CITATION: Shaun James Bretherton v Allianz Australia [2017] NTLC 013

PARTIES:	SHAUN JAMES BRETHERTON
	V
	ALLIANZ AUSTRALIA INSURANCE LIMITED
TITLE OF COURT:	WORK HEALTH COURT
JURISDICTION:	Work Health
FILE NO:	21538633
ORDERS MADE:	19 April 2017
DELIVERED ON:	23 June 2017
DELIVERED AT:	Darwin
HEARING DATE:	31 March 2017
DECISION OF:	Judge Neill

CATCHWORDS:

Legal professional privilege; waiver; modern principles of case management; practice and procedure in the Work Health Court; power of Court to compel decision as to waiver.
Attorney-General (NT) v Maurice (1986) 161 CLR 475
Goldberg v Ng (1995) 185 CLR 83
Brown v Metro Meat International Ltd [2000] WASCA 123
State of Victoria v Carolyn Susan Davies (2003) 6 VR 245
Baird v Northern Territory of Australia [2007] NTMC 023
Ketteman v Hansel Properties Ltd [1987] AC 189
Haset Sali v SPC Ltd (1993) 116 ALR 625
Queensland v JL Holdings Pty Ltd (1997) 189 CLR 146
Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd & Ors [2008] NSWCA 243
Aon Risk Services Australia Limited v Australian National University (2009) 239 CLR 175
Bomanite Pty Ltd v Slatex Corp Aust (1991) 32 FCR 379
Boyes v Colins (2000) 23 WAR 123

REPRESENTATION:

Counsel:

Worker:	Kerry Sibley
Employer:	Ben O’Loughlin

Solicitors:

Worker:	Halfpennys
Employer:	HWL Ebsworth Lawyers

Judgment category classification:	A
Judgment ID number:	013
Number of paragraphs:	51

IN THE WORK HEALTH COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21538633

BETWEEN:

SHAUN JAMES BRETHERTON

Worker

AND:

ALLIANZ AUSTRALIA INSURANCE LIMITED

Respondent

REASONS FOR DECISION

(Delivered 23 June 2017)

JUDGE NEILL:

1. The Worker pleaded that he sustained a back injury in the course of his employment with Get It Up Carpentry Services Pty Ltd ("the employer") on about 11 August 2014. The Respondent Allianz Australia Insurance Limited ("Allianz") admitted the occurrence of a compensable work-related injury but pleaded that this was an

aggravation of a pre-existing injury or disease and the said aggravation ceased on or about 13 August 2014, two days after the occurrence of the injury. The Respondent denied the Worker had any ongoing entitlements under the *Return to Work Act* ("the Act"). The Worker applied to the Work Health Court for a determination of this dispute.

2. The employer had gone into liquidation and its relevant Work Health insurer, Allianz, was substituted in these proceedings in place of the employer as Respondent by the Order of Judicial Registrar Johnson made 7 September 2015.

3. On 7 October 2016 the parties appeared by their legal representatives before Judicial Registrar Johnson at a settlement conference. On that occasion settlement was not achieved and the conference proceeded as a prehearing conference. The proceeding was listed for hearing for 5 days commencing 24 October 2016. These hearing dates were subsequently vacated and on 30 November 2016 the matter was re-listed for hearing as a second–listed proceeding commencing on 8 May 2017, and as a first–listed proceeding commencing on 28 August 2017

4. Both the second–listed and first-listed hearings were allocated to me as hearing judge. I presided over Directions Hearings on 1 February 2017 and 15 March 2017. On 15 March I was made aware of an issue involving legal professional privilege and I listed that issue before me for argument on 31 March 2017. The parties filed lists of authorities and written submissions and at the conclusion of detailed oral argument on 31 March 2017 I reserved my Decision. I made Orders determining the issue on 19 April 2017 without then delivering my Reasons for Decision, in anticipation of the hearing going ahead on 8 May 2017.

5. I set those orders out below for ease of reference:

> "*1. The Respondent by 3:00pm on Friday 21 April 2017 provide to the solicitor for the Worker copies of all the material discovered as privileged documents numbered 5.2 to 5.7 inclusive in the Respondent's List of Documents filed and dated 15 March 2017 OR ELSE the Respondent is prohibited from utilising those documents or*

any contents of them or any part of them in any way at any hearing of this proceeding, including in any cross-examination of the Worker or any witnesses called in his case and in any examination-in-chief of any witnesses called in the Respondent's case."

"2. The costs of and incidental to the parties' attendances on 15 March 2017 and on 31 March 2017 are costs in the cause certified fit for counsel and to be taxed in default of agreement at 100% of the Supreme Court scale."

6. The matter subsequently settled just prior to 8 May 2017, however I now provide my Reasons for Decision in respect of those Orders because the issue is an important one which has arisen from time to time in the past and which will undoubtedly arise in future Work Health matters.

The Issue

7. At the Directions Hearing on 15 March 2017 counsel for the Respondent Mr O'Loughlin advised that the Respondent had still not filed and served its consolidated and up to date List of Documents, in breach of Order 4 which I made on 1 February 2017. Mr O'Loughlin further advised that the Respondent was in possession of surveillance material of the Worker which had not been formally discovered by the Respondent as at 15 March 2017. Counsel for the Worker Ms Sibley had been alerted to the existence of that surveillance material only that morning.

8. I ordered the Respondent to file and serve its consolidated and up to date List of Documents by close of business that day. That was done and that discovered surveillance material in the possession of the Respondent dated 7, 8, 10, 11, 14, and 20 October 2016. This material had not been discovered, its existence was not disclosed by the Respondent's legal representative and its potential impact on any hearing was therefore not considered by the Judicial Registrar on 30 November 2016 when the proceeding was re-listed for hearing. I emphasise this was nearly six

weeks after the then most recent surveillance having been carried out on 20 October 2016.

9. On 15 March 2017 Mr O'Loughlin for the Employer advised me that the Respondent claimed legal professional privilege for the surveillance material but that he on behalf of the Respondent had already taken the decision to show the surveillance material, or selected parts of it, to the Worker in his cross-examination at the hearing. Notwithstanding that he had already taken this decision, Mr O'Loughlin maintained his client's claim for legal professional privilege over this material until he came to cross-examine the Worker at the hearing.

10. Mr O'Loughlin's stated position that he had already taken the forensic decision to cross-examine the Worker on the surveillance material at the hearing raised the question whether the Respondent, through Mr O'Loughlin, had already waived its legal professional privilege over the material. If it had not then a further question was raised, namely whether the foreshadowed future waiver of privilege might adversely impact the orderly running of the hearing. If so, what if anything could or should be done to prevent or reduce any such adverse impact?

Legal Professional Privilege

11. In *Attorney-general (NT) v Maurice* (1986) 161 CLR 475, Gibbs C.J. said at paragraph 5:

> "The rule which recognizes legal professional privilege goes back at least to the time of Elizabeth I (see Wigmore on Evidence (McNaughton rev. 1961), vol. VIII, par. 2290) but that does not mean that it is archaic, technical or outmoded. Without the privilege, no one could safely consult a legal practitioner and the administration of justice in accordance with the adversary system which prevails at common law would be greatly impeded or even rendered impossible."

12. Mason and Brennan JJ said in the same case in paragraph 10 of their joint judgement, as follows:

> “Legal professional privilege is an ancient doctrine which has assumed a life of its own. Succinctly stated, the privilege protects from disclosure "communications made confidentially between a client and his legal adviser for the purpose of obtaining or giving legal advice or assistance": *Reg. v. Bell; Ex parte Lees* [18], per Gibbs J. The raison d'être of legal professional privilege is the furtherance of the administration of justice through the fostering of trust and candour in the relationship between lawyer and client. The privilege is based on the need of laymen for professional assistance in the protection, enforcement or creation of their legal rights. They should have the benefit of that assistance, free of any restraint which fear of the disclosure of their communications with those advisers would impose. (*Reg. v. Bell* [19], per Stephen J.)
>
> When the privilege applies, it enables the client to keep the communication from disclosure and interferes with the public's "right to every man's evidence": Cobbett's Parliamentary History (1812), vol. 12, p. 675. Because of this conflict between the public interest in ensuring the availability of all relevant evidence in a particular case and the public interest in the administration of justice through effective legal representation, the privilege is confined within strict limits: *Grant v. Downs* [20], per Stephen, Mason and Murphy JJ.”

13. In *Goldberg v Ng* (1995) 185 CLR 83, Gummow J said in paragraph 28 as follows:

> “In approaching any particular case in this fashion, it also is to be borne in mind that legal professional privilege is not a mere rule of evidence but a substantive and fundamental Common Law doctrine, a rule of law, the best explanation of which is that it affords a practical guarantee of fundamental rights.”

Waiver

14. On 15 March 2017 Mr O'Loughlin stated he had taken the present decision to waive the Respondent's privilege over the surveillance material at the future hearing at the forensically appropriate time – presumably during his cross-examination of the Worker. This statement prompted the submission on 31 March 2017 by Ms Sibley for the Worker that the Respondent through Mr O'Loughlin had **already** waived its claim to the privilege.

15. I am satisfied that this submission is not correct. Mr O'Loughlin's statement was no more than his compliance with his obligation to the Court at a Directions Hearing to inform it of all circumstances relevant to his client's readiness for the hearing.

16. I accept that Mr O'Loughlin on 15 March 2017 certainly intended on the occasion of the future hearing to waive his client's privilege over the surveillance material. However he had not at that time showed any part of the surveillance material to the Worker or the Worker's legal advisor or used it in any way inconsistent with the claim for privilege. Mr O'Loughlin was always free to resile from his stated intention to waive the privilege at any time before any such waiver actually occurred.

17. I rule that a statement of a present intention to effect a future waiver of privilege over specified documents is not in and of itself inconsistent with a continued assertion of the privilege, and it does not constitute a present waiver of the privilege.

The Mischief to Be Prevented

18. The practice of claiming legal professional privilege over surveillance material, with the intention of waiving the privilege in the course of a future hearing, is long established in personal injuries matters generally and workers' compensation matters specifically. In the past Courts have upheld this practice on the basis *inter alia* that obliging an employer to show such surveillance before the worker gives evidence would be unfair to the employer. This was said to be because a dishonest

worker would be forewarned and could tailor his evidence to fit the surveillance material.

19. This contention was considered by the Full Supreme Court of Western Australia in *Brown v Metro Meat International Ltd* [2000] WASCA 123 delivered 11 May 2000. A workers' compensation Review Officer had ruled at first instance that the employer must show surveillance material to the worker and his treating doctor before the hearing commenced, as a matter of fairness. This was reversed by a Compensation Magistrate on review. The matter was further reviewed and eventually found its way to the Full Supreme Court. The Full Court unanimously agreed with the original Review Officer that withholding the surveillance material from the worker might cause prejudice to the worker. In the course of considering this question, the Full Court in paragraphs 20 to 24 considered some of the types of prejudice which might arise, as follows:

> "20 The problem with the Compensation Magistrate's reasoning is perhaps revealed if one looks to one of the two reasons which seem to have been those underlying his view that the Review Officer misdirected himself. He considered that the decision of the Review Officer to allow the appellant to see the video surveillance "would result in unfairness to the [respondent] insofar as it may affect the [respondent's] right to legitimately attack the [appellant's] credibility". It is true that if a worker in such a situation is indeed untruthful, a malingerer, and prepared to give false evidence, there will be a real forensic advantage to an employer or insurer in ensuring that the worker does not view the video surveillance evidence before he or she gives evidence. As was pointed out by the respondent, a worker who knows that such material is available, but has not seen it, has an incentive to be truthful where he or she otherwise might not, while the worker who persists in being untruthful in evidence can be exposed after he or she has committed to untruthful statements under cross-examination.

"21 However, both the respondent, and, with respect, the Compensation Magistrate, appear to consider only this aspect of unfairness. It must be remembered that the question of whether the worker is untruthful and a malingerer is the very issue which the litigation (or under the Act, the application) is designed to determine. Questions of fairness in allowing access to videotaped material cannot then be determined by assuming that only one answer to that question is possible.

"22 If one assumes, on the contrary, that the worker is not untruthful and is not a malingerer, then he or she may suffer in some cases significant disadvantage from lack of access to the videotaped material. At the very least, an adjournment to allow the worker and/or the worker's medical advisers to view the videotape partway through the hearing, will result in delay and increased cost. Further, depending upon the nature of the disability which the worker alleges and the nature of the activities shown on the videotape, the worker may be able to give or call evidence which explains the activities carried out on the video; perhaps they were undertaken at a time after certain treatment had been undertaken, or perhaps they were followed by particularly severe renewed symptoms, for example. Generally, this difficulty will be able to be cured by adjournment, but on occasions it may not (if, for example, delay in making the video available means that evidence is lost or memories faded). It may be on occasion that medical advisers of the worker, particularly if assisted by comments or explanation from the worker, will form a view of the videotaped material different from that of the experts to whom the film has been shown by the employer or insurer. The worker will be disadvantaged if that material is not able to be put to the employer/insurer's witnesses during cross-examination. Such disadvantage is particularly likely during the course of litigation involving personal injury, where medical witnesses are generally called in a sequence which is convenient to them. Making the videotape available to the appellant only at a hearing would be likely, therefore, not only to require an adjournment, but also to require the respondent's medical

practitioners to revisit the appellant's condition a considerable time after they had last seen her, and to review videotapes which they may (as Professor Cohen indicated in this case) be unwilling to view again. We are informed that in this jurisdiction experts are often "cross-examined" by letter, which may exacerbate such a difficulty.

"23 Finally, disclosure of the videotaped material allows the worker and his or her advisers to consider the possibility of settlement without the spectre of some action which is forgotten or able to be innocently explained being produced at trial in a manner which has a disproportionate impact. It is not an answer to this last contention, that the worker "must know what she/he did", since very few individuals can recall every action undertaken over the period which usually precedes litigation of this kind; the 30 hours of material in this case extending over many months may well contain a number of incidents which have been forgotten by the appellant.

"24 I am aware of a number of decisions of the District Court of this State in which, in the analogous situation of an application pursuant to O 36 r 4 of the *Rules of the Supreme Court*, orders have been made that personal injury plaintiffs not have access to videotaped material. Such an order is certainly one which may be appropriately made, depending upon the circumstances of the individual case. However, there are, equally, many cases in which such an order would not be appropriate. Competing considerations are discussed in ***Khan v Armaguard*** [1994] 1 WLR 1204. Not all of the considerations discussed in ***Khan*** apply in respect of applications pursuant to the Act, since the ability, via appropriate interrogatories, to have a worker commit him or herself to a particular factual position does not appear to be available. However, a worker will generally have committed to at least some facts both in documentation associated with a claim and in discussions with medical experts, and the degree to which this is so will perhaps be a relevant factor. To the extent that those considerations are applicable, it appears to me

that the Compensation Magistrate failed to consider what prejudice might flow to the appellant from non-disclosure of the videotaped material, so as to take that relevant consideration into account."

20. I respectfully agree with these observations.

Timetable for Waiver of Privilege

21. The question whether a Court might impose a procedural timetable or conditions generally in respect of the use of privileged material has previously been determined in the negative, in the absence of a sufficient legislative basis.

22. In *State of Victoria v Carolyn Susan Davies* (2003) 6 VR 245 Batt JA of the Victorian Court of Appeal noted in paragraph 29 as follows:

> "But it appears from the submissions of Counsel that several County Court judges have taken the view that pre-trial disclosure can be required of surveillance videotapes the subject of legal professional privilege and it is desirable that the correctness of that view be considered by this Court….".

23. His Honour went on to consider the issue, and he determined it in paragraph 31 where he relevantly said:

> "If, then, the appellant had not waived privilege, the question arises whether His Honour was entitled to refuse to allow the appellant to use the videotapes in cross-examining the respondent. Now, legal professional privilege is a substantive general principle of the common law of great importance, which is not to be sacrificed even to promote the search for justice or truth in an individual case or to be abolished or cut down otherwise than by clear statutory provision or to be narrowly construed or artificially confined: *Attorney-General (NT) v. Maurice*. This was re-emphasised by the High Court in *Daniels Corporation International Pty. Ltd. v. ACCC*, where it was called a fundamental common law immunity. It is clear as a matter of principle, and from the statements in the two High

> Court cases just mentioned, that a court cannot, **without the authority of statute or of valid rules of court** (emphasis added), by order, in effect compel a party entitled to legal professional privilege in a document to abandon or waive that privilege by, for instance, producing it before trial to an opposing party against the will of the first-mentioned party or prevent the party from tendering or using the document in a hearing where the party has not already disclosed it to the opposing party or, alternatively, where the party does not thereafter first do so."

24. This Decision and this approach were expressly followed in the Northern Territory in May 2007 when Dr Lowndes SM (as he then was) dealt with this issue in the Work Health Court in *Baird v Northern Territory of Australia* [2007] NTMC 023 ("*Baird*").

25. In *Baird* the Court expressly considered subsections110A(1) and (2) of the *Workers Compensation and Rehabilitation Act* (as the *Return to Work Act* was then titled), Rule 3.04 of the *Work Health Court Rules*, the relevant authorities and also arguments as to case management concepts as the law then stood. His Honour was not persuaded by these arguments at that time. He considered many of the cases and arguments which were raised before me in this matter. However, I have had the benefit of additional material, namely the Decisions on case management which have been decided since *Baird*.

The Developing Role of Case Management

26. In 1987 in *Ketteman v Hansel Properties Ltd* [1987] AC 189 at 220, Lord Griffiths said concerning case management:

> "…justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in the balance the strain the litigation imposes on litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues, the raising of false hopes…".

27. Subsequently in Australia in 1993, two judges of the High Court approved the importance of case management but from a slightly different direction, in *Haset Sali v SPC Limited and Anor* (1993) 116 ALR 625 at paragraph [23] where Toohey and Gaudron JJ Said:

> "The contemporary approach to court administration has introduced another element into the equation or, more accurately, has put another consideration onto the scales… The view that the conduct of litigation is not merely a matter for the parties but is also one for the court and the need to avoid disruptions in the court's lists with consequent inconvenience to the court and prejudice to the interests of other litigants waiting to be heard are pressing concerns to which a court may have regard."

28. The High Court took a more restrictive approach only four years later, in *Queensland v JL Holdings Pty Ltd* (1997) 189 CLR 146 ("*JL Holdings*"). Dawson, Gaudron and McHugh JJ said:

> "*Sali v SPC Ltd* was a case concerning a refusal of an adjournment in relation to which the proper principles of case management may have a particular relevance. However, nothing in that case suggests that those principles might be employed, except perhaps in extreme circumstances to shut a party out from litigating an issue which is fairly arguable. Case management is not an end in itself. It is an important and useful aid for ensuring the prompt and efficient disposal of litigation. But it ought always to be borne in mind, even in changing times that the ultimate aim of a court is the attainment of justice and no principle of case management can be allowed to supplant that aim."

29. There the position largely rested until October 2008 when the NSW Court of Appeal in its Commercial Division expressed a strong view in favour of the fundamental importance of case management, focussing mostly on the obligations of parties to litigation precisely to identify the issues in dispute in litigation, both

by the clarity of their pleadings, and otherwise. This was in the case of *Baulderstone Hornibrook Engineering Pty ltd v Gordian Runoff Ltd and Ors* [2008] NSWCA 243.

30. Allsop P delivered the unanimous Decision of the Court. At paragraphs 160 to 164 inclusive, he stated as follows:

> "160 Giving due weight to the realities of life in running a long and complex trial and the vicissitudes of the appreciation of the evidence given, it cannot be emphasised too strongly that it is the responsibility of the parties, through their legal representatives, to exercise a degree of co-operation to express the issues for trial before and during the trial. Such co-operations can now be taken as an essential aspect of modern civil procedure in the running of any civil litigation, including hard-fought commercial cases. The need for clarity, precision and openness as part of this co-operation has been emphasised in the context of ambush or surprise: *White v overland* [2001] FCA 1333 at [4], expressly approved in *Nowlan v Marson Transport Pty Limited* [2001] NSWCA 346; 53 NSWLR 116 (Heydon JA, with whom Mason P and Young CJ in Eq agreed); *Glover v Australian Ultra Concrete Floors Pty Limited [2003] NSWCA 80 at [59]-[60] (*Ipp JA, with whom Sheller and Hodgson JJA agreed)*; Sutton v Erect Safe Scaffolding (Aust) Pty Ltd* [2006] NSWCA 265 at [4] (Bryson JA with whom Basten JA agreed); and *Hooker v Gilling [2007] NSWCA 99 at* [52] (McColl JA, with whom Ipp and Basten JJA agreed).
>
> "161 The need for clarity, precision and openness in the conduct of litigation and the responsibility of parties and their legal representatives therefore **flows most clearly from the statutory duty of a party and his, her or its legal representatives in civil proceedings to assist the court to further the overriding purpose to facilitate the just, quick and cheap resolution of the real issues in dispute and to participate in the processes of the Court to that end**: see *Civil Procedure Act 2005* (NSW),

56 (emphasis added). It may be that the provision no more than restates the proper approach of the modern law of procedure reflected in cases such as *Nowlan v Marson Transport.* It places the proper approach, however, on a firm statutory foundation. These principles can be seen to be reflected in the longstanding rules of pleading requiring any matter that may cause surprise to be pleaded.

"162 An enhanced requirement of clarity and disclosure in modern civil litigation can be seen in Australia and England from at least the early 1990s: see the discussion of the "cards on the table" approach by Ipp J (as his Honour then was) in *Boyes v Colins* [200] WASCA 344; 23 WAR 123 (with whom Pidgeon and Wallwork JJ agreed in *Armaguard Ltd* [1994] 1 WLR 1204. Indeed, from the late 1970s and early 1980s, the Commercial List of this Court (in which List this hearing took place) has been sought to be run on the strict basis of the clear and full enunciation of issues for trial, in a way that has always demanded the fullest co-operation among parties and legal practitioners to delineate and illuminate the real issues in dispute.

"163 The clear statutory duty to assist the Court, and, in a practical way, to co-operate to bring forward the real issues in dispute, encompasses the requirement to be clear and precise in the illumination of the issues for trial. **The occasion for this is not merely pleading** (using the word broadly to encompass the modern commercial list summons and defence), **it extends to all aspects of the engagement in the Court's processes** (emphasis added). For similar responsibilities in the conduct of references, see *Bellevarde Constructions Pty Limited v CPC Energy Pty Limited* [2008] NSWCA 228 at [55]-[56].

"164 This does not deny the possibility, as occurs in real life in litigation that issues will develop. Litigation is dynamic human activity. Changes in how a case is put can be expected. This often occurs in large commercial

cases. Such change, and the potential for it, makes it, however, all the more important that legal practitioners and parties ensure that the clear enunciation of issues keeps pace with that growth and change. This responsibility will encompass parties and their legal representatives making clear what is being put and also what they regard as not legitimately part of the controversy, if it is apparent to them that an issue not pleaded or presented is being relied on."

31. In August 2009 the High Court revisited case management in civil litigation. In *Aon Risk Services Australia Ltd v Australian National University (*2009) 239 CLR 175 ("*Aon*") French CJ said at paragraph 6, in considering the Decision in *JL Holdings*, as follows:

> "However, to the extent that statements about the exercise of discretion to amend pleadings in that case suggest that case management considerations and questions of proper use of Court resources are to be discounted or given little weight, **it should not be regarded as authoritative** (emphasis added)."

32. In paragraph 30 French CJ said:

> "It might be thought a truism that "case management principles" should not supplant the objective of doing justice between the parties according to law. Accepting that proposition, *J L Holdings* cannot be taken as authority for the view that waste of public resources and undue delay, with the concomitant strain and uncertainty imposed on litigants, should not be taken into account in the exercise of interlocutory discretions of the kind conferred by r 502. Also to be considered is the potential for loss of public confidence in the legal system which arises where a court is seen to accede to applications made without adequate explanation or justification, whether they be for adjournment, for amendments giving rise to

adjournment, or for vacation of fixed trial dates resulting in the resetting of interlocutory processes. “

33. The plurality of the High Court in *Aon* took a similar view. In paragraph 95 they said:

> “The statement of Waller LJ identifies a fundamental premise of case management. What may be just, when amendment is sought, requires account to be taken of other litigants, not just the parties to the proceedings in question. The statement is consistent with what was said in *Sali v SPC*, which reflected a proper understanding of case management. The statements in *J L Holdings* do not reflect such an understanding and are not consistent with what was said in *Sali v SPC*. To say that case management principles should only be applied "in extreme circumstances" to refuse an amendment implies that considerations such as delay and costs can never be as important as the raising of an arguable case; and it denies the wider effects of delay upon others.”

34. At paragraph 99 the plurality expressly stated:

> “The modern view is that even an order for indemnity costs may not always undo the prejudice a party suffers by late amendment.”

35. In paragraph 100, the plurality endorsed comments of French CJ made in *Bomanite Pty Ltd v Slatex Corp Aust* (1991) 32 FCR 379, as follows:

> “…That may well have been so at one time, but it is no longer true today… Non-compensable inconvenience and stress on individuals are significant elements of modern litigation. Costs recoverable even on an indemnity basis will not compensate for time lost and duplication incurred where litigation is delayed or corrective orders necessary.”

36. At paragraph 25 in his Decision in *Aon* French CJ had quoted with approval a comment on the inadequacy of costs as a cure for procedural disruption by Samuels JA sitting in the New South Wales Court of Appeal in *GSA Industries* (1990) 24 NSWLR 710 where Samuels JA said at 716:

"….the emollient effect of an order for costs as a panacea may now be consigned to the Aladdin's Cave which Lord Reid rejected as one of the fairy tales in which we no longer believe."

37. These subsequent Decisions in my respectful opinion are fundamental to assessing the role and importance of case management principles in 2017, 10 years after the NT Decision in *Baird*. The Decision of the High Court in *Aon* marked a clear change in approach to case management from much of what had gone before. Since that Decision in August 2009 it is clear that effective case management in Australia now requires consideration of the following:

    i) case management principles are a major consideration for a Court in considering matters which might impact on the orderly and timely disposition of the court's business;

    ii) parties to litigation have a positive obligation to ensure the issues between them are clarified and expressed, particularly in the context of ambush or surprise;

    iii) the requirement to be clear and precise in the illumination of the issues for trial is not limited to pleadings; "it extends to all aspects of the engagement in the Court's processes";

    iv) the loss (actual or potential) of a hearing date or a delay generally in litigation can lead to "an irreparable element of unfair prejudice in unnecessarily delaying proceedings" and "non-compensable inconvenience and stress on individuals are significant elements of modern litigation";

    v) "Costs recoverable even on an indemnity basis will not compensate for time lost and duplication incurred where litigation is delayed or corrective orders necessary";

vi) "the public interest in the efficient use of court resources is a relevant consideration in the exercise of discretions to amend or adjourn"; and

vii) the Court must consider in relation to loss of a hearing or a delay generally, "the impact upon other litigants seeking a resolution of their cases".

Conclusion

38. When these modern views on case management are taken into account then a different approach is necessary in many cases involving privileged surveillance material. This is because the practice of waiver of legal professional privilege during the course of a hearing in many cases will lead to delays and extra costs in the litigation. Time will be lost while workers and their lawyers review surveillance material, engage in arguments as to its admissibility and relevance, and seek adjournments to put the material to their own experts for their opinions.

39. At a prehearing conference when alerted to the existence of privileged surveillance material the Work Health Court cannot adequately comply with its obligations pursuant to rule 7.11 of the *Work Health Court Rules*, to identify the number and nature of witnesses for each party and the order of their evidence and the estimated length of the hearing. This is because when privilege over surveillance material is maintained then the potential impact on these matters of a later waiver of the privilege cannot be assessed in any reliable way. I am satisfied that such difficulties are plainly inconsistent with modern case management principles.

40. From the foregoing it is clear there is a tension between the fundamental legal right of legal professional privilege on the one hand, and the two principles of fairness to the parties and modern case management concepts and practices on the other hand. The question I was called on to answer was whether the Work Health Court has the power to resolve that tension.

41. In a Decision of the Full Supreme Court of Western Australia of *Boyes v Collins* (2000) 23 WAR 123 the Full Court identified its task as considering the application

of Order 35 rule of the *Western Australian Rules of the Supreme Court 1971*. That rule specifically dealt with whether and how any "plan, photograph or model shall be receivable in evidence at the trial of an action". The Full Court was satisfied that surveillance material was included in this. Accordingly, the Full Court was satisfied it had a clear legislative basis for exercising control over the admission into evidence of surveillance material, even though such material might be subject to legal professional privilege.

42. There is no equivalent specific provision in the various Northern Territory legislation relevant to the jurisdiction and powers of the Work Health Court. I identify that legislation as the following:

    1. *Return to Work Act;*
    2. *Work Health Administration Act;*
    3. *Work Health Court Rules*; and
    4. *Supreme Court Rules*.

43. There are some provisions in this legislation which when considered together with the above-mentioned principles of fairness to the parties and modern case management provide a resolution of the tension I have identified above.

44. I refer first to section 110A of the *Return to Work Act* which provides as follows*:*

> **"Procedure**
>
> (2) The proceedings of the Court under this Division shall be conducted with as little formality and technicality and with as much expedition as the requirements of this Act and the *Work Health Administration Act* and a proper consideration of the matter permits.
>
> (3) Subject to this Act and the *Work Health Administration Act*, the Court in proceedings under this Division is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit.

45. Next, I refer to section 31(1)(e) *of the Work Health Administration Act* which provides:

> "The Chief Judge may make rules as follows:
>
> (e) for the practice and procedure of the Court, including the practice and procedures of the registry".

46. Finally, I refer to sub rules 3.04(1) and (2) (m), (n) and (p) of the *Work Health Court Rules* which provide:

> "(1) At any stage of a proceeding the Court may, of its own motion or on application, make orders relating to the conduct of the proceeding that the Court thinks are conducive to its fair, effective, complete, prompt and economical determination."
>
> "(2) Without limiting sub rule (1), the Court may at any stage of proceeding make orders relating to the following matters:
>
> (m)listing the proceeding for hearing;
>
> (n) the giving of evidence and the calling of witnesses;
>
> (p) the admission into evidence of facts or documents."

47. In each of *Aon Risk Services Australia Ltd v Australian National University* (above) and *Brown v Metro Meat International Ltd* (above) the respective Courts identified a party's loss of hearing dates and associated inconvenience and costs as potentially leading to an injustice which cannot always be adequately compensated for by an order for costs. The Courts also identified the waste of Court time which often results from vacating a hearing at short notice, as a matter of more general concern.

48. Plainly, the practice of maintaining a party's claim for legal professional privilege and waiving that claim only at the 11th hour will commonly lead to delay. It will necessitate extra time to complete the hearing or, not infrequently, the hearing will need to be vacated and re-listed on a later date. That outcome is not only likely to be

unfair to a party, its foreseeable occurrence requires the Court to consider its obligation pursuant to s110A (1) of the Act, to conduct its proceedings "with as much expedition as the requirements of the Act….and a proper consideration of the matter permits".

49. A position which foreseeably delays rather than expedites the Court's conduct of its proceedings cannot be encouraged or permitted as the default position. Rather, a party's wish to delay waiving privilege in respect of material such as surveillance material until the hearing is under way should only be permitted upon prior application where that party might first satisfy the Court that any delay and the foreseeable consequences of that delay will be fair and reasonable in all the circumstances.

50. Because of the fundamental nature of the right to legal professional privilege, the Work Health Court cannot in the absence of a proper legislative basis impinge upon that privilege. I am satisfied and I rule that the Work Health Court has that power pursuant to s.110A of the *Return to Work Act* and sub rules 3.04(1) and (2) of the *Work Health Court Rules*, when considered together with the far greater importance given to case management principles over the past decade, to make orders in advance of a hearing controlling the admissibility of evidence at the hearing and/or the use to be made of evidence at the hearing and including setting a timetable prior to the hearing to control the introduction of evidence at the hearing.

51. I rule that the Court has power specifically to make orders permitting the use at hearing of evidence currently the subject of a claim for legal professional privilege only if that claim is first waived prior to hearing, and to determine the timetable and conditions of any such waiver.

Dated this 23rd day of June 2017

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John Neill

LOCAL COURT JUDGE