FEDERAL COURT OF AUSTRALIA

Equititrust Ltd (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) v Equititrust Ltd (In Liq) (Receiver Appointed) (Receivers and Managers Appointed); In the Matter of Equititrust Ltd (In Liq) (Receiver Appointed) (Receivers and Managers Appointed) (No 3) [2016] FCA 738

File number:	NSD 2028 of 2013
Judge:	**MARKOVIC J**
Date of judgment:	23 June 2016
Catchwords:	**PRIVILEGE** – claim of legal professional privilege by director in respect of legal advice to company – whether claim of joint privilege available – whether claim of common interest privilege available
Cases cited:	*Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405 *Archer Capital 4A Pty Ltd as Trustee for the Archer Capital Trust 4A v Sage Group plc (No 3)* [2013] FCA 1160 *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd* [2013] FCA 998 *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223 *Farrow Mortgage Services Pty Ltd (in liquidation) v Webb* (1996) 39 NSWLR 601 *Media Ocean Ltd v Optus Mobile Pty Ltd (No 10)* [2010] FCA 1348 *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418 *Sheahan and Lock (Liquidators); In the Matter of Binqld Finances Pty Ltd (In Liq)* (2015) 107 ACSR 163 *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 967
Date of hearing:	Heard on the papers
Registry:	New South Wales

Division:	General Division
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Category:	Catchwords
Number of paragraphs:	30
Counsel for the Second Respondent:	Paul McQuade QC, James Green
Solicitor for the Second Respondent:	James Conomos Lawyers
Counsel for the Fifth and Sixth Respondents:	Mr JA Arnott
Solicitor for the Fifth and Sixth Respondents:	Allens

ORDERS

NSD 2028 of 2013

BETWEEN:	**EQUITITRUST LTD (IN LIQUIDATION) (RECEIVER APPOINTED) (RECEIVERS & MANAGERS APPOINTED) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE EQUITITRUST INCOME FUND ACN 061 383 944** Applicant
AND:	**EQUITITRUST LTD (IN LIQUIDATION) (RECEIVER APPOINTED) (RECEIVERS & MANAGERS APPOINTED) IN ITS OWN CAPACITY ACN 061 383 944** First Respondent
	MARK MCIVOR Second Respondent
	WAYNE MCIVOR (and others named in the Schedule) Third Respondent
JUDGE:	**MARKOVIC J**
DATE OF ORDER:	**23 JUNE 2016**

THE COURT DECLARES THAT:

1. The communications in the documents at:

(a) tabs 31 (being documents no. 80, 81 and 82) (Document ID: ETL.007.001.00312264; ETL.007.001.00312265; ETL.007.001.00312266), 234 (being document no. 481) (Document ID: ETL.007.001.00442952), 248 (being documents no. 501, 502 and 503) (Document ID: 20160716_mccullough_00002728; 20160716_mccullough_00002729; 20160716_mccullough_00002730), and 249 (being documents no. 504, 505 and 506) (Document ID: ETL.007.001.00130741; ETL.007.001.00130742; ETL.007.001.00130743) in annexure JNC-2 to the affidavit of James Nicholas Conomos sworn 8 February 2016 (**Schedule 1**); and

(b) tab 47 (being document no. 114) (Document ID: 20160716_mccullough_00002684) in annexure JNC-3 to the affidavit of James Nicolas Conomos sworn 8 February 2016 (**Schedule 2**)

are protected by legal professional privilege to the extent that such a claim is made over those documents by the second respondent (**the Privileged Documents**).

THE COURT ORDERS THAT:

2. The second respondent may uplift the Privileged Documents from the Court.

3. Within 7 days of the date of these orders the second respondent is to provide to the Court redacted copies of the Privileged Documents at:

(a) tab 234 (being document no. 481) (Document ID: ETL.007.001.00442952);

(b) tab 248 (being documents no. 501, 502 and 503) (Document ID: 20160716_mccullough_00002728; 20160716_mccullough_00002729; 20160716_mccullough_00002730); and

(c) tab 249 (being documents no. 504, 505 and 506) (Document ID: ETL.007.001.00130741; ETL.007.001.00130742; ETL.007.001.00130743),

in Schedule 1 which mask out those parts of those documents which are subject to a claim for legal professional privilege by the second respondent as set out in Schedule 1 and which claims have been upheld by the Court.

4. The fifth and sixth respondents may inspect and take copies of any documents in Schedules 1 and 2 in relation to which the second respondent's claim for privilege has been rejected including of the redacted form of the documents at tabs number 234 (being document no. 481) (Document ID: ETL.007.001.00442952), 248 (being documents no. 501, 502 and 503) (Document ID: 20160716_mccullough_00002728; 20160716_mccullough_00002729; 20160716_mccullough_00002730) and 249 (being documents no. 504, 505 and 506) (Document ID: ETL.007.001.00130741; ETL.007.001.00130742; ETL.007.001.00130743) in Schedule 1 and must confirm in writing to the second respondent that they have done so.

5. The second respondent to pay the fifth and sixth respondents' costs of the interlocutory application filed 5 January 2016 and their costs relating to the determination of the second respondent's privilege claim.

6. The interlocutory application filed 5 January 2016 be otherwise dismissed.

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

REASONS FOR JUDGMENT

MARKOVIC J:

1 In these proceedings an issue has arisen in relation to the status of 625 documents which were among a range of documents produced by the applicant (**Equititrust**). The principal issue for determination is whether the second respondent (**Mr McIvor**), who is a former director of Equititrust, has a claim for legal professional privilege in those documents.

2 The background to the application can be shortly stated. There had been a request to Equititrust to produce legal advice given to it from time to time by various lawyers, in particular McCullough Robertson. The director respondents took the position that any privilege in those advices was a joint privilege. On 12 August 2015 the solicitors for Equititrust informed the parties that Equititrust waived its legal professional privilege in a number of legal advices provided to it by McCullough Robertson. As a result, arrangements were put in place so that the director respondents had first access to those documents and could, if they wished, assert a claim for privilege in the documents prior to access being given to the balance of the respondents. On 21 and 24 August 2015 Equititrust produced to the director respondents 940 legal advices (**the Documents**). Mr McIvor maintains a claim for legal professional privilege over 625 of those documents identified in two schedules annexed to a letter from his solicitors to the solicitors for the fifth and sixth respondents, KPMG and Mr Paul Steer, a member of KPMG, (**the KPMG Parties**) dated 17 November 2015 and also annexed to the affidavit of James Nicholas Conomos sworn 8 February 2016.

3 The two schedules divide the documents between those over which Mr McIvor maintains a claim for legal professional privilege and which he says are relevant to the proceedings (**Schedule 1**) and those over which Mr McIvor maintains a claim for legal professional privilege and which he says are not relevant to the proceedings (**Schedule 2**).

4 Following correspondence between the parties, the KPMG Parties issued a notice to produce to Equititrust dated 10 December 2015 for production of the Documents (**the Notice to Produce**). Equititrust has produced the Documents to the Court.

5 On 5 January 2016 Mr McIvor filed an interlocutory application seeking an order, among others, that his claim for legal professional privilege over some of the Documents be determined by a registrar of the Court. Those Documents over which Mr McIvor asserts his

claim for legal professional privilege are the 625 documents listed in Schedule 1 and Schedule 2 (**the Disputed Documents**).

6 The determination of whether Mr McIvor has a valid claim for legal professional privilege over the Disputed Documents has been referred to me for determination. The parties in dispute in respect of the issue: Mr McIvor, on the one hand, and the KPMG Parties, on the other, have agreed that Mr McIvor's claims for legal professional privilege over the Disputed Documents can be determined on the papers. Evidence and submissions have been filed by the parties in support of their respective positions.

7 I have determined that a claim for legal professional privilege can be maintained by Mr McIvor over eleven of the Disputed Documents. They are the documents at tabs 31 (being documents no. 80, 81 and 82), 234 (being document no. 481), 248 (being documents no. 501, 502 and 503) and 249 (being documents no. 504, 505 and 506) in Schedule 1 and the document at tab 47 (being document no. 114) in Schedule 2 on the basis that Mr McIvor has a valid claim for joint or common interest privilege in those documents. I note that the claim made by Mr McIvor in relation to the documents at tabs 234, 248 and 249 in Schedule 1 and that I have upheld is a partial claim made over parts of those documents.

8 In my opinion Mr McIvor's claim for legal professional cannot be maintained over the balance of the Disputed Documents either on the basis of a claim for joint privilege or on the basis of a claim for common interest privilege.

9 In coming to my decision I applied the principles summarised below, considered the parties' submissions and the evidence relied on by Mr McIvor, also referred to below, and examined the Disputed Documents.

RELEVANT PRINCIPLES

10 The parties accept that Mr McIvor's claim for legal professional privilege is governed by common law principles. Mr McIvor asserts either a joint privilege with Equititrust or, in the alternative, a common interest privilege with Equititrust over the Disputed Documents.

Legal professional privilege

11 Legal professional privilege protects confidential communications between a legal adviser and client from disclosure. The public policy behind the privilege is to promote candour. In *AWB Ltd v Cole (No 5)* (2006) 155 FCR 30 at [44] Young J set out a summary of

general principles, in the context of a claim for legal professional privilege in relation to communications recording the giving or receiving of legal advice between a lawyer and client, as follows:

(1) The party claiming privilege carries the onus of proving that the communication was undertaken, or the document was brought into existence, for the dominant purpose of giving or obtaining legal advice. The onus might be discharged by evidence as to the circumstances and context in which the communications occurred or the documents were brought into existence, or by evidence as to the purposes of the person who made the communication, or authored the document, or procured its creation. It might also be discharged by reference to the nature of the documents, supported by argument or submissions.

(2) The purpose for which a document is brought into existence is a question of fact that must be determined objectively. Evidence of the intention of the document's maker, or of the person who authorised or procured it, is not necessarily conclusive. It may be necessary to examine the evidence concerning the purpose of other persons involved in the hierarchy of decision-making or consultation that led to the creation of the document and its subsequent communication.

(3) The existence of legal professional privilege is not established merely by the use of verbal formula. Nor is a claim of privilege established by mere assertion that privilege applies to particular communications or that communications are undertaken for the purpose of obtaining or giving "legal advice". If assertions of that kind are received in evidence in support of the privilege claim, their conclusionary nature can leave unclear what advice was really being sought. There will be cases in which a claim of privilege will not be sustainable in the absence of evidence identifying the circumstances in which the relevant communication took place and the topics to which the instructions or advice were directed.

(4) Where communications take place between a client and his or her independent legal advisers, or between a client's in-house lawyers and those legal advisers, it may be appropriate to assume that legitimate legal advice was being sought, absent any contrary indications. In *Kennedy v Wallace*, Black CJ and Emmett J inclined to the view that in the ordinary case of a client consulting a lawyer about a legal problem in uncontroversial circumstances, proof of those facts alone will provide a sufficient basis for a conclusion that legitimate legal advice is being sought or given.

(5) A "dominant purpose" is one that predominates over other purposes; it is the prevailing or paramount purpose.

(6) An appropriate starting point when applying the dominant purpose test is to ask what was the intended use or uses of the document which accounted for it being brought into existence.

(7) The concept of legal advice is fairly wide. It extends to professional advice as to what a party should prudently or sensibly do in the relevant legal context; but it does not extend to advice that is purely commercial or of a public relations character.

(8) Legal professional privilege protects the disclosure of documents that record

> legal work carried out by the lawyer for the benefit of the client, such as research memoranda, collations and summaries of documents, chronologies and the like, whether or not they are actually provided to the client.
>
> (9) Subject to meeting the dominant purpose test, legal professional privilege 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. The privilege extends to 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.
>
> (10) Legal professional privilege is capable of attaching to communications between a salaried legal adviser and his or her employer, provided that the legal adviser is consulted in a professional capacity in relation to a professional matter and the communications are made in confidence and arise from the relationship of lawyer and client. Some cases have added a requirement that the lawyer who provided the advice must be admitted to practice. However, in *Commonwealth v Vance* (2005) 158 ACTR 47, the Full Court (Gray, Connolly and Tamberlin JJ) did not regard the possession of a current practising certificate as an essential precondition to the availability of legal professional privilege: at [23]-[35]. ...
>
> (11) Legal professional privilege protects communications rather than documents, as the test for privilege is anchored to the purpose for which the document was brought into existence. Consequently, legal professional privilege can attach to copies of non-privileged documents if the purpose of bringing the copy into existence satisfies the dominant purpose test. …
>
> (12) The Court has power to examine documents over which legal professional privilege is claimed. Where there is a disputed claim, the High Court has said that the court should not be hesitant to exercise such a power. If the power is exercised, the court will need to recognise that it does not have the benefit of submissions or evidence that might place the document in its proper context. The essential purpose of such an inspection is to determine whether, on its face, the nature and content of the document supports the claim for legal professional privilege.
>
> (citations omitted)

Joint privilege

12 In *Farrow Mortgage Services Pty Ltd (in liquidation) v Webb* (1996) 39 NSWLR 601 (***Farrow***) at 608 Sheller JA (with whom Waddell AJA agreed) referred to the principle of shared or similar interest privilege in the following terms:

> Two or more persons may join in communicating with a legal adviser for the purpose of retaining his or her services or obtaining his or her advice. The privilege which protects these communications from disclosure belongs to all the persons who joined in seeking the service or obtaining the advice. The privilege is a joint privilege. So is it also if one of a group of persons in a formal legal relationship communicates with a legal adviser about a matter in which the members of the group share an interest. Communications by one partner about the affairs of the partnership or a trustee about the affairs of the trust are examples. Implicit in the relationship is the duty or obligation to disclose to other parties thereto the content of the communication.

> Accordingly no privilege attaches to such communications as against others who, with the client, share an interest in the subject matter of communication. But the parties together are entitled to maintain the privilege "against the rest of the world": Phipson, par 20-28 and par 20-29. Logically the joint nature of the privilege means that all to whom it belongs must concur in waiving it. Theirs is one inseverable right. In pars 20-29 the learned editors of *Phipson* say that in the case of joint interest, it is sufficient, as against third persons, if only one of the interested parties claims the privilege, though all must concur in waiving it. …

13 The principle as set out in *Farrow* has been cited with approval in this Court: see *Sheahan and Lock (Liquidators); In the Matter of Binqld Finances Pty Ltd (In Liq)* (2015) 107 ACSR 163 (***Binqld Finances***) (Foster J) at [9]; *Archer Capital 4A Pty Ltd as Trustee for the Archer Capital Trust 4A v Sage Group plc (No 3)* [2013] FCA 1160 (Wigney J) at [68]; *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd* [2013] FCA 998 (Jessup J) at [13]; *Temwell Pty Ltd v DKGR Holdings Pty Ltd* [2003] FCA 967 (Ryan J) at [8] and [12].

Common interest privilege

14 In *Farrow* Sheller JA also set out the principles applying to a claim for common interest privilege. At 609 his Honour said that common interest privilege is not a "rigidly defined concept" and that a "mere common interest in the outcome of litigation will be sufficient to enable any party with that interest to rely on" the privilege citing *Buttes Gas and Oil Co v Hammer (No 3)* [1981] QB 223. At 611-612, Sheller JA referred to the judgment in *Network Ten Ltd v Capital Television Holdings Ltd* (1995) 36 NSWLR 275 where at 279-280 Giles J said:

> … If two parties with a common interest exchange information and advice relating to that interest, the documents or copy documents containing that information will be privileged from production in the hands of each; thus, if one of the parties obtains a letter of advice attracting legal professional privilege and provides it to the other, the other can also claim legal professional privilege. Some remarks in the earlier English cases suggested that the parties must have a common solicitor, but I do not think that is necessary (apart from my view expressed in *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd; see also Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* and *Rank Film Distributors Ltd v ENT Ltd*). If Capital Television Holdings Ltd and ANZ had the requisite common interest, then (subject only to any significance in ANZ's failure to claim legal professional privilege) the copy of the letter of advice in the hands of ANZ would be privileged and, as already indicated, there would be no waiver of the privilege attached to the letter of advice in the hands of Capital Television Holdings Ltd.
>
> Examples of interest sufficient for common interest privilege can be seen in the cases, but the concept is not rigidly defined and it is a question of fact in each case. ..

15 His Honour also referred to the judgment in *Ampolex Ltd v Perpetual Trustee Co (Canberra) Ltd* (1995) 37 NSWLR 405 at 410 where Giles J said that "two persons interested in a particular question will not have a common interest for the purposes of common interest privilege if their individual interest in the question are selfish and potentially adverse to each other": at 612.

16 In *Media Ocean Ltd v Optus Mobile Pty Ltd (No 10)* [2010] FCA 1348 Katzmann J, in considering a claim for common interest privilege, referred with approval to the judgment in *Farrow* at [50]-[54] noting in particular at [53]-[54] that:

> 53 Thus, *Farrow Mortgage Services* stands for the proposition that a mere common interest in the outcome of litigation will suffice but there will be no such common interest if the individual interests of the parties concerned are selfish and potentially adverse.
>
> 54 In this Court, Tamberlin J has accepted this statement from *Ampolex* as correct and appears to have generally accepted Sheller JA's judgment in *Farrow Mortgage Services* as an accurate statement of the law. See *Patrick v Capital Finance Corporation (Australasia) Pty Ltd* [2004] FCA 1249, 211 ALR 272 at [18], [22].

THE EVIDENCE IN SUPPORT OF THE CLAIM FOR PRIVILEGE

17 The evidence provided in support of the claim for legal professional, given through Mr McIvor's solicitor, James Nicholas Conomos in his affidavit sworn on 8 February 2016, is that:

(1) the documents listed in Schedules 1 and 2 consist of communications between Mr McIvor and other persons from Equititrust, McCullough Robertson, KPMG, Tucker Cowen Solicitors, Nyst Lawyers and a Queensland barrister;

(2) McCullough Robertson were engaged to provide advice to Equititrust and the directors of Equititrust;

(3) KPMG was engaged to provide tax advice to Equititrust regarding its affairs;

(4) Tucker and Cowen were engaged to provide advice to Equititrust and its directors in relation to a wide range of matters including litigation, advice regarding Equititrust's structure and taxation issues;

(5) Nyst Lawyers were engaged to provide advice to Equititrust and Mr McIvor in his capacity as a director of Equititrust;

(6) Harry Lakis from the Queensland Bar was engaged to provide legal advice to Equititrust on stamp duty issues;

(7) all legal advices sought by Mr McIvor included in Schedules 1 and 2 were sought for the purpose of obtaining legal advice for Equititrust and its directors;

(8) Mr McIvor believed that all of the legal advices provided to him that are included in Schedules 1 and 2 were provided to him in his capacity as a director of Equititrust;

(9) Mr McIvor claims legal professional privilege over the communications and documents in Schedules 1 and 2 on the basis that they were created for the dominant purpose of obtaining or receiving legal advice for Equititrust and for Mr McIvor in his capacity as a director of Equititrust concerning:

(a) Equititrust's Australian Financial Services Licence;

(b) various amendments to Equititrust's constitution;

(c) the preparation of product disclosure statements and supplementary product disclosure statements concerning Equititrust's business;

(d) the preparation of Equititrust's compliance plan;

(e) liaising with the Australian Securities and Investments Commission in relation to Equititrust's business affairs and its likely response to various activities by Equititrust;

(f) the day to day administration of various funds for which Equititrust was responsible; and

(g) ensuring that Equititrust complied with its taxation obligations.

CONSIDERATION

The status of the evidence

18 The evidence on which Mr McIvor relies to support his claim for privilege is scant. As this is an interlocutory application, Mr McIvor is entitled to provide the evidence through his solicitor. However, the evidence amounts to no more than a series of assertions by Mr Conomos of the state of the documents in Schedules 1 and 2, is given at a high level, even when read in conjunction with the further detail in Schedules 1 and 2, and fails to establish the nature of the retainer between Mr McIvor and any of the providers of legal advice. Copies of the retainers have not been provided.

19 No reason is proffered as to why Mr McIvor could not give the evidence himself. In *Binqld Finances* a claim for legal professional privilege was made over a file note of a conference. The affidavit in support of the claim was made by the applicant's solicitor. Foster J observed at [23] that the solicitor was not present at the relevant conference where the file note was made and his evidence did no more than "record instructions conveyed to

him" by the applicant. His Honour concluded that the solicitor's affidavit should be given little weight particularly where there is "no direct evidence of any relevant individual retainer and no probative evidence which explains the circumstances in which and the purposes for which the conference referred to in the file note was convened".

20 The affidavit of Mr Conomos sworn 8 February 2016, to the extent it sets out the basis of the claims for privilege by Mr McIvor, should, in my opinion be given little weight. It does no more than record instructions given to Mr Conomos by Mr McIvor and does so in little detail.

21 In *Farrow*, where the Court found a joint privilege in the relevant documents between the company and the directors, each of the directors had sworn an affidavit. The evidence given by the directors is extracted by Sheller JA at 613 to 617. It is detailed and includes evidence that they had sought legal advice about their duties as directors in relation to specific transactions, the steps to be taken to discharge those duties, their possible future liability and the types of proceedings that may be commenced against them. On the basis of that evidence, on which the directors were not cross examined, Sheller JA concluded at 618 that the inescapable inference was that "the respondents were themselves seeking advice and would naturally believe that they were being given advice" by the relevant firm of solicitors. Sheller JA could not separate the interest of the various companies from those of the directors. The advice given concerned a restructuring of certain businesses and related issues and involved the respondents' concerns about their duties as directors.

22 In *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418 (***Pioneer Concrete***) a former director applied to restrain the use of documents which had been provided to the plaintiff by the liquidator of the company of which the defendant had been a director. The defendant claimed that the documents were subject to a claim for legal professional privilege on the basis that there was a joint retainer or that he held a joint privilege with the company or that he had a common interest with the company. Simos J noted at 420 to 421 that there was evidence from both the defendant and the other former directors which supported the view that the communications from the barristers were communications to them as clients (notwithstanding that they did not pay for the advices) and evidence from the defendant that he believed that the advices were for the company and its directors.

23 His Honour concluded on the basis of the evidence that "the defendant did have the view that the communications from the barristers were communications to him as a client,

and did believe on reasonable grounds that the lawyers giving advice were his lawyers so as to entitle the defendant to privilege in respect of the relevant documents". In doing so his Honour noted at 423 that he had "particular regard" to:

> the various references by the defendant and his fellow directors in their affidavits to his desire and their desire to obtain advice as to their "personal" liability as directors, and to the fact that such advice was in fact given. I do not consider that the fact that the advices were paid for by the company militates against this conclusion, since I am of the opinion, on the evidence before me, … that the true substance of the arrangements between the lawyers and the company was to the effect that the lawyers would advise as clients both the company and the former directors in their personal capacities although all legal fees were to be paid by the company.

24 There is no evidence of the nature or detail referred to in *Farrow* and *Pioneer Concrete* given by Mr McIvor:

(1) the description of the nature of the advice given does not traverse any advice given to the directors or Mr McIvor in his capacity as a director, the topics described all relate to aspects of Equititrust's business and areas where advice was given to Equititrust. It is difficult to see how it was that the directors required advice in these areas going to their obligations and duties as directors;

(2) there is an assertion that McCullough Robertson, Tucker Cowen Solicitors and Nyst Lawyers were retained to provide advice to Equtitrust and its directors or, in the case of Nyst Lawyers, Mr McIvor, but no further evidence or details of those retainers is provided. The description of areas in which advice was provided does not assist to understand the nature of the retainer and how it is said that the retainer was also on behalf of the directors;

(3) in the case of Mr Lakis of counsel the evidence is that he was retained to provide stamp duty advice to Equititrust. It is difficult to see how, in the face of that evidence, Mr McIvor can assert that the advice was provided to him in his capacity as a director;

(4) similarly in the case of KPMG, the evidence is that it was retained to provide tax advice to Equititrust. Again is difficult to see how communications with that firm can be privileged in the hands of Mr McIvor as opposed to Equititrust;

(5) the evidence that Mr McIvor believed that all of the legal advices sought by or provided to him in Schedules 1 and 2 were sought by or provided to him in his capacity as a director of Equititrust does not assist the claim. It is a mere assertion of what Mr McIvor believed. There is no evidence of the basis for that belief or how it was that the advice sought and provided was advice sought by or given to Mr McIvor in his capacity as a director with distinct obligations and duties as opposed to advice sought by or provided to Equititrust about

Equititrust but which Mr McIvor saw and was interested in because he was an active director running the business.

Is there a joint privilege?

25 Mr McIvor submits that the joint privilege arises in the case of the communications with McCullough Robertson because in a number of instances formal advices are addressed to the directors personally or "The Directors" collectively; in the case of email correspondence, in nearly all cases at least one of the directors or a senior officer of Equititrust is liaising directly with McCullough Robertson to either receive advice prepared by that firm or to provide instructions in relation to the preparation of advice; and in some cases the documents concern communications which either forward legal advice for internal discussion or which have been prepared with the assistance of third parties for the purpose of assisting the directors to obtain legal advice.

26 In my opinion none of these factors are sufficient to demonstrate that Mr McIvor has a joint privilege in the documents in Schedules 1 and 2:

(1) the fact that there are documents in Schedules 1 and 2 that are addressed to the directors personally or "the Directors" collectively does not demonstrate that the advice was being provided to the directors. There is simply no evidence to support such a conclusion. An alternate available inference is that the advice was being provided to Equititrust but was addressed to a particular director who might have had responsibility for the particular issue on behalf of Equititrust or who might have sought the advice on behalf of Equititrust. As for those communications addressed to "the Directors" it is not uncommon to address formal correspondence to a company in this way;

(2) similarly that a director may have been involved in the seeking of advice or in the receipt of advice does not of itself establish a joint privilege in those communications. It is not uncommon for a director to seek or receive advice on behalf of a company. As Sheller JA recognised in *Farrow* at 608-609, the privilege in an advice is not lost by a company when it is disclosed to its directors but this is not because there is a common interest but because the "company can only manifest its acts and intentions by the actions and declarations of human beings" and the directors receive and act on such advice as the "mind and directing will of the company". To the extent that a senior officer was involved that seems to suggest the advice was sought by or provided to Equititrust rather than its directors; and

(3) finally, the internal circulation of a communication for further discussion does not of itself create a joint privilege in the communication.

27 Unlike in *Farrow*, there is simply no evidence that the directors had concerns about various matters, that the solicitors had been instructed to advise the directors about these particular matters or that the solicitors were taking instructions from the directors as well from the company. There is no evidence that the directors joined in with Equititrust to obtain the legal advice or that Equititrust sought advice about matters in which the directors clearly had an interest. The Disputed Documents, with the few exceptions I have found, do not concern the duties of the directors as directors. They are concerned with the position of Equititrust.

Is there a common interest?

28 Mr McIvor submits that he has a sufficient commonality of interest in the advice provided by McCullough Robertson to enliven privilege because:

(1) many of the instructions sent to that firm were sent by the directors personally and many of the advices received were addressed to the directors personally. The fact of direct communication with McCullough Robertson supports an inference that the directors had an interest in the advice being provided. However, as I have already observed, and as Mr McIvor submits himself, this fact does not mean there is a commonality of interest. The directors are the guiding mind of the company and will receive and act on advice in that capacity;

(2) Equititrust was only ever able to manifest its acts and intentions by the actions and declarations of its agents, including Mr McIvor. He, along with his fellow directors, received and acted upon the advices received from McCullough Robertson as the "mind and directing will of the company". Accordingly Mr McIvor had a common interest in the advices concerning the operation and activities of the company, which were carried out under his direction. The fact that the company can only act through its directors does not give rise to a common interest. The director's role is to receive the advice and, if appropriate, have the company act upon it. An inference does not arise that there is a common interest in the advice as a result of that relationship. More is needed; and

(3) Equititrust has alleged various breaches of ss 601FC, 601GA, 601GC, 601HG and 601LC of the *Corporations Act 2001* (Cth) (**the Corporations Act**) against the respondents and Mr McIvor is potentially liable for these breaches under s 601FD(3) which imposes

obligations, among others, to act honestly and take all steps that a reasonable person would take to ensure that Equititrust complied with the Corporations Act, its AFSL, the scheme's compliance plan and the scheme's constitution. There is substantial overlap between the matters included in s 601FD(1)(f)(i) of the Corporations Act and the matters upon which McCullough Robertson provided advice to Equititrust and the directors. That may be so. However, the advice being provided by McCullough Robertson was provided to Equititrust and was provided at a time well before the commencement of the proceedings. The fact that the advice is sought by and provided to a company's directors does not mean that the directors had a common interest privilege in that advice. They are involved in seeking the advice as the guiding minds of the company. The company can only operate through them and its employees that is, as Sheller JA observed in *Farrow*, through "human beings". Indeed in discharging their duties directors will be concerned to ensure the company complies with applicable laws and will in that sense consider legal advice provided to the company. But it does not follow that the director then has a common interest privilege in the advice given to the company. Further, in fact, save for the few exceptions I have found, the Disputed Documents are not concerned with the duties of the directors in their capacity as directors.

Waiver

29 The KPMG Parties submit that if Mr McIvor was able to demonstrate that he had a claim for joint or common interest privilege then he cannot maintain that claim because he has disclosed the contents of the legal advice provided by McCullough Robertson in his defence and thus has waived any privilege in them. Given the decision I have reached I do not need to determine that claim. I have found that Mr McIvor can maintain his claim for privilege in eleven documents. One of those documents is in Schedule 2 and thus is said to be not relevant to the matters in issue in the proceedings. As to the other ten, some of which are copies of the same document, those documents either postdate the matters which are pleaded and which the KPMG parties allege constitute the waiver or do not on their face relate to them.

DISPOSITION

30 I will make a declaration and orders reflecting the conclusions I have reached including an order dismissing the second respondent's interlocutory application filed 5 January 2016 and an order that the second respondent pay the fifth and sixth respondents'

costs of that application and their costs relating to the determination of the second respondent's privilege claim.

I certify that the preceding thirty (30) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Markovic.

Associate:

Dated: 23 June 2016

SCHEDULE OF PARTIES

NSD 2028 of 2013

Respondents

Fourth Respondent:	THOMAS HANEY
Fifth Respondent:	KPMG (A FIRM)
Sixth Respondent:	PAUL STEER