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ClaimsConvention

THE CHANGING WORLD OF CLAIMS

WEDNESDAY 13 AUGUST TO THURSDAY 14 AUGUST 2014



AUSTRALIAN AND NEW ZEALAND
INSTITUTE OF INSURANCE AND FINANCE



AUSTRALASIAN INSTITUTE OF
CHARTERED LOSS ADJUSTERS

PLATINUM PARTNER



Privilege – How do you get it, how do you lose it?

- Legal Professional Privilege
- History
- Types of Legal Professional Privilege
 - Advice Privilege
 - Litigation Privilege
- Created
- Lost
- Examples in Practice

Why is it needed

- Earliest recorded decision on Legal Professional Privilege dates back to 1577 in the UK
- Lord Brougham in 1833 identified the need for the rule in *Greenough v Gaskell*
 - *If the privilege did not exist at all, every one would be thrown upon his own legal resources, deprived of professional assistance, a man would not venture to consult any skilful person, or would only dare tell his counsellor half his case*

CLIENT LEGAL PRIVILEGE

General Proposition

- Confidential communications passing between a client and a legal adviser
 - (1) to enable the client to obtain, or the advisor to give legal advice, or assistance, or
 - (2) with reference to litigation that is actually taking place or was in the contemplation or anticipation of the client
- The relevant time is when the communication was made

ADVICE PRIVILEGE – S 118

- Communication must be
 - confidential;
 - of a professional nature; and
 - made with the **dominant purpose** of obtaining or giving legal advice

LITIGATION PRIVILEGE – S 119

- Privilege for confidential communications and confidential documents made or prepared for the **dominant purpose** of a lawyer providing professional legal services relating to existing or contemplated litigation

The Purpose

- The purpose which, at the time, led to the making of the communication or the preparation of the document
- It will not always or necessarily be the understanding or motive of the person who made the statement that determines the issue, although this will be relevant
- Self serving statements as to the purported status of a document will rarely be relevant
- It is important to recognise that particular communications may combine a number of different purposes
- For example, in-house lawyer may provide in the one document legal advice to the client and, in addition, commercial advice. The former will attract privilege; the latter will not

The Test for Purpose

- Would the communication have been made or the document prepared even if the suggested dominant purpose had not existed?
 - If the answer is ‘yes’, the test is not satisfied. If the answer is ‘no’, the test will be satisfied, notwithstanding that some ancillary use or purpose was contemplated at the time
- Dominant indicates that purpose which was the ruling, prevailing or most influential purpose

Loss of Privilege

- For privilege to be lost, the disclosure must be both
 - "knowing" and "voluntary"
- However, a disclosure made under a mistaken belief as to what is being disclosed will not be one made "voluntarily" and will not necessarily result in the loss of privilege
- If the mistake is "obvious", and should have been appreciated by the party to whom the document is disclosed, privilege may not be lost

Example

Privileged

- A statement of a potential witness is protected by privilege. Delivery of it to the witness, provided its confidentiality is maintained, will not destroy the privilege. However, once it is filed and/or served, it loses its characteristic of confidentiality and no privilege remains in it.

Not Privileged

- An assessors report prepared to assess the nature and extent of a claim is not privileged because it was not made for the dominant purpose of providing legal services, rather it would have been brought into existence for the purpose of assessing the claim in any event.

Expert Reports - Loss of client legal privilege: related communications and documents

- Permits the adducing of “evidence of another communication or document” if it is reasonably necessary to do so to enable a proper understanding of a communication or document before the court.
- If privileged materials influenced the content of a report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials

Principles of Privilege in Relation to Instructions to Experts

- Ordinarily the confidential briefing or instructing by a prospective litigant's lawyers of an expert to provide a report of their opinion to be used in anticipated litigation attracts client legal privilege
- Copies of documents, whether the originals are privileged or not, where the copies were made for the purpose of forming part of confidential communications between the client's lawyers and the expert witness, ordinarily attract the privilege
- Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an *implied waiver* of the privilege in respect of the brief or instructions or documents referred to, at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report

Investigation Reports

Ensham Resources Pty Ltd v Aioi Insurance Company Ltd [2012] FCA 710,

- The decision reaffirms that, in circumstances where an insured makes a claim on its insurance policy and solicitors are instructed by the insurer to advise on indemnity once they receive a third party's report, such a report would be subject to client legal privilege if its dominant purpose is to assist in the provision of legal advice relevant to the prospect of litigation.
- *The occurrence of an event which, in common experience, very often leads to litigation may lead to the conclusion that litigation is reasonably anticipated and therefore give rise to a valid claim of privilege*

Ensham Resources (cont.)

- *The correspondence ...reveals a deliberate attempt by the solicitors for the insurer to attract legal professional privilege to the Crawford reports. This is particularly evident in self-serving statements referring to a potential claim for privilege...*
- *Despite such attempts to attain the status of privileged communication, the Court does not find such statements persuasive.*
- *It is clear that a studious cast of verbiage cannot work the alchemy of transforming what would be otherwise unprivileged into privileged documents.*
- *Although the information in the reports would have been of interest to the insurers generally and would have provided them with necessary information to factor in the cost of the potential claim against them, the reports primarily provide the insurer's solicitors with information relevant to the potential litigation*

Investigation Reports - Not Privileged

Perry & Anor v. Powercor Australia Limited [2011] VSC 308

- The case related to investigation reports that were obtained by Powercor following the Victorian bushfires in February 2009. Powercor, through its in-house lawyer, commissioned investigation reports into the cause of the fire. Litigation followed and Powercor claimed privilege over the investigation reports.
- Powercor had the onus of establishing that the privileged purpose was the dominant purpose.
- Judge found there were many different purposes including to comply with statutory reporting requirements; to provide information to an insurer; internal reporting; and importantly legal advice to Powercor and to use it in the anticipated legal proceedings in giving privileged advice about the Royal Commission
- But there was no 'dominant purpose' of legal advice and/or use in anticipated litigation.

Asahi Holdings v Pacific Equity Partners [2014] FCA (13 May 2014)

- Applicant claimed reports and memo's developed for the assessment of a claim were privileged.
- Applicant engaged Deloitte to provide forensic accounting services, which would then enable the applicant to obtain legal advice they required from Freehills.
- Interview records and Deloitte advices claimed to be prepared for the dominant purpose of the applicant being advised in respect to anticipated litigation.
- Applicant tendered a notice of claim and provided reports as the 'summary of adjustments and calculations'. Applicant deposed that since they did not want to waive privilege in the report by delivering to insurer, the documents provided were marked with "Privileged and Confidential"

Asahi Holdings (cont.)

The privileged material was provided as particulars given in support of a claim made under the policy. The objective purpose was insurer to assess claim. The possibility must have been objectively contemplated that in assessing the claim, the insurer may want to evaluate it by disclosing the information to others including persons who would not be under any restrictions as to its further disclosure. It must also have been objectively appreciated that the insurer could use the information in open court should any legal proceedings be brought against it by the other applicant. It follows that it must have been objectively understood that in pursuit of the purposes for which the information was disclosed, its contents may pass into the public domain.

Sprayworx v Homag [2014] NSWSC

- Final expert report, dated 15 July 2013, and letter of instruction served on the solicitors acting for Homag Australia.
- Notice to produce for draft reports from April 2013 and May 2013 and notice all correspondence and communications between expert and Sprayworx and their solicitors
- It cannot be said that the solicitors comments influenced the content of the report in such a way that the use or service of the report would be inconsistent with maintaining the privilege in those materials, such as, where it would be unfair for the party to rely on the report without disclosure of those materials. Therefore, Sprayworx has not acted inconsistently with the maintaining of its client legal privilege.

Expense Reduction v Armstrong Strategic Management [2013] HCA 46

- During discovery process which involved around 60,000 documents in electronic form, 13 documents subject to client legal privilege inadvertently disclosed
- Advised that mistake had been made – refused to return – asserted waiver
- High Court critical of expense incurred by parties in pursuing the application

Expense Reduction v Armstrong Strategic Management [2013] HCA 46

- Rule 31 of the Australian Solicitors' Conduct Rules, adopted by the Law Council of Australia.
- Duty on a solicitor to return material which is known or reasonably suspected to be confidential, where a solicitor is aware that its disclosure was inadvertent.
- Rule now adopted in NSW