FEDERAL COURT OF AUSTRALIA

Australian Securities and Investments Commission v Australia and New Zealand Banking Group Limited (No 2) [2020] FCA 1013

File number:	QUD 445 of 2019
Judge:	**ALLSOP CJ**
Date of judgment:	17 July 2020
Catchwords:	**EVIDENCE –** legal professional privilege – waiver – whether privilege over certain documents waived by way of disclosure in prior correspondence – whether privilege over certain documents impliedly waived – no waiver found
Legislation:	*Federal Court Rules 2011* (Cth), rr 20.16, 20.17, 20.22
Cases cited:	*Adelaide Steamship Co Ltd v Spalvins* [1998] FCA 144; 81 FCR 360 *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* [1996] NSWSC 7; 40 NSWLR 12 *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237; 140 FCR 101 *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; 151 FCR 341 *Council of the New South Wales Bar Association v Archer* [2008] NSWCA 164; 72 NSWLR 236 *Macquarie Bank Limited v Arup Pty Limited* [2016] FCAFC 117 *Mann v Carnell* [1999] HCA 66; 201 CLR 1 *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118; 58 VR 333
Date of hearing:	25 June 2020
Registry:	Queensland
Division:	General Division
National Practice Area:	Commercial and Corporations
Sub-area:	Regulator and Consumer Protection
Category:	Catchwords

Number of paragraphs:	43
Counsel for the Plaintiff:	Mr S Couper QC with Mr S Seefeld
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Counsel for the Defendant:	Dr M J Collins QC with Ms C van Proctor
Solicitor for the Defendant:	Ashurst Australia

ORDERS

QUD 445 of 2019

BETWEEN:	**AUSTRALIAN SECURITIES & INVESTMENTS COMMISSION** Plaintiff
AND:	**AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ACN 005 357 522** Defendant

JUDGE:	**ALLSOP CJ**
DATE OF ORDER:	**17 JULY 2020**

THE COURT ORDERS THAT:

1. Subject to Orders 2–4 below, on or before 10 August 2020 or such other date as agreed between the parties, the defendant give discovery in accordance with rr 20.16 and 20.17 of the *Federal Court Rules 2011* (Cth) (the **Rules**) of:
   (a) documents which record the contents of the 2011 Communication, as defined in the statement of agreed facts filed on 19 May 2020 (**SOAF**); and
   (b) documents which record or reveal the passing-on of the substance of the 2011 Communication between employees of ANZ between 1 July 2011 and 23 February 2016.
2. Subject to further order, in accordance with r 20.17 of the Rules, the discovery take place by identification in a list of:
   (a) each document in the defendant's control sufficiently to identify the particular document;
   (b) each document that has been, but is no longer in the defendant's control, a statement of when the document was last in the defendant's control and what became of it; and
   (c) each document in the defendant's control for which legal professional privilege is claimed.
3. Such list be verified by an affidavit of the solicitor on the record, such affidavit to include such facts as are necessary to substantiate any claim for legal professional

privilege relied upon under Order 2(c), and otherwise in accordance with r 20.22 of the Rules.

4. The application insofar as it seeks production of the documents described in paras 1.1 and 1.2 of the interlocutory application dated 29 May 2020 be dismissed.

5. The parties be heard as to costs of the application at the next case management hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1 This is an interlocutory application brought by the plaintiff (**ASIC**) that the defendant (**ANZ**) give discovery in accordance with r 20.16 of the *Federal Court Rules 2011* (Cth) of certain documents over which legal professional privilege is claimed by ANZ.

2 There has been no formal discovery in the proceedings. The application is in substance that certain documents are no longer the subject of legal professional privilege. The parties have prepared the application with clarity and economy. There are two bases for ASIC's claim that the relevant documents are no longer privileged (it being implicit that it is accepted that at least the central document was originally privileged): first, that ANZ has disclosed to ASIC in correspondence dated 5 September 2018 the substance of the legal advice over which privilege is claimed; and, secondly, that by reason of the issues raised in the proceeding ANZ has impliedly waived the privilege. To use (inadequate) shorthand: disclosure and issue waiver. The question is by reference to common law principles, not the *Evidence Act 1995* (Cth).

3 The case concerns the conduct of ANZ in connection with the charging of fees to customers, allegedly without contractual foundation. The first two paragraphs of ASIC's concise statement (**CS**) contain the factual essence of the allegations: From August 2003 to 23 February 2016 ANZ is said to have charged fees in connection with periodical payments by customers that it was not entitled to charge. ANZ first became aware, it was said, that there was a risk that it was not entitled to charge these fees in July 2011. But it is said that ANZ continued to charge the fees thereafter, not raising the issue with customers until 23 September 2015, and not beginning to make remediation payments until August 2016.

4 The fees that are said to have been charged without contractual authority are those made in respect of periodical payments between ANZ accounts of the same customer. The relevant (allegedly unauthorised) fees are described in paras 6–9 of ASIC's CS as for:

(a) scheduled payments between two accounts both in the customer's own name, one account being with ANZ and the other with another financial institution;

(b) scheduled payments in the case of business customers between two ANZ accounts both in the customer's own name; and

(c) a non-payment fee if the customer authorised a periodical payment and that payment was not made because there were insufficient funds, in respect of unsuccessful scheduled payments between two accounts in the customer's own name, whether both were ANZ accounts or one was with another financial institution.

5 The fees in (a) and (b) above are referred to as **Same Name PP Transaction Fees**, and those in (c) above as **Same Name PPNP Fees**. Together they are referred to as **Same Name PP Fees**.

6 Paragraphs 12–16 of the CS under the heading: "ANZ is warned that its conduct may be unlawful", are in the following terms:

> 12. In or about May or June 2010, ANZ instructed Blake Dawson (now Ashurst) to conduct a review of its terms and conditions in the context of the "*exception fees*" class action proceedings (*Paciocco and Anor v Australia and New Zealand Banking Group Ltd* (***Paciocco***) and *Andrews v Australia and New Zealand Banking Group Ltd*) (**Review**). The Review was primarily in the context of the class action. However, Blake Dawson also provided information on other aspects of ANZ's contractual documentation which were not directly relevant to the allegations in those proceedings.
>
> 13. In July 2011, ANZ received information from Blake Dawson which "*touched upon*" the question of whether ANZ was entitled to charge the Same Name PPNP Fees, and "*indicated*" that ANZ should investigate its entitlement to charge these fees (the **2011 Information**). The 2011 Information was initially provided orally during the course of two telephone calls on 11 July 2011 and 14 July 2011, and was subsequently reduced to writing on 18 July 2011 in a document described as a "*wrinkle list*". A further version of the "*wrinkle list*" was provided to ANZ by Blake Dawson on 12 October 2011.
>
> 14. The 2011 Information was communicated to a number of ANZ employees including the following senior employees: (i) on 18 July 2011, Mr Guy Gaudion (General Counsel, Dispute Resolution) and Ms Sonya Kilkenny (Head of Legal, Dispute Resolution); (ii) on 20 January 2012, Ms Felicity Worland (Head of Legal, Retail Products); and (iii) on 27 March 2012, Ms Julie Toop (Acting General Counsel, Australia).
>
> 15. By no later than 18 July 2011, ANZ knew that the imposition of the Same Name PPNP Fees was, or was at risk of being, unlawful. ANZ had considered amending its standard terms to deal with the issue between January 2012 and January 2013 but did not ultimately make the amendments. Furthermore, ANZ did not take any steps to disclose the existence of a possible issue in relation to the fee to ASIC until 31 January 2014, and did not cease charging the fee. The conduct ceased due to ANZ's amendment of its standard terms which did not become effective for all customers until 23 February 2016. Remediation payments were not made until August 2016.
>
> 16. The standard terms defined Periodical Payment for the purpose of the PP Transaction Fee in the same terms as it was defined for the purpose of the

> PPNP Fee. Accordingly, by no later than 18 July 2011, ANZ ought to have known that the charging of Same Name PP Transaction Fees was, or was at risk of being, unlawful. However, ANZ did not disclose the existence of a possible issue in relation to this fee to ASIC until 23 September 2015, and did not cease charging the fee. The conduct ceased due to ANZ's amendment of its standard terms which did not become effective for all customers until 23 February 2016. Remediation payments were not made until August 2016.

7 ANZ later came to write to ASIC in February 2014 to report an "issue" in relation to charging Same Name PPNP Fees. It did so after the issue was raised in the *Paciocco* class action proceedings and after admissions had been made in those proceedings by ANZ. This notification was by letter which stated that it had "recently been asserted" that ANZ had charged Same Name PPNP fees without authority. There was no disclosure about ANZ becoming aware of the issue in 2011.

8 ASIC claims, amongst other things, that ANZ charged Same Name PP Fees when it knew that the charging of those fees was without contractual authority or when it knew that charging them was at risk of being unlawful.

9 Relevant to this part of the case is the information from Blake Dawson, the so-called 2011 Information referred to in para 13 of the CS.

10 The concise statement in response (**CSR**) gives some more context. The Blake Dawson communication in 2011 arose out of work that it did in the *Andrews* class action against ANZ. Paragraph 10 of the CSR is as follows:

> In the context of the *Andrews* proceeding, ANZ's solicitors, Blake Dawson (as they were then known), reviewed ANZ's terms and conditions documents and, in July 2011, generated a document referred to as a "wrinkle list" which touched upon the question of whether ANZ was entitled to charge PPNP Fees relating to periodical payments between accounts in the same name (**Same Name PPNP Fees**). At that time, the challenge to PPNP Fees in the *Andrews* proceeding did not relate specifically to Same Name PPNP Fees, or ANZ's contractual entitlement to charge them.

11 The *Paciocco* class action, commenced in March 2013, did raise (in December of that year) the question of contractual authority to charge Same Name PPNP Fees.

12 A decision was made in early 2014 to remediate customers as set out in para 17 of the CSR:

> In early 2014, ANZ decided to remediate customers who had incurred Same Name PPNP Fees and, subsequently, PPT Fees relating to periodical payments between accounts in the same name (**Same Name PPT Fees**) (together, **Same Name PP Fees**). It was determined in about July 2015 that customers affected were to be remediated for Same Name PP Fees incurred over the period from 1 January 2008. ASIC was informed of the approach ANZ proposed to adopt. ANZ did not have a "Limited Remediation Policy", or any formal policy regarding the period over which it would

make payments to customers in remediation programs (**remediation period**). The remediation period was determined by reference to the particular circumstances of the case. ANZ does not agree with the allegations in [23] of the Concise Statement. The timing of ANZ informing customers about its remediation program was not dictated by the reasons stated in [30] of the Concise Statement.

13 Paragraph 19 of the CSR set out ANZ's position as follows:

> Customers who had requested ANZ to make periodical payments, but who had insufficient funds in their account to meet the payment request, continued to incur Same Name PPNP Fees up to (and after) 23 February 2016. Customers also continued to incur Same Name PPT Fees. ANZ continued to charge Same Name PP Fees to that date in circumstances where: (a) **ANZ was entitled to charge Same Name PP Fees or, in any event, had a reasonable basis for doing so**; (b) in light of the remediation decision that had been taken, fees incurred prior to 23 February 2016 were to be refunded to affected customers, together with an amount to reflect the time value of money; (c) the amendment to the terms and conditions was delayed; and (d) there were IT constraints involved in stopping customers from incurring just Same Name PP Fees and not other PP Fees relating to payments to the account of other people/businesses.
>
> (Emphasis added.)

14 At para 24 of the CSR ANZ set out its entitlement to charge the fees, in the following terms:

> Further, and in any event, ANZ was contractually entitled to charge Same Name PP Fees:
>
> (a) ANZ's account fees and charges booklets for retail and business customers stated the amount of the fees for periodical payments at all relevant times, and did not limit such fees to periodical payments between an ANZ account and an account of another person or business. Further, the Business Fees and Charges Booklet expressly contemplated that the periodical payment arrangements which might be subject to fees included payments to accounts in the same name.
>
> (b) ANZ's "Consumer Lending Terms and Conditions", which governed cases where customers had consumer loan accounts with ANZ, expressly provided that one option for repaying principal and interest on a customer's loan was by "periodical payment" from the customer's nominated ANZ account (which, in the context of consumer loans, are often an account in that customer's name).
>
> (c) While it is true, as ASIC alleges, that the terms and conditions documents for retail and business customers contained a description of periodical payments as payments made "to the account of another person or business", ANZ submits that this did not define periodical payments. The proper construction of the terms and conditions documents is that the words "periodical payments" refer to recurring automated payments debited at a particular frequency (that is, periodically), from an ANZ customer's account to another account, whether ANZ or non-ANZ.
>
> (d) In cases where customers signed periodical payment authorisation forms in the form executed by Mr and Mrs Andrews (see [15] above), this was expressly acknowledged by their agreeing that ANZ could charge fees in respect of the periodical payment arrangement which they instructed ANZ to establish.

(e) In other cases, where customers signed authorisation forms which did not deal with the charging of fees, by signing the form the customer acknowledged that the payment arrangement established was a "periodical payment" for the purpose of their contractual relationship with ANZ.

15 In answer to the matters asserted by ASIC and summarised at [8] above, ANZ stated the following in paras 30–34 of the CSR:

> 30. ***First claim.*** The first of ASIC's unconscionable conduct claims relates to the charging of Same Name PP Fees between 26 July 2013 and 23 September 2015. ASIC puts the claim in four different ways:
>
> (a) ANZ knew that the charging of Same Name PP Fees was unlawful and:
>
> (i) knew that it was highly unlikely that ANZ would be able to remediate all affected customers; or
>
> (ii) had reason to believe that it was highly unlikely that ANZ would be able to remediate all affected customers; or
>
> (b) ANZ knew that the charging of Same Name PP Fees was at risk of being unlawful and:
>
> (i) knew that it was highly unlikely that ANZ would be able to remediate all affected customers; or
>
> (ii) had reason to believe that it was highly unlikely that ANZ would be able to remediate all affected customers.
>
> 31. ANZ does not accept these allegations.
>
> 32. While some ANZ staff had been sent a copy of the wrinkle list (see [9] [sic: [10]] above), ANZ denies ASIC's allegation that ANZ knew the charging of the Same Name PP Fees was "unlawful", including after the issue was raised in December 2013 during the trial of the *Paciocco* proceeding.
>
> 33. While ANZ agrees that it received information from Blake Dawson which touched upon the question of whether ANZ was entitled to charge Same Name PP Fees, it is unclear whether ASIC alleges that ANZ staff who received that information also knew or had reason to believe, from 26 July 2013, that it was highly unlikely that ANZ would be able to remediate all affected customers who incurred Same Name PP Fees between 26 July 2013 and 23 September 2015. ASIC's case relies on the aggregation of different knowledge, or states of mind, across staff within ANZ, to attribute a single state of knowledge, or state of mind, to ANZ. That case is not supported by ASIC's Concise Statement.
>
> 34. ANZ also relies on the circumstances referred to in [19] above, in further answer to the whole of ASIC's first claim of unconscionable conduct.
>
> (Footnote omitted.)

16 It is to be noted that in these paragraphs and para 19 of the CSR, ANZ denies that it acted unconscionably, but does not assert any state of mind.

17 The parties have filed an agreed statement of facts (Document A) which states the following at paras 2 and 36–39:

> 2. The parties' agreement on the facts set out in this document:
>
> 2.1. is for the purpose of this proceeding only and does not constitute any agreed fact beyond this proceeding; and
>
> 2.2. does not constitute any waiver by either party of any client legal privilege that otherwise subsists in a communication or other document that is referred to in this document.
>
> …
>
> 36. In July 2011, in the context of the Review, ANZ received a communication from Blake Dawson which touched upon the question of whether ANZ was entitled to charge the Same Name PPNP Fees (**the 2011 Communication**). In summary, an issue identified in the 2011 Communication related (relevantly) to whether ANZ was entitled to charge Same Name PPNP Fees when the Savings and Transaction Terms and Conditions Documents contained a statement that a periodical payment was a payment "to the account of another person or business".
>
> 37. The 2011 Communication was:
>
> 37.1. initially provided orally during the course of two telephone calls on 11 July 2011 and 14 July 2011; and
>
> 37.2. subsequently communicated in writing on 18 July 2011 in a document described as a "wrinkle list".
>
> 38. A further version of the "wrinkle list" was provided to ANZ by Blake Dawson on 12 October 2011.
>
> 39. On various dates between 11 July 2011 and at least 3 December 2013, a number of ANZ employees in the project team for the exception fees litigation, ANZ Legal, and the Deposits and Home Loans team participated in discussions and/or received written communications which made some reference to the 2011 Communication and/or whether there was a possible issue, risk or ambiguity in the contractual terms in relation to ANZ's ability to charge fees in relation to regular automated payments in circumstances where the payment was not a payment "to the account of another person or business".

18 The parties have also filed a document setting out the facts in dispute (Document C) which includes the following disputed assertions of fact made by ASIC about the communication of 2011:

> 3. From 11 July 2011, on the dates set out in the table in **Appendix A** to this document, at least the ANZ employees indentified [sic] in that table became aware (by reason of the communication described in the table) that there was a possible, issue, risk or ambiguity in the contractual terms in relation to ANZ's ability to charge Same Name PP Fees (the **PP Fees Issue**).
>
> 4. As to the 2011 Communication:
>
> 4.1. The issue in relation to the charging by ANZ of PPNP Fees which was

identified in the 2011 Communication was that ANZ had charged PPNP fees in relation to failed regular automated payments between two accounts in the same name when the definition of "periodical payment" in the relevant Savings and Transaction Terms and Conditions Documents captured only payments made to the account of another person or business.

4.2. As part of the 2011 Communication, Blake Dawson indicated to ANZ that ANZ should go and investigate its entitlement to charge the Same Name PPNP Fees.

5. The Savings and Transaction Terms and Conditions Documents defined "periodical payment" for the purposes of the PP Transaction Fee in the same terms as it was defined for the purposes of the PPNP Fee.

6. By no later than 18 July 2011, as a result of the communication of the 2011 Communication, ANZ knew or ought to have known that the charging of Same Name PP Fees by ANZ to its customers was unlawful.

7. Alternatively, by no later than 18 July 2011 as a result of the communication of the 2011 Communication, ANZ knew, at the least, that there was a real risk that the charging of Same Name PP Fees by ANZ to its customers was unlawful.

8. Despite knowledge of the existence of the risk, ANZ took no step to determine whether the charging of Same Name PP Fees to its customers was unlawful before 3 December 2013.

9. Between January 2012 and January 2013, ANZ gave consideration to amending its relevant standard terms and conditions concerning Same Name PP Fees, but decided to make no amendments for reasons which ANZ declines to disclose, claiming legal professional privilege.

10. Alternatively, as a result of:

10.1. the 'Additional Points of Claim" document in the *Paciocco* proceeding being served on ANZ on 3 December 2013; or

10.2. alternatively, the Court, on 5 February 2014, publishing its judgment in *Paciocco v Australia and New Zealand Banking Group Limited* (2014) 309 ALR 249,

by no later than 3 December 2013, or alternatively 5 February 2014, ANZ knew or ought to have known that the charging of the Same Name PP Fees by ANZ to its customers was unlawful.

19 The privileged communications (by way of advice) were (two oral and one written) communications on 11, 14 and 18 July 2011: see paras 36–37 of Document A above.

20 The first basis of the asserted waiver is a letter of 5 September 2018 which it was submitted by ASIC disclosed "the substance or effect of the advice."

21 The letter of 5 September 2018 is to be understood in its context. On 14 February 2014 the General Manager, Deposits & Mortgages and the Head of Compliance (Mr Shaw) wrote to ASIC stating the following:

ANZ wishes to notify the Australian Securities and Investments Commission (ASIC) of an issue involving the charging of ANZ's Periodical Payment Non-Payment (PPNP) fee in a particular circumstance.

Relevant background

A 'periodical payment' is described in ANZ's Saving and Transaction Products – Terms and Conditions as:

> " *... a payment that you have instructed us to pay from your ANZ account to* ***the account of another person or business*** *by providing your account number and branch number (BSB)."* (our emphasis)

Further, the PPNP fee is charged:

> "*... if you have authorised a periodical payment that we cannot pay from your account because there are insufficient cleared funds available in your account".*

In certain cases, where a customer has requested ANZ to make scheduled payments to another account held by that customer, ANZ has had a practice of charging a PPNP fee if the account to be debited did not hold sufficient funds at the relevant time. It has recently been asserted, however, that ANZ does not have a contractual right to charge a PPNP in this circumstance because the payment is not being made to the account of 'another person or business'.

This issue impacts our retail deposit accounts and we are currently assessing whether the same issue arises in relation to our commercial deposit accounts.

Identification of the issue

The issue was identified following a review of ANZ's terms and conditions in the context of the exception fee class action.

Transactions Impacted

The amount of the PPNP fee for retail customers is currently $6 but was higher in previous years.

ANZ is not yet in a position to provide any guidance on the potential financial impact to customers. ANZ will need to undertake further investigation of the matter in order to determine this.

Rectification and Next Steps

To rectify this issue for new and existing customers, ANZ is investigating the exact circumstances in which the PPNP fee is charged across all channels for retail and commercial customers.

In addition to correcting the contractual / system issue, ANZ will also undertake a separate but parallel piece of work to remediate impacted accounts as required.

We will keep you advised of our progress with regard to these matters and would be pleased to meet with you in person if that would assist you.

22 The letter of 14 February 2014 is not asserted to have disclosed any legal advice.

23 By August 2016, there was communication between ASIC and ANZ about the issue of the fees and their remediation. On 16 August 2016, Ms Tam (of ASIC) emailed ANZ's Head of

Compliance, Mr Shaw, asking for certain information. Two days later Mr Shaw provided details of the affected accounts. On 19 August 2016, Ms Tam asked Mr Shaw how and when ANZ identified the matter. Mr Shaw responded:

> The issue was identified and reported to ASIC in February 2014 following a review of ANZ's terms and conditions.

24 This explanation was wrong or potentially misleading to the extent that it implied that the review took place in 2014.

25 Two years later on 5 September 2018 the now Head of Compliance Ms Edelman wrote to ASIC. The relevant parts of the letter were as follows:

> I refer to the above matter and to our telephone discussion on 31 August 2018. As mentioned, ANZ is now writing to you to confirm the matters discussed during that conversation.
>
> **PPNP remediation**
>
> On 14 February 2014, ANZ wrote to ASIC informing it of an issue in relation to when ANZ charged certain Periodical Payment Non-Payment (PPNP) fees.
>
> In summary, the issue related to ANZ having charged PPNP fees in relation to failed periodical payments between two accounts in the same name (same name PPNP fees) when the definition of "periodical payment" in the relevant Terms and Conditions captured only payments made to the account of another person or business.
>
> This letter stated that the issue was identified following a review of ANZ's terms and conditions in the context of the exception fees class action. This class action, which for technical reasons consisted of two closed class proceedings (the *Andrews and Paciocco* proceedings) involved allegations that several ANZ fees, including the PPNP fee, were penalties or contravened various statutory provisions.
>
> Following the letter to ASIC in February 2014, ANZ made remediation payments to customers in around August 2016. Our remediation:
>
> - Generally covered same name PPNP fees charged between 1 January 2008 and 23 February 2016; and
> - Involved the payment of $28.8 million to around 400,000 business and retail accounts.
>
> During the course of the remediation, our technical team concluded that there was a limitation on the data available in respect of a particular type of periodical payment, known as a Direct Loan Payment, between 1 January 2008 and 30 April 2009, which meant that they could not identify customers who were affected by the issue. As a result, customers who were charged same name PPNP fees in relation to Direct Loan Payments during this period were not remediated.
>
> [There was then discussion of a 2017 class action.]
>
> **Additional matters**
>
> As discussed, as a result of more recent work on the class action, we have identified two matters.

> Firstly, we have identified that further data is available which may allow us to overcome the data limitation encountered in the original remediation program. In principle, this data should now enable us to remediate Direct Loan Payment customers who were charged same name PPNP fees between 1 January 2008 and 30 April 2009. Subject to validating whether this is possible, we intend to remediate these customers, as far as possible, on the same basis as in the original remediation program. We will keep you informed of our progress in relation to this.
>
> Secondly, in the context of responding to a request for information for the purposes of ASIC's media release about the remediation, Mark Shaw (a now former employee of ANZ) sent an email to Monika Tam of ASIC on 19 August 2016 that stated as follows:
>
> > *The issue was identified and reported to ASIC in February 2014 following a review of ANZ's terms and conditions.*
>
> We now consider that this statement was partly in error. While ANZ did report to ASIC in February 2014 after a review of its terms, there had been advice provided to ANZ by external lawyers in 2011, in the context of the exception fees class action, which touched on this issue. The advice was only known to a limited group of people within ANZ and having made inquiries with Mr Shaw, we understand that:
>
> - He was not aware of this advice; and
> - The date he referred to in his email regarding the time of identification was simply a mistake.
>
> ANZ maintains privilege in the advice but considers that it is necessary to inform ASIC of its existence in order to correct the statement in Mr Shaw's email. ANZ apologises for this error.
>
> As noted above, we will keep ASIC informed about progress of the additional remediation work we intend to undertake. We are also happy to provide any further information you may like about the class action and any settlement approval.

26 The question is whether, in this letter, there has been a disclosure of the substance of Blake Dawson's advice in 2011.

27 The distinctions drawn in this area are fine. The disclosure of the substance or gist or conclusion of legal advice will render a waiver: *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] FCAFC 237; 140 FCR 101 at 119 [65]–[66]; and the authorities there cited, especially *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* [1996] NSWSC 7; 40 NSWLR 12 at 17–19 and *Adelaide Steamship Co Ltd v Spalvins* [1998] FCA 144; 81 FCR 360 at 366–367 read with 376–377.

28 The fineness of the distinctions can be seen in *Ampolex*. There, statements in a Part B disclosure document at p 58 (set out in 40 NSWLR at 14) were as follows:

> Ampolex's views as to the likely outcome of the Convertible Note litigation.
>
> The views set out below have regard to the pleadings, the evidence available to Ampolex and the advice of the barristers and the solicitors engaged by Ampolex for the purposes of the litigation, as at 1 May 1996. Ampolex considers that:

(a) it is likely that Ampolex will be successful in establishing the conversion ratio for the Convertible Notes as one Ordinary Share for each Convertible Note and, if so, it is unlikely that there would be any further substantial claim against Ampolex in respect of the conversion ratio of the Convertible Notes by any Convertible Noteholder not party to the litigation;

(b) it is unlikely that there will be any substantial effect on Ampolex resulting from the cross-claims made in the litigation; and

(c) if Ampolex is unsuccessful in establishing the ratio for the Convertible Notes as one Ordinary Share for each Convertible Note it has a strong claim against Mallesons for damages for professional negligence in respect of any loss it may suffer arising out of issues raised in the present proceedings, subject to the cross-claim by Mallesons against Ampolex for contributory negligence."

29 Justice Rolfe concluded that there was no waiver from these statements, saying at 40 NSWLR 17–18:

> At the conclusion of the submissions, which lasted for about one hearing day on the 20th and 21st days of the hearing, I said:
>
> > "In this matter, although not without some hesitation, I have come to the conclusion that p 58 of the Pt B statement, exhibit 4 and 6D 94, does not constitute a disclosure of the substance of the evidence, that is, the legal advice of the barristers and the solicitors engaged by Ampolex for the purposes of the litigation."
>
> I now give my reasons for coming to this conclusion. In my view, on a fair reading of what appears at 58 of exhibit 4 and 6D 94 in the context of all the other material in it, the words are a statement of Ampolex's view of the likely outcome of the litigation and they are not a statement of either the substance or effect of the advice. Those seeking disclosure point, of course, to the fact that the view is based, inter alia, on the advice. I do not think it could be suggested that the advice did not play a part in the formation of Ampolex's view. However, the question is whether the statement of Ampolex's view, albeit based on the material to which Ampolex refers, is a disclosure of Ampolex's view or a disclosure of the material on which that view was based. Section 122(2) of the *Evidence Act* 1995 requires a disclosure of the substance of the legal advice. I do not regard the statement of Ampolex's view as constituting a disclosure of the legal advice. It may be that in forming its opinion Ampolex has misconstrued or misunderstood the advice. However that may be, the statement does not rise above a statement of Ampolex's view and it does not purport to state the advice, or its substance or effect and, therefore, it does not amount to a disclosure of the advice. In my opinion what appears at p 58 can be contrasted with what appears on p ii. Those words I have held amount to a waiver of the privilege in that they disclose the substance of the legal advice, viz, that the correct ratio is 1:1.

30 There was waiver, however, in another part of the Part B statement that was set out by Rolfe J at 40 NSWLR 15:

> There is a dispute about the conversion ratio. Ampolex maintains that the correct ratio is 1:1 and has legal advice supporting this position.

31 The fineness of the distinctions involved is apparent: there is a waiver if one states: "I have legal advice. Its substance is." But there is no waiver if a party says what he or she believes and legal advice may be seen to be relevant to it. One must state the substance or gist or conclusion of the advice.

32 The letter of 5 September 2018 does not disclose the substance of advice. The context of the letter was the potentially misleading statement in 2014. The 14 February 2014 letter refers to the recent assertion (made in the *Paciocco* class action) that ANZ did not have a contractual right to charge Same Name PPNP Fees; and that the issue was identified in a review of terms in that context. The 5 September 2018 letter repeated on the first page the nature of the issue; and on the second page corrected the earlier letter by saying that 2011 legal advice "touched on" the issue in connection with the earlier (*Andrews*) class action, thereby identifying the subject matter of the advice.

33 There is no disclosure waiver.

34 The second way ASIC puts the waiver is that by advancing a positive case about its state of mind about the fees ANZ had waived privilege in the 2011 advice.

35 To succeed in this assertion ASIC must prove something more than a joinder of issue on an assertion that ANZ knew that it had no basis to charge or knew that it was a risk that there was no basis to charge; rather, to state the matter shortly: the content of the communication must have been put in issue by the holder of the privilege: *Commissioner of Taxation v Rio Tinto Ltd* [2006] FCAFC 86; 151 FCR 341 at 359 [61]; *Council of the New South Wales Bar Association v Archer* [2008] NSWCA 164; 72 NSWLR 236 at 252 [48]; *Macquarie Bank Limited v Arup Pty Limited* [2016] FCAFC 117 at [34]–[41]; *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2018] VSCA 118; 58 VR 333 at 344–350 [46]–[70]; and *Mann v Carnell* [1999] HCA 66; 201 CLR 1.

36 The question is one of understanding ANZ's case: Has it effectively put its state of mind in issue such that it could be said to be inconsistent to seek to maintain the confidentiality of the privilege? The principle was expressed by the Full Court in *Rio Tinto* 151 FCR at 359 [61] as follows:

> Both before and after *Mann*, the governing principle required a fact-based inquiry as to whether, in effect, the privilege holder had directly or indirectly put the contents of an otherwise privileged communication in issue in litigation, either in making a claim or by way of defence. In *DSE* at [58], Allsop J put the matter somewhat more descriptively, saying waiver arises 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.

(Emphasis in original.)

37 Whether there has been a waiver is to be assessed by reference to the CSR and how the case is being presented. I have set out the relevant parts of the CSR: paras 19, 24 and 30–34.

38 At no point in these paragraphs does ANZ assert that it believed or knew anything. It asserts that it was contractually entitled to charge the fees or that it had a reasonable basis for doing so. This looks, at least in terms of express language, to the objective facts to say there was objectively a correct or reasonable basis for charging the fees, not to ANZ's belief and that such belief was founded on those matters.

39 The submissions of ASIC are that the 2011 advice exists; it is known to be relevant to the issue of the entitlement to charge fees; and it is relevant to the question whether ANZ could properly have held the view that there was a reasonable basis for it to charge the fees. So, it was argued, for ANZ to conduct a case that it had a reasonable basis is inconsistent with the maintenance of the privilege and its confidentiality.

40 The difficulty with the submissions of ASIC (though ultimately it may be ANZ's difficulty in the case) is that ANZ does not assert that it held the view that it could charge the fees or that it had the view that there was a reasonable basis for charging Same Name PP Fees; rather only that it was entitled to charge the fees, or "in any event", it had a reasonable basis for charging the fees.

41 The difficulty for ANZ, however, is that the defence has an air of unreality or meaninglessness about it. Either it was contractually **entitled** to charge the fees or not. If not ("in any event" in para 19 of the CSR) what possible "reasonable basis" could there be as to the fact of entitlement to charge? Unless, of course, what is really meant is that ANZ can be reasonably excused, because it thought that it was entitled to charge the fees. This would appear (at the moment) to be a pleading or case management point, not a waiver point.

42 Dr Collins, senior counsel for ANZ, insisted that no such case as last mentioned was asserted. In that circumstance, the nature of the issue in para 19 (read with para 34) of the CSR perhaps needs to be elaborated. In other words, the carefully crafted words of para 19: "in any event

[ANZ] had a reasonable basis for [charging Same Name PP Fees]" even if there were no contractual authority, should be illuminated. It is said not to mean ANZ believed that it had a reasonable basis for thinking it could charge the fees; but only that objectively there was a reasonable basis to charge the fees, even if there was no contractual basis. How that is relevant to any exculpation is difficult to understand. It may be that this issue needs to be drawn out by way of pleading aspects of the case. For now, on the question of waiver, I am not prepared to conclude that ANZ has relevantly put the contents of the communication into issue in the sense discussed in the authorities. The documents, however, should be collected, and be discovered under an affidavit (properly founding the privilege) of the responsible partner of the instructing solicitors, so that should this issue arise again, in particular in the course of proceedings, the documents can be produced with despatch.

43 I will hear the parties on costs at the next case management hearing. My inclination is to reserve the question of costs.

I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop.

Associate: 

Dated: 17 July 2020