

Article Information

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A Hastie claim for privilege - Hastie Group Ltd (in liq) v Moore [2016] NSWCA 305

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Partner, Ian Nathaniel, Senior Associate, Ben Hartley, and Law Graduate, Jessica Casey, discuss further.

The liquidators of a group of companies, referred to as the Hastie Group, commenced proceedings against its former auditors (**the Respondents**) in relation to a number of audits of the Hastie Group conducted between 2008 and 2010. The Respondents issued notices to produce on the liquidators, and consequently, the liquidators were required to produce documentation that related to attempts to secure litigation funding.

At first instance, McDougall J found the documents, which comprised of, amongst other things, an expert report prepared and provided to a potential litigation funder (**the Report**), were not privileged. It was this finding that formed the foundation of the appellate proceedings.

The liquidators sought leave to appeal the primary judge's decision, asserting that the Report was confidentially prepared for them in connection with the anticipated proceedings, and was therefore, privileged. The Respondents contended that not only was the evidence before the primary judge insufficient to establish that the Report was privileged, but the Report was prepared for the dominant purpose of assisting a litigation funder in reaching a decision regarding the provision of funding.

Accordingly, the matters that arose for determination by the Court of Appeal were:

- Was the report privileged?
- If the Report was privileged, had privilege been waived?
- Whether leave to appeal should be granted.

On the first point, the majority held that the Report was privileged. In rejecting the Respondents' submission as to the breadth of evidence required to be produced in order to establish privilege, the majority determined that there may be circumstances from which privilege can be established without the need for evidence of the level that the Respondents contended was required. The majority confirmed that the Court is not confined to the express statements made in support of the claim for privilege, but is entitled to draw inferences from other proved facts. Accordingly, where both parties accepted that the engagement letter was privileged, having regard to the fact that the evidence established the nature of the Report and the circumstances in which it was prepared; the proper inference is that the Report is also privileged. As such, the majority held that the liquidators had done enough to satisfy the onus that the Report is privileged.

Having failed on their first submission, the Respondents submitted in the alternative that the liquidators had acted in a manner inconsistent with the maintenance of the privilege in the Report. The Respondent's main contention was that the liquidators were deemed to have waived privilege as they had, in the course of seeking extensions of time for service of its statement of claim, relied on an explanation for its delay upon the fact that it had been seeking litigation funding. This reliance it was argued sufficient to waive in privilege in any document which related to these dealings.

For the majority, a waiver ordinarily only occurs where the *contents* of privileged documents are relied upon, rather than merely providing a reference to those privileged documents. The majority held that the disclosure of the Report to a litigation funder was not sufficient to waive privilege in circumstances where it was clear that the Report was being provided on a confidential basis and for a purpose associated with the litigation.

Having regard to the findings made on privilege and waiver thereof, the majority held that a substantial injustice would be occasioned should leave be refused.

While this case is specific to its particular facts, it is an interesting case for litigants, litigation funders and experts as it highlights the importance of substance over form when making a claim for privilege and having established that an expert report is privileged, that privilege will not necessarily be waived by reason of the mere disclosure to a third party.