

Players v Clone: Legal professional privilege & prosecuting claims for legal costs

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Most practitioners would – or should – be well aware of the practical difficulties now encountered as a result of the Full Court decision in *Players Pty Ltd (in Liquidation) (Receivers appointed) & ors v Clone Pty Ltd* (2013) 115 SASR 547. In summary, the problem is how does a practitioner (or their client) practically maintain a claim for legal professional privilege over the solicitor's file when rule 271(3) mandates the opposing (paying party's) solicitor the opportunity to inspect the documents that are being relied upon in support of a claim for inter parties costs at the Short Form stage.

In the absence of spending considerable time, and thus expense, segregating relevant documents (and if need be redacting), the usual approach has simply been to allow blanket access to a file. In light of *Players*, such a practice would waive privilege.

This paper aims to summarise the current legal position both in South Australia, and elsewhere, and offer possible practical solutions.

PLAYERS V CLONE AND SCR/DCR 271(3)

Sub-rule 271(3) was introduced as part of the reforms aimed at reducing the instances of costs claims proceeding to full Adjudications before judicial officers of the Supreme and District Courts in circumstances where it was felt an early opportunity to exchange details of costs claimed *and supporting material* would otherwise resolve the claims.

Sub-rule 271(3) states:

"The claimant must, at the request of the respondent, produce for inspection by the respondent all documents on which the claimant proposes to rely if the claim proceeds to adjudication."

Procedurally, this means that after the claiming party has served its Short Form

Bill, *within the time the respondent has to prepare its response to the Short Form*, on request the claimant's solicitor *must* provide the respondent with an opportunity to inspect all documentation supporting the costs claim. Basically, the claimant solicitor's file.

This raises a matter of professional conduct. Legal professional privilege belongs to the client, not the practitioner. Before allowing access to potentially privileged material, the practitioner should obtain the client's permission to waive privilege (if any).

In *Players* an unusual series of circumstances highlighted the awkward relationship between this early inspection rule and legal professional privilege. The original litigation related to the lease of a commercial premises and an allegation the lease was crucially amended by handwriting. The original lease could not be located and the parties proceeded on photocopies of the document. Judgment was entered for Clone and Clone's solicitors proceeded to follow the Short Form Bill process under rule 271. During the inspection by the solicitors for *Players* under sub-rule 271(3), further copies of the lease, that were not disclosed during the proceeding, were uncovered.¹ The solicitors for *Players* then applied to set aside the earlier judgment in light of their discovery. Clone argued the documents were privileged and privilege was not waived as part of the inspection process under sub-rule 271(3). The Full Court held that by allowing the inspection, there had been a waiver of privilege. The High Court rejected special leave to appeal.²

As a result of the *Players* decision, there appears to be a growing practice of practitioners refusing a respondent's solicitor access to supporting documents under sub-rule 271(3) on the grounds of privilege.

LEGAL PROFESSIONAL PRIVILEGE AND TAXATION OF COSTS

The need to maintain privilege when taxing costs is not a new concept. Indeed, it has been an issue for as long claims for costs have been brought before a court. The High Court confirmed the basic position in *Giannarelli v Wraith* (1991) 171 CLR 592: at a taxation of costs if you want to recover costs for any particular work done, you must produce the documentation supporting that item. If you wish to maintain privilege over that documentation at the taxation, you will not recover that item as costs, unless the work done can be proven another way. Other proof could be: other documents which are not privileged, or the non-redacted parts of privilege documents are sufficient to nevertheless prove the item.

This position continues to be upheld, as can be seen in more recent decisions such as: *Esso v BHP Billiton* [2007] VSCA 224; and *Newtronics v Girogio* [2011] VSC 594.

In the context of a taxation of costs, privilege can be a vital consideration where a court has ordered interlocutory costs be taxed forthwith (before the principal proceeding is concluded) or the subject proceeding is but one of a suite of actions.

The added complication for South Australian practitioners is the requirement for early release of supporting documentation at the Short Form stage under rule 271(3). The need to address privilege arises at a much earlier stage than at the taxing court itself.

SHORT & LONG FORM BILLS

In passing, it should be noted that the Short Form and Long Form Bills that claim any item over which privilege is

to be maintained does not waive privilege in themselves merely by virtue of describing the work done in the item: see *Newtronic*, *ibid.* and *Carey v Korda* (2012) 45 WAR 181. It is production of the supporting documents behind the bills of costs that waives privilege.

LOOKING FOR A LONG TERM SOLUTION

In the absence of the Full Court (or High Court) revisiting the issues raised by sub-rule 271(3) in the foreseeable future, practitioners acting for a party entitled to claim costs must proceed with caution where privileged material is involved.

In all likelihood, the real solution lies in reform to the Short Form process, and in particular sub-rule 271(3). The writer is of the opinion the inspection sub-rule could simply be repealed without unduly impeding the efficacy of the Short Form process. This would leave in place the traditional *Giannarelli* privilege process that could apply at the adjudication hearing stage.

Another perhaps less drastic alternative could be that rather than a right to inspect as is currently conferred by rule 271(3), the timing of provision of access to documents could be altered to coincide with the compulsory early conferencing procedure under Supplementary Rule 225. Prior to the conference taking place, the paying party could be required to provide notice of a list of particular items that it requires to sight, and for those items only the claiming party can consider whether to produce them, claim privilege, or go to the expense of redaction. The rules could be amended to expressly allow that the cost of any such process, including preparation, redaction or the like, form part of the cost of the adjudication. B

(Endnotes)

- 1 The costs of these "additional" leases were claimed as part of Clone's Short Form Bill.
- 2 *Clone Pty Ltd v. Players Pty Ltd (in Liquidation)* (Receiver appointed) & ors. [2013] HCA Trans 216

Challenging cancer



Mother & daughter team up for a touching tribute

For the past four years, KheShan Gronow and her mother, Heather Walker, have teamed up to make a real difference in the fight against cancer.

On Australia Day 2010, KheShan lost her father to pancreatic cancer, and since that time she has participated in Cancer Council's Relay For Life in memory of her dad.

Relays are an amazing sight of colour, excitement and passion as thousands of people, at events around the State, participate by keeping their team's baton, and symbol of hope, moving around the track for 19 hours.

By taking part, Relay participants are celebrating cancer survivorship, remembering those they have lost to the disease and bringing everyone together to fight-back against cancer.

KheShan, who has been on the Adelaide Central event organising committee for the past two years, said that there were many things to love about being involved in the event.

"I love the passion behind every step that everyone takes," KheShan said.

KheShan said that it was also special to share the experience with her mother.

"Mum and I have had so much fun together at relays. We share the same philosophy about wanting to do what we can to fight cancer, so it was a no brainer that we join forces for Relay For Life.

"We have shared many special moments during Relay's over the last four years and we always walk the lap together after the Candlelight Ceremony, usually having a good cry.

"A highlight was when I spoke at the Candlelight Ceremony at the Adelaide Central Relay last year, about my family's cancer journey, in particular my dad."

Cancer Council's Relay For Life events are held in 21 locations around the state. For more information about participating visit www.relayforlife.org.au.

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The LawCare Counselling Service is for members of the profession or members of their immediate family whose lives may be adversely affected by personal or professional problems.

If you have a problem, speak to the LawCare counsellor Dr Jill before it overwhelms you. Dr Jill is a medical practitioner highly qualified to treat social and psychological problems.

The Law Society will pay the first \$250 per annum of any out-of-pocket expenses incurred when using Dr Jill's professional services.

All information divulged to the LawCare counsellor is totally confidential. Participation by the legal practitioner or family member is voluntary.

To contact Dr Jill 08 8110 5279
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LITIGATION ASSISTANCE FUND LAF

The Litigation Assistance Fund (LAF) is a non-profit charitable trust for which the Law Society acts as trustee. Since 1992 it has provided funding assistance to approximately 1,500 civil claimants.

LAF receives applications for funding assistance from solicitors on behalf of civil claimants seeking compensation/damages who are unable to meet the fees and/or disbursements of prosecuting their claim. The applications are subjected to a means test and a merits test. Two different forms of funding exist – Disbursements Only Funding (DOF) and Full Funding.

LAF funds itself by receiving a relatively small portion of the monetary proceeds (usually damages) achieved by the claimants whom it assists. Claimants who received DOF funding repay the amount received, plus an uplift of 100% on that amount. Claimants who received Full Funding repay the amount received, plus 15% of their damages. This ensures LAF's ability to continue to provide assistance to claimants.

For further information, please visit the Law Society's website or contact Annie MacRae on 8229 0263.