

## Article Information

Authors: Anne Freeman, Millie Byrnes Howe, Lisa H Nguyen  
Service: Corporate & Commercial, Dispute Resolution & Litigation

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## Another layer to the shield: legal advice is protected by privilege where a company's director is adversarial

*The recent decision of the Federal Court in **Hammond v Quayeyeware Pty Ltd [2021] FCA 293** reaffirms the rights of directors to access company documents, and provides an important clarification on a director's right to access a company's legal advice where the relationship has become adversarial. It is also a reminder that it is the purpose for which the documents came into existence that is the relevant consideration when it comes to determining whether the privilege exists.*

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### The facts

The plaintiff, Ms Hammond was a founder, director and shareholder of Quayeyeware Pty Ltd (**Quay**), a popular sunglasses company. From August or September 2017, the relationship between Ms Hammond and Quay deteriorated and there was a significant reduction in the flow of information to Ms Hammond as a director of Quay. Ms Hammond claimed that information was excluded from board packs, such as spending for large marketing or collaborations, that Quay refused or delayed the provision of information she requested, and Quay failed to inform her about key details relating to its business affairs, including new marketing projects and the appointment of a new CEO.

Subsequently, two legal proceedings were instituted:

1. Elevate Brandpartners, the majority shareholder which had nominated additional directors to the board (**Elevate**) and Quay commenced proceedings in April 2019 against Ms Hammond and her husband, their newly incorporated company, Dream Bandits Australia Pty Ltd, and Mr Boyd (another director), for various claims including breaches of the shareholders deed and director's duties, copyright and trademark infringements, misleading and deceptive conduct and tortious interference (**Elevate Proceedings**);<sup>[1]</sup>
2. Ms Hammond and Mr Boyd commenced proceedings in May 2019 against Quay seeking orders to compel access to Quay's financial and other books and records (**First Access Proceedings**). Ultimately Quay agreed to upload the requested financial documents to an electronic data room, with unconditional access being provided to Ms Hammond and Mr Boyd, and the First Access Proceedings were dismissed by consent.<sup>[2]</sup>

Despite the resolution of the First Access Proceedings, Ms Hammond raised issues about the electronic data room and continued to request further information. On 6 May 2020, Ms Hammond wrote to Quay seeking:

- *first*, access to various categories of documents relating to Quay's business; and
- *second*, access to all letters of engagement or retainers between Quay and its legal representatives, all written advice provided to Quay and all invoices rendered to Quay in relation to the Elevate Proceedings and the First Access Proceedings.

Quay requested further time to provide the documents in response to the first request from Ms Hammond but refused the second request on the basis that those documents were subject to legal professional privilege.

On 28 May 2020, Ms Hammond commenced proceedings seeking a declaration as to her right to access the financial records, as well as orders for general access to Quay's books and records.

### Directors' access to company documents and declaratory relief

Banks-Smith J summarised the avenues for directors to access the company's financial and other relevant documents, being:

1. the statutory right conferred by section 290 of the *Corporations Act 2001* (Cth) (**the Act**) to access financial records at all reasonable times;
2. the statutory right under section 198F of the Act to inspect books for the purposes of legal proceedings; and
3. the common law right of access to books and records (which, in contrast to the statutory right, is not limited to financial information).

Her Honour was not persuaded that either declaratory relief nor the orders should be made on the basis that there was no utility in granting the relief because the disputes between the parties would not be resolved, and there was potential for litigation to subsist even with the declaration, such as litigation as to its scope and enforceability.<sup>[3]</sup> Ultimately, her Honour held there was insufficient evidence for her to infer that Quay would not comply with its obligations to provide access to documents and financial records when requested in a reasonable period.

### **Access to privileged company documents**

Generally, directors have both a statutory (which includes sections 290, 198F and 247A of the Act) and common law right of access to the company's privileged information. However, this right of access does not abrogate a company's claim to legal professional privilege.<sup>[4]</sup> Relevantly, her Honour noted that "*where a company obtains advice through the request of the directors... [t]he privilege belongs to the company, and not to the directors*", and disclosure of privileged information by the company to its directors does not necessarily waive privilege.<sup>[5]</sup> One example is where there exists a commonality in interest in receipt of the advice which may be assumed to exist with directors, as it is they who assess the advice as part of their duties.<sup>[6]</sup>

Banks-Smith J held that in accordance with section 290 of the Act, Ms Hammond was entitled to access the invoices and retainer letters as financial records of the company to the extent that no privilege attached to them. However, her Honour held that Quay was entitled to withhold the privileged legal advice obtained for the Elevate Proceedings and First Access Proceedings on the basis that it was confidential to Quay and, at all material times, Ms Hammond's position in the litigation was hostile to Quay's interests. Quay had not obtained the advice with the intention that all directors would assess and act upon the legal advice. Her Honour further stated:

*Even if there was a commonality of interest between Quay and the majority directors [which did not include Ms Hammond and Mr Boyd] in seeking the advice, in the adversarial circumstances of that context - litigation or anticipated litigation - such commonality did not extend to Ms Hammond.<sup>[7]</sup>*

Furthermore (and contrary to Ms Hammond's contention), even though both proceedings were finalised, privilege "survives the end of the case".<sup>[8]</sup> Even though Ms Hammond no longer considered herself an adversary of Quay, her Honour held that this did not change the nature of her adverse relationship with the company at the time the advice was prepared (which was the relevant time to consider the existence of the privilege).

### **Key takeaways**

- Companies should be aware of a director's right to access the company's financial documents under the *Corporations Act 2001* (Cth) and the broader power to access documents under the common law.
- Directors generally have the right to access the company's privileged documents.
- Whether privilege over documents can be claimed by a company to avoid disclosure to a director depends on the relationship between the company and director at the time the document was created, and whether the document was intended to be confidential.
- If privilege is established over communications and documents, it will remain privileged unless it is waived or abrogated by statute - such is the case where privilege is claimed by a company to prevent disclosure of information to a director in circumstances which were previously adversarial.

<sup>[1]</sup> See *Elevate Brandpartners Ltd v Hammond* [2019] FCA 1103.

<sup>[2]</sup> See *Hammond v Quayeyeware Pty Ltd, in the matter of Quayeyeware Pty Ltd* [2019] FCA 2207.

<sup>[3]</sup> *Hammond v Quayeyeware Pty Ltd* [2021] FCA 293 at 151.

<sup>[4]</sup> Above n 3, at 188-195.

<sup>[5]</sup> Above n 3, at 197-198.

[\[6\]](#) Above n 3, at 198.

[\[7\]](#) Above n 3, at 221.

[\[8\]](#) Above n 3, at 226.