltip knew that Noble Marketing had made the Assumption.

Particulars

Such knowledge is to be inferred from the facts that Oceltip knew of the First Transaction and that Gloucester SPV had gained certain rights from that transaction associated with the Marketing Royalty after the Waiver Deed had been signed.

42. In reliance upon the Waiver Deed Representation and/or the Assumption:

(a) Noble Marketing entered into the Middlemount SPA on or about 4 August 2010 and completed the First Transaction on or about 30 September 2010;

(b) Noble Marketing executed the Deed of Assignment on or about 22 December 2011; and

(c) Noble Marketing directed Middlemount and Ribfield on or about 22 December 2011 to pay the Marketing Royalty to Gloucester SPV.

Particulars

Noble Marketing repeats and relies upon paragraphs 19A to 19G and 28(f) above and the particulars to those paragraphs.

43. If Oceltip is permitted to depart from the Waiver Deed Representation and/or the Assumption, Noble Marketing will suffer detriment.

Particulars

(i) If Noble Marketing was not entitled to enter into the Middlemount SPA and/or complete the First Transaction and/or the Deed of Assignment and/or the Second Transaction, then the detriment to Noble Marketing is:

A. the amounts it will have to pay the other parties to the Middlemount SPA and/or the Deed of Assignment, including by way of repayment of $167,999,999 to Gloucester SPV, plus interest, on account of the Middlemount SPA and/or the First and/or Second Transactions being declared ineffective; and

B. the legal and other costs incurred by Noble Marketing during the course of entry into the Middlemount SPA, the Deed of Assignment and completion of the First and Second Transactions.

Such amounts and costs will be the subject of lay and expert evidence.

(ii) Alternatively, if Noble Marketing is found to be in breach of the Restated Noble Royalty Deed by reason of Oceltip's departure from the Waiver Deed Representation or the Assumption, then the detriment to Noble Marketing is the amount ordered to be paid by Noble Marketing by way of damages.

[6] It will be seen that critical to the estoppel proposition is the allegation that Noble had a belief, namely the belief adverted to in paragraph 37, that the waiver deed had been validly executed and effective to bind Oceltip from 8 July. The way in which the representations were said to be made, and the reliance generated, cross-refers to earlier paragraphs in the pleading. It suffices to advert only to paragraph 17 of the second further amended defence of Noble:

17. **As to paragraph 17**:

(a) denies the allegation that the Waiver Deed was not binding on Oceltip and was not, on the proper construction of clause 12.6 of the Restated Noble Royalty Deed "writing signed by Oceltip" because the allegation is untrue, as:

(i) on 23 July 2010 Noble Marketing provided Oceltip with the Waiver Deed, executed by Noble Marketing;

Particulars

Email from Bharat Sundavadra to Philip Christensen dated 23 July 2010, and sent 12.12 pm, with attached Waiver Deed executed by Noble Marketing.

(ii) Oceltip executed the Waiver Deed on or about 28 July 2010;

(iii) Noble Marketing was provided with the Waiver Deed as executed by Oceltip under cover of an email from Philip Christensen, on behalf of Mr Tinkler and Oceltip, dated 28 July 2010, copied to Mr Tinkler (**Second Christensen Email**), which stated:

"Nathan has signed the Waiver you requested.
We have been unsuccessful in procuring the signature of Matthew Higgins - the other director.
Matthew has not indicated support or otherwise for the Waiver and Nathan, as a Director, has considered the matter and is of the view that this is in the interests of the company - all shareholders.
Matthew and his lawyers have been provided ample opportunity for comment and have been provided all documents requested.

Nathan's signature, I believe, binds Oceltip.";

Particulars

Email from Philip Christensen to William Randall and Bharat Sundavadra, copied to Nathan Tinkler, dated 28 July 2010 and sent at 10.55 am.

(iv) following receipt of the Second Christensen Email, Bharat Sundavadra, on behalf of Noble Marketing, sent an email to Mr Christensen, on behalf of Mr Tinkler and Oceltip, asking whether Mr Tinkler's signature alone on the Waiver Deed would bind Oceltip;

Particulars

Email from Bharat Sundavadra to Philip Christensen, dated 28 July 2010 and sent at 11.15 am.

(v) in response to Mr Sundavadra's question, Mr Christensen replied by way of email (Third Christensen Email), stating "Yes";

Particulars

Email from Philip Christensen to Bharat Sundavadra, dated 28 July 2010 and sent at 11.20 am.

(vi) Mr Christensen was admitted to practice as a Legal Practitioner of the Supreme Court of New South Wales from in or about 1980;

(vii) Mr Christensen was a partner of the law firm Freehills (now Herbert Smith Freehills) for a number of years up to 2010, which included the period 2007 to 2010;

(viii) Oceltip engaged Mr Christensen and Freehills to act for Oceltip in the negotiation of the terms of the Noble Royalty Deed, the Oceltip Royalty Deed, the Amended Noble Royalty Deed and the Restated Noble Royalty Deed (together, the **Royalty Deeds**) during the period 2007 to 2010, and Mr Christensen did so attend on behalf of Oceltip;

(ix) Mr Higgins and Mr Tinkler, as directors of Oceltip, knew Mr Christensen was acting on behalf of Oceltip in negotiating the terms of the Royalty Deeds;

(x) Mr Christensen had a custom or practice of copying Mr Tinkler in on email correspondence between him and Noble Marketing's solicitors during the negotiation of the Royalty Deeds;

(xi) Mr Christensen did not have a custom or practice of copying Mr Higgins in on email correspondence between him and Noble Marketing's solicitors in relation to the Royalty Deeds, and did so only infrequently;

Particulars of sub-paragraphs (viii) to (xi)

Communications between Mr Christensen, Freehills and Noble Marketing's solicitors, Clayton Utz during the negotiation of the Royalty Deeds in the period 2007 to 2010.

(xii) Noble Marketing knew the matters pleaded in sub-paragraphs (vi) to (xi) above.

(xiii) in his dealings with Noble Marketing concerning the Waiver Deed, Mr Christensen was, at all material times, an agent of Oceltip and/or Mr Tinkler in his capacity as a director of Oceltip;

Particulars

The agency was express, alternatively implied, by reason of the matters in paragraphs 13(a), 14(e), 15(c), and 17(a)(i) to (xi), above, as well as the following:

A. Email from Mr Christensen to Mr Randall, to Mr Randall, dated 18 June 2010 and sent at 1.27pm, which states:

> "*As you may now [sic], I am now working with Nathan.*
>
> *Can you please send me the Middlemount Royalty Agreement ..."*

B. Email from Mr Christensen to Mr Randall, copied to Mr Sundavadra and Mr Tinkler, dated 25 June 2010 and sent at 12.53am, which states:

> "*Will, I think it important that we know your position regarding the sale. Where are you up to on the issue?" [emphasis added]*

C. Email from Mr Randall to Mr Christensen [and Mr Randall], copied to Mr Sundavadra and Mr Tinkler, dated 28 June 2010 and sent at 1.23pm, which states:

> *"Nathan / Philip*
>
> *Can you please advise position on subject.*
>
> *Await response."*

D. Email from Mr Christensen to Mr Randall, copied to Mr Sundavadra and Mr Tinkler, dated 12 July 2010 and sent at 12.32pm, which states:

> *"Nathan is supporting your request for the two way waiver.*
>
> *I am looking at the paperwork now.*
>
> *Can you please give me a call on my mobile (your message bank*
> *is full and not taking any more messages) when you have a chance. Couple of things to discuss -*
>
> *1. Aston/cornerstone/marketing.*
>
> *2. MDL 162/Gloucester."*

E. Email from Mr Randall to Mr Christensen, copied to Mr Sundavadra and Mr Tinkler, dated 12 July 2010 and sent at 1.41 pm, which states:

"Thank you Nathan / Philip. Bharat will handle MM issue with Philip directly. I will call Philip after leaving the hospital today on MDL162 ..."

(xiv) following exchange of, and in reliance upon, the Waiver Deed as executed by Noble Marketing and Oceltip, the Second Christensen Email and the Third Christensen Email, Noble Marketing, believed the Waiver Deed to be validly executed and effective from 28 July 2010;

(xv) by executing the Waiver Deed, Noble Marketing waived its reciprocal rights under clause 9 of the Oceltip Royalty Deed;

(xvi) Mr Tinkler was a director of Oceltip and a company which he controlled, Oceltip Investments Pty Ltd, was a 75% shareholder in Oceltip at the time of executing the Waiver Deed, so Mr Tinkler was in a position of control with respect to the conduct of Oceltip;

(xvii) at the time of execution of the Waiver Deed, Oceltip had a custom or practice of permitting, or acquiescing in, Mr Tinkler exercising or purporting to exercise authority on behalf of Oceltip when dealing with third parties as particularised in paragraph 12 above;

(xviii) at the time of execution of the Waiver Deed, clause 12.1 of the Restated Noble Royalty Deed was in the terms pleaded in paragraph 10(f)(iv) above; and

(xix) Noble Marketing knew the matters in sub-paragraphs (i) to (xvi) and (xviii) above;

(xx) by clause 12.1(a) of the Restated Noble Royalty Deed:

(A) Mr Tinkler was the person authorised by Oceltip to send and receive notices and other communications by and on behalf of Oceltip; and

(B) Mr Randall was the person authorised by Noble Marketing to send and receive notices and other communications by and on behalf of Noble Marketing;

(xxi) Further or alternatively to the preceding sub-paragraph, by clause 12.1(b) of the Restated Noble Royalty Deed, a notice or other communication by Oceltip must have been signed by an officer of Oceltip, or under the common seal of Oceltip;

(xxii) by clause 12.1(c) of the Restated Noble Royalty Deed, a notice or other communication sent by Oceltip in accordance with clause 12.1(a) can be relied on by the addressee, and the addressee is not liable to any other person for any consequence of that reliance, if the addressee believes the notice or communication to be genuine, correct and authorised by Oceltip;

(xxiii) the Waiver Deed was sent by Mr Christensen on behalf of Oceltip, or alternatively on behalf of Mr Tinkler, to Mr Randall on behalf of Noble Marketing, as pleaded in paragraph 17(a)(iii) hereof, was in accordance clause 12.1(a) of the Restated Noble Royalty Deed;

(xxiv) Mr Tinkler, as an officer of Oceltip, signed the Waiver Deed in accordance with clause 12.1(b) of the Restated Noble Royalty Deed;

(xxv) Mr Randall and Noble Marketing believed the Waiver Deed to be genuine, correct and authorised by Oceltip by reason of the matters pleaded in paragraphs 12(c) to (e) and 17(a)(i) to (xix) hereof; and

> (xxvi) in the premises of sub-paragraphs (xx) to (xxv) above, Noble Marketing was entitled to, and did, rely upon the Waiver Deed as being genuine, correct and authorised by Oceltip.

[7] For its part, Oceltip brings an application challenging the approach that Noble has taken to claiming privilege during the disclosure process in this case. It seeks an order that it is declared "that [Noble] has waived privilege over communications between it and its legal advisors in relation to the matters pleaded at paragraphs 17(a)(xii), 17(a)(xiv), 17(a)(xix), 17(a)(xxv), 17(a)(xxvi), 37, 40 and 42 of [Noble's defence]." It also seeks an order that Noble make disclosure of the communications referred to in the declaration that it seeks.

[8] It will have been immediately obvious from the paragraphs that I have quoted (and there is no other relevant paragraph in the defence) that there is no express pleading by Noble of the content of any privileged communication between it and its legal advisors. That it had legal advisors giving it certain advice relevant to the suite of transactions into which it was entering at about the time of the alleged representations upon which it formed the beliefs that it had pleaded, and acted in the way it pleaded, is not in dispute. It has claimed privilege in respect of very many communications that it had with legal advisors during the relevant period.

[9] Schedule A to the written submissions provided by Oceltip, in relation to its application, sets out a detailed chronology of events. The chronology is in a form which inserts into the chronology of events, identified in a particular way, documents falling within Noble's privileged documents claim. The document in schedule A is lengthy, and I will refer to it only by reference. In case the conclusion that I reach is challenged by either party, I make it clear that I have read that document, and have acted upon it, except to the extent that it has been challenged by counsel on behalf of Noble, during the course of argument before me.

[10] Oceltip's argument concerning waiver of privilege is that this is a case of implied waiver of privilege. In this regard, I was taken to a number of cases, but I think there are only three to which I need to make express reference. They are *Macquarie Bank Limited v Arup Pty Limited* [2016] FCAFC 117, *Queensland Local Government Superannuation Board v Allen* [2016] QCA 325 and *Neurim Pharmaceuticals (1991) Ltd v Generic Partners Pty Ltd* [2018] FCA 1082. I do not see any relevant inconsistency between those cases. In so far as a proper articulation of principle is concerned, it suffices, I think, to quote some paragraphs from Arup with the addition of some references in *Neurim Pharmaceuticals*, and then to make some observations as to whether anything different may be concluded from the consideration of the Queensland Court of Appeal decision in *Allen*.

[11] From *Arup* the relevant principles are stated at [29] through to [33] as follows:

> [29] In determining whether there has been an implied waiver of privilege, the Court's focus will be on whether there has been conduct that is inconsistent with the maintenance of confidentiality in the communication over which privilege is asserted. An assessment of whether there has been an implied waiver will be informed by considerations of forensic unfairness.
>
> [30] Whilst not to be treated as a statutory formulation, in *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 ('**DSE'**), Allsop J (as his Honour then was) described (at [58]) an implied waiver as arising when:
>
> > *… 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.*

[31] As the primary judge recognised, a pleading of legal advice may be sufficient to give rise to a waiver of privilege, however a pleading is not necessary for waiver to occur. To this effect, in *Hancock v Rinehart* [2013] NSWSC 1978, Brereton J noted (at [22]) that the pleading in that case did not deploy or even refer to legal advice or its effect. His Honour noted that it was nonetheless open to conclude that privilege had been waived if other factors of the case warranted such a finding.

[32] As stated in *Council of the New South Wales Bar Association v Archer* (2008) 72 NSWLR 236 at [48], by Hodgson JA, with whom Campbell JA agreed:

> *It is not enough to bring about a waiver of client legal privilege that the client is bringing proceedings in which the content of the privileged communications could, as a reasonable possibility, be relevant and of assistance to the other party. For the client to do this is not inconsistent with the maintenance of the privilege, and does not give rise to unfairness of the type in question. What would involve inconsistency and relevant unfairness is the making of express or implied assertions about the content of the privileged communications, while at the same time seeking to maintain the privilege. In this respect, it may be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were confidential communications likely to have affected that state of mind.*
> (Emphasis added.)

[33] It was contended by Macquarie that these principles have particular application where a party pleads its understanding of the legal effect of a contract or agreement. In this regard Macquarie relied upon *Vic Hotel Pty Ltd v DC Payments Australasia Pty Ltd* (2015) 321 ALR 191 ('**Vic Hotel**'), where the Victorian Court of Appeal found an implied waiver of privilege in a context where the pleaded allegation put in issue another party's state of mind as to the existence of legal rights. Dixon AJA (with whom Mandie and Beach JJA agreed) noted (at [46]):

> *I accept that merely putting a state of mind in issue will not, of itself, give rise to waiver of privilege in respect of legal advice that is relevant to the existence of the state of mind. But that is not this case. The state of mind that is put in issue concerns an understanding of legal rights, not simply knowledge of terms recorded in a contract.*

[12] Particular reference should be had to the quotation from Allsop J's decision in *DSE Holdings*, referred to at [30] of the quote, and to the decision of Hodgson JA in *Archer*, referred to at [32], and also to the decision of *Vic Hotel*, referred to at [33].

[13] It is notable that the Full Court of the Federal Court acknowledges the possibility that a party might make an implied assertion, or bring a case, which necessarily lays open a confidential communication to scrutiny, and by such conduct, an inconsistency might arise between that act and the maintenance of the confidence informed partly by the forensic unfairness of allowing the claim to proceed without disclosure. Moreover, to establish an implied assertion of the content of privileged communications, it might be sufficient that the client is making assertions about the client's state of mind, in circumstances where there were – in fact, I observe – confidential communications likely to have affected that state of mind.

[14] In *Neurim Pharmaceuticals*, Nicholson J, having referred to those and other cases at [29] to [34], went on to observe:

> [35] It is therefore clear that in a case involving an alleged issue waiver, it is essential that there be some element or feature of the claim made, or the evidence adduced by the party asserting the privilege, that would be inconsistent with the maintenance of the privilege. Such inconsistency may arise if, as Allsop J (as his Honour then was) explained in *DSE (Holdings) Pty Ltd v Intertan Inc* (2003) 127 FCR 499 at [58]:

> … 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.

> [36] Whether or not it may be said that the party claiming privilege has brought a case that is inconsistent with the maintenance of the privilege involves questions of degree and an evaluative assessment of the unfairness to the other party in permitting the case to go forward without disclosure of communications that are relevant to that case.

> [37] Where the case brought by the party claiming privilege includes as an element the existence of a particular state of mind, then the question whether a waiver of privilege should be imputed will depend on a range of matters including the significance of the party's state of mind to the case sought to be brought, and the probability that the relevant communication will have induced or contributed to that state of mind: see *Wayne Lawrence Pty Ltd v Hunt* [1999] NSWSC 1044 per Hodgson CJ in Eq. at [12].

> [38] The fact that the relevant communication is unlikely to have had more than a peripheral or incidental impact on the party's state of mind is likely to preclude a finding of waiver unless the party whose state of mind is in issue makes some express or implied assertion as to the content of the relevant communication.

[15] I do not see anything different from, or inconsistent with, those principles in the discussion in the Court of Appeal in *Allen*.

[16] I observe that Philippides JA, at [5], expresses the orthodox view that consideration of implied waiver does not involve the operation of some overriding principle of fairness operating at large, rather, what is necessary is conduct that permits of a judgement that the conduct of the party entitled to the privilege is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. Her Honour agreed with the analysis of Burns J, as did the President.

[17] Burns J stated at [69] a summary of general principle, of which only the first four subparagraphs are material here:

> [69] The decisions just examined inform the following summary of the principles applicable to a determination as to whether legal professional privilege has been impliedly waived:
>
> (a) a person may waive privilege without intending that result; the test is objective and privilege may be waived regardless of the subjective intention of the privilege holder;
> (b) privilege will be waived where the conduct of the privilege holder is inconsistent with the maintenance of confidentiality in the communication which the privilege would otherwise protect;
> (c) the focus is on the conduct of the privilege holder, not the party attempting to destroy the privilege;
> (d) whether there is relevant inconsistency is to be evaluated in accordance with the context and circumstances of the case and in the light of any considerations of fairness arising from that context and those circumstances;
>
> …

[18] His Honour went on to consider the possible operation of implied waiver, in the circumstances before him, at [70] through to [72] inclusive. It is not necessary to quote those paragraphs, but it is material to observe that his Honour quoted the same passage from Hodgson JA in *Archer*, as did the Full Court of the Federal Court in *Arup*, and indeed that he noted that the passage had been referred to with approval in *Arup*, specifically cross-

referring to *Arup* at [32]. It may be accepted that his Honour did not add the last sentence to quotation, which had been underlined by the Full Court of the Federal Court in *Arup*, but I do not think anything turns on that.

[19] The argument of Oceltip, in the present circumstances, is that there are seven principle contentions which justify the conclusion that the manner by which, in this case, Noble has pleaded its state of mind, should be taken to have given rise to an implied waiver. They contend that I should regard Noble as having brought a case, which necessarily lays open the confidential communication between it and its legal advisers to scrutiny. They contend, specifically, looking at the Arup quotation of *Archer*, that a conclusion of an implied assertion about the content of the privileged communication in this case, may be drawn because Noble is, in fact, making assertions about its state of mind in circumstances where I should conclude that there were confidential communications likely to have affected that state of mind.

[20] They point to seven particular considerations, which I list below together with my response:

(a) The proposition of estoppel was not peripheral, but central – I agree.

(b) Reasonableness of reliance is relevant – I agree.

(c) The circumstances are derived from a positive case put forward by the party to claim the privilege – I agree that that circumstance exists.

(d) I should find that there were confidential communications likely to have affected Noble's state of mind – I will come back to that question.

(e) The specific nature of the state of mind was a state of mind concerning the effect of a legal document – I agree with that. It will be apparent from my quotation from Noble's pleading that the relevant state of mind was a belief that the execution of the waiver deed by one director was the valid execution of the waiver deed, and that it was effective from 28 July 2010.

(f) If privilege has not been waived, then it is not appropriate at a trial for Noble to seek to avail itself of a *Jones v Dunkel* inference because assertion of a valid claim for legal professional privilege is an adequate explanation – I agree with that.

(g) Finally, the question of the evaluation of the unfairness, and the forensic advantage in asserting the proposition.

[21] All the considerations mentioned by Oceltip are relevant, but the ones that strike me as most persuasive of the correctness of the conclusion that Noble should be taken impliedly to have asserted something about the content of its privileged communication, are twofold. First, it is that the state of mind put in issue is a state of mind about a legal conclusion, that is, that a particular circumstance gave rise to a validly executed and effective waiver deed. Second, it is the inferences that I would draw as to whether it was likely that there were confidential communications likely to have affected that state of mind. That does seem to me to turn on evaluating the role of Noble's legal advisors, in a factual sense, in relation to the chronology. As I have said, that is set out in Schedule A to Oceltip's written submissions.

[22] In this case, the facts there recited, I think, justify me drawing these inferences:

(a) During the period leading up to the alleged making of the representation that gave rise to the state of mind pleaded, Noble had both internal and external legal advisors.

(b) Noble sought a waiver deed, in a particular form, which form contained provision for execution by Oceltip by two directors.

(c) Ultimately, it obtained a waiver deed, executed only by one director, receiving an assurance from a person who would have been taken as a legal advisor associated with Oceltip, that that was sufficient to give rise to valid execution.

(d) In the context of all of this, it had legal advisors advising it on various aspects of the transaction, but notably, even though it had been told that Oceltip's other director had not signed, and it was told that one signature was enough, and on the same day its in-house lawyer communicated with its external lawyers.

[23] It seems to me, very unlikely, given the way in which people behave in commercial transactions, that advice would not have been taken from external legal advisors, on that point, given the conjunction of circumstances.

[24] But even if that is not so, even if that specific inference is not true, I am prepared to conclude that it is likely that during the relevant period there were confidential communications with its legal advisors that are likely to have affected the state of mind that Noble asserts that it had.

[25] Accordingly, I think that Oceltip has established there has been an implied waiver of privilege in the way for which it contends.

[26] I think that the formulation of the wording at paragraph 5 of the orders that Oceltip seeks (marked as MFI A) is too broad. I would declare that Noble has waived privilege over communications between it and its legal advisors, which contain matters directly relevant to the truth or falsity of the matters pleaded, concerning its state of mind, at paragraphs 17(a)(xii), 17(a)(xiv), 17(a)(xix), 17(a)(xxv), 17(a)(xxvi), 37, 40 and 42 of the second further amended defence of Noble.

[27] With that alteration I would make the orders sought by Oceltip in relation to privilege.

…

[28] A question arises as to costs in so far as Oceltip's application relates to on the one hand, Noble, and on the other hand, Gloucester SPV, the nature of which is such that I think the cost orders should reflect the issues which were argued about.

[29] As between Oceltip and Noble, there was a substantial argument concerning waiver of privilege. On that argument, Oceltip succeeded. The cost order that should be made is that Noble should pay Oceltip's cost of the application relating to the claim for orders 3 and 4 of the orders as made.

[30] There is then a question of cost that is common, essentially, as between, on the one side, Noble and Gloucester, and on the other side Oceltip, namely, whether Oceltip should have its costs for the orders I made for disclosure, this morning, concerning financial statements and income tax. I refused the application for such orders even though they had been substantially narrowed by Oceltip because of the clarification that had been made during the course of argument in relation to what was meant by the pleaded assertion to effective consideration. For its part, Oceltip contends that notwithstanding it failed to obtain any remedy, its bringing the application was understandable given the wording of the pleading, which only was clarified, it contends, during the course of the application.

[31] For their part, Noble and Gloucester contend that the operation of the pleading was always obvious. Moreover, Gloucester points to communications between solicitors in which

Gloucester's solicitors asserted, "The real issue in dispute is the legal characterisation of those amounts in the context of the transaction." Oceltip's solicitors responded, "We respectfully agree the financial statements and tax returns are relevant because they are likely to show how those amounts were treated in GSPV's accounts, which will go in [Gloucester's] accounts, which will go to legal characterisation of those payments." Counsel for Gloucester contends that that reveals an acceptance by the solicitors for Oceltip of the very point that he's making, namely, it was only ever about consideration in the context of the proper construction of the instruments concerned. The question is not entirely clear. I do not think that the response from Oceltip's solicitors can be taken to accept the proposition because if it did there is no merit in seeking the other documents, and plainly, that is not what the author of the letter meant by accepting.

[32] I think this is a situation of ships passing in the night, so to speak. It is the sort of pursuit of remedy, and resistance of remedy, for which neither side of the dispute should carry the cost burden reflective of blame, and the better course is that the costs of having the misunderstanding resolved should reflect each parties' costs in the proceeding. The order I will make, in relation to the costs of the application, so far as it relates to the pursuit of orders in relation to disclosure of financial statements and income tax returns, is that the parties' costs of the application, so far as it relates to that claim for relief, be their respective costs in the proceeding.