

Article Information

Author: Lucinda Carter

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Insolvency Update - Can sharing documents waive privilege?

The recent decision in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 481 reinforces the need to ensure that an express relationship of confidentiality exists when sharing or disseminating documents subject to legal professional privilege.

Background

Independent Liquor (NZ) Limited (ILNZ), as nominee for Asahi Holdings (Australia) Pty Ltd (Asahi), purchased the shares of a business operated by Flavoured Beverages Group Holdings Limited (FBG). In accordance with the share sale agreement, Asahi took out policies of Warranty and Indemnity Insurance, which covered ILNZ and Asahi for any loss arising from breaches of the warranties given to them by the sellers under the agreement.

Asahi and ILNZ (together, the applicants) subsequently issued proceedings alleging that the sellers misrepresented the financial position of FBG.

In anticipation of the litigation, the applicants' solicitors prepared a report in order to analyse the true financial position of FBG at the relevant time (Report). One of the purposes of the Report was to prepare a notice of claim under the insurance policy.

The applicants provided a copy of the Report to their Insurer, which was marked 'privileged and confidential' for the purpose of making a claim on their insurance policy. During the proceeding, a redacted version (to assert and protect privilege) was provided to the respondents.

The respondents sought a full, unredacted copy of the Report, on the basis that privilege in the Report had been waived by the applicants when they provided it to their Insurer.

Decision

Did privilege exist?

It was conceded by both parties that legal professional privilege was attached to the original Report so the respondents were not entitled to view an unredacted version unless the privilege had been waived.

Was there a waiver of legal professional privilege?

The key issue was whether privilege in the Report had been waived when a copy of the entire, unredacted Report was provided to the Insurer. If it had, the respondents were entitled to receive an unredacted copy of it.

It is well established that:

- Whether privilege has been waived will depend on whether the client with the benefit of that privilege acts inconsistently with the maintenance of the confidentiality of the document in question.
- The test for determining inconsistency is an objective one which will take into account the relevant circumstances surrounding the alleged waiver.
- An implied waiver of privilege may occur even though this may not reflect the subjective intention of the privilege holder.

In this case, the Court found that privilege in the Report had been waived by providing it to the Insurer.

A summary of the principles which a Court will take into account in determining a waiver of privilege issue in an insurance context are:

- The type of privilege: the Report provided to the Insurer was the subject of 'litigation privilege' rather than 'advice privilege'. This meant that the purpose for which confidentiality was sought to be maintained was to keep the Report hidden from the applicants' actual or potential adversary in litigation.
- The nature of the disclosure: the disclosure of the Report to the Insurer was voluntary – which is a fundamental indicator of acting inconsistently with the privilege. While the applicants had a duty of disclosure under the policy, that duty did not extend to providing information that was protected by legal professional privilege.
- Existence of a common interest: the applicants and the Insurer did not have a common interest. At the time the Report was provided, there was no basis to say that the Insurer was likely to cover the insurance claim. In the contrary, the context of the substantive claim created an alignment of interest between the Insurer and the respondents to establish that there had been no misleading and deceptive conduct (and that the warranty had not been breached). In effect, privileged information was voluntarily disclosed to a potential opponent, being the Insurer.
- Terms of the policy: the terms of the policy did not expressly require the Insurer to keep material provided to it confidential and no assurances as to confidentiality were sought or obtained from the Insurer. Furthermore, the confidentiality of the Report could not be implied from the circumstances. At the time of providing the Report, the applicants were seeking to claim on their policy. Accordingly, the objective purpose of providing the Report must have included the use of it by the Insurer to assess the claim under the policy. It followed that it must have been objectively understood that its contents may lose their confidentiality (for example if the Insurer needed to provide it to third parties to assess coverage for the insurance claim, or if proceedings were commenced in relation to the insurance claim).
- Duty of good faith: the fact that the Insurer was subject to a duty of utmost good faith did not create any confidentiality obligation or restriction on the use of the Report for the purposes for which it would have been understood to have been provided.
- Privilege on the face of the document: the Report was not obviously sensitive or obviously privileged so that the reader of the material would understand that the confidentiality of the material was intended to be maintained. The fact that 'Private and confidential' appeared on the document did not carry much weight. It only reflected the intention that the information not be used for extraneous purposes.
- Express statement of confidentiality: Finally, confidentiality in the Report was not apparently expressly reserved when it was disclosed. That is, there was no express agreement or even a stipulation spelling out the basis upon which the Report was disclosed nor were any limitations of the further use of the Report stated when it was provided to the Insurer.

In this context, the Judge also noted that:

- The covering letter with which the Report was provided to the Insurer was not tendered as evidence of any attempt to reserve rights of confidentiality in the Report
- The policy specifically provided for a regime for the protection of privilege in documents in a different context which could have been adopted in relation to the Report, but was not.

The decision reinforces the need to ensure that an express relationship of confidentiality exists when sharing or disseminating document subject to legal professional privilege.