IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PRACTICE COURT

Not Restricted

S CI 2007 6949

DURA (AUSTRALIA) CONSTRUCTIONS PTY LTD — Plaintiff

v

HUE BOUTIQUE LIVING PTY LTD — Defendant

JUDGE:	MACAULAY J
WHERE HELD:	Melbourne
DATE OF HEARING:	6 September 2011
DATE OF JUDGMENT:	23 September 2011
CASE MAY BE CITED AS:	Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd
MEDIUM NEUTRAL CITATION:	[2011] VSC 477

PRACTICE AND PROCEDURE – Legal advice privilege – Litigation privilege – Joint legal privilege – No joint advice or legal privilege found – Definition of 'Australia or overseas proceeding' and 'Australian Court' under the *Evidence Act 2008* (Vic) - *Krok v Szaintop Homes Pty Ltd (No 1)* [2011] VSC 16 - *Evidence Act 2008* (Vic) ss 118, 119 .

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr T Margetts SC with Mr R Andrew	Noble Lawyers
For the Defendant	Dr S McNicol with Ms L Kirwan	Freehills

HIS HONOUR:

Introduction

1 Hue Boutique Living Pty Ltd, the first defendant, owns land in Richmond on which, in late 2005, it commenced construction of 29 residential apartments. It owned the land and undertook the development as trustee of the SC Land Richmond Unit Trust. To build the apartments it engaged a builder, Dura (Australia) Constructions Pty Ltd which is the plaintiff. As well as being the builder, Dura is also the holder of 20 percent of the units in the trust.

2 In 2007 Dura commenced this proceeding against Hue to litigate disputes that have arisen under the building contract made between them. Essentially, the issue is whether or not Dura was in breach of the contract to justify Hue serving a series of 'show cause notices' on Dura in September 2006 after which, in purported reliance on the contract, Hue took the works out of the hands of Dura and retook possession of the site. Dura claims damages against Hue if it was not justified in serving the show cause notices and retaking possession, and Hue claims damages against Dura if it was so justified. The matter is fixed for trial on 4 October 2011.

3 On 30 August 2011 Randall AsJ refused to order that Dura was entitled to inspect certain documents produced to the Court by third parties in answer to subpoenas issued at the request of Dura. Those documents are, in the main, communications between Hue's various project consultants (eg quantity surveyor, replacement builder, contract superintendent, architect) and its solicitors. There are 729 such documents dating between 19 April 2006 and 10 November 2009.

4 In refusing to make the order, his Honour ruled, in effect, the documents were protected by legal advice privilege or litigation privilege, under ss 118 and 119 of the *Evidence Act 2008* (Vic), in favour of Hue. Dura has appealed his Honour's decision so I must rehear and determine the application.

5 Dura claims that any advice privilege or litigation privilege protecting the documents generally, is not maintainable against Dura because any such privilege is

enjoyed jointly between Hue and Dura. It maintains this position because, it says, all the relevant communications were made for the purpose of advising Hue in its capacity as trustee of the trust, and for the proper administration of that trust. If that is so, Dura contends that any privilege attaching to such advice is the joint privilege of both the trustee and the beneficiaries (of which it is one). Therefore, Hue cannot rely on the privilege as against Dura.

6 Because it was thought possible that joint privilege would be harder to establish for documents brought about for the purpose of litigation services than it would for documents brought about for legal advice generally, Hue pressed for the classification of litigation privilege for as many of the documents as possible.

7 Aside from the question of joint client legal privilege, Dura argued that two particular categories of documents could not attract litigation privilege. The first was a class of documents brought into existence for the purpose of an adjudication process under the *Building and Construction Industry Security of Payment Act 2002* (Vic) ('the *Security of Payment Act*'). This statutory adjudication process was used by the parties in connection with disputed payments under the contract. Dura argues that such a process is not an 'Australian proceeding' under s 119 of the *Evidence Act* and, so, communications made to enable Hue to be advised about that process do not qualify for the litigation privilege.

8 The second category of documents Dura sought to exclude from privilege protection are those which relate to the actual preparation of the show cause notices (including drafts of such notices). Dura argues that such documents are akin to transaction-type documents, merely relating to the due administration of the building contract, which do not attract privilege.

9 Associate Justice Randall did not rule in relation to all 729 documents. His Honour made these orders:

(1) There is no joint client legal privilege reposed in the plaintiff and the first

defendant as referred to in paragraph 16 of the reasons …

(2) Client legal privilege is maintained with respect to those documents identified in paragraph 31 of the reasons …

(3) A further hearing of the summons filed 12 July 2011 is adjourned to a date to be fixed.

10 In 'other matters' his Honour recorded: 'Whether the Court is required to examine the balance of 695 documents will depend in part on the outcome of the appeal'. (At the date of the making of the orders, Dura had made it clear it would appeal his Honour's decision). As his reasons record, his Honour was invited to inspect a sample of 26 documents, and to rule specifically on them, in the hope that those rulings would enable the parties to resolve the entire class. Five of the 729 documents were not pressed for a ruling, leaving 724 documents. Following his Honour's oral ruling on 26 August 2011, Hue removed a further 29 documents from its privileged list, then leaving a total of 695.[1] Thus, as I understand it, the 695 documents referred to in 'other matters' are the balance. It is apparent that his Honour had in mind hearing arguments on those remaining documents if the parties did not reach agreement and, so, he did not finally dispose of the application.

11 The parties before me were not agreed on what I am seized of in this appeal. Can I only rule on the 26 documents the subject of his Honour's orders, or on the whole 724? I have been provided with a folder of the same 26 documents, supplemented by an additional 25 documents which Dura says (without having seen them) are likely to be better examples of the various classes of documents upon which I should rule. Without deciding the matter during submissions, I said I would accept the further documents and only look at them if I considered it was appropriate to do so.

12 The issues for decision are therefore:

(1) Is the legal advice privilege (s 118) or litigation privilege (s 119) over the

1 Affidavit of James Moore sworn 30 August 2011.

documents enjoyed jointly by Hue and Dura?

(2) Do the documents described as 'adjudication documents' and 'show cause documents' attract privilege?

(3) Over which of the 724 documents should I make orders?

Is the legal advice privilege (s 118) or litigation privilege (s 119) over the documents enjoyed jointly by Hue and Dura?

13 Hue has asserted advice privilege or litigation privilege, or both, as the basis for objecting to production to all 724 documents. Dura says that there is a global answer to either or both claims – that is, that the privilege is a joint client legal privilege.

14 Dura rests its argument on the foundation that everything that Hue did as the owner of the site, including any step it took under or in connection with the building contract with Dura, it did as trustee of the trust. It says, therefore, all steps Hue took to obtain legal advice in connection with the building contract, or in connection with litigation over that contract, were steps taken in discharge of its obligation to properly administer the trust. Because Dura was at all relevant times a beneficiary of the trust, it argues that any client legal privilege enjoyed by Hue is one that it enjoyed jointly with Dura.

15 Hue drew attention to the question of which legal principles should apply. Are they the principles used to decide whether a beneficiary is entitled to access to trust documents, on the one hand, or, on the other, the ordinary principles governing the law of privilege and evidence? Although there may be little practical difference for present purposes, I agree, with respect, with the statement made by Judd J in *Krok v Szaintop Homes Pty Ltd (No 1)*[2] where his Honour said:

> … A trustee's right to withhold, in the course of litigation, disclosure of a document from a beneficiary, on the ground of client legal privilege, is not to be determined by an analysis of the beneficiary's proprietary right to trust documents. The question is to be resolved by reference to the ordinary principles applicable to the protection of

2 [2011] VSC 16 ('*Krok's* Case').

privileged information and documents, and obligations of disclosure in litigation.[3]

16 A convenient statement of the foundation of joint legal privilege is found in *Farrow Mortgage Services Pty Ltd (in liquidation) v Webb*[4] in which it was said by Sheller JA, Waddell AJA agreeing, that:

> Two or more persons may join in communicating with a legal advisor 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 it is also if one of the group of persons in a formal legal relationship communicates with a legal advisor 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 the 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.[5]

17 As explained by Buss JA (McLure JA agreeing) in *Schreuder v Murray (No 2)*:[6]

> The beneficiary will not be entitled to a joint privilege with the trustee if the confidential communications, information or documents relate to legal services obtained for the benefit of the trustee personally (for example, if the trustee seeks legal advice as to his or her personal rights or liabilities in connection with an alleged breach of trust or threatened legal proceedings against him or her personally).[7]

18 To similar effect, in *Yunghanns v Elfic Pty Ltd (No 2)*,[8] Warren J (as she then was) cited with approval the following statement from *Phipson on Evidence*:[9]

> But where the communications relate to matters *outside* the joint interest, they are privileged even as against a person bearing the expense of the communications — *eg* communications between … a

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3 Ibid [14].
4 (1996) 39 NSWLR 601.
5 Ibid 608. See also *Yunghanns v Elfic Pty Ltd (No 2)* (2000) 1 VR 92, 99 [22], 101 [30] and 102 [34]-[35].
6 (2009) 260 ALR 139.
7 Ibid 161, [94](f).
8 (2000) 1 VR 92.
9 Sidney Phipson, *Phipson on Evidence* (Sweet and Maxwell, 14th ed, 1990)

> trustee and his solicitor as against the cestui que trust, where the communication is not made for the former's guidance in the trust, but to enable him to resist litigation by the latter, or where it concerns his character, not as trustee, but as mortgagee of the client.[10]

19 As can be seen, the cases distinguish the situation in which the advice is sought and obtained by a trustee in the discharge of its obligation to properly administer the trust from that in which it seeks advice in its personal capacity. The same distinction was important in *Krok's* case. Judd J answered the question in favour of the beneficiary seeking production of the documents from the trustee '…because the advice sought and obtained by the trustee was in discharge of its obligation to administer the trust, and not for its own personal benefit.'[11]

20 In *Gray v BNY Trust Company of Australia Limited*,[12] Bergin CJ (in Eq) applied a similar distinction to deny a beneficiary of right to inspect documents containing legal advice provided to the trustee. The critical reason for denying the inspection, and the upholding of the privilege, was the nature of the relationship between the plaintiff beneficiary and defendant trustee. His Honour said:

> …It is necessary to focus on the relationship at the time the documents were created. There is no doubt that at the time the documents were created in relation to the main proceedings in which the plaintiff was suing the defendant the communications were privileged.[13]

21 I then turn to the facts of this case. The nature of the relationship between Hue and Dura, and the background to Hue engaging Gadens and Freehills as its solicitors, was set out in an affidavit of Lance Chu, director of Hue.

22 In or about March 2006 Hue became concerned about the cost of scaffolding claimed by Dura and made repeated inquiries about Dura's calculations of the claimed provisional sum. On 16 March 2006 Dura alleged that Hue was in breach of the contract by not paying the provisional sum and threatened to cease works in relation

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10 *Yunghanns v Elfic Pty Ltd (No 2)* (2000) 1 VR 92, 102-103 [35].
11 Ibid [28]; See also [31].
12 (2009) 76 NSWLR 586 ('*Gray's* Case').
13 Ibid 601 [54].

to scaffolding and access equipment. Around the same time Dura became increasingly in conflict with the contract superintendent's and quantity surveyor's assessments regarding extensions of time.

23 From late April or early May 2006 Chu noticed that Dura had significantly increased its flow of correspondence on the project, and that its writing seemed increasingly formal and contentious. He said that, at this time, he believed that Dura was 'gearing up for a major dispute'. About the same time Dura also began making allegations of unfairness and bias against the superintendent.

24 Based on these matters, Chu said that he believed from at least April 2006 Hue and Dura were headed for a dispute which would need to be resolved by some form of legal proceeding.

25 In March 2006 Hue had sought legal advice from Gadens, who had drafted the building contract, in relation to Hue's rights and obligations under the contract and concerning possible legal proceedings against Dura in relation to problems identified in the works.

26 Furthermore, in early May 2006 Hue retained Freehills to provide advice in relation to an adjudication application made by Dura on 16 May 2006 under the *Security of Payment Act* (referred to in more detail below). As disputes developed between the parties, the scope of Freehills retainer enlarged to include the provision of advice in relation to each of the later adjudications and subsequent legal proceedings commenced by both parties. In due course, a total of 14 legal proceedings were issued, including the current proceeding which was initially issued at VCAT on 21 September 2006 and, on 28 May 2007, transferred to the Supreme Court.

27 At all relevant times Dura has been separately represented by Noble Lawyers.

28 On 11 September 2006 Hue issued the 'show cause' notices pursuant to clause 44.2 of the building contract that are the subject of this litigation. Those notices alleged against Dura:

(a) failure to provide evidence of insurance;

(b) failure to use the standard of materials or provide the standards of workmanship required by the building contract;

(c) failure to comply with a direction of the superintendent under clause 30.3 of the building contract; and

(d) failure to proceed with the works with due expedition.

29 Chu says that from 14 July 2006 onwards there was correspondence between Hue and the superintendent, Charter Keck Kramer, in the lead up to the preparation of the show cause notices. That correspondence, he said, was for the purpose of obtaining information so that Hue could, in turn, obtain legal advice from Freehills in relation to the issuing of those notices. The issuing of those notices was the contractual pre-condition to the removal of the building works from Dura. As I have already explained above, the central issue in this proceeding revolves around whether Hue was justified in the serving of those notices and retaking possession of the project.

30 In my view it is plain beyond doubt that the position of Dura and Hue in this period was adverse and that, relevantly, they did not share any common interest in the legal advice which Hue was obtaining. In obtaining its legal advice, Hue was plainly acting in its personal interests. None of the advice was sought, either implicitly or explicitly, about its obligations as trustee under the trust but, rather, in connection with the personal interest of Hue as the owner under the building contract.

31 The fact that Hue was, at all relevant times, the trustee of the trust was purely coincidental and its role as trustee had no bearing on the content of the legal advice it was given. This places the facts of this case in stark contrast with that of *Krok's* case on which Dura placed considerable reliance. Whereas, in that case Judd J said that the trustee's evidence and submissions did not explain why the advice did not relate to the administration of the trust, in this case it is clear that the trustee's evidence and

submission does precisely that. Furthermore, applying the focus, referred to by Bergin CJ in *Gray's* case, on the relationship between the parties at the time the documents were created, there is no doubt that when the disputed documents were created the parties were engaged in clear conflict, each separately represented by lawyers and heading towards the commencement of the very litigation in which the parties are now engaged.

32 Dura relies on an inference it says I should draw from the evidence, that the costs of the legal advice the subject of the claimed privilege has been paid out of the assets of the estate. Whilst Judd J used a similar feature in *Krok's* case to corroborate his conclusion that the advice concerned the administration of the trust, and the beneficiary was entitled to see the documents in question, that fact alone cannot be determinative of the issue. It depends upon the circumstances in each case. For example, in *Gray's* case the privilege was upheld despite the fact that the advice had been paid for by trust funds.[14] In any event, whether or not a trustee has properly used trust funds to pay for legal advice raises an issue quite independent of the question of privilege attaching to that advice.

33 Assuming (without deciding) it can be inferred that Hue paid for its advice from trust funds, that fact does not convert personal advice into advice concerning the administration of the trust.

34 For these reasons I reject the submissions made by Dura that the advice privilege or litigation privilege claimed by Hue over the documents is one jointly held by Hue and Dura.

35 I also consider, upon the evidence before me and having perused the 26 documents referred to above, that there was a real prospect of litigation[15] from at least 5 May 2006 when, as Randall AsJ noted in his reasons, Chu wrote to Gadens requesting a meeting to discuss measures to adopt 'as Dura is obviously gearing up for a major

14 (2009) 76 NSWLR 586, 601 [54].

15 *Mitsubishi Electric Australia Pty Ltd v WorkCover Authority (Vic)* (2002) 4 VR 332, [19].

dispute'.

36 Finally, it was not entirely clear to me, in any event, what the outcome might have been had I agreed with Dura that the privilege was jointly held. Under common law, a jointly held privilege could only be waived with the consent of both holders – which has not occurred in this case. One holder alone could not waive the privilege to permit the document or communication to be admissible in evidence. Section 124 of the *Evidence Act* appears to modify that position so that the existence of the joint privilege could not prevent one of the parties from adducing evidence of a protected communication or a confidential document. Nevertheless, the conditions for the application of that modified principle, set out in s 124(1) of the Act, do not apply to the circumstances of this case.

37 It is not necessary for me to deal with this aspect of the argument further. As I have said, the client legal privilege that arises is not a joint privilege.

Do the documents described as 'adjudication documents' and 'show cause documents' attract privilege?

Adjudication documents

38 Documents relating to the adjudications which qualify for protection under the advice privilege (s 118) do not need to be considered for this purpose. They are privileged from production in any event. Dura's challenge to the adjudication documents was only in respect of their qualification for the litigation privilege under s 119. Accordingly, the sub-set of the adjudication documents that are in issue are, broadly speaking, those that were *not*:

- communications between Hue (as 'client' in its extended meaning under s 117) and its lawyers, or
- prepared confidentially by a third party (ie. 'another person') –

for the dominant purpose of a lawyer providing legal advice to Hue.

39 In so far as documents passed between agents of Hue and its lawyers, or were confidentially prepared by third parties so that lawyers could give legal advice to Hue in relation to the adjudication, those documents are covered by the advice privilege. Moreover, any document, in particular any email, which on its face does not qualify for advice privilege but which attaches a chain of prior communications which do attract such privilege, is protected, because the production of it would result in the disclosure of privileged material.

40 Therefore, Dura's arguments about the ambit of an 'Australian or overseas proceeding' (s 119) are only relevant to those adjudication documents that fall outside those already covered by the advice privilege.

41 The litigation privilege which is provided in s 119 of the *Evidence Act* protects confidential communications or the contents of confidential documents made or prepared 'for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court, or an anticipated or pending Australian or overseas proceeding) in which the client is or may be, or was or might have been, a party'. The expression 'Australian or overseas proceeding' is defined in the dictionary to the *Evidence Act* as meaning 'a proceeding (however described) in an Australian court or a foreign court'. In turn, an 'Australian court' is defined to mean any of the Federal, State or Territory courts or:

- a judge, justice or arbitrator under an Australian law; or
- a person or body authorised by an Australian law, or by consent of parties, to hear, receive and examine evidence; or
- a person or body that, in applying a function under Australian law, is required to apply the laws of evidence.

42 The *Security of Payment Act* (as in force in early 2006) created a statutory entitlement

for contractors under construction contracts to recover progress payments.[16] The mechanism for the enforcement of that entitlement was as follows. The claimant contractor would lodge a payment claim with the owner or principal as respondent; that respondent would reply with a payment schedule indicating what it agreed or disagreed with and, in the case of dispute, an adjudicator was appointed to make a determination on the dispute.

43 The adjudication process consisted in the claimant lodging with the adjudicator a written adjudication application setting out the claim, the respondent would reply with a written adjudication response and then the adjudicator was required to provide a written determination within ten days. The adjudicator did not have to be a lawyer but a person who by qualification and experience was appropriate. Other than receiving written submissions, the adjudicator could call a conference between the parties and have an inspection of the relevant site. The written determination had to state the reasons and the basis of the determination.

44 Upon receipt of the determination, the respondent was obliged to either pay the amount determined or, only if the respondent commenced court or tribunal proceedings against the claimant, give security for the payment in some appropriate form. The adjudicator's determination could be recovered as a debt using court enforcement processes.

45 Importantly, the Act provided that the adjudication did not affect parties' rights under the contract and, in any 'proceeding before a court or tribunal' in relation to any matter arising under the construction contract, the court or tribunal was obliged to allow for any payment received by a party to the contract under an adjudicator's determination or it could order restitution of any amount so paid.

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16 See generally the description of the regime in *Metacorp Australia Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199, [18]-[20]. The statutory adjudication process has recently been the subject of numerous decisions in Victoria, particularly in relation to whether adjudications are susceptible to judicial review: see *Metacorp Pty Ltd v Andeco Construction Group Pty Ltd* [2010] VSC 199; *Grocon Constructors v Planit Cocciardi Joint Venture (No 2)* [2009] VSC 426; *Hickory Developments Pty Ltd v Schiavello (Vic) Pty Ltd* [2009] VSC 156.

46 The objects of the Act (s 4) made it abundantly clear that the adjudication procedure was not intended to prejudice any claim in a proceeding in a court or tribunal concerning work to which any payment claim related. The Act was limited to enabling the recovery of progress claims during the currency of a construction contract without prejudicing any final rights and entitlements at law.

47 Although the adjudicator does not have to apply the laws of evidence, parties may, by means of the 'payment claim' and 'payment schedule', present quite detailed evidence concerning the contested entitlement to the progress claim. Further, the adjudicator is to receive submissions. In the current case it is evident from my inspection of the number of the adjudication documents provided to me in Dura's further sample (eg documents 36, 45 and 46) that evidence was provided to the adjudicator in the form of statutory declarations, and very detailed and contentious submissions were presented.

48 I agree with Dura's submission that, because an adjudicator is not bound to apply the laws of evidence, such a person does not qualify as an 'Australian court' on that basis. But, is an adjudicator authorised by the *Security of Payment Act* to 'hear, receive and examine evidence'? In considering whether, as a matter of statutory interpretation an adjudicator meets that description I am to prefer a construction that promotes the purpose or object of the *Evidence Act*.[17] Assuming, as I do, that the regime of privilege is intended to ensure fairness between participants in the conduct of litigious processes, I would not give that expression a narrow meaning.

49 The adjudication occurs in a patently adversarial setting. It is determined upon the basis of evidence presented in documentary form, and upon written submissions. The process employed by Dura and Hue itself bears out that reality. Despite the fact that the adjudication may not ultimately determine the parties' rights if, in a subsequent court proceeding, the parties' entitlements are litigated, the adjudication result is enforceable at law and is binding upon the parties unless and until a

17 *Interpretation of Legislation Act 1984* (Vic), s 35.

subsequent court order changes that outcome. I think that the nature of adjudications is such that preserving the confidentiality of communications, made for the dominant purpose of enabling the provision of legal services to participants in the adjudication, would promote the object of fairness for and between those participants.

50 Bearing those matters in mind, I conclude that the provisions of the Act I have summarised above do authorise the adjudicator to 'hear, receive and examine evidence' as I would construe that expression. I therefore construe the definition of 'Australian court' to embrace an adjudicator under the *Security of Payments Act*, and an adjudication as an 'Australian proceeding' within the meaning of s 119 of the *Evidence Act*.

51 For these reasons I reject Dura's submission that s 119 privilege cannot apply to documents brought about in this case for the dominant purpose of enabling legal services to be provided to Hue for the adjudications under the *Security of Payments Act*.

Show cause notices

52 Dura's challenge in relation to documents relating to the preparation of show cause notices was relatively confined. It argues that the privilege does not attach because documents in this category are, or are likely to be, documents which merely constitute or evidence transactions (such as contracts, conveyances, declarations of trust, offers or receipts).[18] It argued,

> ..the dominant purpose of these documents must relate to the creation of the show cause notices as a step in the due administration/management of the Plaintiff's (builder) rights and entitlements under the building contract and the Principal's obligations under that building contract.
>
> It is submitted that these documents are not covered by s 119 of the *Evidence Act*.[19]

18 *Baker v Campbell* (1983) 153 CLR 52, 86.
19 Plaintiff's written submission, para 10(c) and (d).

53 It seemed that Dura's challenge was, once again, confined to the question of those documents which could only qualify for litigation privilege and would not already be protected under advice privilege.

54 The show cause notices in this case are the assertions of contractual wrongdoing which are the very foundation of the issues in dispute. Advice given about them, and even the formulation of them, go to matters which are at the very heart of this litigation. The preparation of them in September 2006, well after I have found that litigation was reasonably anticipated, were themselves critical steps taken towards the litigation.

55 In those circumstances I do not accept that documents to gather information for the preparation of, and advice given in relation to, the show cause notices are no more than transactional documents. Furthermore, having inspected a number of the documents which pertain to those draft notices (eg 261, 286, 350, 351, 352, 353, 354), and having also looked at a number of the additional documents which Dura suggested I should look at (eg 340, 350, 351, 352, 353, 361, and 364), I am fortified in that view.

56 Thus, I reject Dura's submissions that documents relating to the preparation of the show cause notices do not qualify for the litigation privilege protection.

Over which of the 724 documents should I make orders?

57 I have looked at each of the 26 documents referred to in paragraph 31 of Randall AsJ's reasons. I do not intend to set out the same list of documents, descriptions or findings that his Honour made. I will simply state that I agree with the conclusions he has reached in relation to each document and I adopt them as if they were my own.

58 As mentioned above, I have perused the additional 25 documents which Dura requested that I inspect for the purpose of seeing whether those documents altered my view in any way, or assisted me to reach conclusions. Other than looking at

them for that purpose, I do not intend to formally rule in relation to each of those documents.

59 Nor, unsurprisingly, do I intend to make rulings in relation to the remainder of the 695 documents (which I have not seen) listed in the exhibit JEM-2. Assuming the descriptions given to each of the remaining documents are correct, based upon my rulings of general principle within these reasons it would follow (without me ruling as such on each document) that each them will likely be protected by advice privilege or litigation privilege, or both.

60 If the parties are unable to reach agreement on the remaining documents as a result of these reasons then I will refer the matter back to an associate judge to determine the fate of such of them that remain in dispute, in accordance with the rulings I have made.

Conclusion

61 For the reasons I have stated:

(a) I reject the submissions made by Dura that the advice privilege or litigation privilege claimed by Hue over the documents is jointly held by Hue and Dura.

(b) I reject Dura's submission that s 119 privilege cannot apply to documents brought about in this case for the dominant purpose of enabling legal services to be provided to Hue for the adjudications under the *Security of Payments Act*.

(c) I reject Dura's submissions that documents relating to the preparation of the show cause notices in this case do not qualify for the litigation privilege protection.

62 I will hear the parties on the form of orders I should make to give effect to these reasons.