

# Issue waiver: when is privilege lost?

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Legal professional privilege is a familiar concept to solicitors. Generally it belongs to the client; however there are circumstances where the client is not entitled to object to production of documents on the ground of legal professional privilege. ‘Issue waiver’ arises when a client loses the entitlement to rely upon client legal privilege over the issue in question by reason of conduct on the part of the privilege holder. Most commonly this arises where advice given by a solicitor to a client is critical to an issue in the proceedings, or where a client sues their former solicitor for negligence. Issue waiver is particularly relevant in the context of avoiding an unexpected personal costs order.

## Waiver of privilege

In a recent class action against a pharmaceutical company, the defendant raised a limitation defence and the court heard the defence separately as a preliminary point. This required evidence of the date that each plaintiff acquired the knowledge relevant to the cause of action. The obvious source of knowledge was advice from the plaintiff’s own solicitor. The solicitor objected to production of the relevant material on the basis of the client’s legal professional privilege.

The Court found that this was a clear case of issue waiver – the ‘issue’ in question being the date upon which each plaintiff acquired knowledge of their rights. The plaintiffs were therefore not entitled to object to production of documents on the ground of legal professional privilege in respect of communications with their solicitor. Although the plaintiffs agreed to produce the material requested, costs were awarded against them, and the solicitors who had objected to production of the material were directed to indemnify the plaintiffs in respect of the costs order.

In *Thomason v Campbelltown Municipal Council* [1939] 39 SR (NSW) 347 a deceased workman’s widow brought proceedings against the Council alleging negligence leading to the death of her husband. The claim was for statutory compensation which was dependent upon the state of her knowledge (which the plaintiff resisted disclosing). The Court found that the plaintiff was ‘acting inconsistently with the maintenance of the confidentiality of advice which was in all likelihood the only source of the

## Snapshot

- It is important for all solicitors to maintain awareness of the more complex issues surrounding legal professional privilege.
- In professional negligence litigation, client privilege will be waived if the cause of action calls into question the correctness of the solicitor’s advice or conduct.

knowledge...’. The plaintiff was therefore held to have waived client legal privilege over communications with her solicitor.

## Professional negligence

In professional negligence litigation, a client will waive privilege over advice given by the solicitor if the cause of action calls into question the correctness of the solicitor’s advice or conduct.

*Lillicrap v Nalder & Son* [1993] 1 WLR 94 is an English decision and is often accepted as the leading authority in Australia. In situations where a client issues proceedings against their former solicitor, they cannot maintain a claim of privilege. In defence of the action, therefore, the solicitors are entitled to disclose communications with their former client in order to lead evidence as to the instructions and advice given.

In *Benecke v National Australia Bank* (1993) 35 NSWLR 110 the plaintiff called into question the conduct of her former solicitors. Although the plaintiff did not sue the solicitors directly, she did allege collusion by her former counsel with the defendant bank. The Court found that the assertion of collusion had the effect of waiving privilege over the advice and conduct of her former counsel since, in the alternative, the Court would have had to rely upon the uncontested evidence of the plaintiff; a course which the Court considered to be unfair to the defendant bank.

Further clarification is needed where an application for personal costs is made against the solicitor by a third party. In this situation the solicitor may have acted upon instructions from his or her client and may have given necessary and proper advice, but is prevented from disclosing those communications without the consent of the client.

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## Conclusion

Solicitors should be aware of the more complex issues surrounding legal professional privilege. Solicitors may be subject to a personal costs order if an objection to production of material relevant to the issue in question is maintained on the grounds of legal professional privilege. This is particularly relevant to a plaintiff’s solicitor when, generally, the date of any advice as to the client’s rights may have to be disclosed and is not necessarily protected by legal professional privilege. **LSJ**