

# SUPREME COURT OF QUEENSLAND

CITATION: *Smith (a pseudonym) v Gilchrist Connell Pty Ltd (a firm)*  
[2026] QSC 122

PARTIES: **JANE SMITH (A PSEUDONYM)**  
(applicant/plaintiff)  
v  
**GILCHRIST CONNELL PTY LTD (A FIRM)**  
ACN 131 087 673  
(respondent/not a party to the proceeding)  
**THE CRECHE AND KINDERGARTEN ASSOCIATION  
LIMITED**  
ACN 150 737 849  
(defendant/not a party to the application)

FILE NO/S: BS No 4073 of 2025

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 June 2026

DELIVERED AT: Brisbane

HEARING DATE: 27 April 2026, 29 May 2026; supplementary written submissions on behalf of the respondent filed 3 June 2026; supplementary written submissions on behalf of the applicant filed 9 June 2026

JUDGE: McCafferty J

ORDER: **1. The parties are to agree a form of order reflecting these reasons and provide it to my Associate by 4.00 pm on 18 June 2026.**

**2. I will hear the parties on costs.**

CATCHWORDS: PROCEDURE — CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS — DISCOVERY AND INTERROGATORIES — DISCOVERY AND INSPECTION OF DOCUMENTS — PRODUCTION AND INSPECTION OF DOCUMENTS — GENERAL MATTERS — DOCUMENTS IN POSSESSION OF NON-PARTY — where the plaintiff served a notice of non-party disclosure (the **non-party disclosure notice**) on the defendant's legal representatives (the **law firm**) — where the law firm objected to the non-party disclosure notice on grounds that the documents sought are subject to a claim for legal professional privilege (the **objection notice**) — where on service of the objection notice the non-party disclosure notice was stayed —

where the plaintiff applies for orders lifting the stay and for production of the documents sought — whether the documents sought should be produced

PROCEDURE — CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS — DISCOVERY AND INTERROGATORIES — DISCOVERY AND INSPECTION OF DOCUMENTS — PRODUCTION AND INSPECTION OF DOCUMENTS — GENERAL MATTERS — GROUNDS FOR RESISTING PRODUCTION — PRIVILEGE — INSPECTION BY COURT — where the plaintiff served a notice of non-party disclosure (the **non-party disclosure notice**) on the defendant's legal representatives (the **law firm**) — where the defendant asserts a claim of legal professional privilege over the documents sought — where the defendant relies on an affidavit from a solicitor in the employ of the law firm in support of its claim to privilege — where the evidence adduced is inadequate to establish a claim to privilege over certain documents — whether the court should exercise its discretion to inspect the disputed documents

*Uniform Civil Procedure Rules 1999* (Qld), r 213, r 213(3), r 242, r 245, r 246, r 247

*AKS Investments Pty Ltd v Queensland Police Service; AKS Investments Pty Ltd v Queensland Police Service* [2018] QSC 4, cited

*Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 491; (2014) 312 ALR 403, cited

*Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547; [2009] FCAFC 32, cited

*AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; [2006] FCA 1234, cited

*Balabel & Another v Air India* [1988] Ch 317, cited

*Cantor v Audi Australia Ltd* [2016] FCA 1391, cited

*Commissioner of Taxation v Pratt Holdings Pty Ltd* [2005] FCA 1247; (2005) 225 ALR 266, cited

*Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67, cited

*Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404; [1996] HCA 34, cited

*Fletcher v Fortress Credit Corporation (Australia) II Pty Limited* [2014] QSC 303, cited

*Grant v Downs* (1976) 135 CLR 674, cited

*Hancock v Rinehart* [2016] NSWSC 12, considered

*Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305; (2016) 339 ALR 365, considered

*Kirby v Centro Properties Ltd (No 2)* [2012] FCA 60; (2012) 87 ACSR 229, cited

*Komlotex Pty Ltd v AMP Ltd* [2022] NSWSC 1525, cited

*Medibank Private Limited v McClure* [2026] FCAFC 38, cited  
*National Crime Authority v S* (1991) 29 FCR 203, cited  
*Neal v Neal* [2018] NSWSC 1356, considered  
*Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357; [2004] FCAFC 122, cited  
*Re Southland Coal Pty Ltd* (2006) 203 FLR 1; [2006] NSWSC 899, cited  
*Rinehart v Rinehart* [2016] NSWCA 58, cited  
*Rio Tinto Ltd v Commissioner of Taxation* [2006] FCA 1200; (2006) 235 ALR 127, cited  
*Santos Ltd v Fluor Australia Pty Ltd (No 3)* (2021) 9 QR 353; [2021] QSC 281, cited  
*Sea Swift Pty Ltd v Torres Strait Island Regional Council* (2023) 15 QR 371; [2023] QSC 160, cited  
*Securities and Investments Commission v Mercorella (No 3)* [2006] FCA 772; (2006) 58 ACSR 40, considered  
*Singtel Optus Pty Ltd v Robertson* [2024] FCAFC 58; (2024) 425 ALR 1, cited  
*Sparnon v Apand Pty Ltd* (1996) 68 FCR 322, cited

COUNSEL: C C Heyworth-Smith KC, with S P Herd, for the applicant/plaintiff  
P W Telford for the respondent and defendant

SOLICITORS: Travis Schultz & Partners for the plaintiff  
Gilchrist Connell for the respondent and defendant

## Introduction

- [1] The plaintiff applies for orders that documents sought in a notice of non-party disclosure issued to Gilchrist Connell, the solicitors acting for the defendant, The Creche and Kindergarten Association Limited (**C&K**) be produced. C&K objects to disclosure on the basis that the documents sought are subject to a claim for legal professional privilege.
- [2] To understand the controversy between the parties, some background is necessary.

## Background

- [3] C&K operates various kindergartens throughout Queensland, one of which was attended by the plaintiff's daughter. On 11 October 2021, while in the care of C&K, the plaintiff's daughter swallowed a button battery (the **incident**). The plaintiff has commenced these proceedings seeking damages for psychological injuries she alleges were sustained as a result of the incident.
- [4] By no later than 12 October 2021, the incident had come to the attention of Workplace Health and Safety Queensland (**WHSQ**). On that day, WHSQ requested information from C&K regarding the incident. The following day, the Department of Education (**Department**) made a similar request. Neither request is in evidence. The information sought, and the basis for the requests, are not apparent.

- [5] It is nevertheless uncontroversial that both WHSQ and the Department were investigating the incident. That process resulted in C&K providing a report dated 9 November 2021 (the **Report**), which had been requested by the Department and prepared by Gilchrist Connell.
- [6] The circumstances in which Gilchrist Connell were retained are as follows. On the morning of 13 October 2021, two days after the incident, two solicitors, then partners of Gilchrist Connell, Mr Flint and Mr Solomon, were contacted by C&K's insurance broker for the purpose, as the insurance broker put it, of "urgent legal advice regarding a WorkSafe investigation and potential PIPA claim". It is apparent that this contact occurred after WHSQ had sent their request for information to C&K but before the Department had done so. Later that morning, C&K's broker and the insurer had a conversation in which the insurer acknowledged notification of C&K's claim in relation to the incident.
- [7] This conversation was followed by an email, also sent on 13 October 2021, by the insurer to the broker. This email, which was copied to Mr Flint, confirmed receipt of the notification and included the following:

"Obviously it is early days and as such I have opened a notification only file ...

I appreciate the severity of the event and as such our mutual client wishes to proactively retain lawyers to protect privilege in anticipation of a claim being made. I have received confirmation from Gilchrist Connell that they are able to assist and provide every assistance bearing in mind the [insurance policies] at play. Please direct [C&K] to [Mr Flint].

I have spoken to [Mr Flint] and he would be pleased to assist [C&K] in any way possible."

- [8] A retainer was executed on 13 October 2021. It described the matter as the "Worksafe Investigation" and "Department of Education Investigation" and stated that Gilchrist Connell would provide legal services regarding those investigations and any potential liability claims. For reasons I will explain, it is apparent that the Department had requested that C&K undertake an investigation and provide a report. Gilchrist Connell was also retained to perform that work and did so.

### **The notice of non-party disclosure**

- [9] On 12 December 2025, the plaintiff issued Gilchrist Connell a notice of non-party disclosure under r 242 of the *Uniform Civil Procedure Rules 1999 (UCPR)* seeking production of the following documents (the **notice**):

"A copy of your file relating to your retainer to prepare an investigation report for the Department of Education on behalf of [C&K] including all correspondence with [C&K], letters of instructions [sic] and briefs from [C&K], all file notes, notes and records of interview with the persons interviewed, any recordings of the interviews with each of those persons, diary notes, memorandum [sic] and any other material relating to work undertaken to prepare the report which itself is dated Monday 11 October 2021."

- [10] Part 2, Division 3 of the UCPR regulates what occurs after a notice of non-party disclosure is served. The default position is r 242 which requires documents sought under a notice of non-party disclosure to be produced within 14 days after service. Under r 245 the respondent or a person who has been served with a notice has a right to object to the production of some or all of the documents sought. An objection is to be made within 7 days after the notice is served or, with the court’s leave, a later time. There are formal requirements for an objection. Rule 245(3) provides that an objection must be made in writing and clearly state the reasons for the objection. The rule contemplates that an objection may be made for various reasons including, but not limited to, “the lack of relevance to the proceeding”<sup>1</sup>, “the lack of particularity with which the documents are described”<sup>2</sup>, and “a claim of privilege”<sup>3</sup>.
- [11] Under r 246 the service of an objection operates as a stay of a notice of non-party disclosure. Rule 247 permits an applicant, within 7 days after service of an objection, to apply to the court for a decision about the objection. On such an application the court may make any order it considers appropriate including an order lifting the stay, varying the notice or setting it aside.

### **Objection to the notice**

- [12] On 23 February 2026, Gilchrist Connell provided a notice of objection. On 4 March 2026, the plaintiff filed the present application. That application, which is outside the 7-day period provided for under r 247(1), seeks an extension of time and orders that the stay be lifted and the documents identified in the notice be produced. C&K did not object to the extension of time.
- [13] The objection notice provided by Gilchrist Connell advances five reasons for the objection. A lack of relevance to the proceeding was not a reason provided. A claim that the documents “attract legal professional privilege” was.
- [14] The hearing focused on privilege. In written submissions provided on the day of the hearing, C&K also contended that the documents lacked relevance and that the plaintiff bore the onus of establishing relevance. That contention was not raised in the notice of objection and was advanced for the first time at the hearing. Applications concerning document production should be dealt with practically and cost-effectively.<sup>4</sup> In circumstances where the notice of objection did not raise lack of relevance as a ground, I decline to entertain the argument.

### **The documents for which privilege is claimed**

- [15] On the claim for privilege, C&K relies upon an affidavit of Mr Hauser who is now a principal of Gilchrist Connell. At the time the firm was retained by C&K, Mr Hauser was a solicitor at the firm who had what he describes as “day-to-day conduct of this file” under the supervision of Mr Flint. The reference to “this file” is ambiguous. It does however appear to be the case that the “file” captures all work that Gilchrist Connell performed for C&K after they were retained. The firm did not create or otherwise maintain separate files for different work they performed.

---

<sup>1</sup> UCPR r 245(4)(b).

<sup>2</sup> UCPR r 245(4)(c).

<sup>3</sup> UCPR r 245(4)(d).

<sup>4</sup> *Kirby v Centro Properties Ltd (No 2)* [2012] FCA 60; (2012) 87 ACSR 229 at [12].

- [16] Within the file there are various documents for which a claim to privilege is made. Mr Hauser has caused to be prepared an Excel spreadsheet which lists all documents and communications within the Gilchrist Connell file for C&K (the **spreadsheet**).
- [17] It will be necessary to make further observations about Mr Hauser's evidence below. At present, it is sufficient to record that there are a total of 411 documents, including 6 audio recordings, for which a claim to privilege is made (the **disputed documents**).
- [18] Elsewhere within the spreadsheet there are documents for which no claim to privilege is made that are identified as "available for disclosure". These documents have not previously been disclosed. I do not propose to deal with these documents. In circumstances where the spreadsheet does not otherwise identify any other reason for objecting to their production, C&K should produce the documents. To the extent that the assertion is made that they lack relevance, for the reasons indicated, I decline to entertain that contention.

### **Legal principles: privilege**

- [19] The parties did not dispute the principles generally applicable to the determination of whether a document or communication is subject to legal professional privilege. The relevant inquiry is whether at the time it was brought into existence the communication was for the dominant purpose of giving or obtaining legal advice or assistance or for the dominant purpose of use in existing or reasonably anticipated legal proceedings, including quasi-judicial and regulatory proceedings.<sup>5</sup>
- [20] Legal professional privilege is a fundamental common law right. It is for this reason that courts have traditionally avoided an overly narrow or technical approach to the identification of documents or communications that fall within its scope.
- [21] Consistent with this, the concept of legal advice is wide. It embraces professional advice as to what a party should prudently or sensibly do in the relevant legal context.<sup>6</sup> It extends to notes, memoranda or other documents made by officers or employees of the client that relate to information sought by the client's legal adviser to enable him or her to advise. This includes drafts, notes and other material brought into existence by the client for the purpose of communication to the lawyer, whether or not they are themselves actually communicated to the lawyer.<sup>7</sup> It also includes internal documents of the client or the lawyer which reproduce or otherwise reveal communications that are covered by privilege.<sup>8</sup>
- [22] Regardless of the nature of the document or type of communication, it remains the position that the requisite legal purpose must be established. To establish a claim of privilege, that purpose must be the dominant purpose.
- [23] The dominant purpose, which must be determined objectively having regard to the evidence, is one which is the ruling, prevailing, or most influential purpose.<sup>9</sup> It is one that predominates over other purposes, that is, one that is of greater importance than

---

<sup>5</sup> *Esso Australia Resources Ltd v Commissioner of Taxation* (1999) 201 CLR 49; [1999] HCA 67.

<sup>6</sup> *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30; [2006] FCA 1234 ("*AWB*") at [44].

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid* at [46].

<sup>9</sup> *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at 416.

any other.<sup>10</sup> The concept of a dominant purpose is not the same as the primary or substantial purpose.

- [24] Where two purposes are of equal weight, neither is dominant.<sup>11</sup> As such, privilege will not attach where obtaining legal advice was one purpose for creating a document but another purpose was equally important, or where the document would have been created irrespective of any intention to obtain legal advice or use it in anticipated litigation.<sup>12</sup> As Bromwich J observed in *Cantor v Audi Australia Ltd*:<sup>13</sup>

“If the facts as found on the evidence demonstrate objectively that subsequent use, for example by provision to a third party, was a purpose in creating it equal to or greater than the purpose of providing legal advice, that will be sufficient to displace the provision of the advice to the client as being dominant in the sense of being the ruling, prevailing, or most influential purpose. In that event, there is no privilege. But a later decision to use legal advice in that way, even if made immediately after communication and perhaps dependent on considering the contents of the advice or the conclusions reached in making that decision, will not displace the dominant purpose otherwise established. However, subsequent use may still be of considerable importance on the question of waiver, and the related question of continuing confidentiality, considered later in these reasons.”

- [25] The purpose for which a document is created is a question of fact. The onus lies on the party claiming privilege to establish the claim. In the ordinary course this is done by admissible evidence. The onus may however be discharged by evidence as to the circumstances and context in which the communication occurred or the document was brought into existence or by evidence as to the purposes of the person who made the communication.<sup>14</sup> It is also capable of being discharged by reference to the character of the documents or the nature of the communication.<sup>15</sup>
- [26] The intention of the person creating the document or who authorised or procured it is not conclusive of purpose.<sup>16</sup> The mere involvement of solicitors, even intimate involvement, does not determine the issue of privilege. As Wigney, Lee and Hespe JJ observed in *Medibank Private Limited v McClure*:<sup>17</sup>

“It is trite to observe that the task is evaluative and requires attention to all the surrounding circumstances, including contemporaneous communications and the practical role the documents were expected to perform. Further, a recurrent theme in the cases is that the involvement of solicitors, even close involvement, does not solely determine the issue. A document may be ‘channelled’ through solicitors, drafted under a retainer with a firm, and later used in the provision of legal advice, but nonetheless fail to attract privilege if objectively its predominant purpose was

<sup>10</sup> *Rio Tinto Ltd v Commissioner of Taxation* [2006] FCA 1200; (2006) 235 ALR 127 at [38].

<sup>11</sup> *Commissioner of Taxation v Pratt Holdings Pty Ltd* [2005] FCA 1247; (2005) 225 ALR 266 at [30].

<sup>12</sup> *Ibid.* See also *Sparron v Apand Pty Ltd* (1996) 68 FCR 322 at 328.

<sup>13</sup> [2016] FCA 1391 at [68].

<sup>14</sup> *Grant v Downs* (1976) 135 CLR 674 at 677.

<sup>15</sup> *AWB* at [44]; *Singtel Optus Pty Ltd v Robertson* [2024] FCAFC 58 (“*Singtel*”) at [26].

<sup>16</sup> *Singtel* at [26].

<sup>17</sup> [2026] FCAFC 38 at [26].

something else, or if the legal purpose did not prevail over competing substantial purposes.”

- [27] In applying the dominant purpose test, an appropriate starting point is to identify the intended use or uses that led to the document being created.<sup>18</sup> The relevant time for determining privilege is when the document came into existence.<sup>19</sup> Evidence identifying a document's purpose with the benefit of hindsight is of limited value.

### **Evidence relied upon to make a claim for privilege**

- [28] At a practical level, one issue which arises in this application is what evidence should ordinarily be adduced by a party seeking to object to a notice of non-party disclosure on grounds of privilege. The UCPR is silent on the issue.
- [29] In the context of a privilege dispute arising as part of the disclosure regime, r 213 requires the party claiming privilege to file and serve on the other party an affidavit stating the claim. That affidavit is subject to certain requirements. Rule 213(3) provides that it must be made by an individual “who knows the facts giving rise to the claim”.
- [30] In *Fang v Yao*<sup>20</sup>, Freeburn J considered that r 213(3) “has an impact on what would otherwise be the law, at least in Queensland.” That impact is that the rule imposes more onerous requirements on a claim for privilege.<sup>21</sup> The requirement is more onerous because the purpose of r 213(3) is to require the claim to privilege to be supported by an affidavit of “an individual who knows the facts giving rise to the claim”. This, in his Honour’s view, requires direct evidence from a participant in or author of the communications the subject of the claim for privilege.<sup>22</sup>
- [31] It was however accepted by Freeburn J that the rule could be dispensed with in appropriate circumstances. As to this, it is not difficult to envisage a situation where the rule will impose impractical burdens. One can readily see how a party may encounter difficulties marshalling evidence from those involved in the preparation of documents the subject of a claim for privilege. It can also be readily seen how r 213 is capable of unduly complicating and rendering unacceptably expensive the process of determining privilege issues.<sup>23</sup> These outcomes are inimical to the philosophy enshrined in UCPR r 5.
- [32] On one view it may be that a person can obtain knowledge of the facts giving rise to the claim by inspecting the relevant documents subject to the claim for privilege and, as part of that process, become aware of surrounding circumstances, including other communications not the subject of dispute which provide relevant context to the claim.<sup>24</sup> There is some merit in the argument that a person could gain knowledge of

<sup>18</sup> *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357; [2004] FCAFC 122 at [35]; *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547; [2009] FCAFC 32 at [45].

<sup>19</sup> See *Hancock v Rinehart* [2016] NSWSC 12 at [7]; *Santos Ltd v Fluor Australia Pty Ltd (No 3)* (2021) 9 QR 353; [2021] QSC 281 at [32].

<sup>20</sup> [2025] QSC 265 (“*Fang*”).

<sup>21</sup> *Ibid* at [24]-[25].

<sup>22</sup> *Ibid* at [29]-[30] and [33].

<sup>23</sup> See *Re Southland Coal Pty Ltd* (2006) 203 FLR 1; [2006] NSWSC 899 at [30].

<sup>24</sup> And, in doing so, become aware of the character or nature of a document for which a claim to privilege is in dispute in a manner and context in which a judge who merely inspects the document to determine

the facts giving rise to the claim, and satisfy r 213(3), without having been a party to the communication.

- [33] In order to gain such knowledge, that person could not simply limit their inquiries to an examination of the character or nature of the document for which privilege is claimed. Rather, it would require a proper examination of the circumstances in which the document came into existence. It is by this process that a person gains knowledge of the facts giving rise to the claim. To do so, the person making the affidavit in support of the claim to privilege would need to undertake an examination of the surrounding circumstances, including contemporaneous communications and the practical role the documents the subject of the claim were expected to perform. If this process is undertaken a person providing the affidavit could, in my view, obtain knowledge of the facts giving rise to the claim and satisfy r 213(3). In circumstances where the rule does not require a person to have direct knowledge of the facts giving rise to the claim, it is conceivable that the signatory of the affidavit could include statements based on information and belief.<sup>25</sup>
- [34] In any event, this is not the occasion to consider the issue as r 213(3) does not apply to objections made to notices of non-party disclosure.
- [35] The fact that there is no equivalent rule does not however obviate the need on the part of the person seeking to maintain a claim to privilege to adduce evidence in support of the claim. The party claiming privilege must still adduce evidence sufficient to establish the claim. As the plurality observed in *Grant v Downs*:<sup>26</sup>

“It is for the party claiming privilege to show that the documents for which the claim is made are privileged. He may succeed in achieving this objective by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual... It should not be forgotten that in many instances the character of the documents the subject of the claim will illuminate the purpose for which they were brought into existence.”<sup>27</sup>

- [36] What is required in terms of evidence will depend upon the circumstances, and each case will depend on its own facts. There may of course, as I have said, be circumstances from which privilege may be established without the need for detailed evidence. An obvious example where evidence is not required is where the nature of the document is such that it is self-evidently privileged. At all times however, it remains the position that the party claiming privilege must establish the facts that provide the basis for the claim.<sup>28</sup> In other words, the person claiming privilege is to

---

the claim will not have the benefit of: cf *Fletcher v Fortress Credit Corporation (Australia) II Pty Limited* [2014] QSC 303 at [40].

<sup>25</sup> UCPR r 430(2) permits an affidavit for use in an application that does not seek final relief to contain statements based on information and belief, provided the signatory states the sources of the information and the grounds for the belief.

<sup>26</sup> (1976) 135 CLR 674 at 689.

<sup>27</sup> This test remains good law. In *Fletcher v Fortress Credit Corporation (Australia) II Pty Ltd* [2014] QSC 303, McMurdo J cited this passage as reflective of the usual practice “outside the requirements of r 213”.

<sup>28</sup> *National Crime Authority v S* (1991) 29 FCR 203 at 211–12.

establish the facts from which the court is able to make an informed decision as to whether the claim is supportable. In assessing the claim, the court is, of course, entitled to draw inferences from other proved facts.<sup>29</sup>

- [37] In the context of a notice of non-party disclosure, in the absence of an equivalent to r 213(3), it must be correct that a solicitor who does not know the facts giving rise to the claim and was not a participant in the privileged communications is permitted to review the documents and then provide an affidavit deposing “to that solicitor’s conclusions as to the character and nature of each document as a result of that review.”<sup>30</sup> In practical terms, this task is capable of being undertaken by a person who does not have direct knowledge of the facts giving rise to the claim in the sense of being a participant.<sup>31</sup> Unless the nature of the documents makes it plain such that no evidence is required, in the ordinary course discharging the onus would require evidence from a solicitor who has in fact perused each of the documents for which a claim to privilege is made. It would also require the person undertaking the examination to provide evidence about the circumstances in which the document or communication was brought into existence.
- [38] The court retains the power to examine the documents for itself. In *Grant v Downs* it was suggested by Stephen, Mason and Murphy JJ that this power “has perhaps been exercised too sparingly in the past.”<sup>32</sup> One might speculate whether those remarks, made half a century ago, would be volunteered in the digital era, particularly with the prolific generation of electronic documents.
- [39] Nevertheless, more recent authorities, aligned with the digital era, accept that the power to inspect documents is wide and should not be unduly circumscribed.<sup>33</sup> While this proposition must be accepted, the power to inspect calls for the exercise of discretion. There are various matters which might inform whether the power is exercised. For example, where a claim to privilege over a vast amount of documents is devoid of supporting evidence there should be no expectation that the court will readily inspect the documents. As Mansfield J said in *Securities and Investments Commission v Mercorella (No 3)*:<sup>34</sup>
- “ ... It is not the function of the court to trawl through voluminous material without the party which claims privilege having adduced evidence in support of the claim.”
- [40] These observations are sound. To his Honour’s remarks may be added a situation where the evidence adduced to maintain the claim is inadequate or deficient. Where a party has failed to provide adequate evidence or explain why it cannot do so, the court should not be expected to assume the burden of determining whether a privilege claim is sound, particularly where large volumes of documents are involved.<sup>35</sup> To expect the court to examine voluminous documents is a disproportionate exercise and one which is not an efficient use of valuable court resources.

---

<sup>29</sup> *Hastie Group Ltd (in liq) v Moore* [2016] NSWCA 305; (2016) 339 ALR 365 at [33]-[34].

<sup>30</sup> *Fang* at [30].

<sup>31</sup> *Fang* at [32].

<sup>32</sup> (1976) 135 CLR 674 at 689.

<sup>33</sup> See *Rinehart v Rinehart* [2016] NSWCA 58 at [20].

<sup>34</sup> [2006] FCA 772; (2006) 58 ACSR 40 at [23].

<sup>35</sup> *Komlotex Pty Ltd v AMP Ltd* [2022] NSWSC 1525 at [10].

- [41] The power of inspection is not to be used as a substitute for evidence and it remains the responsibility of a party claiming privilege to provide adequate evidence for the claim to be entertained.<sup>36</sup> There may well be compelling reasons why a party claiming privilege has been unable to adduce adequate evidence. But in such a case, at a minimum a party should provide a sworn explanation as to why.

### **The evidence in the present case**

- [42] Mr Hauser’s affidavit was the only evidence C&K sought to rely upon to establish the claim to privilege. This affidavit deposes to the retainer C&K entered into with Gilchrist Connell. As Mr Hauser puts it, the agreed scope of services the firm was to provide C&K with was “legal services in regards to the Worksafe Investigation and Department of Education investigation and potential liability claims.”
- [43] In claiming privilege over the disputed documents, Mr Hauser’s evidence is that he has caused the spreadsheet to be prepared which, he says, “accurately contains all documents and communications within the Gilchrist Connell file” for C&K. The disputed documents are categorised within the spreadsheet as follows:

<b>CATEGORY</b>	<b>DESCRIPTION</b>
1	File Notes
2	Insured’s documents
3	Investigations/Statements
4	Audio – Interviews taken 18.10.2021
5	Photographs taken at site inspection 18.10.2021
6	Witness Statements
7	Correspondence
8	Client correspondence
9	Accounts and Admin
10	Emails

- [44] Within categories 8, 9 and 10 are groups of correspondence which contain compendious descriptions. The individual documents have not been identified within the schedule. Nor have they been individually identified in Mr Hauser’s affidavit.
- [45] Mr Hauser also deposes to some of the work Gilchrist Connell undertook. In his words:

“As part of our firm’s retainer to provide legal advice to the defendant, including in anticipation of potential liability claims:

- a. I attended [C&K’s] premises on 18 October 2021 to inspect the relevant spaces, as well as conduct interviews with several of [C&K’s]

<sup>36</sup> *Sea Swift Pty Ltd v Torres Strait Island Regional Council* (2023) 15 QR 371 at [55]-[56].

employees. Further interviews and investigations were conducted after this time;

- b. I personally took a series of photographs of [C&K's] premises;
- c. I personally undertook legal research and directed other employees of the firm to undertake legal research;
- d. I obtained copies of relevant documents; and
- e. I caused to be prepared for [C&K], a 48 page draft report marked 'Privileged – For the Purposes of Legal Advice' which contained the results of my investigations and legal advice to [C&K], which was provided in draft form under cover an email marked Privilege on 1 November 2021."

[46] The final version of the report referred to in the last paragraph was provided by Mr Hauser to C&K on 3 November 2021. This version is said to contain legal advice concerning liability and recommendations for future management of the matter in contemplation of the plaintiff's child's future claim. It is said by Mr Hauser that "the inspection and interviews undertaken on 18 October 2021 and subsequently, as well as the discussions between myself, Mr Flint, and [C&K], all informed the advice communicated in that report".

[47] Sometime after 3 November 2021, Mr Hauser was instructed to prepare the Report. Again, to adopt Mr Hauser's words, the Report was prepared "in response to the request of the Department". It was delivered to C&K on 9 November 2021. The Report does not contain the legal advice contained in the report of 3 November 2021. Mr Hauser's evidence is that he was also informed by Mr Flint that the firm was also instructed to provide a copy of the Report to WHSQ in response to its requests.

[48] Mr Hauser does not specifically identify by reference to the 10 categories which of the disputed documents he was involved in preparing. It may readily be inferred that the extract of his affidavit above broadly corresponds to certain categories identified in the spreadsheet. For example, the interviews conducted with C&K's employees, the taking of photographs and the preparation of reports which contained legal advice to C&K. Apart from this, Mr Hauser makes the following assertions:

"28. Since 13 October 2021 Gilchrist Connell has been engaged by [C&K], and subsequently [C&K's] insurer, to provide legal advice and services to both [C&K] and [its] insurer, which has included (but is not limited to) legal advice and strategy relating to; [sic]

- a. investigating the circumstances of 11 October 2021;
- b. the claim for personal injuries made by the plaintiff's daughter pursuant to the *Personal Injuries Proceeding Act 2002* (Qld);
- c. the claim for personal injuries made by the plaintiff; and

d. the investigations into the incident by the Department of Education and Office of Industrial Relations, being the subject of the plaintiff's notice and subsequent application.

29. In the premises set out in this affidavit, I say that the documents identified in [the spreadsheet] as attracting legal professional privilege, do so because they were prepared and brought into existence for the dominant purposes of providing legal advice to [C&K] and its insurer, including in connection with the proceedings now brought against [C&K].”

[49] Paragraphs 28(a) and (d) of Mr Hauser's affidavit do not, in my view, accurately reflect contemporaneous events. Gilchrist Connell was retained not only to advise C&K but also to conduct the investigation requested by the Department and prepare the resulting report. This assumes some importance for reasons I will shortly explain.

[50] There are otherwise some deficiencies in C&K's evidence. To begin with, it is not apparent how the spreadsheet was in fact prepared. There is no evidence as to what the process involved, or who was involved in it. Another deficiency is that while Mr Hauser identifies he has included in the spreadsheet “the bases for the claim” he does not in fact say he has reviewed each of the documents. A further deficiency is that the affidavit does not identify or explain by reference to individual documents why it is asserted that the document or communication was created for the requisite dominant purpose.

[51] On one view, what Mr Hauser has done is make a mere assertion to a claim for privilege without proving the facts that establish the claim is properly made. There are competing views as to whether this is appropriate in the circumstances. In *Hancock v Rinehart*, Brereton J observed:<sup>37</sup>

“To sustain a claim of privilege, the claimant must not merely assert it; but must prove the facts that establish that it is properly made. Thus a mere sworn assertion that the documents are privileged does not suffice, because it is an inadmissible assertion of law; the claimant must set out the facts from which the court can see that the assertion is rightly made, or in other words ‘expose ... facts from which the [court] would have been able to make an informed decision as to whether the claim was supportable’. The evidence must reveal the relevant characteristics of each document in respect of which privilege is claimed, and must do so by admissible direct evidence, not hearsay.”

[52] A different approach was adopted in *Neal v Neal*<sup>38</sup>. There a subpoena was directed towards a solicitors' file which sought “a copy of the file held by [the firm] in relation to the family law proceedings between [the plaintiff] and the solicitors acting for [another party].” Production was objected to. The objection was accompanied by an affidavit sworn by a solicitor who had in fact reviewed the documents, and who on this basis made the assertion that production would “reveal communications between the Plaintiff and his family lawyers ... made for the dominant purpose of giving or

<sup>37</sup> [2016] NSWSC 12 at [7]. See also *Santos Ltd v Fluor Australia Pty Ltd (No 3)* (2021) 9 QR 353 at [32].

<sup>38</sup> *Neal v Neal* [2018] NSWSC 1356.

obtaining legal advice and the provision of legal services.” In these circumstances, Hallen J upheld the claim for privilege offering the following reasoning:<sup>39</sup>

“However, in my view, bearing in mind the generality of the documents identified in the subpoena, and the fact that the privilege relied upon protects confidential communications between a lawyer and a client made for the dominant purpose of the lawyer providing legal advice or professional legal services to the client, or the communications are for use in (then) current litigation, the evidence given by [the solicitor] in regard to the claim for legal professional privilege would, as a matter of common sense, be more likely than not. It is an inference that can, and should, be drawn.”

- [53] This is also consistent with what was said by Beazley P and Macfarlan JA in *Hastie Group Ltd v Moore*:<sup>40</sup>

“[33] We acknowledge that there are statements in the first instance authorities, and in particular, in *Hancock*, which might be thought to support that submission. However, as is accepted, every case depends on its own facts and, as is stated by the plurality in *Grant*, there may be circumstances from which privilege may be established without the need for evidence of the detail that the respondents contend is required.

[34] We are also of the opinion that the Court is not confined to the express statements made in support of the claim for privilege. The Court is entitled to draw inferences from other proved facts. That is of particular relevance in the present case.”

- [54] In the present matter, in some respects, C&K’s evidence was sufficient to discharge the onus. For example, Mr Hauser’s evidence concerning reports containing legal advice was, in my view, enough to establish privilege in those documents, subject only to the fact that it is not clear how many reports contain privileged material, a matter which I shall return to.<sup>41</sup> In other respects, however, the evidence was inadequate.
- [55] The significance of a failure by a party asserting privilege to put adequate evidence before the court to determine the issue is, as I have said, relevant to whether the court should exercise its discretion to examine documents to resolve the question of privilege.
- [56] While in this case the discretion to inspect was exercised, it should not be assumed, for the reasons I have identified, that a party asserting privilege should rest on the expectation that a court will too readily inspect documents.

---

<sup>39</sup> *Neal v Neal* [2018] NSWSC 1356 at [15].

<sup>40</sup> (2016) 339 ALR 635 at [33]-[34].

<sup>41</sup> See paragraph 68 below.

### **Inspection of disputed documents: determination of purpose**

- [57] In the present case, inspection had a practical consequence. The review of the disputed documents raised further issues with a further hearing and submissions becoming necessary.
- [58] What emerged from the inspection of the documents, is that which I have mentioned above: the Department in fact requested an investigation and report from C&K and Gilchrist Connell were tasked with undertaking the investigation. That is not to suggest that the firm did not undertake other work for C&K as contemplated by the retainer; the firm did. That is clear from inspection of the disputed documents and from Mr Hauser's affidavit.
- [59] However, in terms of the investigation, the actual position was that the Department requested the investigation and report. Gilchrist Connell performed this work. In every sense, they took control of the investigation and undertook it instead of the Department or WHSQ doing so. This process, as undertaken by Gilchrist Connell, contemplated the site visit to C&K's kindergarten on 18 October 2021 and interviewing C&K's personnel.
- [60] This is significant. The investigation conducted by Gilchrist Connell was undertaken in response to the Department's request for an investigation and report.
- [61] In the circumstances, upon my examination of the documents and assessment of the evidence relied upon to establish privilege, I am not satisfied that the following documents were brought into existence for the dominant purpose of giving or obtaining legal advice or assistance or for use in reasonably anticipated legal proceedings.

<b>CATEGORY</b>	<b>DESCRIPTION</b>
4	Audio – Interviews taken 18.10.2021: documents 1, 2, 3, 4, 5 and 6
5	Photographs taken at site inspection 18.10.2021: documents 1 to 58 (inclusive)
6	Witness Statements: documents 1 to 12 (inclusive)
10	Email from Ellen Brown to Graham Olde (with attachment) sent 26 October 2021 Email from Ellen Brown to Tania Tidy (with attachment) sent 26 October 2021 Email from Ellen Brown to Jenny Boal (with attachment) sent 26 October 2021 Email from Ellen Brown to Graham Olde (with attachment) sent 26 October 2021 Email from Ellen Brown to Ruth Law (with attachment) sent 27 October 2021 Email from Ellen Brown to Rachel Sayer (with attachment) sent 28 October 2021

	<p>Email from Julian Boal (Jenny) to Ellen Brown (with attachment) sent 28 October 2021</p> <p>Email from Ruth Law to Ellen Brown sent 27 October 2021</p> <p>Email from Jenny Boal to Ellen Brown (with attachment from Graham Olde) sent 1 November 2021</p> <p>Email from Ellen Brown to Jenny Boal (with attachment) sent 1 November 2021</p> <p>Email from Ellen Brown to Danielle Wilson (with attachment) sent on 12 November 2021</p> <p>Email from Rachel Sayer to Ellen Brown (with attachment) sent on 16 November 2021</p>
--	--

- [62] Within these documents are draft witness statements and two statements which C&K said were prepared after the Report was finalised, being documents 11 and 12 within category 6. It is necessary to make two observations about these documents.
- [63] First, while it may be accepted that draft witness statements are capable of attracting privilege, it remains the position that they must still be prepared for the requisite dominant purpose. While the draft statements may have been used for a multitude of purposes, the particular use to which the legal work from which the drafts were created is put has a bearing on whether or not legal professional privilege attaches.<sup>42</sup> In this case, I am not satisfied that these documents were made for the dominant purpose of the provision of legal services or advice or for use in reasonably anticipated legal proceedings. In these circumstances, the claim of privilege over these documents fails.
- [64] Second, for the statements prepared after the Report was finalised, C&K placed some reliance on the fact that documents created after the Report was finalised could not be realistically sought under the notice. The proposition that they were provided after the report was finalised is correct. It is however incorrect to assert that they were not prepared earlier and as part of the investigation process. In my view, they were. In the circumstances, consistent with what I have already found, I am not satisfied these two statements are privileged documents.
- [65] The fact that I have found that C&K has not demonstrated the requisite purpose for the documents I have identified, does not mean C&K is incapable of maintaining a claim of privilege in respect of other disputed documents, including documents connected with the investigation. Plainly enough, the concept of legal advice includes advice as to what C&K should prudently and sensibly do in connection with the investigation.<sup>43</sup> There are many examples of documents which meet this description. There are also multiple communications containing legal advice and communications which are properly characterised as information passing by the firm or C&K aimed at keeping both the firm and C&K informed so that advice may be sought and given as required.<sup>44</sup>

<sup>42</sup> *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 491; (2014) 312 ALR 403 at [38] and [39].

<sup>43</sup> See *AWB* at [57].

<sup>44</sup> *Balabel & Another v Air India* [1988] Ch 317 at 330.

- [66] As for the remaining documents in dispute, having inspected each of the documents I am satisfied that all but the following were created for the dominant purpose of obtaining legal advice or for use in legal proceedings:

CATEGORY	DESCRIPTION
7	Email from Mitchell Hauser to David Flint sent 5 November 2021 at 2.57 pm C&K Maleny Community Kindergarten Report regarding incident on 11 October 2021 Email from Danielle Wilson to Ellen Brown and Mitchell Hauser sent 11 November 2021 at 3.46 pm Email from Martin Forster to Mitchell Hauser sent 20 October 2021 at 12.03 pm
10	Email from Danielle Wilson to Mitchell Hauser sent 22 October 2021 at 6.09 pm

- [67] With one exception, consistent with the approach adopted in other cases,<sup>45</sup> I shall not attempt to give reasons for my conclusion beyond the fact that, having regard to the nature and character of the relevant documents and the apparent context from which they appear to have been created, either read alone or in context with other documents in my view the requisite purpose is demonstrated.
- [68] The exception is the four reports which fall within category 3. The existence of reports recording advice are, as I have mentioned, specifically referred to in Mr Hauser's affidavit, albeit it is not immediately apparent on the face of the affidavit that there are, as the schedule discloses, four documents which meet this description. In any event, independent of this, upon my inspection each of these documents contains matters which fall within the concept of legal advice, being what a party should prudently or sensibly do in the relevant legal context.

### Conclusion

- [69] The result is that C&K has established the requisite purpose of some of the disputed documents and failed to do so for various other documents.
- [70] In the circumstances, I propose to make orders that the parties are to agree a form of order reflecting these reasons and provide it to my Associate by 4.00 pm on 18 June 2026. If orders cannot be agreed the parties are to provide a draft order with their respective positions and submissions, limited to two pages, by the same deadline.
- [71] I will hear the parties on costs.

---

<sup>45</sup> *Fletcher v Fortress Credit Corporation (Australia) II Pty Ltd* [2014] QSC 303 at [50]; *AKS Investments Pty Ltd v Queensland Police Service*; *AKS Investments Pty Ltd v Queensland Police Service* [2018] QSC 4 at [127].