# FEDERAL COURT OF AUSTRALIA

## Australian Securities and Investments Commission v Macleod [2024] FCAFC 174

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| Appeal from: | *Australian Securities and Investments Commission v Noumi Ltd* [2024] FCA 349 |
| File number(s): | NSD 676 of 2024<br>NSD 678 of 2024 |
| Judgment of: | **BURLEY, ANDERSON AND MEAGHER JJ** |
| Date of judgment: | 20 December 2024 |
| Catchwords: | **PRIVILEGE** – legal professional privilege – third party report – investigation into accounting issues – whether report was created for the dominant purpose of providing legal advice<br><br>**PRIVILEGE** – waiver – implied waiver – whether voluntary disclosure of report to the regulator was inconsistent with the maintenance of confidentiality in the report – whether "derivative use" and/or "derivative disclosure" of the report amounted to a waiver of privilege – no waiver found – appeal allowed |
| Legislation: | *Australian Securities and Investments Commission Act 2001* (Cth) s 19<br>*Corporations Act 2001* (Cth)<br>*Federal Court of Australia Act 1976* (Cth) s 24(1A) |
| Cases cited: | *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475<br>*Australian Securities and Investments Commission v Noumi Limited (No 3)* [2024] FCA 862<br>*Australian Securities and Investments Commission v Noumi Limited (No 4)* [2024] FCA 1192<br>*Australian Securities and Investments Commission v Noumi Ltd* [2024] FCA 349<br>*British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; [1988] 3 All ER 816<br>*Cantor v Aldi Australia Pty Ltd* [2016] FCA 1391<br>*Citic Pacific Ltd v Secretary for Justice* [2012] HKCA 153<br>*Commissioner of Australian Federal Police v Propend* |

*Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501

*Commissioner of Taxation v PricewaterhouseCooper* [2022] FCA 278

*Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543

*Décor Corporation Pty Ltd v Dart Industries* [1991] FCA 844; (1991) 33 FCR 397

*Director of Public Prosecutions (Cth) v Kinghorn; Kinghorn v Director of Public Prosecutions (Cth)* [2020] NSWCCA 48; (2020) 379 ALR 345

*DSE (Holdings) Pty Ltd v Intertan Inc* [2003] FCA 384; (2003) 127 FCR 499

*Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46; (2013) 250 CLR 303

*Fyffes v DCC* [2005] 1 IR 59

*Goldberg v Ng* [1995] HCA 39; (1995) 185 CLR 83

*Goldman v Hesper* [1988] 1238; [1988] 3 All ER 97

*Gotha City v Sotheby's [No 1]* [1998] 1 WLR 114

*Grant v Downs* (1976) 135 CLR 674

*Jones v Dunkel* [1959] HCA 9; (1959) 101 CLR 298

*Macquarie Bank Ltd v Arup Pty Ltd* [2016] FCAFC 117

*Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1

*New South Wales v Betfair Pty Ltd* [2009] FCAFC 160; (2009) 180 FCR 543

*Osland v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275

*Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357

*Property Alliance Group Ltd v Royal Bank of Scotland plc* [2016] 1 WLR 361

*Robertson v Singtel* [2023] FCA 1392

*Singtel Optus Pty Ltd v Robertson* [2024] FCAFC 58

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| Division: | General Division |
| Registry: | New South Wales |
| National Practice Area: | Commercial and Corporations |
| Sub-area: | Regulator and Consumer Protection |
| Number of paragraphs: | 157 |
| Date of hearing: | 12 November 2024 |

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| Solicitor for the Australian Securities & Investments Commission: | MinterEllison |
| Counsel for Noumi Limited: | Ms B Lambourne |
| Solicitor for Noumi Limited: | Ashurst Australia |
| Counsel for Rory Macleod: | Mr J Giles SC, Ms M Mellos |
| Solicitor for Rory Macleod: | Norton Rose Fulbright |
| Counsel for Campbell Nicholas: | Mr Nicholas did not participate in the hearing. |

# ORDERS

**NSD 676 of 2024**

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|---|---|
| **BETWEEN:** | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**<br>Applicant |
| **AND:** | **RORY MACLEOD**<br>First Respondent |
| | **NOUMI LIMITED ACN 002 814 235**<br>Second Respondent |
| | **CAMPBELL NICHOLAS**<br>Third Respondent |

| | |
|---|---|
| **ORDER MADE BY:** | **BURLEY, ANDERSON AND MEAGHER JJ** |
| **DATE OF ORDER:** | **20 DECEMBER 2024** |

**THE COURT ORDERS THAT:**

1. By 1 February 2025, the parties confer and supply to the chambers of Justices Burley, Anderson and Meagher short minutes of order giving effect to these reasons for judgment.

2. Until further order, the Full Court's reasons for judgment not be disclosed to or published by any person, save to the parties, their legal representatives, and Court staff.

3. By 1 February 2025, the parties confer and supply to the chambers of Justices Burley, Anderson and Meagher a list identifying any paragraphs or parts therefore of these reasons for judgment which are said to contain confidential information and that ought not be published in an unredacted form, including the reasons why a confidentiality claim is made; noting that for the convenience of the parties only and without indicating any view as to confidentiality, the Full Court has highlighted yellow parts of the reasons for judgment which were redacted by the primary judge for reasons of asserted confidentiality.

4. Insofar as the parties are unable to agree to the terms of the short minutes of order referred to in order 1 or the list of confidential information referred to in order 3, the areas of disagreement should be set out in mark-up.

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

# ORDERS

**NSD 678 of 2024**

| | |
|---|---|
| **BETWEEN:** | **NOUMI LIMITED ACN 002 814 235**<br>Applicant |
| **AND:** | **RORY MACLEOD**<br>First Respondent |
| | **AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION**<br>Second Respondent |

| | |
|---|---|
| **ORDER MADE BY:** | **BURLEY, ANDERSON AND MEAGHER JJ** |
| **DATE OF ORDER:** | **20 DECEMBER 2024** |

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# REASONS FOR JUDGMENT


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**THE COURT:**

## 1. INTRODUCTION

### 1.1 Overview

1 Two applications for leave to appeal are before the Court. They concern whether legal professional privilege attaches to a report provided by **Noumi** Ltd (formerly Freedom Foods Groups Ltd) to the Australian Securities and Investments Commission (**ASIC)**, and if so, whether the provision of the report in the circumstances of this case amounted to a waiver of that privilege. They arise in the context of proceedings commenced by ASIC against Noumi, Campbell Nicholas, Noumi's former Chief Financial Officer (**CFO**) and Company Secretary,

and Rory Macleod, Noumi's former Chief Executive Officer (**CEO**) and Managing Director, for contraventions of the *Corporations Act 2001* (Cth) (**the Substantive Proceedings**). ASIC's proceedings against both Noumi and Mr Nicholas have since been determined through admissions and agreed orders as to penalties: *Australian Securities and Investments Commission v Noumi Limited (No 3)* [2024] FCA 862; *Australian Securities and Investments Commission v Noumi Limited (No 4)* [2024] FCA 1192.

2 In the Substantive Proceedings, orders were made in relation to the production of documents by ASIC. Prior to the documents being provided to the other defendants, Noumi was granted first access to identify those documents in respect of which it claimed legal professional privilege. Of the 135 documents over which Noumi claimed privilege (in whole or part), Mr Macleod, on 5 September 2023, notified a dispute regarding 53 of them. On 13 September 2023, Noumi filed an interlocutory application seeking a declaration that legal professional privilege attaches to a number of documents and that they are privileged from production. That question was referred by the judge hearing the Substantive Proceedings to another judge of the Court. During the course of the hearing, the number of documents in dispute had reduced to 15, however, the present application focusses on whether a single document referred to by the primary judge as the **PwC Report** (entitled "Freedom Foods Group Limited – Investigation Report" dated 28 September 2020) benefitted from legal professional privilege, the parties agreeing that the answer to that question would be determinative of the question for the remaining documents.

3 The primary judge found that Noumi had established that legal professional privilege attaches to the PwC Report but that such privilege was waived by Noumi because it voluntarily provided the report to ASIC; *Australian Securities and Investments Commission v Noumi Ltd* [2024] FCA 349 (**Primary Judgement** or **PJ**) at [9].

4 ASIC and Noumi seek leave to appeal from that decision and the orders consequent upon it. Mr Macleod has filed draft notices of contention, in the event leave is granted.

### 1.2 Leave to appeal

5 On 28 May 2024, ASIC and Noumi filed separate applications for leave to appeal on the basis that the orders and reasons of the primary judge are attended with sufficient doubt such as to warrant them being reconsidered by a Full Court.

6 Mr Macleod did not oppose the grant of leave to appeal and filed draft notices of contention with respect to each of the draft notices of appeal, which will be dealt with below.

7 Leave to appeal from an interlocutory judgment is required pursuant to s 24(1A) of the *Federal Court of Australia Act 1976* (Cth). The principles governing the grant of leave to appeal are well-settled. The questions to be answered are whether the primary judgment is attended with sufficient doubt such as to warrant its reconsideration on appeal, and whether substantial injustice would result should leave be refused (assuming the decision is wrong): *Décor Corporation Pty Ltd v Dart Industries* [1991] FCA 844; (1991) 33 FCR 397 at 398-399.

8 As the reasons below make clear, we consider that the primary judgment is attended with sufficient doubt to warrant reconsideration by the Full Court and that substantial injustice would result to both ASIC and Noumi were leave refused. On that basis, leave to appeal is granted.

### 1.3 Notices of appeal and contention

9 ASIC's and Noumi's (collectively, the **appellants**) notices of appeal contend that his Honour erred in finding that Noumi waived legal professional privilege in the PwC Report by voluntarily disclosing it to ASIC pursuant to a "Voluntary Confidential Legal Professional Privilege Disclosure Agreement" (**VDA**). ASIC contends that that error arose from several other errors including construing the VDA to permit "derivative disclosure" or disclosure brought about "in circumstances where it would not be possible for ASIC to disassociate whether the source of the information was the PwC Report or some other source".

10 Mr Macleod filed amended notices of contention in the same terms in relation to both appeals, seeking that the judgment be affirmed on different grounds. By grounds 1 to 4 of his amended notices of contention, Mr Macleod challenges the primary judge's finding that "the dominant purpose for the creation and bringing into existence of the PwC Report was for Ms Rani John, Partner at Ashurst engaged by Noumi to provide legal advice to Noumi, and for Noumi to obtain that legal advice."

11 Mr Macleod further contends that the primary judge failed to find that Noumi's purposes for commissioning and obtaining the PwC Report relevantly also included:

(a) the purpose of assisting Noumi to implement solutions and controls to satisfy the public and its shareholders of its commitment to corporate governance, and to facilitate a good corporate culture; or

(b) the purpose of the report being provided to ASIC. Specifically, that a purpose of the preparation of the PwC Report was to disclose either the Report or (at least) the outcome of the investigation to ASIC.

12 Accordingly, the issues for determination, in the order in which they are addressed below are, first, whether the primary judge erred in finding that the dominant purpose test was met. Secondly, whether the primary judge erred in finding that by disclosing the PwC Report to ASIC, Noumi waived privilege in its contents.

### 1.4 Summary of conclusions

13 For the reasons set out in more detail below, we find that the primary judge did not err in the application of the dominant purpose test but did err in his conclusion that legal professional privilege in the PwC Report had been waived. Accordingly, we allow the appeal.

## 2. BACKGROUND FACTS

**14** The following statement of the background facts is derived from the reasons of the primary judge. As the grounds of appeal make clear, some of the primary judge's factual findings are challenged. Nonetheless, the following is a convenient summary of the relevant background to the proceedings.

15 The events in issue concern an allegation that Noumi had accumulated large amounts of unsaleable inventory without having any or adequate policy for writing down the carrying value of the inventory within its accounts in the period from 1 January 2019 to 30 June 2020 (**Inventory Issue**). It is alleged that Noumi's annual report for the year ending 30 June 2019 and the half-yearly report for the six months ending 31 December 2019 demonstrate the lack of sufficient provisions or write-downs for the unsaleable inventory.

16 These events are alleged to have been brought to Mr Macleod's attention in early October 2019 by an employee of Noumi.

17 In March 2020, Noumi engaged the law firm, Ashurst, to provide legal advice relating to a separate matter about its employee share option plan (**ESOP Issue**). [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED].

18 On or about 15 April 2020, Mr Nicholas, sought the assistance of Ms Paddy Carney, Partner of PwC, in relation to the ESOP Issue. Mr Nicholas was thereafter provided with a proposed scope of work regarding the ESOP Issue.

19 On 28 May 2020, the Inventory Issue was escalated to Noumi's Board. On the following day, Noumi issued an ASX announcement which included that there would be a "one-off non-cash write down of the carrying value of inventory in FY 20".

20 On 30 May 2020, Mr Trevor Allen, then a non-executive director of Noumi, sent an email to Mr Nicholas, copied to Mr Macleod, regarding matters to be included in a brief to PwC to conduct a "review [into] the process for determining the quantification of the stock provision requirement".

21 Mr Nicholas ceased working as the CFO and Company Secretary of Noumi on 23 June 2020. Noumi's Board met twice on 24 June 2020. At a meeting at 8:30am, the Board accepted Mr Nicholas's resignation and resolved to issue an announcement to the ASX that Mr Macleod had been placed on leave pending a further announcement. At the second meeting, later that day, the Board also resolved to request an immediate trading halt in the shares of the company. The primary judge records that the Board discussed the trading halt in the context of information it had "just received" that "there may be further irregularities in the accounts of the company…[which] could not be immediately particularised or quantified and required further investigation". The trading halt continued until 22 March 2021.

22 In a subsequent Board meeting on 25 June 2020, that Mr Macleod did not attend, it was noted that Mr Nicholas "did not provide a satisfactory explanation of the issues raised and tendered his resignation". As set out at PJ[26]–[27], discussions at the meeting also included:

> … that the Board had not previously received information regarding the emerging accounting irregularities which were coming to light, and that it had become apparent to the Board that "management below Mr Macleod had been blocked from speaking with Directors". The Board "noted that it was essential to ensure that all areas of concern in relation to the company's accounts must be uncovered" and that "all staff need to come forward and feel it safe to do so". Importantly, the minutes record that the Board had "determined to seek legal advice on the issue".
>
> The reference to the Board seeking legal advice requires some elaboration. The unchallenged evidence of Ms John was that, although Ashurst had been engaged in early March 2020 to advise in relation to the ESOP Issue, its engagement by Noumi was ongoing during May and June 2020 and expanded to matters about which Noumi wished to obtain advice during that period. Ashurst's advice was provided both in writing and orally including at Board meetings. Many of the issues about which Noumi

sought advice included "complex accounting matters".

23 On 25 June 2020, Noumi then made a further ASX announcement, which included that the company "continues to review its inventory levels and the carrying value of inventory" and that it had "engaged Ashurst and PwC to advise it in relation to these matters". The announcement revised the estimate of an aggregate inventory write down for FY20 to $60 million.

24 Mr Macleod ceased to be a director, CEO and Managing Director of Noumi on 29 June 2020.

25 On 5 July 2020, Mr Stephen Longley, Partner of PwC, provided to Mr Perry Gunner, the Executive Chair of Noumi, an engagement letter confirming the scope of PwC's services. The letter noted the Inventory Issue.

26 On 8 July 2020, Ashurst provided Noumi with its investigation report into the ESOP issue. The following day, Noumi provided that report to ASIC pursuant to a VDA in materially the same terms as the agreement pursuant to which Noumi would later disclose the PwC Report.

27 In the first half of July 2020, [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]. On 16 July 2020, Ms Cassandra Michie, a forensic accounting partner at PwC, sent an email to Ms Johns attaching a draft engagement letter for the provision of "forensic assistance in relation to the concerns at [Noumi]". A revised version of the engagement letter was subsequently provided by Ms John to Ms Michie, and the final version was executed on 20 August 2020.

28 Ms John stated that Ms Michie was engaged to assist her in the provision of advice to Noumi. On 20 July 2020, Ms Carney provided Noumi with a "Statement of Work", which included the provision of assistance with the preparation of accounting position papers and the FY20 annual report.

29 On or about 24 July 2020, Ms John spoke with ASIC officers regarding the ESOP Issue. Ms John recalled that one of the ASIC officers referred to the issues raised in Noumi's ASX announcement of 25 June 2020, referred to above at [23], and Ms John advised ASIC that an internal investigation was being conducted.

30 On 29 July 2020, Ashurst wrote to ASIC informing it of the matters in respect of which PwC was conducting an investigation and which Ashurst was examining. In its response of 30 July

2020, ASIC requested further information about the suspected conduct that led to the accounting issues and noted that it "is willing to await the outcome of the Company's internal investigation as it currently believes it may lead to a more expedient outcome during this difficult external environment" but that it would "proceed to use its compulsory powers to obtain information and advance its investigation" if circumstances changed. ASIC's response also provided details regarding concerns raised by third party sources as to Noumi's accounting treatment and other matters.

31 On 6 August 2020, responding to a request from ASIC, Ashurst informed ASIC of some of the matters that had prompted the investigation and noted that the investigation being conducted would consider the matters ASIC identified. The letter included that staff at Noumi had "indicated that they received various verbal instructions from Mr Macleod not to perform write downs or recording provisions relating to certain obsolete stock, out of date stock and product withdrawals".

32 On 28 September 2020, the PwC Report was finalised.

33 On 2 October 2020, Ms John wrote to ASIC enquiring as to whether ASIC was prepared to receive from the Board the PwC Report on a confidential basis pursuant to aVDA substantially in the form provided on ASIC's website. The primary judge noted that ASIC's Information Sheet 165 provided information about ASIC's standard form VDA and set out the relevant paragraphs from the Information Sheet.

34 ASIC and Noumi entered into a VDA in respect of the PwC Report on 14 October 2020. The version entered into by Noumi contained minor amendments to ASIC's standard form VDA.

35 On 19 October 2020, Ashurst provided the PwC Report to ASIC pursuant to the VDA.

36 The reasons of the primary judge set out the relevant parts of the VDA at PJ[48]–[51] as follows:

> …The Recitals section of the VDA provided:
>
> **Recitals**
>
> A. Reference is made to communications between ASIC, the Disclosing Party and the Disclosing Party Representative in July 2020 in connection with an investigation conducted by the Disclosing Party related to certain accounting issues (the **Investigation**).
>
> B. On 2 October 2020, ASIC received notification from the Disclosing

Party that it held, or had within its control documents (the **Disclosed Information**), which it claims are subject to legal professional privilege (**Privilege**).

C. The Disclosing Party has sought to provide the Disclosed Information to ASIC under this Agreement in a manner which is consistent with the maintenance of any Privilege. ASIC has agreed to receive the Disclosed Information subject to the terms of this Agreement.

D. The Disclosing Party has entered into this Agreement to facilitate the provision of the Disclosed Information to ASIC, to assist ASIC being informed in relation to the Investigation, without waiving any Privilege in the Disclosed Information.

E. Neither the entry by ASIC into this Agreement, nor its receipt of the Disclosed Information subject to the terms of this Agreement, indicates that ASIC accepts that the Disclosed Information is subject to Privilege.

Clause 1 of the VDA provided:

**1. ASIC acknowledgments and undertakings**

1.1 ASIC acknowledges that:

(a) the Disclosing Party does not lose the right to make a claim that the Disclosed Information is subject to Privilege by having provided the Disclosed Information to ASIC in accordance with this Agreement;

(b) the Disclosed Information has been provided to ASIC in confidence by the Disclosing Party;

(c) the provision of the Disclosed Information to ASIC by the Disclosing Party is not a waiver of any Privilege existing at the time of disclosure and is consistent with the maintenance of any Privilege;

(d) subject to clause 3.1, it will not seek to present the Disclosed Information as evidence in proceedings against the Disclosing Party, or any third parties.

1.2 ASIC undertakes that it will not contend in any proceeding, that by reason of the Disclosing Party having disclosed the Disclosed Information to ASIC under this Agreement, that the Disclosing Party has lost its right to make a claim that the Disclosed Information is subject to Privilege.

1.3 Subject to clause 1.2, ASIC reserves its rights to contend in any proceeding that the Disclosed Information disclosed to ASIC by the Disclosing Party is not subject to Privilege (including, without limitation, by reason of the Disclosed Information lacking the necessary quality of confidentiality).

Clause 3 of VDA provided:

**3. Use of the Disclosed Information by ASIC**

3.1 ASIC will not seek to present the Disclosed Information as evidence in any proceeding other than:

(a) where the Disclosing Party has consented to its admission as evidence in the proceeding;

(b) subject to clause 1.2, to challenge the validity of the Privilege claim (including, without limitation, by asserting that the Disclosed Information lacks the necessary quality of confidentiality);

(c) where Privilege in respect of the Disclosed Information has otherwise been waived or it has been determined that the Disclosed Information is not privileged;

(d) in a criminal proceeding in respect to the falsity of a statement made by a person who has a claim of privilege in respect of the Disclosed Information.

3.2 Subject to clause 3.1, ASIC may use the Disclosed Information for the purposes of its consideration of the matters the subject of the Investigation and any proceedings commenced by ASIC in connection with the subject matter of the Investigation, including any appeals in respect of those proceedings.

3.3 Without limiting clause 3.2, ASIC is permitted to obtain, and to present as evidence in proceedings against the Disclosing Party or third parties, material and information obtained as a result of the Disclosing Party having provided the Disclosed Information to ASIC.

Finally, clause 4 of VDA relevantly provided:

**4. Disclosure of the Disclosed Information by ASIC**

4.1 ASIC will treat the Disclosed Information as confidential, and will not disclose the Disclosed Information, other than in accordance with the procedures set out in this clause 4.

4.2 ASIC is permitted to disclose the Disclosed Information to:

(a) ASIC's external advisers or experts, on a confidential basis, in performance of their duties, who will provide an acknowledgement to ASIC that the Disclosed Information is received by them on that basis; and

(b) any Commonwealth Minister or any committee established by the Parliament of the Commonwealth of Australia, or to any advisor to such Minister or committee, in response to any questions or requests to which ASIC may be expected to respond, whether by reason of compulsion or not. If Disclosed Information is to be disclosed pursuant to this clause 4.2(b), ASIC will request that the recipient of the Disclosed Information maintain the confidentiality of the Disclosed Information.

## 3. DOMINANT PURPOSE

### 3.1 Introduction

37 By his amended notices of contention, Mr Macleod seeks that the judgment be affirmed on the following grounds:

(a) By ground 1, Mr Macleod contends that the primary judge erred in concluding that the dominant purpose of bringing the PwC Report into existence was for the provision of legal advice: PJ[79], [90]

(b) By ground 2, Mr Macleod contends that the primary judge erred in failing to find that Noumi's purpose for obtaining the PwC Report relevantly included a purpose of assisting it to implement solutions and controls to satisfy the public and its shareholders of its commitment to corporate governance, and to facilitate a good corporate culture.

(c) By ground 3, Mr Macleod contends that the primary judge erred in finding that there was no "rival purpose" in the PwC Report being commissioned by Noumi or Ms John: PJ[93]. Specifically, the primary judge erred in failing to find on the evidence that, from 30 July 2020, a purpose of the preparation of the PwC Report was to disclose either the Report or (at least) the outcome of the investigation to ASIC.

(d) By ground 4, Mr Macleod's further contention is that the primary judge erred in holding that Noumi had discharged its onus of proof in "establishing that there was no other purpose that was *inconsistent* with Ms John's purpose" (emphasis added): PJ[92]. The relevant significant purpose is instead contended to be that of Noumi's board.

### 3.2 Findings of the primary judge

38 The Inventory Issue was first brought to the attention of Noumi's Board at a meeting on 28 May 2020: PJ[20]. Thereafter, there were a series of cascading developments drawn to the Board's attention, with each subsequent development presenting a worsening position in relation to unsaleable and obsolete inventory as well as raising other serious concerns: PJ[81].

39 The initial report from Mr Macleod to the Board on 28 May 2020 indicated that the Inventory Issue would lead to a write-down in Noumi's accounts in the range of $20-25 million. Mr Allen expressed concern as to whether Noumi's senior management knew about the Inventory Issue and, if so, why it had not been disclosed in the Audit Reports of previous years: PJ[82].

40 At the Board meeting on 28 May 2020 Ms Genevieve Gregor, another non-executive director, expressed the need for an external review possibly to be conducted by PwC given that it had recently been involved in reviewing the ESOP issue: PJ[82]

41 On 30 May 2020, Mr Allen sent an email referring to the Board having asked PwC to review the process for the quantification of stock. Mr Allen's email is one of the documents Mr Macleod seeks to rely on in support of his grounds of contention. The primary judge however held that the purposes for the engagement of professional advisers were not "immutably anchored in time to these initial reactions". Rather, there were subsequent developments which led Noumi, through its Board, including Mr Allen, to refine its purposes in seeking out legal and accounting assistance to deal with the overlapping but distinct issues at hand: PJ[82].

42 By late June 2020, the Board had been informed of further "irregularities". Noumi then published a revised estimate for the write-down in inventory in the order of $60 million for FY20: PJ[83].

43 By the time of the Board meeting on 25 June 2020, the Board considered that it had not received a satisfactory explanation from Mr Nicholas in his position as CFO, and Mr Macleod had not attended a meeting to explain the recent developments. The Board considered that "management below Mr Macleod had been blocked from speaking with Directors" and that it was essential that "all staff need[ed] to come forward and feel it safe to do so": PJ[83].

44 In light of the developments after the Board meeting on 28 May 2020, the Board, at its meeting on 25 June 2020, determined that it would seek legal advice. It was after that Board meeting that Ms John was approached in the first half of July 2020 by Mr Allen to provide legal advice, and it was after this time that PwC came to be engaged by Ashurst to conduct a forensic investigation for the purpose of Ashurst advising the Board in relation to various matters including "who knew what and when, and what they did or did not do, and what were the causal factors relating to the Inventory Issue": PJ[84].

45 In the days and weeks following the 25 June 2020 Board meeting, Noumi entered into a number of engagements with PwC. Each engagement related to a different stream of work and was distinct to the other, but all related to the Inventory Issue: PJ[85].

46 By 5 July 2020, Mr Longley was tasked with looking backwards in time in relation to the accounting and reporting issues: PJ[85].

47 By 20 July 2020, Ms Carney was tasked with looking forward in time to impending reports and announcements: PJ[85]

48 Throughout this period, Ms John was retained to provide ongoing legal advice which expanded in scope as more information came to hand. By early July 2020, Ms John was specifically retained to provide legal advice in relation to the Inventory Issue: PJ[85].

49 As it was Ms John who ultimately engaged Ms Michie and sought the production of an investigation report, the primary judge considered that she was to be regarded as the person who came to "commission" the PwC Report. Ms John caused Ms Michie and her team at PwC to be engaged "for the purposes of assisting Ashurst to provide legal advice and professional legal services to Noumi": PJ[87].

50 The primary judge found that Ms John's evidence regarding her subjective purpose for Ms Michie's engagement and the creation of the PwC report was corroborated by the terms by which Ms Michie was retained. The primary judge also found that the purpose was corroborated by the fact that at the time Ms Michie came to be engaged, the Board wanted legal advice about serious issues that had been raised about whether Mr Macleod and other senior executives knew about the Inventory Issue and whether they had given directions to subordinates to, effectively, conceal the Inventory Issue. The primary judge found that the engagement of Ms Ms Michie and her team was qualitatively different from the other engagements of PwC at the time which were focused on "nuts and bolts" accounting issues: PJ[87].

51 The primary judge found that over the continuum of time leading to the creation of the PwC Report, Noumi's Board, including Mr Allen, had the same purpose as Ms John which was that the PwC Report was being obtained and created to provide legal advice to Noumi: PJ[88].

52 The primary judge found that the Board, including Mr Allen, wanted to know what had happened, what needed to be done, who knew what and when, and what they did about it. However, the primary judge held that the Board, including Mr Allen, came to want to know and be advised about these matters by way of legal advice provided by Ms John. In this context, the primary judge held that the Board's purpose, or that of Mr Allen, was not mutually exclusive to Ms John's purpose: PJ[89].

53 The primary judge found that by the time the PwC Report was commissioned and created, it was being commissioned by Ms John for the purpose of providing legal advice to Noumi and it was created for that purpose: PJ[90].

54 The primary judge found that it was left to Ms John to make the decision as to how best to provide legal advice to Noumi, including as to whether she would retain Ms Michie and her team to assist in this regard: PJ[91].

55 The primary judge found that Noumi had discharged its onus of establishing that there was no other purpose that was inconsistent with Ms John's purpose: PJ[92].

56 The primary judge did not accept that there was any rival purpose in Noumi or Ms John seeking to commission and obtain the PwC Report for the purpose of it being provided to ASIC. The primary judge accepted Ms John's evidence that at the time she retained Ms Michie, Ms John had not given any thought to whether a report would be provided to ASIC, and the primary judge also accepted her evidence that this was a matter for further consideration and instructions: PJ[93].

57 The primary judge accepted that Ms John was not instructed to provide a copy of the PwC Report to ASIC until after it had been created and provided to Noumi's Board. As a result, the primary judge considered that the provision of the PwC Report to ASIC was not the purpose for which that report had been brought into existence: PJ[93].

### 3.3 The submissions

58 By his amended notices of appeal, Mr Macleod contends that the primary judge fell into error in failing to find the presence of significant non-legal advice purposes for the preparation of the PwC Report, with the consequence that obtaining legal advice was not the dominant purpose for the creation and bringing into existence of the PwC Report.

59 Mr Macleod submits that because the PwC report was in substance a third-party investigation by a non-lawyer, particular scrutiny of the report was required before accepting that it attracted privilege, referring to ***Pratt Holdings*** *Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122; (2004) 136 FCR 357 at [46] (Finn J).

60 Mr Macleod contends by ground 2(a) that the primary judge erred in failing to find that Noumi had a purpose in obtaining the PwC Report to assist it in implementing solutions and controls to satisfy the public and its shareholders of its commitment to corporate governance, and

facilitate a good corporate culture, which was inconsistent (alone, or together with other purposes) with the primary judge's finding as to dominant purpose.

61 Mr Macleod submits that the primary judge erred by failing to find, based upon five documents Mr Macleod identified, that Noumi also "had a purpose in determining what happened in relation to its inventory and accounts so as to assist it in implementing solutions and controls to satisfy the public and its shareholders of its commitment to corporate governance and facilitate a good corporate culture".

62 The five documents Mr Macleod sought to rely upon in support of his contention were, in chronological order:

(a) the email from Mr Allen sent to certain Noumi executive on 30 May 2020, referred to above at [20] and [41]. In the email, Mr Allen records that "the Board has asked that PWC review the process for determining the quantification of the stock provision requirement". Mr Allen also sets out a list of matters which he suggests should be included in the brief to PwC;

(b) minutes of the Board meeting on 25 June 2020, which recorded that it had become apparent that "management below Mr Macleod had been blocked from speaking with Directors". The Board "noted that it was essential to ensure that all areas of concern in relation to the company's accounts must be uncovered" and that "all staff need to come forward and feel it is safe to do so." The minutes of the meeting also record the Board's determination to seek legal advice;

(c) an ASX announcement by Noumi on 25 June 2020 which states "Freedom Foods is committed to ensuring that it operates at the highest level of integrity and operational performance and value the support of all major stakeholders and the commitment from its employees". Following further updates under headings titled "Inventories", "Doubtful Debts", "Employee Share Plan" and "Banking Facilities", the ASX announcement states: "The Company has requested a voluntary suspension to allow it to investigate its financial position. The Company has engaged Ashurst and PWC to advise it in relation to these matters";

(d) an email chain between Mr David White, a partner of Deloitte, and Ms Fiona McGregor, Noumi's Managing Director of Human Resources. On 10 August 2020, Mr

White notified by email a whistleblower disclosure to Noumi. On 24 August 2020, Ms McGregor replied to Mr White's email stating:

> [D]oes the person know how seriously the business is treating such information and that the business is working through all the root causes to find the full truth so that full solutions can be implemented? The new leadership team are carefully considering all information and grateful to people who are raising matters of this nature. We want people to know that these matters are not only being taken seriously but steps are being taken to resolve these for a secure future and a stronger culture for the business and our team members;

(e) Noumi's 2020 Corporate Governance statement published on 30 November 2020. Mr Macleod points specifically to a statement that "[Noumi] is committed to implementing high standards of corporate governance". Under a separate section of the statement titled "Risk Management", the statement notes:

> *Internal Audit and Controls*
>
> …[T]he Company has not previously had an internal audit function but has determined to do so and is recruiting for the position.
>
> The Board understands its responsibilities in relation to identifying and appropriately managing risk.
>
> In doing so, the following activities have taken place during the year.
>
> The Board has received a statement from the Chief Executive Officer and Chief Financial Officer that:
>
> (1) the Company's Financial Statements are founded on a sound system of risk management and internal compliance and control which implements the policies adopted by the Board; and
>
> (2) the Company's "Risk Management and Internal Compliance and Control System", in so far as it relates to financial risk, is operating effectively in all material aspects.
>
> In the view of the Directors, the activities described above, in conjunction with the work undertaken by the Company's external auditor, PWC, and Ashurst, demonstrate that for this financial year the Board is satisfied that there has been an appropriate:
>
> - review of the Company's risk management system that satisfies the Board that all risks have been identified and assessed, and that appropriate policies are in place for the management of risks;
> - monitoring and review of the implementation of the Company's policies relating to business and risk; and
> - monitoring of the Company's compliance with all applicable laws, regulations, standards and best practice guidelines.

63 Mr Macleod submits that in the context of Noumi's public commitment to operating at the highest level of integrity, those five documents established that Noumi had a significant or

substantial reason for obtaining the PwC Report other than to obtain legal advice. Mr Macleod submits that this distinct and non-legal purpose was maintained across the relevant continuum of time. It first arose by no later than 20 May 2020, prior to Ashurst's engagement and it persisted after the engagement of Ms Michie as shown by the whistleblower email chain of 24 August 2020, and it is demonstrated by the Corporate Governance Statement of 30 November 2020 to have been a use to which Noumi put the PwC Report. Mr Macleod contends that the primary judge erroneously assumed at PJ[90] that the developing purpose of obtaining legal advice meant that the other identified purposes had become wholly subordinate. Mr Macleod contends that the primary judge therefore erred in failing to find that Noumi would have needed to know the answer to the relevant questions quite aside from whatever legal issues it asked Ms John.

64 For the same reasons, Mr Macleod submits that the primary judge was in error in failing to draw a *Jones v Dunkel* [1959] HCA 9; (1959) 101 CLR 298 inference at PJ[92] that Mr Allen's evidence would not have assisted Noumi's case. Mr Macleod submits that Noumi's evidence included evidence on information and belief based upon instructions from Mr Allen, but no evidence (even of a hearsay kind) was given about his state of mind and purpose or that of Noumi's other directors.

65 Additionally, in relation to Ground 2(b), Mr Macleod points to the primary judge's finding at PJ[89] that the Board "wanted to know what had happened, what needed to be done, who knew what and when, and what they did about it", but that the Board and Mr Allen "came to want to know and be advised about these matters by way of legal advice provided by Ms John. Mr Macleod submits that there are two errors in this reasoning.

66 The first error, in Mr Macleod's submission, is that the findings overlook Noumi's purpose of satisfying the public and its shareholders of its commitment to corporate governance, and to facilitate a good corporate culture. That purpose, Mr Macleod submits, cannot be assimilated to the legal advice purpose because it was not established by evidence (and the primary judge did not find) that Ashurst was retained to advise about corporate governance and culture. Further, those are not matters about which a lawyer would be expected to give advice.

67 The second error, in Mr Macleod's submission, is that the reasoning of the primary judge confuses Noumi's purpose of obtaining the PwC Report (i.e. to find out "what had happened, what needed to be done, who knew what and when, and what they did about it") with the means

by which that purpose was to be actuated (i.e. "to know and be advised about these matters by way of legal advice provided by Ms John"). In Mr Macleod's submission, the question of purpose may be equated with the intended use of the document. Therefore, to say that Noumi came to want to know the answers to those questions by way of legal advice was to focus not on intended use, but instead, on the means by which the information was acquired. Mr Macleod submits that in confusing those two distinct concepts, the primary judge erred, both as to conflating means and purpose and overlooking that material does not become privileged because it is "routed" through a legal adviser such as Ms John: *Pratt Holdings* at [46] (Finn J) (Merkel J agreeing), endorsed in *Commissioner of Taxation v PricewaterhouseCooper* [2022] FCA 278 at [163] (Moshinsky J), and in *Robertson v Singtel* [2023] FCA 1392 at [88] (Beach J) which was in turn endorsed in *Singtel Optus Pty Ltd v Robertson* [2024] FCAFC 58 at [23] (Murphy, Anderson, Neskovcin JJ).

68 By ground 3, Mr Macleod contends that the primary judge erred in finding that there was no "rival purpose" in Noumi or Ms John seeking to commission and obtain the PwC Report for the purpose of it being provided to ASIC. The primary judge's reasoning on this issue at PJ [93] proceeded in two steps, which Mr Macleod contends are both attended by material error. First, the primary judge accepted Ms John's evidence that she did not give any thought at the time she retained Ms Michie to whether a report would be provided to ASIC; and second, Ms John was not instructed to provide a copy of the PwC Report to ASIC until after it had been created and provided to Noumi's Board.

69 As to the first step in the primary judge's reasoning, Mr Macleod submits that the threshold difficulty is that the primary judge did not precisely identify the point in time at which Ms John retained Ms Michie. At PJ[34] the primary judge pointed out that there were several communications between Ms John and Ms Michie up until the final version of the engagement was executed on 20 August 2020. In Mr Macleod's submission, the evidence was that Ms Michie's work commenced from 17 to 20 July 2020, and that the subject matter of the investigation was evolving over the course of late July 2020. Mr Macleod submits that in its letter to ASIC on 29 July 2020, Ashurst described the scope of Ms Michie's work in terms which indicated that new matters had been added to the scope of PwC's engagement compared with the draft engagement letter circulated by email on 20 July 2020. Therefore, whenever Ms Michie may have been retained, her scope of work evolved over time.

70 Mr Macleod further submits that the primary judge did not grapple with the evidence that the scope of Ms Michie's engagement changed in response to matters identified by ASIC. Mr Macleod contends that it was inapt for the primary judge to focus on the point in time at which Ms Michie was "retained". Instead, the primary judge should have focused on the evolution of Ms Michie's scope of work.

71 As to the second step, Mr Macleod submits that it was erroneous for the primary judge to place reliance upon Noumi's withholding of instructions to provide the PwC Report to ASIC until after it received the PwC Report. Mr Macleod submits that the existence of a contingency does not falsify the existence of the purpose to which the contingency attaches. Merely because Noumi reserved to itself a final decision as to whether to provide the PwC Report, does not, in Mr Macleod's submission, falsify the existence of a non-privileged purpose.

72 Mr Macleod submits that on the evidence, the primary judge ought to have inferred that there was a purpose of providing the PwC Report to ASIC from at least 24 July 2020. Such an inference is supported by the fact that: first, Ashurst informed ASIC that an internal investigation was underway; second, ASIC had expressly threatened to use compulsive powers to obtain information but also deferred doing so while the report was prepared; third, ASIC had shaped the matters to be investigated by PwC; and fourth, within four days of the PwC Report being provided to Ashurst and Noumi on 28 September 2020, Ms John was instructed on 2 October 2020 to engage with ASIC about providing the PwC Report to ASIC under the VDA.

73 Mr Macleod further submits that if either grounds 2 or 3 are established, the consequence is that there was more than one purpose for the commissioning of the PwC Report which Noumi did not address before the primary judge. Given the presence of significant non-legal purposes, Mr Macleod submits that Noumi failed to prove that Ms John's purpose was Noumi's dominant purpose, and the privilege claim should have failed before the primary judge.

### 3.4 Relevant legal principles

74 The legal principles applicable to a claim for legal professional privilege were not substantially in dispute between the parties before the primary judge or on appeal.

75 The relevant principles were set out by the primary judge at PJ[57]–[66]. We adopt the primary judge's summary of legal principles.

76 See also the Full Court's recent statement of relevant principles in *Singtel Optus Pty Ltd v Robertson* [2024] FCAFC 58 at [24]–[32] (Murphy, Anderson and Neskovcin JJ).

### 3.5 Consideration

77 During the relevant period in 2020, PwC had been engaged by Noumi to provide advice and services relating to a number of different matters, including the ESOP Issue as set out at [18] above.

78 On 28 May 2020, the separate Inventory Issue was escalated to the Noumi Board. The Board was informed on that day that $37 million for inventory was considered "at risk" with a provision to be made in the range of $20-25 million as net exposure. Mr Allen expressed that "this issue (known by senior management, not Board [sic]) was not stated anywhere in the Audit Report for the last 4 years" and that Mr Macleod believed that "the issues started to occur in 2018 & 2019 during rapid expansion but could offer no explanation as to why is [sic] was not stated in the report for those years." Ms Gregor stated the need for an external review: "possibly PwC given their current engagement for the Option Series they could add this engagement [sic]": PJ[20].

79 While Mr Allen's subsequent email on 30 May 2020 was consistent with the above, it raised a number of issues that would need to be considered, including whether management knew about the issue and the efficacy of control procedures. Notwithstanding the contents of Mr Allen's email and subsequent developments, we nonetheless agree with the primary judge's approach outlined at PJ[82] that:

> [I]t does not follow that the purposes for the engagements of the professional advisers that followed were immutably anchored in time to these initial reactions. Nor does it follow that the purposes were incapable of refinement after further consideration.

80 As the primary judge correctly pointed out, there were subsequent developments following 28 May 2020 when the Inventory Issue was first escalated to the Noumi Board. In particular, the matters that came to light before the Board by late June 2020 (which are identified at [19]–[20] and [41]–[42] above) resulted in the Board determining that it would seek legal advice.

81 In our view, the primary judge was also correct to consider the various PwC engagements with a degree of specificity. As the primary judge found at PJ[85], "[e]ach engagement related to a different stream of work and was distinct to the other, but obviously enough all related to the

general topic of the Inventory Issue". Mr Macleod did not seek to challenge this finding on appeal. As the primary judge outlined at PJ[85]:

(a) By 5 July 2020, Mr Longley was tasked with, in a simplified sense, looking backwards in time in relation to the accounting and reporting issues in so far as any revisions were required;

(b) By 20 July 2020, Ms Carney was tasked with, in a simplified sense, looking forward in time to impending reports and announcements; and

(c) By early July 2020, Mr John was specifically retained to provide advice in relation to the Inventory Issue, and it was this engagement which brought about the engagement with Ms Michie.

82 Turning specifically to Ms Michie's engagement, on 16 July 2020, Ms John received an email from Ms Michie stating that she had been asked by Ms Carney to send Ms John a draft engagement letter to provide "forensic assistance in relation to concerns at [Noumi]". The email attached a first draft of an engagement letter. The following day Ms John sent a revised version of the engagement letter to Ms Michie. Subsequent communications between Ms John and Ms Michie and her team amended and refined the scope of work that PwC would undertake. The final version of the engagement letter was executed on 20 August 2020. The salient provisions of the engagement letter as set out at PJ[34] are as follows:

> We are writing to confirm that:
>
> 1. Ashurst (or "you") act for [Noumi]. You have been retained to provide [Noumi] with legal advice in relation to certain matters.
> 2. In order to assist it in providing that legal advice, Ashurst wishes to have PwC conduct enquiries and analytical procedures as set out in 'The Services' below.
> 3. PwC's work will be performed at the direction of Ashurst in order to assist it in providing legal advice to [Noumi] and as such should be considered protected under all applicable legal professional privileges.

83 The terms of the Ms Michie's engagement establish that the work of Ms Michie was to be performed "at the direction of Ashurst", "in order to assist it in providing legal advice" to Noumi and that the investigation was to address the subject of whether [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]: PJ[34]. This was not a factual investigation, commissioned by Ashurst into the "Inventory Issue" generally and "what happened" at large.

It was an investigation, the scope of which was shaped and refined by Ms John, focused upon the specifically identified areas of concern.

84 Critically, the primary judge found that the services provided by PwC under Ms Michie's engagement were qualitatively different from the other engagements of PwC at the time, which the primary judge described as "being focused on the 'nuts and bolts' accounting issues: PJ[87]. This is consistent with Ms John's evidence that the engagement did not address the matters being separately addressed by other partners of PwC, relating to accounting issues such as adjustments, restatements or write-downs in Noumi's restated prior year accounts or those for the then extant or upcoming financial period: PJ[35].

85 The findings of the primary judge as to the distinct nature of Ms Michie's engagement were not challenged on appeal. Rather, Mr Macleod's submissions failed substantively to engage at all with the differences between the various PwC engagements.

86 With respect, the primary judge was correct to identify at PJ[87] that Ms John was the person who came to "commission" the PwC Report, that Ms John's subjective purpose accorded with an objective assessment of the purpose for Ms Michie's engagement and the creation of the PwC Report, and therefore, that Ms Michie was engaged to assist Ashurst in providing legal advice to Noumi.

87 Mr Macleod's submissions sought to identify potential factual enquiries which an investigative report might serve at a general level. This approach, however, ignores the facts as found by the primary judge as to the circumstances in which Ms Michie and her team at PwC were retained by Ms John and the scope of the works under that engagement.

88 Additionally, for the reasons outlined below in relation to grounds 2 and 3, we consider that the primary judge was correct to conclude, at PJ[89], that the Board's purpose, or that of Mr Allen, were not mutually exclusive to Ms John's purpose.

89 We detect no error in the reasoning and analysis of the primary judge in finding that the dominant purpose for the creation and bringing into existence of the PwC Report was for Ms John to provide legal advice to Noumi, and for Noumi to obtain that legal advice. It follows that ground 1 must be rejected.

90 In support of ground 2(a), Mr Macleod relies upon the five documents identified at [62] above to contend that Noumi also had a purpose in obtaining the PwC Report to assist it in

implementing solutions and controls to satisfy the public and its shareholders of its commitment to corporate governance, and facilitate a good corporate culture. For the reasons that follow, none of the five documents establish any connection between the purported corporate governance purpose and the commissioning of the PwC Report by Ms John.

91 First, Mr Macleod refers to Mr Allen's email of 30 May 2020 email. As the primary judge found, that email represented an "initial reaction" to the issues that emerged at the 28 May 2020 Board meeting, but also found that there were "subsequent developments" which satisfied the primary judge that Noumi, through its Board, including Mr Allen, had refined its purposes by the time Ms Michie and her team at PwC were engaged: PJ[82]. It was these subsequent developments that prompted the need to seek legal advice, following which Ms Michie came to be engaged: PJ[84].

92 Mr Macleod has not established how the purported corporate governance purpose in Mr Allen's email has any connection with the commissioning of the PwC Report.

93 Second, Mr Macleod refers to the minutes of the Board meeting on 25 June 2020. Mr Macleod suggests that, because a statement was made at that meeting, that it was "essential to ensure that all areas of concern in relation to the company's accounts must be uncovered" and that "all staff need to come forward and feel safe to do so" that this was a purpose of the PwC Report. However, Noumi was already addressing areas of concern through a number of separate workstreams with different partners at PwC. Additionally, the particular section of the minutes Mr Macleod focused on should be read in the context of the paragraph that follows:

> The Board noted that it was essential to ensure that all areas of concern in relation to the company's accounts must be uncovered and that all staff need to come forward and feel it is safe to do so.
>
> Mr Gunner and Mr Allen met with the finance team on 24 June and encouraged the team to be honest and transparent in the way they performed their duties and diligent in the way they raised matters with senior management. The finance team was also encouraged to contact Mr Gunner and Mr Allen and other members of the Board at any time if they had concerns about any matter.

94 We accept Noumi's submission that the minutes of the meeting do not establish any connection between the purported corporate governance purpose and the PwC Report being commissioned one month later by Ms John.

95 Third, Mr Macleod relies on the ASX announcement dated 25 June 2020. It is unclear how the statement that "[Noumi] is committed to ensuring that it operates at the highest level of integrity

and operational performance" is said to be linked to the PwC Report, which had not yet been commissioned, nor had Ms Michie been engaged and was made  in the context of the other PwC engagements.  Additionally, there is no basis upon which to connect the statement that "the Company has engaged Ashurst and PWC to advise it in relation to these matters" with the PwC Report.  The sentence appears to refer to several matters discussed within the announcement including matters titled "Inventories", "Doubtful Debts", "Employee Share Plan" and "Banking Facilities".

96 Fourth, Mr Macleod relies on an email from Ms McGregor to Mr White on 24 August 2020 in connection with a whistleblower report.  Ms McGregor was not a member of the Board, nor did she commission the PwC Report, nor was she a person responsible for instructing Ashurst. We accept Noumi's submission that there is no evidence that Ms McGregor had any authority to influence or speak to the purposes of the PwC Report.  Additionally, there is no suggestion that the activities she describes such as "working through all the root causes" were being undertaken by means of the PwC Report.

97 Fifth, Mr Macleod relies on Noumi's 2020 Corporate Governance Statement, published on 30 November 2020.  While the statement identifies various steps taken by Noumi to improve its corporate governance, as illustrated by the section extracted at [63](e), the statement does not refer to the PwC Report.

98 As with each of the other documents Mr Macleod refers to, the most that may be said is that the Corporate Governance Statement could support a general view that Noumi intended to facilitate a good corporate culture, which would hardly be surprising of a publicly listed company.  However, there is nothing in the statement which connects the purported purpose of facilitating a good corporate culture with the purpose for the commissioning of the PwC Report by Ms John.

99 By ground 2(b) Mr Macleod contends that the primary judge erred by confusing a purpose of Noumi in obtaining the PwC Report (being to know what had happened, what needed to be done, who knew what, etc.) with the means by which that purpose was to be actuated. Mr Macleod submits that the primary judge erred in treating as determinative the fact that Noumi came to seek answers to its questions by way of legal advice. For the reasons provided above, we consider that the primary judge was correct to conclude, at PJ[89], that the Board's purpose was not mutually exclusive to that of Ms John. In our view, the primary judge's statement at

PJ[89] is not to be understood as a finding of some separate or rival purpose of the Board to its purpose of seeking to obtain legal advice about the issues. We do not accept Mr Macleod's submission that the primary judge treated as determinative the means by which it sought the relevant information.

100 For the reasons given above, ground 2 must be rejected.

101 By Ground 3, Mr Macleod contends that the primary judge erred in finding that there was no "rival purpose" in Noumi or Ms John seeking to commission and obtain the PwC Report for the purpose of it being provided to ASIC. The primary judge accepted Ms John's evidence that "at the time she retained Ms Michie" whether the PwC Report would be provided to ASIC "was a matter for further consideration and instructions" and that those instructions were not received until after the report was created and considered by the Noumi Board: PJ[93]. Mr Macleod has not, on appeal, established any basis for challenging the correctness of this finding by the primary judge.

102 Mr Macleod did not challenge the primary judge's finding that no decision was made to provide the report to ASIC until after its contents could be considered. In those circumstances, the provision of the report to ASIC was, even putting it at its highest, a mere possibility at the time the Report was commissioned. In circumstances where the primary judge accepted Ms John's evidence that the report was commissioned for the purpose of providing legal advice, the possibility of a contingent subsequent use of the report could not displace the dominant legal purpose for which the PwC Report was commissioned. The same result was found by Bromwich J in *Cantor v Aldi Australia Pty Ltd* [2016] FCA 1391 at [112] where his Honour held that where "there was no evidence to show that Volkswagen AG had made any decision in relation to the use of the [privileged communication] before it was furnished [to the German Motor Transport Regulator]", subsequent provision to the regulator did not "constitute an alternative or competing purpose that existed at or by the time of communication so as to make that purpose dominant or at least equal to the purpose of provision of advice…".

103 It is also relevant to note that it was Ms John's unchallenged evidence that the engagement with Ms Michie was not modified by reasons of ASIC's letter dated 30 July 2020, and that the scope of Ms Michie's investigation already encompassed the matters identified by ASIC in their letter.

104 Mr Macleod has not, on the evidence, established the "ASIC purpose" and as a consequence ground 3 must be rejected.

105 For the reasons given in addressing grounds 1, 2 and 3, the primary judge was correct to find that the dominant purpose for the creation and bringing into existence of the PwC Report was for Ms John to provide legal advice to Noumi, and for Noumi to obtain that legal advice: PJ[79]. As Mr Macleod has not established that there were "other purposes" for the commissioning of the PwC Report, ground 4 must also be rejected.

## 4. WAIVER OF PRIVILEGE

### 4.1 Introduction

106 The primary judge concluded that Noumi waived privilege in the PwC Report by voluntarily disclosing it to ASIC on the basis that the disclosure of that report was inconsistent with the maintenance of confidentiality in it: PJ[204]; [217]. This was because, inter alia, Noumi permitted ASIC, by the terms of the VDA, to use the information in the report in a "derivative way" as against Mr Macleod in proceedings that could be brought against him by ASIC: PJ[207].

107 In their separate notices of appeal, ASIC and Noumi contend that the primary judge erred in various respects in reaching that conclusion. In ground 5 of his amended notices of contention, Mr Macleod contends that the primary judge erred in making some specific findings and reasoning relevant to his Honour's finding that Noumi waived privilege in the PwC Report to which we refer below.

### 4.2 Findings of the primary judge

108 The primary judge characterised the question of waiver as being whether Noumi's disclosure of the PwC Report to ASIC was inconsistent with the maintenance of the confidentiality which the privilege in that Report was intended to protect noting that the onus of demonstrating this falls to the party seeking to dislodge the privilege, being Mr Macleod: PJ[136]; [139]. Neither proposition is challenged on appeal.

109 His Honour then considered the terms of the VDA and their construction, along with what he considered amounted to "derivative disclosure" and "derivative use":

> [180] Whilst I accept that cl 4.1 has the effect that ASIC could not disclose the PwC Report and its contents to another person (other than in the circumstances

> prescribed by cll 3.1 and 4), in my view cl 4.1 has to be read in a way that is workable with cll 3.2 and 3.3. Specifically, I do not read and construe cl 4.1 as preventing ASIC from engaging in, what may be best described as, *derivative disclosure* of the Disclosed Information, or disclosure of that Information brought about *in circumstances where it would not be possible for ASIC to disassociate whether the source of the Information was the PwC Report or some other source*.
>
> [181] To make sense of this point, the fact is that the primary document that was disclosed here was an investigation report. It would have been known to the parties to the VDA that an investigation report of this type would include findings and matters of opinion expressed by the investigator, as well as evidence. To the extent that it included evidentiary matters, cl 3.2 permitted ASIC to use that evidence in its consideration of the subject matter of the Investigation and any proceedings commenced by it, and cl 3.3 permitted it to obtain that information in another form. In relation to the latter point, ASIC (correctly) submitted that it is "not uncommon for investigators to use inadmissible evidence to obtain admissible evidence against that same person in circumstances where the investigator is permitted by law to do so". ASIC also submitted that the rationale for cl 3.2 (which it described as providing for "explicit permitted use") and 3.3 (which was described as permitting "derivative use") was in part because it "would be impossible for ASIC to put to one side and exclude any knowledge it has of the Disclosed Information in considering the matters the subject of any proceedings" and the "voluntary disclosure regime would become unworkable if ASIC was restricted from using the Disclosed Information in this way". I agree with these submissions. It follows that cl 4.1 has to be read sensibly and harmoniously with the uses permitted by cll 3.2 and 3.3 so as not to prevent derivative disclosure of the information contained in the Disclosed Information, including the PwC Report.

(Emphasis added)

110 His Honour concluded at [183] that the combined effect of cl 3.2 and cl 3.3, read together with cl 3.1 and cl 4.1 is that although ASIC could not tender or present the **Disclosed Information** (as that term is defined in the VDA), it could consider it and then use its powers to obtain the same or similar information for use in its statutory investigations and in any proceedings commenced by it. Specifically, his Honour noted that ASIC could use the information to take leads and inform its next steps in its regulatory response to the Inventory Issue, including to issue notices for certain documents, select witnesses to attend compulsory examinations under s 19 of the *Australian Securities and Investments Commission Act 2001* (Cth), and ask witnesses questions knowing what their likely evidence would be. His Honour further found at [183] that:

> …By doing so, ASIC could, if it wished, seek to elicit the same or similar evidence as contained in the PwC Report through these indirect or derivative means. It could then use that information as evidence in proceedings or for other purposes connected with such proceedings.

111 In finding that the claim of privilege advanced by Noumi was inconsistent with the maintenance of confidentiality, the primary judge:

(a) found that Noumi knowingly placed ASIC in a position where it was permitted to use the information in the PwC Report for the purpose of its consideration of its investigation and any proceedings that it might commence against either Noumi or any third party, including Mr Macleod: PJ[205];

(b) found that Noumi knew that the effect of its disclosure was to "arm" ASIC with information it did not have at the time, enabling ASIC to, among other things, identify which witnesses to examine, the topics to be explored with them, the questions to be asked, the answers they would give and the documents to obtain: PJ[206]. The primary judge at [207] concluded that:

> …this conduct, when viewed in context in light of the surrounding circumstances, was inconsistent with the maintenance of confidentiality in the PwC Report as a privileged communication. In particular, permitting ASIC to use the Disclosed Information *in a derivative way* as against Mr Macleod in proceedings that could be brought against him was conduct that was inconsistent with the maintenance of confidentiality in the PwC Report as a privileged communication. It does not matter that ASIC could not present the PwC Report as evidence in proceedings or disclose it to any third party, other than in specified circumstances. That is because, in essence, ASIC was placed in a position where (if it so wished) it could seek to *elicit any of the relevant evidence in the PwC Report by derivative means*. The placing of ASIC in that position was, in my view, conduct that was inconsistent with the maintenance of confidentiality in the PwC Report.

(Emphasis added)

(c) was satisfied that specific unfairness arose. The unfairness that arose was because, on the one hand, Noumi disclosed information to ASIC that it could consider and use in statutory investigations and potential proceedings against Mr Macleod, but, on the other hand, Noumi maintained confidentiality over that same information as against Mr Macleod: PJ [209].

(d) rejected Noumi's submission that there was no unfairness to Mr Macleod because, as things have come to pass, proceedings have been commenced against Mr Macleod in which he has had full disclosure of the case he has to meet and the evidence that ASIC relies upon: PJ[210].

(e) rejected ASIC's submission that no unfairness arises to a former company officer if a company provides information to a regulator to enable it to properly carry out its regulatory functions. His Honour notes that such a submission is misconceived and that

the issue here is whether there is specific unfairness to the former company officer "when such information is provided to the regulator, but withheld from that officer": PJ[211].

(f) in relation to Noumi's subjective motivation for its disclosure of the PwC Report, did not accept Mr Macleod's submission that Noumi acted for a calculated or forensic purpose (at [212]):

> …Noumi was seeking to assist ASIC in respect of a matter of serious concern. I do not consider that to be a calculated purpose engaged in for a forensic purpose. Nor do I consider that Noumi was making its disclosure to secure some advantage from ASIC. At the time that the VDA was entered into, ASIC had not commenced any proceedings against Noumi and there is no evidence that any specific assurance or promise was given by ASIC to Noumi.

**4.3 The submissions**

112 ASIC contends that the primary judge made three substantive errors in concluding that privilege in the PwC Report had been waived. Noumi joins in advancing these submissions. Mr Macleod contests each asserted error, as summarised below.

113 First, that the primary judge erred in determining that cl 4.1 of the VDA did not prevent ASIC from engaging in "derivative disclosure" or disclosure "in circumstances where it would not be possible for ASIC to disassociate whether the source of the information was the PwC Report or some other source": PJ180]. They submit that such a conclusion is contrary to the language and purpose of the VDA and is not required for cl 4.1 to be read sensibly with cl 3.2 and cl 3.3. Further, it is contended that "derivative disclosure" is unknown as a legal concept, and cannot, when properly understood, form a basis upon which to conclude that confidentiality in a privileged document has been lost by means of disclosure.

114 In answer, Mr Macleod submits that little turns on the use by the primary judge of the expression "derivative disclosure". He accepts that the primary judge found at [180] that cl 4.1 of the VDA, other than in the circumstances of cl 3.1 and 4, prevented ASIC from disclosing the PwC Report and its contents to another person. Beyond that, he submits that it is difficult to discern any material or dispositive point of departure between that which ASIC *accepts* that the VDA permitted it to do, and that which the primary judge *found* ASIC could do.

115 Secondly, that the primary judge erred in finding that Noumi's conduct in permitting ASIC to use the Disclosed Information in in accordance with cl 3.2 and cl 3.3 of the VDA was not

inconsistent with its maintenance of confidentiality in the documents as against the rest of the world, including Mr Macleod.

116 The appellants submit that placing ASIC in a position where it was "armed" with additional information concerning Mr Macleod early in its consideration of the circumstances surrounding Noumi is not enough to give rise to the conclusion that, in resisting production of the documents to Mr Macleod, Noumi was taking an "inconsistent position" or denying the logical consequences of any forensic benefit it had earlier sought to obtain. The primary judge found that Noumi did not provide the documents to ASIC to secure any forensic advantage for itself.

117 ASIC emphasises that the provision of the PwC Report by Noumi occurred in a regulatory context. While ASIC had not invoked its statutory powers to compel production of documents, the VDA was executed to enable it to perform its statutory duties. ASIC suggests that in those circumstances there is a public interest in preserving confidentiality of disclosures of this kind. The terms of the VDA are in substantially the same terms as those that have been used by ASIC since 2012. Further, it is submitted that the primary judge failed to give adequate weight to this context, including the fact that information disclosed voluntarily under the VDA ought to be regarded as analogous to information disclosed under compulsion, citing *Citic Pacific Ltd v Secretary for Justice* [2012] HKCA 153, *Fyffes v DCC* [2005] 1 IR 59 and ***Property Alliance Group*** *Ltd v Royal Bank of Scotland plc* [2016] 1 WLR 361 at [113].

118 In answer, Mr Macleod defends the reasoning of the primary judge noting that his Honour's conclusions were drawn having regard to "all the context and circumstances" attending the disclosure.

119 Thirdly, that the primary judge erred in his analysis of "unfairness".

120 The appellants submit that there are four related aspects that give rise to a conclusion that the primary judge erred on this question.

121 First, it is contended that there was no specific unfairness to Mr Macleod at the time the PwC Report was provided to ASIC, which, on ASIC's submission, is the point at which unfairness is to be assessed (because that is when Noumi's conduct allegedly giving rise to waiver occurred). No proceedings were on foot and no compulsory notices had been issued. Even if they had, or if proceedings had been commenced by ASIC against Mr Macleod, he would not

have been entitled to know what information ASIC possessed. Accordingly, by withholding the PwC Report, Mr Macleod was not deprived of anything to which he was entitled, citing ***Osland*** *v Secretary to the Department of Justice* [2008] HCA 37; (2008) 234 CLR 275 at [48].

122 Mr Macleod submits that whilst it is true that he had no right to know what information ASIC possessed from its investigations, it is that circumstance that generates the unfairness of Noumi secretly arming ASIC with the PwC Report, knowing that it was about Mr Macleod and would be used against him, whilst withholding it from him.

123 Secondly, the primary judge erred in rejecting ASIC's submission that Noumi caused no specific unfairness to Mr Macleod in circumstances where he has since had full disclosure of ASIC's case against him. Any prejudice to Mr Macleod must be considered in view of the information available to him and the nature of the Substantive Proceedings. There is no dispute that he has the primary documents obtained by ASIC during the investigation and the transcripts of the compulsory examinations. A defendant to proceedings will not generally have complete access to all communications between an opposing party and its witnesses, because such communications would normally be subject to legal professional privilege.

124 Mr Macleod submits in answer that this argument cannot be accepted because, as ASIC submits, the relevant time for assessing unfairness is the time when the PwC Report was provided to ASIC. It is accordingly irrelevant that subsequently proceedings were commenced and full pleadings and documentary disclosure given. If, however, the relevant time for assessing unfairness is the time when the privilege is claimed (as Noumi submits), then Mr Macleod submits that there is no evidence to support the proposition that the service on him of ASIC's case has ameliorated the unfairness to him. Moreover, if it is Noumi's unfairness that must be considered, then it is incorrect when considering whether that unfairness is ameliorated to have regard to whatever it is that ASIC has done. In any event, Mr Macleod submits that specific unfairness arises because two of the three active parties to the litigation, ASIC and Noumi, have access to the PwC Report but Mr Macleod does not.

125 Thirdly, the conclusion at PJ[206] that the PwC Report would be "probative" to ASIC's regulatory response is not enough to engender specific unfairness. What is required ordinarily is an express or implied assertion about the content of the privileged communication, while simultaneously maintaining the privilege. Noumi is not said to have made any such assertion. The rational underpinning the doctrine of waiver of privilege is not to ensure broad equality of

information between parties to litigation: ***Mann*** *v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [29]. It is to respond to situations where it can no longer be said that the privilege holder is preserving the confidentiality of its information any longer.

126 In response, Mr Macleod submits that the primary judge did not reason that mere relevance and assistance, to the knowledge of the privilege holder, was sufficient. Mr Macleod instead suggests that when understood against the limits of what the primary judge could say about the PwC Report, it was also relevant that the Report contained findings and evidence that Noumi knew ASIC would use against him.

127 Fourthly, it is asserted that Noumi's conduct caused no unfairness to Mr Macleod. Here, ASIC brought proceedings against Mr Macleod several years after the preparation and disclosure to ASIC of the PwC Report. The privilege holder is Noumi. Considerations of unfairness are inapt in those circumstances because there was no relevant advantage sought to be gained by Noumi by the disclosure vis-à-vis Mr Macleod. Even if Noumi was seeking an advantage from transparency with ASIC that would not be conduct whereby it was seeking to obtain a forensic benefit as against Mr Macleod. Given the primary judge's finding that Noumi did not act for any "calculated or forensic purpose", the primary judge ought not to have found that Noumi's conduct amounted to specific unfairness as against Mr Macleod, such as to inform his Honour's enquiry into whether Noumi's conduct was inconsistent with its maintenance of confidentiality.

128 In answer, Mr Macleod submits that it is not the case that for unfairness to exist there must be some corresponding advantage accruing to or intended by the privilege holder. Even if such was true, it should not be limited to the subjective intentions of the privilege holder, given that imputed waiver depends on an attribution of the character of an election to the privilege holder. In circumstances where imputed waiver of privilege can arise notwithstanding the subjective intention of the privilege holder, then unfairness should not be made dependent upon an intention to grain advantage or forensic benefit.

### 4.4 Consideration

129 The fundamental importance of the confidentiality which legal professional privilege preserves was explained by Stephen, Mason and Murphy JJ in *Grant v Downs* (1976) 135 CLR 674 at 685:

> The rationale of this head of privilege, according to traditional doctrine, is that it promotes the public interest because it assists and enhances the administration of

> justice by facilitating the representation of clients by legal advisors, the law being a complex and complicated discipline. This it does by keeping secret their communications, thereby inducing the client to retain the solicitor and seek his advice and encouraging the client to make a full and frank disclosure of the relevant circumstances to the solicitor. The existence of the privilege reflects, to the extent to which it is accorded, the paramountcy of this public interest over a more general public interest, that which requires that in the interests of a fair trial litigation should be conducted on the footing that all relevant documentary evidence is available.

130 Legal professional privilege is a rule of substantive law which is a fundamental common law right: *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] HCA 49; (2002) 213 CLR 543 at [9], [11]. It protects the confidentiality in the communication. The onus lies on the person asserting waiver to establish that there has in fact been waiver of any privilege found to exist: *New South Wales v Betfair Pty Ltd* [2009] FCAFC 160; (2009) 180 FCR 543 at [54].

131 In *Mann* the privileged material was contained in legal advice provided to the Chief Minister for the Australian Capital Territory (**ACT**) concerning the conduct of litigation. A complaint was made by Dr Mann to Mr Moore, an independent member of the Legislative Assembly of the ACT, about the conduct of the litigation. Mr Moore wrote to the Chief Minister, repeating Dr Mann's complaint that the litigation had been a waste of public funds. In answer, the Chief Minister sent Mr Moore in confidence a letter from the ACT Government Solicitor setting down particulars of the litigation and attaching copies of advice from senior counsel. Mr Moore sent a copy of the letter to Dr Mann but not the attachments. Dr Mann made an application for pre-trial discovery of the attachments on the basis that he believed that they contained defamatory imputations. There was no dispute that those attachments were originally the subject of legal professional privilege as communications to the Minister, but it was contended that the privilege had been lost because of their disclosure to Mr Moore.

132 The plurality (Gleeson CJ, Gaudron, Gummow and Callinan JJ) at [28] noted that legal professional privilege exists to protect the confidentiality of communications between lawyer and client and it is the client who is entitled to the benefit of such confidentiality and who may relinquish that entitlement. It is inconsistency between the conduct of the client and the maintenance of the confidentiality which effects a waiver of the privilege. In a seminal statement on the subject, the plurality said at [29]:

> Waiver may be express or implied. Disputes as to implied waiver usually arise from the need to decide whether particular conduct is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. When an affirmative answer is given to such a question, it is sometimes said that waiver is "imputed by

> operation of law". This means that the law recognises the inconsistency and determines its consequences, even though such consequences may not reflect the subjective intention of the party who has lost the privilege. Thus, in *Benecke v National Australia Bank*, the client was held to have waived privilege by giving evidence, in legal proceedings, concerning her instructions to a barrister in related proceedings, even though she apparently believed she could prevent the barrister from giving the barrister's version of those instructions. She did not subjectively intend to abandon the privilege. She may not even have turned her mind to the question. However, her intentional act was inconsistent with the maintenance of the confidentiality of the communication. What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the confidentiality; not some overriding principle of fairness operating at large.
>
> (Footnotes omitted)

133 The rejection in *Mann* of an overriding principle of fairness and its subordination to possible relevance in the context of an assessment of the inconsistency between the act and the confidentiality of the communication has been said to represent an important change in the law from that stated in *Attorney-General (NT) v Maurice* [1986] HCA 80; (1986) 161 CLR 475 at 487-8: see ***DSE (Holdings)*** *Pty Ltd v Intertan Inc* [2003] FCA 384; (2003) 127 FCR 499 at [14], [70]; *Macquarie Bank Ltd v* ***Arup*** *Pty Ltd* [2016] FCAFC 117 at [25].

134 The plurality in *Mann* at [30] also accepted the proposition arising from ***Goldberg*** *v Ng* [1995] HCA 39; (1995) 185 CLR 83 at 120 that disclosure by a person of advice received from a lawyer to one or more people will not necessarily lead to a waiver of legal professional privilege in that document. Examples where privilege was not waived in such circumstances were given by reference to decisions of the United Kingdom Court of Appeal in *British Coal Corporation v Dennis Rye Ltd (No 2)* [1988] 1 WLR 1113; [1988] 3 All ER 816, *Goldman v Hesper* [1988] 1238; [1988] 3 All ER 97 and *Gotha City v Sotheby's [No 1]* [1998] 1 WLR 114.

135 On the facts of *Mann*, the plurality found at [33]-[35] that provision of the legal advice by the Chief Minister to Mr Moore, himself a member of the ACT's Legislative Assembly, under fetter of confidence in order to consider the reasonableness of the litigation in the ACT, was not inconsistent with the maintenance of privilege. There was nothing inconsistent with that purpose in the Chief Minister conveying the terms of that advice to a member of the Legislative Assembly who wished to consider the reasonableness of the conduct of the ACT in relation to the litigation.

136 In *Goldberg*, a solicitor, Mr Goldberg, disclosed documents to the New South Wales Law Society that constituted privileged communications. He did so for the purpose of assisting with

enquiries concerning a complaint lodged against him by former clients, and subject to an express requirement and agreement that they would not be shown to anyone else. In separate proceedings, essentially involving the same dispute as the subject of the complaint to the Law Society, Mr Goldberg's former clients sued for the return of moneys they had paid to Mr Goldberg's wife and in those proceedings subpoenaed the Law Society for documents relating to the dispute between them and Mr Goldberg. The majority held at p. 95 that disclosure by Mr Goldberg to the Law Society did not constitute an express or intentional general waiver of privilege because confidence had been deliberately maintained. They found that there was an imputed or implied waiver because the disclosure was voluntary and made for the express purpose of rebutting the complaint made by Mr Ng against him, in circumstances where the court proceedings and the complaint procedure were closely related and concerned the same subject matter. There was a relevant inconsistency between the defence of the suit for return of the money and the confidential steps taken to ward off the complaint by the provision of the privileged material (p. 98, 101–102). The inconsistency and relevant unfairness lay in maintaining privilege in the proceedings when the same material had been deployed to Mr Goldberg's forensic benefit in the Law Society enquiry.

137 In *Osland*, the appellant had been convicted and sentenced to imprisonment for murder. Following unsuccessful appeals, she petitioned the Governor of Victoria for mercy. The Attorney-General subsequently issued a press release stating that he had obtained a joint advice from counsel, which recommended that the petition be denied, and that the Governor had denied the petition. The appellant sought access under the *Freedom of Information Act 1982* (Vic) (the **FOI Act**) to a number of documents relating to her petition including the joint advice. That request for access was refused, save for two of 265 pages. The High Court found that privilege in the joint advice had not been waived by virtue of the press release, emphasising that the context in which the press release had been issued was central. The Court considered that its evident purpose was to satisfy the public that due process had been followed in the consideration of the petition and that the decision was not based on political considerations, emphasised by the fact that three eminent lawyers, external to the Department of Justice, had given the advice. The Attorney-General was seeking to give the fullest information about the process undertaken. The plurality said at [48]:

> …This did not involve inconsistency and it involved no unfairness to the appellant. If she had had a legal right to reasons for the decision, then she still has it. If she had no such right, the press release did not deprive her of anything to which she was entitled.

What the Attorney-General said did not prevent the appellant from making public her petition, or any part of it, as and when she desired.

138 More recently, in ***Expense Reduction*** *Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Limited* [2013] HCA 46; (2013) 250 CLR 303 the High Court observed that waiver in its strict legal connotation is an intentional act done with knowledge whereby a person abandons a right or privilege by acting in a manner inconsistent with that right or privilege. The Court went on:

> [30] …In most cases concerning waiver, the area of dispute is whether it is to be implied. In some cases, waiver will be imputed by the law [*Goldberg v Ng* (1995) 185 CLR 83 at 95-96] with the consequence that a privilege is lost, even though that consequence was not intended by the party losing the privilege. The courts will impute an intention where the actions of a party are plainly inconsistent with the maintenance of the confidentiality which the privilege is intended to protect [*Mann v Carnell* (1999) 201 CLR 1 at 13 [29]].
>
> [31] In C*raine v Colonial Mutual Fire Insurance Co Ltd* [(1920) 28 CLR 305 at 326], it was explained that "'[w]aiver' is a doctrine of some arbitrariness introduced by the law to prevent a man in certain circumstances from taking up two inconsistent positions ... It is a conclusion of law when the necessary facts are established. It looks, however, chiefly to the conduct and position of the person who is said to have waived, in order to see whether he has 'approbated' so as to prevent him from 'reprobating'". In *Mann v Carnell* [(1999) 201 CLR 1 at 13 [29]], it was said that it is considerations of fairness which inform the court's view about an inconsistency which may be seen between the conduct of a party and the maintenance of confidentiality, though "not some overriding principle of fairness operating at large."

(Footnotes inserted)

139 In *Arup*, the Full Court said of implied waiver at [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.*

140 The above passage from *DSE (Holdings)* was also cited with approval in *Director of Public Prosecutions (Cth) v* ***Kinghorn****; Kinghorn v Director of Public Prosecutions (Cth)* [2020] NSWCCA 48; (2020) 379 ALR 345, where information obtained as a result of compulsory examinations under s 264 of the *Income Tax Assessment Act 1936* (Cth) was disclosed by the Australian Taxation Office (**ATO**) to the Commonwealth Director of Public Prosecutions

(**CDPP**) or the Australian Federal Police (**AFP**) on some 14 occasions. The defendant was subsequently prosecuted, and subpoenas were issued on his behalf to the CDPP, the ATO and the AFP, each of which sought to prevent access to documents produced in answer to the subpoenas on the basis that they were subject to privilege. The Court of Criminal Appeal found at [151] that the only matter identified as giving rise to a relevant inconsistency was the necessity for the defendant to have access to relevant materials "to show the manner and extent of the use" of the information obtained pursuant to the s 264 examinations. Yet mere relevance of the withheld material "does not by itself establish an inconsistency necessary to give rise to an implied waiver…". The Court found at [155] that the fact that the information sought by the defendant may have been relevant or even crucial to his Notice of Motion heard before the primary judge was not sufficient by itself to bring about a waiver.

141 In the present case, the PwC Report was supplied by Noumi to ASIC on 19 October 2020. Subsequently, in 2023, ASIC brought proceedings against Noumi, Mr Nicholas and Mr Macleod for contraventions of the *Corporations Act 2001* (Cth). As we have noted in [1] above, the proceedings against Noumi and Mr Nicholas have been resolved by agreed orders. The case against Mr Macleod continues. It is in that context that Mr Macleod sought discovery of the PwC Report and in which Noumi, by interlocutory application dated 13 September 2023, claims privilege in that Report.

142 There is little real dispute that in the circumstances surrounding the provision of the PwC Report to ASIC, Noumi intended that it remain confidential. Recital C of the VDA makes this express. Recital D affirms that the purpose of the disclosure is to assist ASIC being informed in relation to its investigation relating to certain of Noumi's accounting issues while preserving privilege in the information disclosed. By the terms of cl3, the only substantive use that may be made of the Disclosed Information by ASIC is for consideration of matters the subject of its investigation and consideration of the commencement of proceedings. Subject to limited exceptions set out in cl 4.2, cl 4.1 makes plain that ASIC must treat the Disclosed Information as confidential.

143 The primary judge found at [153] that the combined effect of these terms is that Noumi sought to maintain confidence in the Disclosed Information and not waive legal professional privilege in it. By its terms, ASIC could use the PwC Report as set out at PJ[178], but could not disclose its contents or tender it in evidence.

144 Nonetheless, the primary judge found that by these means, Noumi had permitted what he describes at [207] as use of the Disclosed Information in a "derivative way", which would appear to be a reference to the "derivative disclosure" and "derivative use" of confidential information to which he refers earlier.

145 If, by that reference, the primary judge intended to convey that by "derivative disclosure", ASIC thereby was permitted to disclose confidential information in the PwC Report, then we respectfully disagree. Use of information does not amount to disclosure of it. ASIC, by cl 4.1 was expressly prohibited from making a disclosure of the Disclosed Information. Any use that might have had the consequence that a disclosure was made was forbidden. Whilst ASIC in its investigations might have used the content of the PwC Report to identify chains of enquiry or witnesses to investigate, such investigations cannot be said, of themselves to amount to a disclosure of the confidential information in the PwC Report. A privileged document will not be deprived of its confidential character simply because some facts contained in it are established through separate means. This may be seen when one considers that a copy of a document may be privileged and confidential while the original of the same document is not. The copy will retain its privilege because, for example, it is included in a brief of evidence provided to a lawyer for the purpose of providing advice: *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* [1997] HCA 3; (1997) 188 CLR 501 at 571–572 (Gummow J). The copy is privileged because of the circumstances in which it is created.

146 The references to "derivative use" in the judgment are not to disclosure, but rather to how the contents of the PwC Report may be used by ASIC. In this regard the primary judge found that there was, in effect, an information asymmetry between Noumi and ASIC on the one hand, and Mr Macleod on the other. It was the conduct of Noumi in disclosing the PwC Report to ASIC in the knowledge that ASIC would use the information to support its statutory investigations that led him to the conclusion that such disclosure was inconsistent with the maintenance of privilege (see PJ[206]). His Honour considered that the PwC Report could be used to identify witnesses to examine, the topics to be explored with them, the questions to be asked and so on. It was this conduct that the primary judge considered at [207] to be inconsistent with the maintenance of confidentiality in the PwC Report.

147 In our respectful view it cannot be said that such derivative use of information amounts to a disclosure of that information. As noted above, to the extent that it might have been, ASIC was prevented by clause 4.1 of the VDA from doing so. We consider that the primary judge erred

in finding at [207] that by permitting ASIC to use the Disclosed Information in a derivative way against Mr Macleod, Noumi expressly or impliedly acted in a way that was inconsistent with the maintenance of the confidentiality which the privilege is intended to protect.

148 We might add that our conclusion in this regard is consonant with the position in the decision of Birrs J (as his Lordship then was) in *Property Alliance Group* at [113]–[114] where a party who provided documents to a regulator for the limited purpose of conducting an investigation into misconduct (bid-rigging in relation to foreign exchange benchmarks), which then carried out the investigation did not of itself yield a waiver of privilege. In that case it was only when the disclosing party pleaded that the regulatory decision flowing from the provision of the documents (which exonerated it) did it open up the document so supplied to scrutiny.

149 After making the essential finding required in *Mann* that there was an inconsistency in the conduct of Noumi with the maintenance of privilege, the primary judge went on to consider whether there was an unfairness in the that may inform the conclusion as to inconsistency. His Honour concluded at [209] that unfairness of the requisite kind arose because Noumi had disclosed information to ASIC that it could consider and use in its statutory investigations and potential proceedings against Mr Macleod, but it maintained confidentiality over the same information as against Mr Macleod.

150 However, an information asymmetry between parties does not of itself amount to unfairness in this context. The unfairness that informs inconsistency is *forensic unfairness* as between the privilege holder and the privilege challenger: *Arup* at [29]. Unlike the position on the facts in *Goldberg*, here, no disclosure was made by Noumi to gain an advantage over the opposing party in related litigation. Indeed at [212] the primary judge explicitly found that there was no such motive in subjective terms. Nor is one apparent in objective terms. Mere relevance of the withheld material does not by itself establish an inconsistency necessary to give rise to an implied waiver; *Kinghorn* at [151].

151 In *Osland*, the High Court considered at [48] that no inconsistency or unfairness to the appellant was involved by the reference in the press release to legal advice obtained because had the appellant had a legal right to the reasons for the decision of the Attorney-General, then that right continued to exist and if no such right existed then the press release "did not deprive her of anything to which she was entitled". The same may be said of the derivative use to which the primary judge directed attention. To the extent that investigations and admissible evidence

obtained informed the formulation by ASIC of a case against Mr Macleod, he was entitled to access such material as might be deployed against him in the case in the course of normal pre-trial processes. Whether unfairness is considered at the time of the disclosure of the privileged material (here, on 19 October 2020) or at the time the claim for privilege is made by Noumi (13 September 2023), it may be assumed that ASIC and Noumi were aware that such pre-trial processes would make information of the kind considered above available to Mr Macleod.

152 We reject the contention advanced by Mr Macleod that the primary judge erred in taking into account Noumi's subjective intention in disclosing the PwC Report. His Honour did not take that intention to be determinative: PJ[143]. It was a factor that was open to the primary judge to take into consideration on the question of unfairness.

153 In this context we also reject the contention of Mr Macleod that the primary judge erred in his finding, as a matter of fact, that Noumi did not act for a calculated or forensic purpose in disclosing the PwC Report to ASIC: PJ[212], [221]. Having heard the evidence before him over two days, including a witness who was asked about the reasons for Noumi's disclosure of the PwC Report, we are not persuaded that his Honour erred in his finding.

154 Accordingly, we allow the appeal.

155 For completeness we do not accept that any of the further points raised in the amended notices of contention raise matters that lead to a different conclusion. In this regard, we reject the contention that cl 4.2(b) of the VDA, in recognising ASIC's obligations to disclose material to the Parliament or Executive in certain circumstances, generates a relevant inconsistency within the principles set out in *Mann*. There is no evidence to suggest that there has been any disclosure to the Parliament or the Executive. No Australian authority was cited to address this particular circumstance, but we note that in *Property Alliance Group* Birss J considered several cases in Ireland and Hong Kong before concluding at [113] that the existence of such a provision ought not to deprive the documents of legal professional privilege. We respectfully agree. In the circumstances of this case, we can see no unfairness or inconsistency in the maintenance of privilege, even though there is a theoretical obligation on the part of ASIC to disclose the document provided to Parliament or the Executive.

## 5. DISPOSITION

156 For the reasons set out above we grant leave to appeal and allow the appeal. The notices of contention must be rejected. Mr Macleod must pay the costs of the appeal.

157 We will direct that the parties provide short minutes of order giving effect to these reasons by 1 February 2025.

I certify that the preceding one hundred and fifty-seven (157) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Burley, Anderson and Meagher.

Associate:

Dated: 20 December 2024