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Abstract
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Keywords
former directors, legal professional privilege, corporate information, State of South Australia & Anor v Barrett & Ors

Cover Page Footnote
For those of the arguments which support the central thesis of this article, the author is indebted to Messrs M L Abbott QC and J R Sulan QC (now Judge Sulan) and Messrs Matthew Selley and Marcus Thompson of Piper Alderman. For those that do not, the author accepts responsibility. Readers should note that, with the exception of Mr Thompson, each of the abovenamed, together with the author, acted for the non-executive directors in Barrett.

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ARTICLES

THE CORPORATION, ITS FORMER DIRECTORS & LEGAL PROFESSIONAL PRIVILEGE

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In this article, the author considers, against the backdrop of recent South Australian and Queensland Supreme Court decisions, the right of a corporation to withhold from its former directors privileged communications passing between the corporation and its legal advisers at a time when the directors still held office and which have since become material to the former directors' defence of legal proceedings instituted against them by either the corporation or a third party.

Introduction

The 1995 decision of the South Australian Supreme Court in *State of South Australia & Anor v Barrett & Ors*[1] (*'Barrett')* caused enormous consternation in the Australian business community. It called into question the right of former company directors to access corporate information no longer in their possession, but critical to their defence of proceedings issued against them by the corporation of which they were once directors.

In *Barrett*, the former State Bank of South Australia successfully asserted legal professional privilege in respect of legal advice tendered to the Bank at a time when each of the former director defendants still held office, notwithstanding that the Bank was suing its former directors in circumstances which put much of that privileged material in issue. Whilst the reasoning of the Full Court in *Barrett* has not been attacked, there have been moves, both judicially and extra-judicially, to ameliorate its effects. Although many are resigned to the need for legislative reform if the potential problems created by *Barrett* are to be overcome, the purpose of this article is to consider whether the Full Court in *Barrett* was correct in regarding the former directors as strangers to the Bank for the purposes of legal professional privilege. Critical to that analysis is the need to distinguish clearly

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* LLB. (Hons.)(Adel.), LLM. (Cantab.). For those of the arguments which support the central thesis of this article, the author is indebted to Messrs M L Abbott QC and J R Sulan QC (now Judge Sulan) and Messrs Matthew Selley and Marcus Thompson of Piper Alderman. For those that do not, the author accepts responsibility. Readers should note that, with the exception of Mr Thompson, each of the abovenamed, together with the author, acted for the non-executive directors in Barrett.

1 (1995) 64 SASR 73.

between the proper ambit of legal professional privilege on the one hand and a former director's right to access corporate information on the other.

The Scope Of Legal Professional Privilege

Legal professional privilege exists to protect the confidentiality of:

(a) communications of a professional nature passing between legal advisers and their clients (whether or not the context be litigious), the *'sole purpose'* [2] of which is the seeking or giving of legal advice as to rights or obligations; and

(b) information gathered by or for legal advisers for the *'sole purpose'* of use in current or anticipated litigation.

In respect of both limbs, privilege vests in and can only be waived by the client.[3] It is not a privilege which is in any way personal to the client's legal advisers, although they will be under a duty, as part of their retainer, to preserve privilege unless and until waived by the client.[4] On either limb, it is the fact of the communication having been made or the information having been gathered *in confidence* which confers privilege.[5] In other words, the advice sought and given, or the information so gathered, should be of a kind which is not intended to be communicated to a third party. *Confidentiality* is of the essence of legal professional privilege.

In the case of documents generated by and within corporations, difficulties have long been encountered in defining the appropriate limits to the second limb of legal professional privilege. It was primarily because of those difficulties that the *'sole purpose'* test was created in order to ensure that the privilege could not be used to shield from production documents which would ordinarily have been created by the corporation irrespective of whether litigation ensued.[6]

Nevertheless, in the case of corporations, the operation of the first limb has the potential to create difficulties no less significant. In this article, consideration is given to those difficulties and some possible solutions, including those suggested by both the Courts and, more recently, by the Australian Institute of

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2 *Grant v Downs* (1976) 135 CLR 674 at 688 per Stephen, Mason and Murphy JJ. The familiar *'sole purpose'* test may have been displaced in Courts exercising Federal jurisdiction by ss 118 and 119 of the *Evidence Act 1995 (Cth.)* where the *dominant purpose* test will prevail, at least in terms of the reception of evidence at trial, although possibly not at the discovery phase: see *Sparnon v Apand Pty Ltd & Ors* (1996) 138 ALR 735, 737-8.

3 This principle was first established in *Wilson v Rastall* (1792) 4 T R 753; 100 ER 1283. See also *Schneider v Leigh* [1955] 2 QB 195.

4 *R v Craig* [1975] 1 NZLR 597.

5 See Ligertwood, *Australian Evidence* (2nd ed, Butterworths, Sydney, 1993), Ch 5, p 209, para [5.14] and Heydon QC, *Cross on Evidence* (5th Australian ed, Butterworths, Sydney, 1996), Ch 13, p 705, para [25255].

6 *Grant v Downs* (1976) 135 CLR 674 at 686-8 per Stephen, Mason and Murphy JJ.

Company Directors *'AICD'* in a paper prepared by Professor Baxt on behalf of the Corporations Law Committee of that body.[7]

Identifying Problems

It is now well understood that the corporation is an entity distinct from its directors[8] (not to mention, of course, its shareholders). In the context of legal professional privilege and the right of directors to access the corporation's legal advice, this has the potential to create enormous problems. In many cases, some or all of these issues will arise:

- in respect of legal advice tendered to the corporation, who is the client? Is it the corporation, its directors or both?

- assuming that it is, in most cases, the corporation which is the client (and this will be an issue of fact[9] in each case), what rights of access do directors have to the corporation's legal advice?

- assuming that existing directors have an unrestricted right of access to the corporation's legal advice, are there nevertheless circumstances in which the corporation can assert privilege against its own directors?

- if privilege cannot be asserted by the corporation against its own directors, might this be because: (i) the directors are a *co-client* with the corporation or (ii) because there is a *'commonality of interest'* in the receipt of such advice or (iii) because no *confidentiality* can be said to attach to the documents *vis-a-vis* the corporation's directors or (iv) because it is to be assumed that the corporation has *impliedly waived* privilege in respect of those directors (perhaps merely by virtue of their occupation of such office)?

- if a matter of *waiver*, is this to be limited by class and/or time - that is to say, should the *waiver* be limited to the corporation's board of directors as from time to time constituted?

- if so, can the privilege, at some subsequent time, and if the corporation so elects, be reasserted as against those former directors:

  (a) to whom the advice was tendered (for and on behalf of the corporation); or

  (b) who saw the advice; or

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7 AICD Corporations Law Committee Paper: *Directors' Right of Access to Company Documents*, published October 1996. See also Bateman, *Some Safeguards For Directors NSW Law Society Journal, October 1996, pp 55-59.*

8 See below, ***D The relationship between the corporation and its directors***.

9 *Grant v Downs* (1976) 135 CLR 674 at 692 per Jacobs J.

(c) who were at least entitled to see the advice when initially tendered,

despite the fact that such persons have since ceased to be directors of the corporation?

An ancillary question is whether, and if so why, newly appointed directors are entitled to access privileged advice which was tendered to the corporation *prior* to their appointment as directors.

The issues identified above are particularly acute in two situations. The first is where the board of the corporation consists of warring factions and one or other of those factions, say those in control of the board, seeks legal advice in the name of the corporation. Can or should that legal advice be withheld from those directors who might be viewed by the corporation as hostile to its interests? The second is where the corporation seeks to withhold from its *former* directors legal advice to which they may well have had access at the time at which they were directors (and which may even have been obtained at their request or for their benefit) and which bears on the former directors' liability for alleged breach of statutory or fiduciary duty whilst directors. In the case of the latter, can that legal advice be withheld even where to do so may expose those former directors to civil or criminal liability? A further complication arises where the corporation is itself suing its former directors for breach of duty and the documents in respect of which privilege is asserted are considered to be relevant to the former directors' defence of the claim. In such circumstances, does the corporation, by virtue of the issue and maintenance of those proceedings, plead the documents into relevance thereby *impliedly waiving* any claim to privilege?

Before addressing these questions, it is necessary to consider the relationship between the corporation and its directors. The issues of who is the client and of what rights of access directors have to corporate information are preliminary steps in any understanding of whether and how far legal professional privilege can be asserted against the corporation's present and former directors and by whom.

The Relationship Between The Corporation And Its Directors

For certain purposes and at certain times, the director *is* the corporation in the sense that he or she is the *'directing mind or will of the company'*.[10] This concept has been deployed in the criminal law to hold a corporation directly - and not merely vicariously - liable for the acts or omissions of its employees.[11] The principle recognises that a corporation cannot act other than through the agency of individuals. As Lord Reid observed in *Tesco Supermarkets Ltd v Nattrass*:[12]

10 See *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713-4 per Viscount Haldane.

11 See *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153 at 170, 187 and 199-200 per Lord Reid, Viscount Dilhorne and Lord Diplock respectively (approved by the High Court of Australia in *Hamilton v Whitehead* (1988) 166 CLR 121 at 127).

12 Ibid at 170.

> A corporation ... must act through living persons ... [T]he person who acts is not speaking or acting for the company. He is acting as the company and his mind which directs his acts is the mind of the company.

However, outside the criminal law and areas of statutory responsibility, the traditional and better view is that however much directors exercise control over the corporation and its officers carry out its day to day affairs, directors and officers are really only the trustees or agents of the corporation,[13] with the corporation merely vicariously liable for their acts or omissions.[14] Nevertheless, on either test, the Courts have encountered little difficulty in recognising that the corporation is a separate legal entity distinct from its members and from those who control or administer its affairs.[15]

Rights Of Access To Corporate Information

(a) existing directors

If the corporation has a life of its own distinct from those who control or administer its affairs, the latter are at least able, if not required, to access corporate information. Insofar as the directors are the *'directing mind or will of the company'*, they must do so.

Rights of access depend upon two factors - the status of the individual who seeks the information and the nature of the information sought. Clearly, a shareholder *'is not entitled as of right to range at will through the company's affairs'*.[16] Similarly, a mere employee will have fewer rights to access corporate information than the corporation's directors who, in order to discharge their fiduciary responsibilities, must be permitted full and unrestricted access to all corporate information, especially documentation,[17] including the right to take copies of that documentation.[18] In the words of Owen J in *Re Geneva Finance Ltd; Quigley v Cook*:[19]

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13 See *Beach Petroleum N L v Johnson & Ors* (1993) 43 FCR 1 at 23 per von Doussa J.

14 Ibid at 28.

15 See *Salomon v Salomon & Co Ltd* [1897] AC 22; *Lee v lee's Air Farming Ltd* [1961] AC 12 at 25, 26-7 and 29-30; *R v Goodall* (1975) 11 SASR 94 at 99-102 and *Crouch v Commissioner for Railways* (1985) 159 CLR at 35.

16 *Edmond v Ross (1922)* 22 SR (NSW) 351 at 358 per Street Cj in Eq.

17 *Burn v London and New South Wales Coal Company* [1890] 7 TLR 118; *Edman v Ross* (1922) 22 SR (NSW) 351; *Conway v Petronius Clothing Co Ltd* [1978] 1 WLR 72; *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 NZLR 150; *Molomby v Whitehead and ABC* (1985) 7 FCR 541; *McGee v Saunders [No. 2]* (1991) 32 FCR 397 at 405; *Deluge Holdings Pty Ltd & Anor v Bowlay & Ors* (1991) 9 ACLC 1486; *Re Geneva Finance Ltd; Quigley v Cook* (1992) 7 ACSR 415 and generally Norman, *'Access to corporate Information'* (1986) 4 C&SLJ 149; Teele, *'Collapse of the State Bank of South Australia: Implications for Directors'* (1996) 14 C&SLJ 56, Baxt, *'Access to Company Documents by Directors'* (1996) 14 C&SLJ 182 and Teele, *'Directors' Access to Documents: A Ray of Hope?'* (1996) 14 C&SLJ 319. The *Corporations Law* also confers upon *existing directors a statutory right to inspect company accounts, see s 289(9) and* Deluge Holdings Pty Ltd v Bowlay *(1991) 9 ACLC 1486.*

18 See *Re Geneva Finance Ltd; Quigley v Cook* (1992) 7 ACSR 415 at 426.

19 *Ibid* at 423.

> It follows as a matter of commonsense that unless a director has access to these sources of information, he or she would be severely inhibited in the proper performance of his or her duties.

The degree to which the Courts have been prepared to protect the existing director's right to access corporate information is shown by their reluctance to allow information to be kept from directors who might otherwise be considered hostile to the corporation. For example, in what remains the seminal Australian case on directors' rights of access, *Edman v Ross*,[20] Street CJ in Eq. ordered that a corporation permit a recalcitrant director and his accountant to access its books and records, notwithstanding a suggestion that the director intended engaging in business in competition with the corporation. On that issue, Street CJ said:[21]

> It must be assumed ... [that the director] will use his knowledge for the benefit of the company, and if the members of the company think otherwise their proper course is to take the necessary steps to remove him from his position as a director.

In other words, there is a presumption that a director seeking access to corporate information intends to use it in the best interests of the corporation. It is the corporation which bears the onus of establishing that this is not so.[22] Even then, *Edman v Ross* suggests that the remedy is removal from office, not denial of the documents.

In *Berlei Hestia (NZ) Ltd v Fernyhough*,[23] Mahon J endorsed the view that directors' rights of access are unqualified, even where there is a perception that the occupation by some board members of dual directorships is working against the corporation's interests. His Honour held that the right to inspect a corporation's documents was only forfeited '... where it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books ...'.[24] According to Mahon J, it is not sufficient that a director *might* be in a position of conflict. It must be shown that his or her interests are in conflict with the corporation's and that the director intends to use the opportunity to access documents for purposes inimical to those of the corporation. Again, the onus of proof rests with the corporation.

Perhaps the high water mark of this principle is another New Zealand case, that of *Trounce & Wakefield v NCF Kaipoi Ltd & Ors*,[25] where Heron J refused to allow a majority of directors to prevent the active participation of the minority directors in the deliberations of the board at a time when another corporation

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20 (1992) 22 SR (NSW) 351.
21 Ibid at 362.
22 See *Re Geneva Finance Ltd; Quigley v Cook* (1992) 7 ACSR 415 at 426.
23 [1980] 2 NZLR 150.
24 Ibid at 163.
25 (1985) 2 NZCLC 99-422.

controlled by those minority directors had launched a hostile takeover bid. His Honour said:[26]

> ... it seems to me that there must be the full and active participation of all directors least in any way their collective wisdom is blunted in a way which may be detrimental to the shareholders they represent.
>
> Upholding the right to participate in deliberations only reinforces the exactitude of the fiduciary duties owed to the company whose affairs ... [the minority directors'] are determining.

Whilst these decisions may be difficult to reconcile with s 232A of the *Corporations Law* - which, since 1 February 1993, has required a director of a public company faced with a potential conflict to not only refrain from voting, but to leave the boardroom - the principle that directors will ordinarily have unrestricted rights of access to corporate information is well established. Recent United States' decisions affirm the absolute and unqualified right of even hostile directors to inspect corporate books and records, save where their purpose in accessing such material is to breach their fiduciary obligations to the corporation.[27]

(b) commonality of interest

It is sometimes said that rights of access are dependant upon a *'commonality of interest'* in the information sought. A number of cases on access to corporate or trust information have focussed on this principle. For example, in *Gourard v The Edison Gower Bell Telephone Company of Europe*,[28] Chitty J held that the plaintiff in a shareholder's action against a corporation was entitled to see confidential communications passing between the corporation and its solicitors in that the same had been paid for out of the corporation's funds.

Whilst this principle is clearly relevant to shareholders' access (or, say, the right of a beneficiary to inspect trust records), no recourse to this concept ought to be necessary in the case of directors. Unlike shareholders, or trust beneficiaries, directors are the *'directing mind or will'* of the corporation, to whom they also owe duties, both statutory and fiduciary, of a kind which no shareholder or beneficiary could ever owe. Moreover, unless directors have an unqualified right to access corporate information, they cannot fully discharge their responsibilities.

Where the concept of *'commonality of interest'* may be of relevance is in assessing a director's entitlement to documents which the corporation seeks to

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26 Ibid at 99-430.

27 See *Lau v DSI Enterprises, Inc* (1984) 477 NYS 2d 151. See also *Darby Drug Co., Inc v Zlotnick* (1983) 573 F Supp 661; *Brenner v Hart Systems, Inc* (1985) 493 NYS 2d 881; *State ex. rel. Oliver v Society for the Preservation of Book of Common Prayer* (1985) 693 SW 2d 340; *Baker v Henry Glass & Co.* (1988) 531 NYS 2d 746 and *Cooper-Rutter Associates, Inc v Anchorational Life Insurance Co.* (1990) 563 NYS 2d 491.

28 (1888) 57 LJ Ch D 498; 59 LT 513.

withhold on the grounds of legal professional privilege. In such cases, one of the principal issues will be whether, at the time that the documents came into existence, it was ever intended that *confidentiality* be maintained as against all or some of the corporation's directors. For this reason, it is a concept to which we return when discussing the specific issue of privileged communications.

(c) former directors

Clearly, where a director has resigned office, his or her right to access corporate information ceases.[29] This follows from the fact that the director no longer occupies the very office which gave rise to those statutory and fiduciary duties the discharge of which would be frustrated were access to be denied. Given that a director has no right to access documents in a *personal* - as opposed to a *directorial* - capacity, there is no longer any *standing* with which to assert a general right to access corporate information. Put simply, the corporation's documents no longer have any relevance to a former director.

This is not to say that some fiduciary duties - for example, duties of confidentiality - do not subsist beyond vacation of office. However, such on-going duties are unlikely to require a former director to have regard to, let alone access, the corporation's documents.

Nevertheless, the possibility that the requisite *standing* to justify a right of access might somehow be re-acquired cannot be discounted - for example, where a former director seeks documents relevant to proceedings issued by the corporation against that former director. In such cases, *relevance* is re-established by the curial process itself. Relevant documents must be discovered and, subject to questions of legal professional privilege, produced.

In the United States, a former director's right to access corporate documents relevant to the defence of legal proceedings, civil or criminal, is seen as a substantive right. So far in Australia, such rights are no more than procedural in the sense that, where relevant, corporate documentation will only be obtainable on discovery or subpoena.[30] In any event, on the assumption that *Barrett* was correctly decided (see below), a successful claim to privilege by the corporation in either case will defeat a former director's right to access such documents.

(d) potential injustices and the American solution

Given the nature of and the responsibilities which flow from holding, or having held, directorial office, and the very real possibility that a former director's conduct whilst a director might subsequently be challenged, any significant restrictions on a *former* director's right to obtain access to relevant corporate documentation is likely to lead to injustice. If an *existing* director was called upon

29 See *Funerals of Distinction Pty Ltd* [1963] NSWR 614 at 615 and *South Queensland Broadcasting Holdings Pty Ltd* [1976] Qd R 69.

30 See ***E (e) obtaining documents by curial process*** below.

to account for his or her actions, be it by the corporation or a third party, it is unthinkable that that director would be denied access to documents ordinarily accessible by the board. However, for a *former* director in a similar position, a request of the corporation for access to documents critical to his or her defence, even those which he or she generated, requested and/or acted upon at the time and to which they then had unrestricted access, will most likely be denied in the absence of a Court order.

As previously indicated, the United States' position is more flexible. Where former directors are sued in respect of a misdemeanour or other breach of duty whilst a director, and whether by the corporation or a third party, it has been held that former directors are entitled, as of right, to access corporate documents relevant to their defence. By way of example, in *State ex rel Oliver v Society for Preservation of Book of Common Prayer*,[31] the Supreme Court of Tennessee accepted that whilst a director's right to access documents might have ceased upon his or her vacating office, this was not so where *'the director has been or may reasonably be charged with some act or failure to act during his incumbency for which he might be held personally responsible'*. In such cases, US Courts will enforce the right of former directors to access documents relevant to their defence of legal proceedings.

(e) obtaining documents by curial process

Of course, even in Australia, if a former director is sued by his or her former corporation, relevant documentation can be pursued through the discovery process. Alternatively, if the plaintiff is other than the corporation, the documents can be obtained from the corporation by subpoena or on third party discovery. It is the fact of being sued for an alleged breach of directorial duty which re-establishes the relevance of the corporation's documents and the former director's *standing* to seek access. Because those documents were once in the former director's possession, custody or power, that director will also be obliged to formally discover them as part of his or her own discovery.

Nonetheless, there is an obvious anomaly in a *former* director having to rely on interlocutory processes to secure documents once, but no longer, within his or her domain, but now critical to their defence of criminal or civil proceedings.

Questions of privilege aside, there is much to be said for the US position in recognising a substantive right in all former directors to access documents within, or previously within, their domain where relevant to any issue concerning the discharge of directorial duties. As is argued later, urgent consideration should be given to legislative reform to confer this right.

(f) the problem posed by privileged documents

The issue of rights of access to corporate documentation ought not to be confused with the quite separate issue of whether the corporation can maintain a

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31 693 SW 2d 340 (1985) at (referred to in *Barrett* as *Tennessee v Society for Preservation of Book of Common Prayer*).

plea of legal professional privilege as a bar to the production of documents relevant to a former director's defence of criminal or civil proceedings and, if so, whether that outcome sits easily with the rationale for legal professional privilege. This - and not the right of *access* - was the real issue before the South Australian Full Court in *Barrett*, although the two concepts were to become enmeshed and confused with unsatisfactory results.

The Decision Of The South Australian Full Court In Barrett[32]

The decision in *Barrett* arose out of an action brought by the State of South Australia and the former State Bank of South Australia against certain former non-executive directors of the Bank. It was alleged against the former directors that, in breach of statutory and fiduciary duties owed to the Bank, they approved the acquisition of a subsidiary corporation, Oceanic Capital Corporation Limited, without ensuring that management undertook appropriate *'due diligence'*. Prior to the trial, the former directors had sought discovery and inspection of documents falling into three categories (all of which had come into existence whilst they were still directors of the Bank and some of them at their specific request), namely:

(a) legal advice tendered to the Bank from external solicitors at the time of the acquisition and concerning its documentation;

(b) legal advice tendered to the Bank by the Bank's own internal lawyers in connection with the acquisition:

(c) legal advice tendered to the Bank by officers of Crown Law, including Parliamentary Counsel, and from its own internal lawyers, relating to *(i)* the operation of a statutory immunity conferred upon directors and officers by s 29 of the *State Bank of South Australia Act, 1983 (SA)* and *(ii)* the necessity for separate directors and officers' insurance cover over and above the statutory immunity.

The relevance of these documents was not in dispute. They were directly relevant on the pleadings. They had, in fact, been discovered by the Bank. In all likelihood, they should have been discovered by the former directors. Nor was it in dispute that none of the former directors had actually sighted copies of any of the advice when tendered. The Bank also conceded that when the documents came into existence there was a *'commonality of interest'* in them on the part of both the Bank and its directors. Indeed, the documents falling into categories (a) and (c) above had been specifically requested by the board of the Bank. In the case of category (c), their interest was singularly personal.

However, in respect of each of the categories identified above, the Bank claimed legal professional privilege. It asserted that even if the former directors had a right of access to these documents at the time that they came into existence

32 (1995) 64 SASR 73

by virtue of their office as directors of the Bank, which right would have precluded privilege being maintained against them at that time, the fact that their entitlement to view these documents ceased upon their vacation of office now meant that as against them - but not as against the existing board which had replaced them and who were not even in office at the time that the documents came into existence - the privilege was maintainable. In particular, it was said that the former directors were only ever entitled to see the documents in order to discharge their directorial duties and that having *(i)* ceased to hold office and *(ii)* been made the subject of an allegation of breach of duty by the Bank, it could no longer be said that they had any interest in the documents consistent with the discharge of any duty owed by them to the Bank. From the Bank's perspective, it no longer had any interest in its former directors accessing these documents. Quite the reverse.

At first instance, the trial judge, Perry J, was satisfied that if the former directors could have accessed the documents at the time that they came into existence, privilege could not be maintained as against them. Critical to that conclusion was the finding, much criticised on appeal, that *'the directors were in all relevant senses fully identified with the bank at the time these documents came into existence'*.[33] In addition, his Honour was also of the view, consistent with the *'sole purpose'* test, that the issue of privilege was to be determined as and when the documents came into existence, the purpose of their creation being determinative of their status. As his Honour said:[34]

> It seems to me to be inconsistent with the undoubted fact that at the time they held office they could have had access to these documents, that in some way that situation should be regarded as having changed when they ceased to hold office.

On appeal, the Full Court, comprising Justices Cox, Olsson and Mullighan, took a very different view. The Full Court agreed with the Bank's submission that insofar as they were being sued in a *personal* capacity, the former directors were '*strangers to the Bank'*.[35] As Olsson J (with whom Cox J agreed) observed:[36]

> ... even whilst they held office as directors ... [they] were only entitled to access to documents privileged in the hands of the Bank for the limited due diligence purposes for which their power of access existed, and not for any reasons private and personal to them. The common law principle did not negate the existence of legal professional privilege qua the directors, it merely qualified it to the extent of a bona fide exercise of their power so far as it was necessary to enable them to discharge their legal obligations. That is to say, the power [to access documents belonging to the corporation] would be enforced by the Courts only for the purpose for which it existed and not for a purpose antipathetic to the best interests of the corporation.

33 Remarks of the trial judge, Perry J, reproduced in *Barrett*, ibid at 80.
34 Ibid at 77.
35 Ibid at 75.
36 Ibid at 77-8.

> The plain fact of the matter is that the ... [former directors] are being sued in their personal capacities, albeit that the claim relates back to their activities whilst directors. They are no longer directors and their due diligence powers ceased when they relinquished office.

At pages 83-84, Mullighan J was equally specific:

> The privilege does not cease to apply merely because the documents come into existence at a time when the directors held that office. The privilege will apply when the directors seek inspection in their private or personal capacity
>
> The appropriate time to consider whether the privilege extends to relevant persons is when it is claimed.

At face value, the Full Court's decision constitutes a major victory for the corporation over its directors and officers, both present and former. Notwithstanding the right of directors and officers to access documents when they first come into existence, any privilege remains with the corporation and the corporation alone.

The decision in Barrett created immediate concern at the AICD, prompting them to mount a test case in Queensland in order to clarify the law.[37] The AICD's concerns were justified. If the right to access documents relevant to the defence of legal proceedings instituted against the corporation's former directors is dependant, both before and after the event and irrespective of the merits of the corporation's claim, on whether the production of such documents is in *'the best interests of the corporation'*, documents which serve to make out a director's defence of legal proceedings brought by the corporation will almost never be available. Were the production of such documents in *'the best interests of the corporation'*, documents, even privileged ones, would have been made available from the outset.

More difficult to follow was the assumption made expressly by Mullighan J, and implicitly by other members of the Full Court, that the issue of privilege is to be determined *at the time privilege is claimed*, not at the point in time at which a document comes into existence. By taking this view, the Court was able to conclude that whilst a document might not be treated as confidential in the hands of an existing director when first created, it could later assume a confidential status because of a change in status on the part of the individual concerned. That view was expressly doubted by the trial judge in *Barrett*. More importantly, it seems inconsistent with the principles underpinning legal professional privilege.

Of similar concern was the Court's insistence on a distinction between the *directorial* and *personal* capacities of the defendants, as if they were being sued for acts or omissions wholly unrelated to the office which they once held. Clearly,

37 See *Kriewaldt & Ors v Independent Direction Ltd* (1996) 14 ACLC 73, discussed below.

had it not been for their having once held office as directors of the Bank, none of them would have been sued in the present proceedings.

Similarly, many of the documents sought by the former directors on discovery were central to the very transaction the subject of the Bank's claim. Indeed, in respect of most of them, the directors had required their receipt by the Bank as a pre-condition to board approval. Even accepting the *directorial/personal* distinction, the legal advice on statutory immunity and D&O was very much personal to the former directors, having regard to their desire to protect themselves from potential legal liability, both before and after vacating office.

It is to be regretted that in a matter which, as the Full Court itself recognised, was not governed by precedent, little weight appears to have been given to the potential injustices which might flow from denying the former directors access to the very legal advice which they had asked management to obtain in order to protect their and the Bank's interests - and, ultimately the board - and which they now had reason to believe might exonerate them from a potential $83m liability.[38] At the very least, the directors were entitled to have before them the self same documents as those upon which their decisions of the time were based.

Whilst the Courts are rightly cautious in adopting any approach which might make *'inroads ... upon the privilege in individual cases by involving a 'higher public interest'*,[39] there is much in the reasoning of the Full Court in Barrett which appears at odds, or at least out of step, with the principles underpinning legal professional privilege. This case should not be seen, as some commentators have suggested, as one which *'accords with the doctrinal and policy basis of legal professional privilege ...'*.[40] Just where *Barrett* departs from that basis is a matter for discussion below.

The Decision In Barrett And The Misapplication Of Legal Professional Privilege

(a) rationale for the rule

Both limbs of legal professional privilege exist to preserve and protect the confidentiality of, and encourage a full and frank dialogue in, all lawyer-client communications. In the words of Brennan J in *Baker v Campbell*:[41]

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38 In fairness to the Full Court in *Barrett*, it should be remembered that their Honours knew very well that the issue of waiver was yet to be argued. Indeed, the matter was remitted to the trial judge for this very purpose. It may be that the Court was influenced by the fact that other avenues for the production of these documents were likely to be pursued and before a trial judge who was already satisfied as to their relevance.

39 *Attorney-General (NT) v Kearney* (1985) 158 CLR 500 at 523, per Dawson J.

40 Teele, *'Collapse of the State Bank of South Australia: Implications for Directors'* (1996) 14 C&SLJ 56 at 57.

41 (1983) 153 CLR 52 at 108. See also *Carter v Managing Partner, Northmore Hale Davy & Leake & Ors* (1995) 183 CLR 121 at 126-129 per Brennan J.

> The purpose of the privilege is the facilitation of access to legal advice, the inducement to candour in statements prepared for the purposes of litigation, and the maintenance of the curial procedure for the determination of justiciable controversies...

The High Court has recently emphasised the role of legal professional privilege in reassuring citizens that the confidentiality of their communications with legal advisers will be protected.[42] In this notion of *confidentiality* lies the *raison d'etre* of legal professional privilege. In the words of Deane, Dawson and Gaudron JJ in *Goldberg v Ng*,[43] it is *'confidentiality which is necessary for its maintenance'*. As the authors of *Cross on Evidence* state: *'The [privileged] communication must be a confidential one'*.[44]

It was common ground in *Barrett* that when the documents sought by the former directors came into existence, no *confidentiality* attached to them *vis -a - vis* the directors. This is what Perry J meant when his Honour said that the former directors were, at the time at which each of these documents came into existence, *'... fully identified with the bank ...'*. If the directors in *Barrett* had demanded to see these documents at the time, they would have been produced to them. This was not a case where the directors - or some of them - were warring with the Bank or other members of the board. Nor did these documents contain advice as to how the Bank was to conduct itself *vis-a-vis* some or all of its directors. The documents were sought as much for the directors' benefit as the Bank's. Indeed, the advice on s 29 was of much greater import to individual directors, in their personal capacities, than it was to the Bank.

(b) but does not the privilege reside with the Bank?

It is true that as a legal entity distinct from those who controlled or administered its affairs, the Bank's legal advice, like advice tendered to any corporation, belonged to the Bank. As a general rule, unless directors have specifically sought advice from the corporation's solicitors in respect of their own responsibilities (in which case the directors may be either a *co-client* with the corporation[45] or clients in their own right), the corporation will *be the client*.[46] However, in that a corporation cannot but act through the agency of individuals, many persons will see that advice or have the right to access it. In particular, given that existing directors have an unqualified right to access corporate information in the discharge of their statutory and fiduciary responsibilities, it must follow that when legal advice is tendered to a corporation, its directors, as *'the directing mind or will of the company'*, have the *right* to see it. Depending

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42 See *Grant v Downs* (1976) 135 CLR 674 at 685; *O'Reilly v Commissioners of State Bank of Victoria* (1982) 153 CLR 1 at 22-3; *Baker v Campbell* (1983) 153 CLR 52 at 108, 113-6 and 127-8; and *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487.

43 *Goldberg v Ng* (1995) 185 CLR 83 at 95.

44 Heydon QC, *Cross on Evidence* (5th Australian ed, Butterworths, Sydney, 1996) Ch 13, p.705, para [25255].

45 See *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 13 ACLC 1,749.

46 See *Baker v Evans* (1987) 77 ALR 565.

upon the gravity of the matter, the directors will more often than not have seen it, but this is not in itself determinative of privilege.

As a general proposition, and save for the most exceptional of caseswherethecorporationisrackedbydisputation,itcanneverhavebeentheintentin of the corporation to claim, as against its own directors, any privilege in respect of legal advice tendered to the corporation. This must follow from the fact that the corporation could never have intended that such advice be kept *confidential* from some or all of its directors.

Moreover, because a corporation can only act through its directors, it cannot follow that such access threatens the very *rationale* of legal professional privilege, namely the encouragement of candour in lawyer-client communications. Quite aside from the fact that with the right to see legal advice tendered to the corporation comes a duty to protect the confidentiality of that advice, it will, in most instances, be the directors who will need to evaluate and act upon the advice. This is why, in *Barrett*, Perry J concluded that for the purposes of determining as against whom privilege could be maintained, the former directors were to be '*fully identified*' with the Bank.

(c) commonality of interest

If '*fully identified*' puts the case too strongly, then there is, at the very least, an obvious '*commonality of interest*' in the legal advice tendered to the corporation.[47] In determining whether the requisite *commonality of interest* exists, it is relevant to ask, in relation to each document in respect of which privilege is claimed, whether the content of the communication to the corporation would have been any different had those who commissioned it (or those who provided it) thought that the directors (or some of them) would, or would ask to, see it. If, as in most cases, the answer is '*no*', then '*a commonality of interest*' is established and no basis can exist for the assertion of legal professional privilege against those directors.[48]

As identified earlier, there may be specific occasions where there is no '*commonality of interest*', even among existing directors. As the cases show, such occasions will be few and far between. Nonetheless, it is conceivable that advice might be sought in the name of the corporation by a majority of directors who apprehend a breach of duty to the corporation by a hostile minority and in respect

47 *Farrow Mortgage Services Pty Ltd v Webb & Ors* (1996) 14 ACLC 1,240.

48 The decision of Simos J in *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 13 ACLC 1,749 has been cited as a *commonality of interest* case. Although the outcome for privilege is the same, it ought perhaps better to be seen as a joint-client/joint-privilege case. In any event, the legal advice on insolvent trading which had been tendered to the corporation by its lawyers in *Pioneer Concrete* was seen to be as much for the benefit of the directors as it was for the corporation. It was irrelevant that the corporation was responsible for and met the cost of that legal advice. Given that in respect of at least one category of documents, the former directors in *Barrett* were seeking material relevant to their personal liability as directors, they were at least as much co-clients with the Bank as were the *Pioneer Concrete* directors co-clients with their company. See also on the issue of joint privilege, *Farrow Mortgage Services Pty Ltd v Webb & Ors*, ibid.

of which the latter cannot sensibly assert a *'commonality of interest'*. The best example of this is where the corporation has identified breaches of duty on the part of certain directors and has sought and obtained legal advice on the corporation's entitlement to sue. This is to be contrasted with the situation in *Trounce*, where corporate information sought to be withheld from the warring minority directors concerned not the corporation's rights *vis-a-vis* those directors, but the capacity of the corporation to resist a takeover bid launched by those directors through another corporate vehicle controlled by them.[49]

All of the cases considered above demonstrate that short of some suggestion of improper purpose or other breach of duty to the corporation, *'commonality of interest'* is generally presumed. In *Barrett*, there was no suggestion by the Bank of any improper purpose on the part of the board when they sought legal advice on the transaction before them and other matters. If, as is contended, the question of purpose - and therefore *'commonality of interest'* - can only be determined at the time that the advice is sought and tendered, then there can be no doubt that at the time that the documents in *Barrett* came into existence, no privilege could be asserted against any of the persons who then held office as directors of the Bank. If none could be asserted at the time, how then is it possible for privilege to be asserted later?

It is true that the former directors may now be wearing different 'hats'. However, the only relevance of their directorial 'hat' is that this was the basis of their right to *access* the documents at the time that they came into existence. As is argued below, rights of access are only relevant in determining whether privilege can be asserted at the time that the document comes into existence. It is at that moment that the privileged status of the document is to be determined. Once the director has left office, he or she has lost the right to access these and other corporate documents, unless and until the requisite standing is re-established by the fact of legal proceedings. In such cases, a former director is in precisely the same position *vis-a-vis* access as any other litigant. However, the issue of whether privilege can thereafter be claimed as against that former director involves quite separate considerations.

(d) confusing access and privilege

In these propositions lie the most significant criticism of the decision in *Barrett*, namely the Court's determination to treat a claim to privilege as if it were merely a question of access. Clearly, a right of access at the time that the document comes into existence is critical in determining against whom a claim to privilege can thereafter be maintained. Without that right, one cannot call for the document, its *confidentiality* is presumed, there is unlikely to be any *'commonality of interest'* and there is nothing to prevent privilege being claimed both then and later.

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49 See *Trounce & Wakefield v NCF Kaiapoi Ltd & Ors* (1985) 2 NZCLC 99-422. For a case where the right of shareholders to access legal advice to the company was upheld see *Dennis & Sons, Ltd v West Norfolk Farmers' Manure & Chemical Co-Operative Co., Ltd* [1943] 2 All ER 94.

But having established a right of access at the time that the document comes into existence, the privileged status of that document does not ebb and flow depending upon changes in a person's right to access corporate documentation. In other words, if a document's status *vis-a-vis* another party is to be determined at the time that it first comes into existence, the status of that document cannot thereafter change merely because another party does.

The matter can be stated in these simple propositions:

(a) documents evidencing legal advice are not privileged as against the corporation's directors when they come into existence because:

(i) the directors have an unrestricted right to access the documents; and

(ii) no *confidentiality* can therefore attach to them;

(b) whilst a director's right to access such documentation ceases on his or her vacating office, the fact that such documents, on first coming into existence, are *not*, and cannot possibly be, privileged as against that director on the *'sole purpose'* test means that *vis-a-vis* that director, the claim to privilege cannot thereafter be maintained, whatever his or her subsequent status and notwithstanding that no right of access endures;

(c) however, once the *relevance* of a document is sufficiently established so as to create a fresh right of access as a result of curial process (or judicial order), then the absence of *confidentiality* in the document at the time of its creation puts an end to any argument that, as against that former director, privileged can be maintained.

In other words, access whilst in office determines the privileged status of the document once and for all. Thereafter, changes in access rights and the absence of any *general* entitlement to corporate information cannot change the original status of the document *vis-a-*vis that party. If that document becomes relevant to any proceedings in which the former director may be involved, privilege cannot be asserted against that former director and the document should therefore be produced.

(e) personal or directorial

It should also be said that the Full Court's distinction between a director's *directorial* and *personal* capacities[50] overlooks the fact that in cases such as *Barrett*, the cause of action being pursued by the corporation against its former directors will be derived wholly from their allegedly inadequate discharge of statutory and fiduciary duties owed to the corporation whilst directors.

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50 This division of roles relies on the now familiar distinction drawn in *Crouch v Commissioner for Railways* (1985) 159 CLR 22 at 35 between ... *the transient natural person who happens to hold the particular office at a particular time and the continuing corporate identity which the law attributes to the office*.

Further, the distinction presupposes that privilege can turn on *categories* of persons rather than by reference to the particular individuals entitled to access at the time that the communication originates.

Because of the Full Court's insistence on deciding the issue as a question of access, their Honour's did not develop the argument that the director defendants fell within a category or class of persons against whom no privilege could be claimed, then or thereafter, namely, all or any of the directors occupying office *from to time to time*. Were it possible to assess privilege by classes of persons and not on a case by case basis, it might have been possible to assert privilege against a former director, but not as against board members presently occupying office (say those initiating the proceedings against the former board).

However, as the trial judge in *Barrett* noted, it seems illogical that simply because a person's *status* might change, documents he or she might have been allowed to access as a director, or might even have commissioned, are to be later denied them on the grounds that they are privileged - ie: *confidential* - communications. Such an outcome sits uncomfortably with the fact that a former director, having once occupied directorial office, will already have, or be deemed to have, knowledge of the content of the privileged material. Indeed, a former director may still have a copy and/or be able to recall the contents or purport of the same. It is simply not possible to equate the position of a former director with that of, say, an incoming director, as if the former director is not already fixed with knowledge of the fact or content of the privileged advice.

(f) the time at which the privileged status of the communication is to be determined

As noted previously, the issue of timing was critical to the Full Court's decision in *Barrett*. Mullighan J was of the view that the documents in question were *not* privileged *vis-a-vis* the directors at the time that they came into existence, but that they *subsequently* became so after the directors had vacated office. In particular, his Honour held that privilege was to be determined as and when claimed, not when the documents came into existence. Cox and Olsson JJ appear to have been of the same view.

However, whether a communication attracts legal professional privilege at all - and as against whom - can only be determined at the time that the document comes into existence. This necessarily follows from the fact that privilege is determined by whether the communication was made, or the document generated, for the *'sole purpose'* of seeking or giving legal advice or for use in current or anticipated litigation. The *'sole purpose'* test requires an analysis of the communication or document at the point in time at which it comes into existence. The test cannot be deferred to any later point in time. Nor can the test be applied

without determining who can and cannot see the privileged material at the time of its creation.[51]

(g) might there be an implied waiver of privilege by the mere appointment of directors?

Another theory for the displacement of legal professional privilege, and one which was not explored by the Full Court in *Barrett*, is that of the *implied waiver* inherent in the appointment of directors.

Adopting this approach, the corporation would be taken as having *impliedly waived* any privilege in communications passing between the corporation and its legal advisers to which the directors have a right of access. In that this would effectively include all communications, there must be taken to be a general *implied waiver* in respect of all legal advice tendered to the corporation. Were the corporation to assert privilege against its directors - so the argument continues - whether at the time of or subsequent to the receipt of that advice, particularly where that advice might be relevant to the directors' defence of legal proceedings brought by the corporation, the principle of fairness which underpins the concept of *implied waiver* would be infringed.[52]

Of course, it might be said that even if there is an *implied waiver* of privilege whilst the director holds office, the *waiver* is withdrawn once the director ceases to hold office. However, the difficulty with this proposition - and the *implied waiver* justification generally - is that if a director, at the time that the document comes into existence, has the *right* to access it, then how can privilege be said to have been *waived* by the corporation? In other words, if there is no right to assert privilege as against an existing director, then what is there to waive?

If anything, directorial office should be seen as less a matter of *waiver* and more a statement of the fact that no *confidentiality* exists between the corporation and its directors. However, *implied waiver* has at least one useful function in this context. In that the privileged status of a document can only be determined at the point of its creation, it must follow that the right of an incoming director to access legal advice pre-dating his or her appointment arises because of an implied waiver inherent in his or her appointment.

Implied waiver may have one other role to play in this context, and that is in the case of '*pleading into relevance*', the principle subsequently used by Perry J to order production of much of the privileged documentation sought in *Barrett*.

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51 The Full Court's reasoning is also at odds with what the same Court has subsequently confirmed in *State Bank of South Australia v Smoothdale (No 2) Limited* (1995) 64 SASR 224, namely that privilege attaches to documents at the time they are created and, other than in cases of intentional waiver, not in the light of subsequent events.

52 In the words of Mason and Brennan JJ in *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 487: *An implied waiver occurs when, by reason of some conduct on the privilege holder's part, it becomes unfair to maintain the privilege.*

Reference is made to this principle below when consideration is given to subsequent developments in *Barrett.*

(h) conclusion

It is submitted that the Full Court in *Barrett* was overly zealous in protecting the Bank's claim to privilege, particularly in a case not governed by precedent. At worst, it was mistaken in its application of the principles underpinning legal professional privilege. As argued, the Full Court failed to give adequate consideration to the factors militating against the possibility of the 're-emergence' of privilege - in particular, on the issues of confidentiality and timing - and confused the two very different concepts of access on the one hand and privilege on the other. The Court should have recognised that a right of access is only relevant in establishing a directors' entitlement to see the document on its creation and, secondly, that it is at this very point in time that the privileged status of the document is to be determined.

Postscript to Barrett - the decision of Perry J to order production: implied waiver and pleading into relevance

Legal professional privilege can be lost in litigation brought by a corporation against its current or former directors on the grounds that the issue and maintenance of the proceedings and the relevance to facts in issue of otherwise privileged documents leads to an *implied waiver* of the privilege in accordance with the dictates of fairness. For example, if a corporation has alleged a breach of fiduciary or other duty against its former directors in the full (actual or constructive) knowledge that it holds documents which might then and now be privileged, but which are nonetheless directly relevant to the former directors' conduct (eg: they evidence legal advice sought and relied upon by the corporation's directors in acting as they did), then, for reasons of fairness, the corporation will generally be required to discover and produce those documents. In such circumstances, the otherwise privileged communications are said to be pleaded into relevance in the sense that the corporation will have directly or indirectly put in issue the substance of the privileged communications.[53]

In *Attorney-General (NT) v Maurice*,[54] the High Court emphasised that questions of *implied waiver* are to be determined by considerations of fairness and not by the subjective intention of the party claiming privilege.[55] In other words, the issue is not what the corporation intended to accomplish by the

53 See *Thomason v Council of the Municipality of Campbelltown* (1939) 39 SR (NSW) 347; *Lillicrap v Nalder & Son (a firm)* [1993] 1 All ER 724; *Goldberg v Ng* (1993) 33 NSWLR 639 (NSW Court of Appeal) and [1995] 69 ALJR 919 (High Court)(a case of imputed waiver by pre-trial conduct); *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419; *Benecke v National Bank of Australia Ltd* (1993) 35 NSWLR 110, *Data Access Corporation v Powerflex Service Pty Ltd* (1994) AIPC 38,714, *Ampolex v Perpetual Trustee Co (Canberra) Ltd & Ors* (1995) 37 NSWLR 405 and *Wardrope v Dunne* (1996) 1 Qd R 224.

54 (1986) 161 CLR 475.

55 Ibid at 481, 488, 497-8 and 492-3.

institution of the proceedings, but what ought to be required of the parties to ensure fairness as between them.[56]

Generally, these issues are to be determined on the face of the pleadings. If, on those pleadings, *'the communications form part of the circumstances from which the rights and liabilities of the parties arise'*[57] then privilege is likely to have been waived. In the words of Duggan J in the South Australian case of *Pickering v Edmunds*:[58]

> Where professional advice is the subject matter of litigation, insistence on legal professional privilege would make the litigation impossible to conduct in many cases.

In *Hongkong Bank of Australia Ltd*,[59] it was successfully argued that the plaintiff had put in issue legal advice received by it on the question of whether the plaintiff had been induced to enter into a contractual arrangement on the basis of representations made to it by one of the defendants. The Court accepted that where a party, by its pleadings, puts in issue the content of legal advice by it, then privilege in respect of that advice will have been waived.

Whilst most decisions on pleading into relevance have involved *implied waiver* on the part of the proponent of the proceedings, at least one recent decision has gone a step further in suggesting that a defendant may open up the discovery and production of otherwise privileged documents in the possession of the plaintiff by merely pleading defences which rely upon or render such communications relevant. In *Lillicrap v Nalder & Son (a firm)*,[60] Dillon LJ said:

> But the waiver must go far enough not merely to entitle the plaintiff to establish his cause of action but to enable the defendant to establish a defence to the cause of action if he has one.

In other words, if such communications are relevant to the defence of the proceedings put forward by the defendant in answer to the plaintiff's claim, then the fact of the issue and maintenance of those proceedings will constitute an *implied waiver* on the plaintiff's part.[61]

It can be predicted with some confidence that the principle of pleading into relevance or *implied waiver* will go some way in ameliorating the problems posed by *Barrett*. Indeed, the Full Court in *Barrett* itself emphasised that it was dealing

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56 *Goldberg v Ng* (1995) 185 CLR 83 at 95-96.

57 *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419 at 438.

58 (1994) 63 SASR 357 at 360.

59 [1993] 2 VR 419.

60 [1993] 1 All ER 724 at 729

61 See *also Thomason v Council of the Municipality of Campbelltown* (1939) 39 SR (NSW) 347 at 358-9; *Hongkong Bank of Australia Ltd v Murphy* [1993] 2 VR 419 at 437-9; *Lillicrap v Nalder* [1993] 1 All ER 724 at 729, 731-3; *Data Access Corporation v Powerflex Services Pty Ltd* [1994] AIPC 38,714 and *Pickering & Ors v Edmunds & Ors* (1994) 63 SASR 357.

only with the issue of against whom privilege could be maintained, divorced from other issues, such as *implied waiver*, which were yet to be argued before the trial judge.

Indeed, on subsequent applications to the trial judge in the months following the Full Court's decision in *Barrett*, many of the documents for which privilege had previously been claimed were produced consensually and practically all of those which were not were ordered to be produced by the trial judge, Perry J, relying on the doctrine of *implied waiver*. Neither the Bank nor the State of South Australia as co-plaintiff appealed any of those subsequent orders.

Kriewaldt v Independent Direction Ltd ("Kriewaldt")[62] - an unsatisfactory diversion

The decision in *Barrett* led to considerable debate in Boardrooms across Australia. The AICD took immediate steps to review the decision and prepare an issues paper for public circulation.[63]

However, the AICD was active in other ways, supporting a test case in the Queensland Supreme Court which many hoped would 'overturn' *Barrett*. In *Kriewaldt v Independent Direction Ltd*,[64] the directors of a corporation resolved that they were now, and thereafter, entitled to access any board paper from the preceding seven years, even if a director, in the meantime, ceased to hold office. Subsequent legal advice to the corporation suggested that such a resolution was beyond power. The directors sought declarations as to the validity of the resolution.

Somewhat surprisingly, de Jersey J held that it was in the corporation's interests for its existing directors to have an on-going right to access board papers and that the board's resolution was therefore within power. However, as in *Barrett*, de Jersey J was troubled by the position of former directors:[65]

> It is clear that the only legitimate purpose of a director's access to such documents is to facilitate the proper performance of duty as a director. One asks therefore whether a *former* director might need such access, to further the company's interest, after ceasing to be a director. [de Jersey J's emphasis]

His Honour accepted the proposition that there was no *personal* right in a former director which would justify access. Nonetheless, his Honour upheld the validity of the resolution, even insofar as it applied to former directors, on the ground of the desirability of fixing a former director with knowledge of prior transactions in which the latter might be more easily implicated.

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62 (1996) 14 ACLC 73.

63 AICD Corporations Law Committee paper: *Directors Right of Access to Company Documents*, published October 1996.

64 (1996) 14 ACLC 73.

65 Ibid, at 76.

Coming so soon after the ruling in *Barrett*, the decision in *Kriewaldt* was seen as a major victory for directors - and especially former directors - in their quest for access to corporate documents. Certainly, de Jersey J went further than any other Australian judge in finding a legitimate corporate purpose in allowing *former* directors the right to access corporate documentation. However, as his Honour himself noted, the Court was not called upon to rule on the issue of access to documents in adversarial situations where the corporation was asserting legal professional privilege against its former directors.

However strained his Honour's reasoning, there are three respects in which *Kriewaldt* advances the cause of directors. First, it reaffirms the right of existing directors to make copies of documents made available to them by the corporation. Whilst some commentators see this as a '*highly inefficient*'[66] solution to the problem of access, *Kriewaldt* at least gives some legitimacy to that approach. Secondly, his Honour suggested that such copies could be deployed by those directors even after they had retired from office. Finally and most significantly, his Honour suggested that property in board papers provided to a director without any apparent reservation of rights by the corporation vested in the director.[67]

Carter v Managing Partner, Northmore, Hale, Davy & Leake[68] - will the High Court endorse Barrett?

Just as *Kriewaldt* has been cited as at least a partial solution to the problems posed by *Barrett*, so too has the High Court's 3:2 decision in *Carter* been seen by some as giving support to the reasoning and result in *Barrett*.[69] However, the cases are qualitatively different.

In *Carter*, the question was whether an auditor who had been charged with various criminal offences relating to a corporate collapse should have access to documents in the possession of a third party which might have helped to establish his innocence. The documents were the subject of a claim for privilege. The question, put simply, was whether the circumstances required that the undoubted privilege which attached to the documents be set aside for the purposes of the criminal proceedings and in accordance with what Brennan J called '*... an exception in favour of protecting the liberty of the subject*'.[70]

Critically, these documents were never sought by, shown to or otherwise accessible by the auditor. They were not documents which had been brought into existence for, at the request of or at a time when the auditor enjoyed any rights of

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66 See AICD Corporations Law Committee Paper: *Directors Right of Access to Company Documents*, published October 1996.

67 (1996) 14 ACLC 73, 77.

68 (1995) 183 CLR 121.

69 Teele, *Collapse of the State Bank of South Australia: Implications for Directors* (1996) 14 C&SLJ 56 at 57-8.

70 Ibid at 126.

access. The only issue before the Court was whether an exception to legal professional privilege should be made in order to ensure that relevant information potentially determinative of guilt or innocence could be made available to the defence.

Quite aside from the fact that the case was decided by a slim majority, with strong dissents from Justices Toohey and Gaudron, the facts of this case are very distant from those in *Barrett* where the documents in question came into existence at the request of the directors, for their benefit and at a time when the same could have been read, copied or taken away by Board members.

Band-Aid Measures

Until Barrett is reconsidered or we have remedial legislation, the only steps open to existing directors to protect themselves, at least in advance of litigation where *implied* waiver operates, are those identified in or alluded to by Kriewaldt and in the AICD's paper of October 1996,[71] namely:

(a) to retain all board papers, acting on the assumption that property in them has passed to directors at the time of receipt;
(b) amend the corporation's articles to provide for rights of access to corporate documentation, both whilst as a director and for a specified period thereafter - or alternatively, for the limited purposes of the former director defending civil or criminal proceedings, whether brought by the corporation or a third party; and
(c) propose and enter into an *access* deed with the corporation providing for unrestricted access to documentation for a period of, say, seven years after vacating office.

There are problems with each of these 'solutions'. First, the corporation might contend that no property has passed in board papers or that the same are supplied under a reservation that the same shall be returned to the corporation on the director's relinquishing office. Secondly, in the case of both (b) and (c) above, it is difficult to see what corporate purpose could be satisfied in amending the articles or entering into an 'access deed'. To the extent that de Jersey J was prepared to find such a corporate purpose in *Kriewaldt*, his Honour's decision must be viewed with caution.

Conclusion

(a) does the corporation need such protection?

71 See AICD Corporations Law Committee paper: *Directors' Right of Access to Company Documents*, published October 1996.

It might be said that to prevent a corporation asserting legal professional privilege against its former directors risks exposing it to the dissemination of sensitive legal advice to a wider audience than that envisaged when the documents first came into existence, with former directors enjoying greater access to documentation than that enjoyed by an ordinary litigant.

Whilst the inability to assert privilege will doubtless see documents, including legal advice, surface where their confidentiality might otherwise have been preserved, this is a small price to pay in the interests of justice, especially in the relatively unusual circumstances of a retired director being sued by his or her former corporation where documents relevant to liability reside with the corporation.

Because of the potential threat posed by *implied waiver*, wherever a corporation sues a former director, a judgment will already have been made by the corporation and its lawyers that the action is worth the potential loss of privilege. In any event, there are sufficient safeguards in the trial process to protect the corporation's interests. For example, quite apart from the specific arrangements which the Court might be persuaded to make for the receipt of commercially sensitive material, confidentiality in the documents will be maintained in accordance with the implied undertakings ordinarily associated with discovery. Clearly, compulsory disclosure would not of itself be a waiver for any other purpose or in respect of any other proceedings.

(b) the need for a solution

It is plain - and unobjectionable - that whilst an existing director has the right to access all of the corporation's documents, that right ceases upon the vacation of office. Ordinarily, a *former* director is not entitled to any further access to documentation, even to those documents to which that director might have once had access - or even possibly created or seen - at the time of his or her directorship. The attempt in *Kriewaldt* to extend the right of access beyond a director's term of office was essentially artificial, as were the arguments used to assert a legitimate corporate purpose in the corporation's resolving to do so.

Better arguments need to be deployed if the problems posed by *Barrett* are to be overcome. The best of these is to challenge the reasoning in *Barrett* head on, namely that the Full Court was mistaken in its application of the principles governing legal professional privilege.

At the heart of the challenge to *Barrett* is the Full Court's failure to distinguish between rights of access (long since lost in the case of an *ex*-director) and the legitimate parameters of legal professional privilege. Access can only be relevant at the point in time at which the document comes into existence - being the time at which privilege is to be determined. It is the director's right of access which precludes the *confidentiality* without which there can be no legitimate claim to privilege. That a general right of access to corporate documentation might later be denied because the director has, in the meantime, vacated office, is irrelevant to the issue of privilege.

If it be the case that *Barrett* was correctly decided, it is far preferable that we recognise and correct the inadequacies in the present law. As evidenced by the eventual release of most, if not all, of the privileged documents in *Barrett*, there are a number of ways around the strict application of legal professional privilege. Already access deeds between both private and public sector Boards and their corporations are proliferating. Nonetheless, the central issue of what rights former directors have at common law to access corporate documents, including privileged ones, in circumstances where they are sued for alleged misdemeanours whilst a director, needs to be resolved.

Rather than await the common law evolution of similar rules to those now found in the United States, an obvious solution is the enactment of a statutory right in all former directors to access corporate documentation in defined circumstances. That right should be spelled out, in clear terms, in the *Corporations Law*. The US approach might well be the legislative model.

In the meantime, Australian corporations are still at liberty to pursue legal action against their former directors in the full knowledge that, questions of *implied waiver* aside, they can withhold from director defendants documents which might well exonerate them. That legal professional privilege should be used in this way to deprive former directors of access to potentially crucial documents to which they were once entitled and in circumstances where injustice is likely, is a matter about which all of us, and not just the AICD, should be concerned.