# SUBPOENAE AND CLAIMS FOR LEGAL PROFESSIONAL PRIVILEGE

By Tony Cavanagh

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The long running litigation between members of the Rinehart family has recently produced a judgment that has potentially broad application. Although interlocutory, the decision in *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 ('***Rinehart***'), deals with a common practice issue – disputes over privileged material – and suggests that the way in which subpoenae are commonly answered poses a real risk of inadvertent waiver of privilege.

## The short facts

This case related to a subpoena issued by Bianca Rinehart, the second plaintiff, ('**the plaintiff**') for production of certain documents relating to the 'Hope Margaret Hancock Trust' ('**the Trust**').

The plaintiff had, as a result of earlier orders, become trustee of the Trust, in place of her mother Gina Rinehart ('**the defendant**'). It was not contentious that the plaintiff was entitled to any trust documents since, as the trustee she had the same entitlement to them as did the former trustee (the defendant) The defendant contended however that some of the documents falling within the ambit of the subpoena were privileged on the basis that they had been prepared for the purpose of her personally obtaining legal advice, or to conduct anticipated or pending litigation (as opposed to in her capacity as trustee).

The two underlying issues to be answered were therefore whether the disputed documents were trust documents or 'personal' documents; and if they were personal documents, were they privileged from production?

The defendant contended (at [4]) that, because there was actual or pending litigation in the Supreme Court of Western Australia (**WASC**) at the time the disputed documents were created, the Court could be satisfied that they were brought into existence in connection with those proceedings and were therefore privileged.

## Snapshot

- Where a client wishes to object to a subpoena that 'catches' allegedly privileged documents, it is important that the objections be made prior to the material being produced to court.
- Although there are some situations in which recourse to the disputed documents themselves (if produced) may be justified in order to assert a claim of privilege, the 'default position' is that the claim should be proved by means other than the documents themselves.
- Ideally, that will comprise testimonial evidence from persons with direct knowledge of the relevant facts and circumstances in which the documents were created.

## Proving privilege

It is settled law that the person who asserts the existence of a privilege must prove it, but in this case the evidence in support of the defendant's claim was scant. It included a solicitor's affidavit and a schedule of the documents said to be privileged. Justice Brereton commented unfavourably on the absence of any direct testimonial evidence from any person with actual knowledge of the circumstances in which the disputed documents were created. He said the contents of the schedule were 'unverified assertions of no evidentiary value' and noted that even if the solicitor who had sworn the affidavit was called to give oral evidence about the content of the schedule, he had not been the plaintiff's solicitor at the relevant time, so any evidence would have been inadmissible hearsay or opinion (at [10]).

Although the Court accepted there was litigation in the WASC at the time the documents were created, it did not mean the documents were relevantly associated with it (at [13]). The Court concluded based on the testimonial evidence that the documents were obtained for the benefit of the defendant in her capacity as trustee (at [17]) and were not privileged.

However the defendant also relied on the disputed documents themselves, so the Court proceeded to consider their relevance to the privilege claim.

The disputed documents had been produced to the Court by the recipient of the subpoena (the former solicitors who had created them) without objection; and the defendant 'pressed the Court to inspect the disputed documents to determine the claim' (at [18]). The plaintiff objected to the Court looking at the documents.

It is with this particular aspect of the case, and its implications for 'day to day' practice, that this article is primarily concerned.

## The true nature of the privilege

The Court reviewed the true nature of the privilege and the procedure applicable to the making and testing of a claim of privilege. Fundamentally, the privilege is a privilege *against production* to the Court. In this case, Brereton J noted that 'because the privilege is one *against production*, it is inconsistent with maintaining the claim to produce the documents to the Court, let alone to tender them on the *voir dire* as evidence in support of the claim' (at [23]).

Justice Brereton commented that, although the historical position had been to determine claims for privilege on the basis of sworn evidence alone – provided it showed sufficient factual basis for the claim – without cross examination and without recourse to the documents themselves, that practice had been somewhat modified over the years.

More recently, cross examination for the purpose of testing an asserted claim has become more common (at [28]- [29]). In addition, *UCPR* rule 1.9 (5)(c) provides that, where a person objects to the production of documents, they may be compelled to produce them - not for the purpose of using the disputed documents as evidence *per se*, but rather as 'a means of enabling a claim to be scrutinised and tested' (at [31]).

Brereton J also noted, as a practical matter, that allowing recourse to the disputed documents as evidence in support of the claim had inherent problems. The Court would receive little or any assistance by way of submissions. A claimant could not refer to the content of the documents without revealing the privileged subject matter; and a respondent would not be able to make submissions, since only the Court would see the documents (at [18, 32]).

That said, it was recognised there may be some situations in which recourse to the documents might be appropriate – for example, where there was other evidence to establish the claim but where a dispute existed as to whether documents had been correctly described so as to fall within a privileged category; or where the course was taken by consent, or at least without objection (at [33]).

## The decision

The Court concluded that it was not permissible in principle for a party claiming privilege to rely upon the documents themselves in support of the claim (at [34]). In the absence of any other admissible evidence to establish the claim, it was held to be 'contrary to justice' to uphold the claim based solely on an inspection of the disputed documents (at [36]). As the documents had already been produced, the plaintiff was granted access to them.

## Implications for daily practice

When a subpoena for production is served for documents which are said to be privileged, it has become fairly common practice amongst solicitors to produce the material to court (albeit, sometimes separated into 'privileged' and 'non-privileged' bundles) and only later make a claim for privilege and/or object to *access* being granted to other parties in the particular litigation.

Based on the analysis in *Rinehart,* that practice is flawed, because the initial *production* of the documents to the Court is inconsistent with the maintenance of a privilege *against production*. If documents are produced to Court without objection, the privilege may be lost by that very act. That has obvious potential to prejudice the client's interests and, ultimately, to give rise to a claim against the solicitor for any loss that flows from an inadvertent waiver.

Where a client wishes to object to a subpoena that 'catches' allegedly privileged documents, the decision suggests it is important that the objection be made prior to the material being produced to court.

Although there are some situations in which recourse to the disputed documents (if produced) may be justified, the 'default position' is that the claim should be proved by means other than the documents themselves. Ideally, that will comprise testimonial evidence from persons with direct knowledge of the relevant facts and circumstances in which the documents were created.

The case has a number of nuances that are beyond the scope of this article, but it merits close examination especially by litigation lawyers, or practitioners who may be asked to advise clients (often at short notice) about their obligations to comply with a subpoena that calls for the production of privileged documents.

As a postscript, the decision was appealed (*Rinehart v Rinehart* [2016] 2016 NSWCA 58) but the decision was not disturbed.

The Court of Appeal accepted there was a discretionary power to examine disputed documents; but agreed with Brereton J that it was not appropriate to do so in this case – at least in part because the defendant/appellant had made a forensic decision not to adduce probative testimonial evidence; and also because it would be inherently unfair to the plaintiff (at [31]).

The Court noted the primary judge's view that privilege issues should be determined prior to production without any direct comment; but did not explicitly disagree with that view. **LSJ**