

FAMILY LAW PRACTICE AND PROCEDURE Legal Professional Privilege Examination by the Court to determine privilege Parties requested to indicate why documents are then not amenable to discovery. Evidence Act 1995 (Cth) Family Law Act 1975 (Cth) Esso Australia Resources Ltd v Federal Commissioner of Taxation [1999] HCA 67; (1999) 201 CLR 49 Mann v Carnell, [1999] HCA 66; (1999) 201 CLR 1 Talackov Talacko [2014] VSC 328 APPLICANT: Mr Grattan RESPONDENT: Ms Grattan INTERVENOR: B Pty Ltd FILENUMBER: MLC 4259 of 2013 DATE DELIVERED: 24 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: 3 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Ackman QC with Mr Werner SOLICITOR FOR THE APPLICANT: Taussig Cherrie Fildes COUNSEL FOR THE RESPONDENT: Mr Glick QC with Mr Strum SOLICITOR FOR THE RESPONDENT: Kaine Law Australian Lawyers COUNSEL FOR THE 2ND RESPONDENT: Ms Ben-Simon SOLICITOR FOR THE 2ND RESPONDENT: C Law Firm ORDERS (1) The documents marked privileged in the subpoena bundle and sealed are not released for inspection. (2) Each party has leave to relist the matter at short notice on whether the same documents are discoverable. IT IS NOTED that publication of this judgment by this Court under the pseudonym Grattan & Grattan and Anor (No. 5) has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER: MLC 4259 of 2013 Mr Grattan Applicant And Ms Grattan Respondent And B Pty Ltd 2nd Respondent REASONS FOR JUDGMENT By subpoena issued by the Court at the request of Ms Grattan (the wife), a solicitor, Mr C, was required to produce a variety of documents including any files relating to professional work undertaken for Mr Grattan (the husband). The solicitor objected to the release of any documents which he determined were the subject of legal professional privilege. The solicitor prepared a bundle of documents said to be privileged. They were separated from the various documents produced and placed in a sealed envelope with an appropriate index. It was common ground that I should examine the documents and, without disclosing the details of the contents of them, indicate whether I considered them so protected by the privilege. That process has been followed by other courts (see for example Talacko v Talacko [2014] VSC 328.) The importance of the privilege cannot be

overstated. As was said by the High Court of Australia in *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at 13, the privilege exists to protect the confidentiality of communications between lawyer and client. It is the client who is entitled to the benefit of such confidentiality and is the person who may relinquish that entitlement. The husband has apparently not waived the privilege and this ruling is therefore required. Sections 118 and s 119 of the Evidence Act 1995 (Cth) (relating to legal advice and separately to litigation) provide that evidence is not to be adduced if, on objection by a client of a lawyer, the court finds that adducing the evidence would result in disclosure of : (a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or (b) the contents of a confidential document (whether delivered or not) that was prepared; for the dominant purpose of the client being provided with professional legal services or that sort of assistance in an anticipated proceeding in which the client is or may be a party. Section 117 of the Act provides the various definitions about lawyers, clients and various types of proceedings. That was not contentious here. To attract the privilege and to be protected when the lawyer's communication is contained in a document, the document must have been created for the dominant purpose of obtaining legal advice: *Esso Australia Resources Ltd v Federal Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49 at 65-66. In an interlocutory proceeding relating to discovery and, I include in that the hearing in respect of the return of subpoenas, the dominant purpose test applies. Was the document about which the claim is made, a confidential communication? Was it prepared for the dominant purpose of the lawyer providing legal advice? A confidential document is defined to mean one prepared at a time when, relevantly, Mr C was prima facie under an express or implied obligation not to disclose its contents. Such a document also means one under which, the husband cannot be required to disclose the contents of Mr C's advice. Having inspected the documents which number 18 in total, they all appear to relate to correspondence including emails involving a commercial entity named E Pty Ltd with whom the husband (or his entities) had a contractual arrangement. They all relate to the period of July 2013 to September 2013. Globally, it must be said, they were all provided by the husband to Mr C for the purposes of seeking and, in response by Mr C giving advice about the named commercial entity. As

such, they are privileged. I find each of the relevant documents appears to have been created by their various authors for the dominant purpose of enabling the husband and/or his entities to obtain professional advice. But I am not convinced the matter ends there. I find it curious that the documents all relate to the one transaction. It is not appropriate that I go further than what I have already said (because the matter has not been so argued) but as these are property proceedings as between the husband and the wife, one would have expected that the husband had an obligation to make disclosure of any document relating to actions involving property and/or an entity which is no doubt the subject of the application for the alteration of property interests. Whether those documents extend to legal advice about the transaction is a different issue. Chapter 13 of the Family Law Rules and specifically rules 13.04 and 13.07 provide there is a duty of disclosure of each document which is relevant to an issue in the case (as between husband and wife). There should immediately be some discussion about whether or not, despite the confidential nature of the communications to which I have referred, the documents are part of the disclosure process. I shall give the parties an opportunity to discuss these issues. I certify that the preceding Fifteen (15) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Cronin delivered on 24 October 2014. Associate: Date: 24 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/909.html>