COURT: SUPREME COURT OF TASMANIA (FULL COURT)

CITATION: *Weeding Party Hire Pty Ltd v Salters (Tas) Pty Ltd* [2025] TASFC 4

PARTIES: WEEDING PARTY HIRE PTY LTD
v
SALTERS (TAS) PTY LTD
NATION, Jarrod

FILE NOS: 3598/2023, 3359/2024

JUDGMENT
APPEALED FROM: *Weeding Party Hire Pty Ltd v Salters (Tas) Pty Ltd and Nation* [2024] TASSC 75

DELIVERED ON: 30 May 2025

DELIVERED AT: Hobart

HEARING DATE: 9 April 2025

JUDGMENT OF: Wood J, Pearce J, Brett J

CATCHWORDS:

Procedure – State and territory courts: jurisdiction, powers and generally – Discovery and interrogatories – Discovery and inspection of documents – Production and inspection of documents – General matters – Appeals against two interlocutory decisions heard together – Interlocutory decision refusing discovery and production of documents on respondents' solicitor's file – Documents relevant and legal professional privilege waived by inconsistent conduct – Interlocutory decision setting aside subpoena – Legitimate forensic purpose – Appeals upheld.
Aust Dig Procedure [1245-1249]

Legislation:
Evidence Act 2001
Supreme Court Civil Procedure Act 1932
Supreme Court Rules 2000

Cases cited:
Comcare v John Holland Rail Pty Ltd (No 5) [2011] FCA 622
Compagnie Financiere Du Pacifique v Peruvian Guano Co (1883) UK Law Rp KQB 95, (1882) 11 QBD 55
Dorajay Pty Ltd v Aristocrat Leisure Ltd [2005] FCA 588
Minister for Immigration v SZVFW [2018] HCA 30, 264 CLR 54
Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited [2015] HCA 37, 256 CLR 104
Power Infrastructure Pty Limited v Downer EDI Engineering Power Pty Limited (No 4) [2012] FCA 143
Quenchy Crusta Sales Pty Ltd v Logi-tech Pty Ltd [2002] SASC 374, 223 LSJS 266
Solemn Equities Corporation Ltd (in liquidation) v Arthur Andersen & Co (No 5) [2001] SASC 335
Strang v Hydro-Electric Corporation, Hydro-Electric Corporation v Strang [2022] TASSC 49

REPRESENTATION:

***Counsel*:**

Appellant:	P Wallis KC and N Willing
Respondents:	J Peters KC and T Warner

Solicitors:

Appellant:	Clayton Utz
Respondents	Groom Kennedy Lawyers & Advisors

Judgment Number:	[2025] TASFC 4
Number of paragraphs:	55

Serial No 4/2025
File No 3598/2023
& 3359/2024

WEEDING PARTY HIRE PTY LTD v SALTERS (TAS) PTY LTD and JARROD NATION

REASONS FOR JUDGMENT

FULL COURT
WOOD J
PEARCE J
BRETT J
30 May 2025

Orders of the Court:

1. Appeals upheld.
2. Orders of the Associate Judge and Acting Judge dismissing the interlocutory applications be set aside.
3. Applications remitted to the Associate Judge to be determined according to law.

Serial No 4/2025
File Nos 3598/2023
& 3359/2024

WEEDING PARTY HIRE PTY LTD v SALTERS (TAS) PTY LTD and JARROD NATION

REASONS FOR JUDGMENT

FULL COURT
WOOD J
30 May 2025

1 I agree with the reasons of Brett J and his conclusion that the appeals should be upheld, and the applications remitted to the associate judge for determination.

File Nos 3598/2023
& 3359/2024

WEEDING PARTY HIRE PTY LTD v SALTERS (TAS) PTY LTD and JARROD NATION

REASONS FOR JUDGMENT

FULL COURT
PEARCE J
30 May 2025

2 I agree with Brett J.

File Nos 3598/2023
& 3359/2024

WEEDING PARTY HIRE PTY LTD v SALTERS (TAS) PTY LTD and JARROD NATION

REASONS FOR JUDGMENT

FULL COURT
BRETT J
30 May 2025

3 This decision concerns two appeals against separate interlocutory decisions in the same action. The appeals were heard together, and ultimately relate to the same issue, which is whether the appellant should have access to documents on the respondents' solicitors file. The respondents claim legal professional privilege in respect of those documents. The first appeal is from a decision of Daly AsJ refusing the appellant's application for discovery and production of the said documents. The basis of his Honour's decision was that the documents were not relevant to the issues arising on the pleadings. The second appeal is from a decision of Marshall AJ setting aside a subpoena relating to the same documents. The basis of his Honour's determination was again relevance, leading to a determination that there was no legitimate forensic purpose with respect to the subpoena. His Honour also upheld the claim of privilege.

2. The appellant's action concerns a written agreement entered into by the parties for the sale of a business by the first respondent to the appellant. The agreement provided for a purchase price of $5.5 million payable by way of an initial instalment of $500,000 on 19 July 2023, with a second instalment equivalent to the balance remaining, less $2,750,000, payable on the completion date. The said sum of $2,750,000 was to be the subject of a loan agreement between the parties. It is a condition precedent to completion of the sale agreement that the loan agreement would be executed by the parties on or before the completion date. The completion date is specified as 1 September 2023 "or such other date as the parties may agree in writing".

4 It is common ground on the pleadings that the initial instalment was duly paid on 19 July 2023 and further that as at 31 August 2023, the terms of all documents required for the purpose of the loan agreement had been agreed. This agreement was contained in a series of emails between the solicitors for each party. However, it is also common ground that completion did not take place on 1 September 2023, and that the loan agreement was not executed until 4 September. By email sent by the respondent's solicitor to the appellant's solicitor at 4.50pm on 4 September 2023, the respondents purported to terminate the agreement because of the appellant's failure to complete.

5 The determinative issue which arises on the pleadings is whether an agreement was reached between the appellant and the first respondent to extend the date of completion to 8 September 2023. The statement of claim alleges that such an agreement was reached on the basis of an exchange of text messages and emails between the solicitors for each party between 1 September and 4 September 2023. The appellant's claim that the completion date was extended by agreement depends on the agreement arising by implication from the content of the said messages and emails. It is not alleged that there was express agreement to that effect. In submissions on the hearing of the appeal, senior counsel for the appellant described the agreement as arising from "a course of conduct", constituted by the communications which are particularised in the statement of claim.

6 The pleaded exchange commences with an email from the appellant's solicitor to the respondents' solicitor informing the latter that the appellant would not be in a position to settle that day but would make arrangements to do so as soon as possible. It is alleged that on 2 September 2023 there was an exchange of text messages between Sam Pope, a representative of the appellant and Jarrod Nation, the second respondent and a director of the first respondent concerning alternative

arrangements for settlement. The pleading also alleges emails exchanged between the solicitors for each party on 4 September 2023 concerning arrangements for the execution of the Loan Agreement, and which include an email confirming that the condition precedent had been satisfied.

7 The statement of claim pleads that by reason of these "matters", the parties "have agreed (including in writing) that the Completion Date would be on or before 8 September 2023" and "to extend the time for compliance with execution of the Loan Agreement Condition Precedent until it was satisfied on 4 September 2023". The appellant's pleaded case is that because of this extension, the respondents' purported termination of the contract constituted an anticipatory breach and repudiation of the contract. The appellant seeks specific performance of the agreement.

8 The respondents dispute that there was any concluded agreement to extend the completion date. The defence admits the existence of the messages and emails, but denies that they constitute or give rise to an agreement. Further, the admission of their existence is subject to the production of the relevant messages and emails at trial "and reference to their full terms and effect, including the context in which they were sent (including by reference to all earlier documentation, conversations and correspondence)".

9 On 16 May 2024, Daly AsJ made trial directions which included orders for evidence to be given by affidavit. In due course, a trial date was set for 11 December 2024. In accordance with his Honour's direction, the parties filed affidavits in preparation for the trial.

10 One of the affidavits filed on behalf of the respondents was an affidavit by the second respondent, which was filed on 15 October 2024. Contained in that affidavit were a number of paragraphs which are critical to the issue arising on this appeal:

> "6 On 31 August 2023 at approximately 8.30 am, I attended a meeting with Mr Marriner and Mr Pope in Hobart. They informed me that they may not be in a position to settle until the week commencing 4 September 2023. At this meeting I expressly and explicitly stated that there would be no agreement to extend settlement.
>
> 7 On 31 August 2023 at 9.32 am, I sent a text message to Sam Pope further confirming that there was no agreement to extend the completion date from 1 September 2023, as discussed in our meeting referred to in paragraph 6 above. A copy of this text message appears at **CB page 257,** in a grey box.
>
> 8 On 1 September 2023 at 6.38 am, I sent an email to Miguel Martinez and Marcus Christie confirming that I was preparing for settlement that day, as per the BSA. A copy of this email appears at **CB page 1605.**
>
> 9 At no point did I agree to, or provide instructions to my solicitor to agree to, extend the completion date from 1 September 2023 or waive any of the conditions precedent.
>
> 10 Following the plaintiffs failure to satisfy the conditions precedent by the date required (being 1 September 2023), I instructed my solicitor, Mr John Wilson, to terminate the BSA on 4 September 2023.
>
> 11 To the extent relevant, a large part of the reason I instructed Mr Wilson to terminate (as opposed to indulge the plaintiff with agreed extensions) was because the BSA provided for only part payment of the purchase price upfront, and therefore the first defendant would be committed to a vendor fmance relationship with the plaintiff for the remaining balance (which constituted over half of the purchase price). As a result of the plaintiffs conduct up until that date, culminating in the completion payment deadline being missed, I had no confidence that they would repay the loan on time or at all. More specifically, in my experience, past business conduct is a reasonably good predictor of future business conduct. If Mr Marriner and the

> plaintiff were already unable to meet their obligations at the outset of the BSA, it was highly likely that they would be defaulting on their commitments when it came to repaying the loan. This would have left the parties in a position where the plaintiff would seek to renegotiate the purchase price and if not agreed, I would have no choice but to commence proceedings to recover the loan. This is the antithesis of how I like to do business. In my view, if you cannot trust a proposed business counterpart, you should do your utmost to completely avoid any transactions with them. I was also motivated by the fact that Mr Marriner himself had steadfastly refused to provide personal guarantees in the BSA."

11 In addition to the conversation, text message and email referred to by Mr Nation, there is other evidence concerning the email exchange referred to in the statement of claim. Some relevant aspects of this exchange are as follows:

- At 1.04pm on 31 August, the respondents' solicitor sent an email to the appellant's solicitor which contained the following passage:

  > "As noted to David and Sam when they spoke this morning, Jarrod does not accept a delay to the completion date. We are ready to complete as planned tomorrow. Please ensure that your client will be in a position to transfer the funds so that they are received into Jarrod's nominated account tomorrow."

- At 8.44am on 1 September, the respondents' solicitor sent to the appellant's solicitor an email confirming that he held the "wet ink signature pages of all completion documents" and finished with this paragraph":

  > "Please confirm that your client is able to transfer the completion funds so that it is received by the vendor today. My client is ready, willing and able to complete today as agreed."

- At 4.08pm on 1 September, the appellant's solicitor sent an email to the respondents' solicitor advising that his "client was not in a position to settle today" and has taken "steps…to be in a position to settle as soon as possible" and "will commit to a new settlement date once it is in a position to do so with certainty".

- At 7.07am on 4 September, the respondents' solicitor sent to the appellant's solicitor an email which contained the following:

  > "As I am sure you can appreciate, my client is extremely disappointed that the timetable set out in the BSA has not been adhered to. Jarrod and his team have worked tirelessly over the past few weeks to ensure a smooth handover on 1 September and expects your client to approach this transaction with similar levels of speed and professionalism.
  >
  > I understand that Sam Pope has suggested to Jarrod that your client will have the funds available for settlement by, at the latest, Friday 8 September. Could you please let me know as soon as possible if there is any delay to that timing. I note your comments on the adjustments spreadsheet and will consider these with Jarrod once we have some certainty from the purchaser on when funds will be available."

12 On 28 March 2024, the respondents purported to provide discovery by way of an affidavit of the second respondent verifying a list of documents. On 8 November 2024, the appellant applied for an order that the respondents make further discovery of and produce documents from the respondents' solicitors file which are said to relate to the instructions given by Mr Nation to his solicitor which are referred to in his affidavit. Those documents were identified as follows:

> "1 All documents which comprise, evidence or record instructions given by the Second Defendant, Jarrod Leigh Nation, to his solicitor or the First

> Defendant's solicitor between 31 August 2023 and 4 September 2023, inclusive.
>
> 2 All documents which comprise, evidence or record the instructions given by Mr Nation, to his solicitor or the First Defendant's solicitor, as referred to in paragraph 10 of Mr Nation's affidavit sworn on 15 October 2024 and filed in this proceeding (**Nation Affidavit**).
>
> 3 All documents which comprise, evidence or record Mr Nation's state of mind as asserted in paragraph 11 of the Nation Affidavit, including any communication with Mr Nation's solicitor or the First Defendant's solicitor in that regard."

13 As I will discuss in more detail shortly, these documents, if they were included at all, arguably were contained in the respondents list of documents in a general description of legal documents from the solicitor's file. The list noted that the respondents objected to production of the documents so described on the basis of legal professional privilege.

14 The application was heard by Daly AsJ on 28 November 2024. In essence, the appellant's argument before his Honour was that the documents were made relevant for the purpose of discovery by the contents of Mr Nation's affidavit, and that his description of the nature of his instructions to his solicitor set out in the affidavit had the effect of waiving privilege. It was submitted that the first category was relevant to whether or not Mr Nation provided the instructions to his solicitor asserted in paragraph 9 of his affidavit and the second category related to documents relevant to the instructions asserted in paragraph 10. The third category was also said to be made relevant by virtue of paragraph 11 but on the hearing of the appeal the appellant's counsel abandoned any argument in respect of this category. The respondents resisted the application on the grounds of relevance and further that there had not been a waiver of legal professional privilege.

15 His Honour published a written decision on 6 December 2024. The application was dismissed on the basis that none of the documents were relevant to an issue "raised by the pleadings". His Honour determined that because "the plaintiff pleads that the agreement to extend the date for completion was in writing, the parole [sic] evidence rule applies". His Honour reasoned that this rule would exclude Mr Nation's evidence as to his instructions to his solicitor, because his subjective state of mind would not be relevant to the Court's interpretation of the alleged agreement. His Honour summarised his conclusion as follows:

> "On the materials before me, there is no appreciable prospect that Mr Nation's evidence would be admitted as evidence which could 'subtract from, add to, vary or contradict' the written agreement as pleaded, because there is no issue on the pleadings that the documents comprising the agreement to extend time are unclear, ambiguous or susceptible to more than one meaning."

16 His Honour did not determine the question of legal professional privilege.

17 Immediately after the dismissal of the discovery application, the appellant applied for the issue of a subpoena addressed to the respondents' solicitors seeking production of the same documents. The return of the subpoena came before Marshall AJ on 9 December 2024. At that hearing, the respondents applied to have the subpoena set aside on the basis that it served no legitimate forensic purpose and further that the respondents had not waived legal professional privilege. The appellant foreshadowed an appeal against the discovery decision, but did not reassert relevance on the pleadings as a forensic purpose for the subpoena. Instead, it asserted that the documents sought by the subpoena would be relevant to Mr Nation's credit with respect to the evidence asserted in his affidavit. The difficulty with this approach is immediately apparent. If the decision of Daly AsJ is correct, and the only issues raised by the pleadings depend solely on the

objective interpretation of written communications, then it is difficult to see how an assessment of Mr Nation's credit could have any legitimate forensic purpose.

18 In any event, Marshall AJ rejected the appellant's arguments and set aside the subpoena. His Honour's reasons are brief, and were delivered ex tempore. They are:

> "Having heard the submissions of the parties, I'm not satisfied that an issue of credit arises in respect of the paragraph that says:
>
> > 'At no point did I agree to extend completion date from 1 September 2023 or waive any of the conditions precedent.'
>
> The materials relied on to assert the contrary are stated clearly in his statement of claim and I'm not satisfied that legal professional privilege has been waived. So, in my view, the subpoena doesn't serve an appropriate forensic purpose and should be set aside."

Nature of each appeal

19 Each appeal came before this Court by a different legislative path. The appeal from Marshall AJ is authorised, as with any appeal from a judge, by s 40 of the *Supreme Court Civil Procedure Act* 1932. An appeal from the associate judge is authorised by r 680A of the *Supreme Court Rules 2000*. Because this appeal is in respect of an interlocutory judgment, it is to a single judge. However, by virtue of r 680A(8), the judge may refer the appeal for determination by this Court. That is what happened in this case.

20 Both parties accept that each appeal is in the nature of a re-hearing. This is clearly correct: see s 46 of the *Supreme Court Civil Procedure Act.* However, there did seem to be some confusion on the part of counsel for each party as to exactly what this meant. For example, senior counsel for the respondent submitted that error must be shown on the part of Daly AsJ in respect of the appeal against him. It was unclear whether it was being suggested that this must be a specific error that appears on the face of the record.

21 The question of the standard to be applied on an appeal by way of rehearing is well settled. The appeal court is required to determine the correctness of the decision below on the basis of the evidence and materials before the primary decision-maker, together with any further evidence that the appeal court may allow to be adduced on the appeal, and on the law as it stands at the time of appeal: see Kiefel CJ and Gageler J (as his Honour then was) in *Minister for Immigration v SZVFW* [2018] HCA 30, 264 CLR 54. Although it is necessary to show error, in a case which does not involve an exercise of discretion, and where there is only one "unique outcome" the error, if it exists and is not otherwise demonstrated in the reasons of the primary judge, will appear from the correctness of the final decision. This is the correctness standard of appeal, and was explained by Gageler J in *Minister for Immigration v SZVFW* as follows:

> "The course of High Court authority since *Warren v Coombes* has accordingly proceeded on a consistent understanding of how the line of demarcation is to be drawn between those of a primary judge's conclusions which attract the correctness standard of appellate review reaffirmed in that case and those which attract the deferential standard applicable to appellate review of an exercise of judicial discretion. Without excluding the potential for other considerations to affect the standard of appellate review in a particular category of case, the understanding provides a principled basis for making at least the principal distinction.
>
> The line is not drawn by reference to whether the primary judge's process of reasoning to reach a conclusion can be characterised as evaluative or is on a topic on which judicial minds might reasonably differ. The line is drawn by reference to whether the legal criterion applied or purportedly applied by the primary judge to

> reach the conclusion demands a unique outcome, in which case the correctness standard applies, or tolerates a range of outcomes, in which case the *House v The King* standard applies. The resultant line is not bright; but it is tolerably clear and workable."

22 In respect of both discovery and setting aside a subpoena, there are aspects of the determination which require the exercise of discretion. For example, the discovery process generally, which ultimately includes the question of whether the Court should make an order for discovery, is discretionary. *Power Infrastructure Pty Limited v Downer EDI Engineering Power Pty Limited (No 4)* [2012] FCA 143 per Katzmann J at [14]. However, the grounds of each appeal in this case raise, in essence, two substantive issues: the relevance of the documents for the purpose of each procedure, and whether there has been a waiver of legal professional privilege in respect of them. Neither determination involves an exercise of discretion, there is only one correct answer to both questions. Accordingly, the correctness standard will apply to each appeal.

Discovery

23 The appellant's grounds of appeal with respect to the discovery decision raises three discrete arguments. I will deal with each in turn.

Grounds 1, 5(a) and 5(b)

24 In order to understand the argument advanced under these grounds, it is necessary to consider the detail of the proceedings before Daly AsJ in a little more detail.

25 In *Strang v Hydro-Electric Corporation, Hydro-Electric Corporation v Strang* [2022] TASSC 49, I briefly discussed the scheme provided for discovery under the *Supreme Court Rules*.

> "Division 1A of the Rules provides an integrated scheme dealing with discovery and inspection of documents. Rule 383(1) imposes an obligation on a party to make discovery upon request by notice by any other party, at any time after the pleadings between them are deemed to be closed. The discovery obligation activated by this request is to produce for inspection all discoverable documents in respect of which privilege is not claimed. 'Discoverable documents' are defined by r 382. If the notice so requires, then the party required to make discovery must also make and serve a list of all discoverable documents. Discovery must be made within 14 days after receipt of the notice or such further time as agreed or allowed by the court or a judge."

26 The interlocutory application sought orders that the respondents provide further discovery of the said documents pursuant to r 388 and produce those documents for inspection and determination of "a claim for privilege" pursuant to r 395. Rule 388 permits a court to order a party to make, file and serve an affidavit discovering a discoverable document or class of discoverable documents where there are grounds for belief that such documents are in the possession of a party. The rule is clearly intended to provide relief where a party has not discovered the relevant documents in accordance with its obligation to do so under other provisions of Div 1A, for example where the documents have not been produced or referred to in a list pursuant to a notice under r 383(1). Much of the argument before his Honour was concerned with the question of relevance, within the context of determination of the question of whether the documents were "discoverable documents" within the meaning of r 382. However, at the conclusion of the hearing, the associate judge found that the documents had in any event already been discovered in the list of documents provided by the respondents. In particular, his Honour concluded that the documents were contained in the general description of documents in Part 11 of the First Schedule in the list. This description encompassed the class of documents of which discovery was sought in the application, such as documents "comprising instructions to the defendant's solicitors". Of course, the list noted that the respondents objected to production of such documents for inspection on the grounds that they were subject to legal professional privilege.

27 Having made that finding, his Honour effectively acceded to the second order sought in the interlocutory application, that is that those documents be produced to him under r 395 so that he could determine the objection to production. In the course of oral discussion with the parties, his Honour noted that the respondents objected to production, at least to the appellant, not just on the basis of legal professional privilege as stated in the affidavit but also on the ground of relevance. His Honour then adjourned to enable the documents to be produced, and as far as I am aware did not reconvene prior to his decision on 6 December 2024. As I have already noted, by that decision, his Honour refused to order the production of the documents to the appellant on the basis of lack of relevance but did not consider it necessary to determine the question of legal professional privilege.

28 The appellant's argument under the stated grounds, as I understand it, is that having concluded that the documents had been discovered, the associate judge was not entitled to refuse their production on the ground of relevance. The argument is that inclusion of the documents in the list concedes and establishes that they are discoverable documents, and hence their underlying relevance, leaving legal professional privilege as the only basis for objection to production, and his Honour did not determine that question. Because the appellant contends that the respondents have waived their right to claim legal professional privilege in respect of the documents, the asserted outcome is that the documents ought be produced to the appellant.

29 In my view, there is a fundamental difficulty with the appellant's argument. In particular, the interlocutory application did not seek an order that the documents be produced to the appellant. The orders sought were an application for discovery under r 388, an order which his Honour considered otiose because the documents had already been discovered, and a further order that they be produced under r 395 "for inspection and determination of a claim for privilege". Rule 395 provides for the production of those documents to the Court for that purpose. This is the precise course taken by the associate judge. It may well be that the appellant framed the application in those terms because it did not appreciate that the documents had in fact already been discovered in the list. If they had in fact been included in the list, the pathway to production to the appellant was to seek an order for production for inspection under r 392. It is at that point that any objection to production would be determined, and production to the Court under rr 394 or 395 is available for the purpose of that determination. However, as already noted, his Honour did not have before him an application under r 392, and the appellant did not seek to remedy this omission in the hearing at first instance.

30 Despite this, there is no question that both parties have conducted the appeal on the basis that the appellant is seeking production of the documents to it, and the respondents are resisting this outcome on the basis of both relevance and privilege. The fact that technically the pathway to that order was not enlivened by the application should not be permitted to avoid determination of this substantive question. On the other hand, the respondents should not be prevented from objecting to production on the ground of relevance on the technical basis that the documents have already been included in a general description of such documents contained in the original list of documents. The rules clearly envisage that only documents which fall properly within the definition of discoverable documents, the definition of which rests upon the notion of relevance as defined in rr 382(1) and (2), should be subject to discovery and inspection. The appellant should not be entitled to avoid determination of these fundamental questions on a technical basis, while seeking the courts indulgence to ignore the technical position with respect to the adequacy of its application.

31 Further, although neither party has challenged his Honour's finding that the documents were already discovered by their inclusion in the list, there must be some doubt about the accuracy of this finding. As was noted in argument before the associate judge, the description is in general terms commonly used to collectively capture all documents which are on a solicitor's file, and hence subject to a claim of legal professional privilege. It does not describe each document separately. When a question arises as to whether any specific document falling within the ambit of that general description is in issue, the first question is whether the specific document is a discoverable document,

which necessarily entails a consideration of the relevance of that document. It is a reasonable assumption that such a description is intended to include only documents which are relevant in the r 382 sense, and hence discoverable. Hence, it is arguable that the r 388 application was not in fact resolved by the list, and is properly available in respect of documents which the discovering party says are not discoverable in the first place.

32 For these reasons, the question of relevance in respect of the specific documents under consideration is properly before this Court and requires determination. I reject the argument raised by these grounds.

Grounds 2 and 3: relevance.

33 These grounds attack his Honour's finding in respect of relevance, in particular the finding that cl 9 and 10 of Mr Nation's affidavit are irrelevant to issues raised on the pleadings by virtue of the parol evidence rule. The focus on those clauses is appropriate because it is their inclusion in a trial affidavit which is said to underpin their relevance. At the appeal, the appellant abandoned reliance on the contents of cl 11, and has been noted, no longer seeks discovery and production of the documents referred to in category 3 of the application.

34 As already discussed, the question of relevance for the purpose of discovery is determined by whether the document falls within the definition of a discoverable document under r 382 of the *Supreme Court Rules*. Rule 382(1) provides that a discoverable document is a document which is "directly relevant to the issues raised by the pleadings". Rule 382 provides that for the purpose of that definition, the documents must meet at least one of the following criteria:

> "(a) The documents are those on which the party intends to rely.
>
> (b) The documents adversely affect the parties own case.
>
> (c) The documents support another party's case.
>
> (d) The documents adversely affect another party's case."

35 It is clear that relevance as defined for the purpose of discovery is more restricted than that applicable for evidentiary admissibility under the *Evidence Act* 2001. By s 55 of that Act, the test of relevance is whether the evidence, "if it were accepted, could rationally affect, directly or indirectly, the assessment of the probability of the existence of a fact in issue in the proceeding". The test of direct relevance applicable under r 382, mirrors that adopted in other jurisdictions in respect of discovery, including the Federal Court Rules. The selection of this test has been judicially observed to give effect to an intention to restrict the ambit of discovery to a greater extent than that which previously applied, which required discovery of documents which were not only directly relevant but which also may fairly lead to a train of enquiry which might advance the case of the party seeking discovery or damage the case of an adversary: see *Compagnie Financiere Du Pacifique v Peruvian Guano Co* (1883) UK Law Rp KQB 95, (1882) 11 QBD 55. However, the cases are also clear that the requirement of direct relevance, although more restrictive, must still be applied in a common sense way. In *Solemn Equities Corporation Ltd (in liquidation) v Arthur Andersen & Co (No 5)* [2001] SASC 335, Bleby J commented on the requirement of direct relevance as follows:

> "However, there is a further qualification, in that the documents must be 'directly' relevant. I doubt whether that qualification effectively narrows, for the purposes of discovery, ordinary concepts of relevance for the purpose of admissibility into evidence. In my opinion, it cannot mean, if the document is not itself proof of a fact in issue but is merely a piece of circumstantial evidence tending, along with other evidence, to prove the fact in issue, that it is not discoverable. Many a case is provable and in fact proved by circumstantial evidence, including documents. I note that a similar view was expressed by Demack J in *Robson v REB Engineering*

> *Pty* Ltd (1997) 2 Qd R 102 at 104 - 105 in respect of a similar rule in Queensland. The Rule cannot be allowed to govern in practice the admission of documents into evidence merely because they have not been revealed in the discovery process."

36 In *Quenchy Crusta Sales Pty Ltd v Logi-tech Pty Ltd* [2002] SASC 374, 223 LSJS 266, Doyle CJ said at 11:

> "It is not wise to attempt to state in comprehensive terms the effect of the requirement that the document be 'directly relevant'. The adverb 'directly' is probably intended to emphasise the requirement of relevance, and to be used in the sense of requiring that the document be directly in point, excluding as sufficient indirect relevance which might be established through another linking circumstance. That is not to say, as I have already said, that a document is not directly relevant if it is merely a piece of circumstantial evidence. The point is that a document will not be directly relevant if, rather than tending to prove an issue on the pleadings, it merely tends to prove something that may be relevant to an issue."

37 In this case, the associate judge was clearly concerned to determine relevance by reference to his interpretation of the "issues raised by the pleadings". In particular, his Honour interpreted the statement of claim as alleging that the extension of the completion date arose exclusively from an agreement in writing. Hence, his Honour reasoned, the evidence contained in the relevant paragraphs of Mr Nation's affidavit would be excluded under the parol evidence rule. The appellant attacks this finding and reasoning. The argument is that the relevant provisions of the statement of claim do not assert an agreement in writing, but rather an agreement which arises by implication from a course of conduct, which includes but is not limited to written communications. Although no oral conversations are particularised in the statement of claim, it is submitted that such conversations are relevant to the objective determination of the context and effect of the emails and text messages exchanged by the parties during and as part of the alleged course of conduct, and are generally relevant to whether an agreement arose by implication.

38 The parol evidence rule is simply a rule of evidence that gives effect to the objective theory of contract. That theory requires that the question of whether an agreement has been formed must be assessed objectively, that is "whether or not a reasonable bystander would construe agreement from the parties' statements, conduct, and other relevant circumstances of the particular case", see *Laws of Australia* at [7.1.680]. This also applies to the interpretation of the terms of an agreement. In making an objective assessment, context may have an important role to play. These objective events and circumstances can be distinguished from evidence of subjective perception or intent. As was explained by French CJ, Nettle and Gordon JJ in *Mount Bruce Mining Pty Limited v Wright Prospecting Pty Limited* [2015] HCA 37, 256 CLR 104:

> "[50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations."

39 In this case, it is clear in my view that the statement of claim does not allege that the agreement as to the completion date was varied by an express written agreement but rather from an agreement arising from a course of conduct. The determinative allegation is contained in cl 10:

> "[10] In the premises, by reason of the matters referred to at paragraphs 6 to 9 above, as at 4.20 pm on 4 September 2023:
>
> (a) the plaintiff and the defendants have agreed (including in writing) that the Completion Date would be on or before 8 September 2023; and

> (b) the plaintiff and the defendants have agreed (including in writing) to extend the time for compliance with execution of the Loan Agreement Condition Precedent until it was satisfied on 4 September 2023."

40 The only reasonable interpretation of this clause, read in the context of the various written communications particularised in preceding paragraphs, is that the agreement arises by implication, from the circumstances referred to in paragraphs 6 to 9 of the pleading. It is important to note that the reliance on the written communications is to found the allegation that an agreement is to be implied, not to constitute the agreement itself. Accordingly, although the conclusions to be drawn from the parties conduct and communications will require objective assessment, that assessment will be conducted in the context of surrounding events, which may include oral conversations.

41 This understanding of the issue raised by the statement of claim is consistent with the manner in which the respondents have joined issue in the defence. It is clear that the defence puts in issue the objective interpretation of the conduct and communications between the parties and gives notice of reliance upon, among other things, conversations. This is demonstrated by the pleading which responds to paragraph 10:

> "[10] They deny paragraph 10.
>
> **PARTICULARS**
>
> On a proper construction of the SBA as a whole (including clauses 4.4 and 17.7 referred to above) and the emails and SMS messages relied upon, including in the context in which they were sent (including by reference to all earlier documentation, conversations and correspondence), there was no agreement to vary the terms of the SBA, in the way alleged or at all."

42 It should also be noted that the defence does not raise an argument that the contract itself provides that the completion date may only be "such other date as the parties may agree in writing". This is understandable, there is ample authority for the proposition that such a stipulation will not apply if the provision is varied by the parties. However, the absence of reliance by the respondents on this point reinforces the understanding that the issue raised by the pleadings is whether the contract has been so varied by implication.

43 Mr Nation's evidence must be considered in the context of the issue defined in this way. In paragraph 6, his affidavit alleges a conversation on 31 August 2023, the purpose of which seems to be the assertion of his clear oral communication that "there would be no agreement to extend settlement". Presumably, this is to leave open an argument that subsequent emails and text messages must be assessed in the light of this communication. Such a fact, if accepted, has direct relevance to the question of whether an agreement can be implied from conduct, which is an issue raised by the pleadings.

44 The question which then arises is how Mr Nation's instructions to his solicitor, asserted in paragraphs 9 and 10 of his affidavit can bear on an objective assessment of these communications. The only possible relevance could be to bolster the credibility of his assertion in paragraph 6. For example, if his version of that conversation is disputed, and it was conceded in argument that it may well be, then it can be asserted on his behalf that it is more probable that he would have taken an attitude in that meeting consistent with his subsequent instructions to his solicitor, rather than inconsistent with them. Whether such evidence is ultimately admitted on this basis is beside the point. The evidence is relevant for the purposes of discovery. The chain of relevance extends to documents on the solicitors file that have a bearing on the probability of the existence of those instructions. Because the enquiry at this point is that posed by r 388, it can be concluded that there are reasonable grounds for a belief that such documents are in the possession of the respondents and are discoverable

documents in the sense that they will either support or be adverse to the case of the appellant. Accordingly, the test of direct relevance is satisfied.

45 It follows that the learned associate judge was in error in determining that any such documents were not relevant. Subject to the question of legal professional privilege, this Court should order that such documents be produced for inspection by the appellant. It is arguable, however, that the description of documents referred to in paragraph 1 is too wide in that it relates to all instructions and not just those of the type referred to in paragraph 9 of Mr Nation's affidavit. In my view, the discovery documents should be limited to documents which "comprise evidence or record instructions" given by the second defendant to his solicitor or the first defendant's solicitor of the nature referred to in cl 9 of Mr Nation's affidavit, sworn on 15 October 2024. This restriction is already applied by paragraph 2, which is relevant to cl 10 of the affidavit.

Ground 4: Legal professional privilege

46 The complaint made by this ground is that his Honour did not determine the claim of legal professional privilege. Clearly, this should have been determined because there were reasonable grounds for a belief that the documents existed and were discoverable. The claim of privilege was determinative of the question of production. By virtue of s 131A of the *Evidence Act*, the question of whether production can be resisted on the basis of client legal privilege falls to be determined in accordance with the relevant provisions of that Act. There is no dispute between the parties that the documents sought to be discovered are confidential communications which are protected from disclosure by virtue of ss 118 or 119 of the Act. The matter in issue is whether there has been a loss of client legal privilege pursuant to s 122, because of inconsistent conduct. The claim of inconsistency is on a narrow basis, and this Court is in as good a position as the primary judge to determine it, and should do so.

47 The relevant provision is s 122(2) which provides in effect that privilege will be lost if the "party concerned has acted in a way that is inconsistent with" the maintenance of the privilege. Section 122(3) provides as follows:

> "(3) Without limiting subsection (2) , a client or party is taken to have so acted if –
>
> (a) the client or party knowingly and voluntarily disclosed the substance of the evidence to another person; or
>
> (b) the substance of the evidence has been disclosed with the express or implied consent of the client or party."

48 The "evidence" which is the subject of the privilege in this case includes the documents on the solicitor's file which if adduced, would "result in disclosure of … a confidential communication made between the client and a lawyer" for the dominant purpose of the lawyer providing legal advice to the client, see s 118. As noted, it is not disputed that the documents sought in category 1 and 2 fall within that description. The question, therefore, is whether Mr Nation has disclosed the substance of that evidence in cl 9 and 10 of his affidavit.

49 In my view, there is no doubt that he has done so. Both clauses assert the substance of the instructions provided to the solicitor. This has clearly been done deliberately for the purpose of bolstering the acceptance of Mr Nation's version of the conversation in paragraph 6. This is not a case where Mr Nation has simply asserted the provision of instructions without identifying what they are, he has described the substance of the instructions.

50 The respondents object to the width of the description of the class of documents sought to be discovered, on the basis that the description goes beyond that in respect of which privilege has been waived. I agree that there is a need for care in this respect. The privilege afforded by ss 118 and 119

relates to evidence which "would result in disclosure of" the relevant confidential communication. The waiver attaches to the communication in question. Because discovery is dealing with documents, the privilege would prevent discovery of documents which would result in disclosure of the relevant confidential communication. If this privilege is lost, then evidence which would result in disclosure of the communication is discoverable. This would apply to documents which comprise evidence or record the relevant communication. In my view, that is an appropriate description and makes an adequate distinction between documents to which the privilege applies and those to which it does not. There may be difficulties if the relevant document contains more than simply disclosure of the relevant communication. In my view, that would be a matter for the exercise of appropriate discretion and management by the Court. I note that pursuant to r 394 the Court has power to order production of a discoverable document, and deal with the document in any appropriate manner.

51 It follows that the appeal in respect of discovery must succeed. The associate judge's dismissal of the interlocutory application should be set aside. In my view, the appropriate procedure is for the matter to be remitted to his Honour for determination in accordance with law. In particular, this would involve his Honour restricting discovery to documents identified in accordance with the guidance set out in these reasons.

The subpoena

52 The determination of the issues of relevance and waiver of privilege are also relevant to the question of the appeal in respect of the setting aside of the subpoena. However, the considerations applicable to that question are different to those which apply in respect of discovery. As already noted, a subpoena may be set aside where it lacks a legitimate forensic purpose. The test of a legitimate forensic purpose is relevance. In *Comcare v John Holland Rail Pty Ltd (No 5)* [2011] FCA 622, Bromberg J concluded that "the test for the existence of a legitimate forensic purpose is that of apparent relevance". His Honour went on to rely on the analysis of Stone J in *Dorajay Pty Ltd v Aristocrat Leisure Ltd* [2005] FCA 588 in reaching the conclusion "that apparent relevance to an issue is demonstrated where the material sought could reasonably be expected to throw light on the issue in the proceeding and not simply where the material 'might permit a case to be made'." His Honour also observed that a subpoena "is not to be used as a fishing or trawling exercise". However, he went on to say that it will not be fishing "when there are reasonable grounds to think that fish of the relevant type are in the pond, or as has been expressed in other cases, that it is on the cards that relevant documents (even if they are relevant only to credit) will be elicited by the subpoena: *Liristis v Gadelrabb* [2009] NSWSC 441 at [5] per Brereton J."

53 In this case, senior counsel for the respondents argues that the subpoena was necessarily a trawling exercise because the appellant, and the Court, cannot know whether the documents exist. However, it is not trawling when there are reasonable grounds to conclude their existence. Such grounds exist in this case. Firstly, there is the general reference to such documents in the list of documents. Secondly, as Mr Nation has sworn to the conversations with his solicitor, it is a reasonable inference that those conversations would have been recorded by the solicitor and retained on the file. Finally, in an email from the respondents' solicitor to the appellant's solicitor dated 31 October 2024 which responded to an email foreshadowing the issue of the subpoena, the respondent indicated that it would resist production on the basis that the documents were not relevant and were subject to privilege. It did not dispute their existence. Further, it is not to the point that the documents may well support or corroborate Mr Nation's evidence. The fact remains that the documents are relevant, notwithstanding that they may not be utilised by the appellant.

54 In the circumstances, I am of the view that the subpoena should not have been set aside on the grounds of either relevance or privilege. There is a legitimate forensic purpose, which is to obtain evidence which is apparently relevant to the assertions made by Mr Nation in paragraphs 9 and 10.

55 The appeal in respect of the subpoena should be upheld. I conclude that this question should also be returned to the associate judge for determination. It is clearly established that the Court may require documents under subpoena to be produced to it, so that it can then determine what is to be done with those documents and in particular whether or not they should be disclosed to the parties. This will involve a similar, if not identical, exercise to that involved in his Honour's inspection of the documents for the purposes of discovery.