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When disclosure to an insurer risks waiving privilege

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***Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2)* [2014] FCA 481**

Introduction

Following the Federal Court's decision in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Ltd Limited (No 2)* [2014] FCA 481, insureds (and insurers) should be careful not to assume that privileged information provided by an insured to its insurer will always remain privileged.

This article explores the adverse consequences for an insured who was held to have waived privilege over information it provided to its insurer in the course of making a claim under the relevant policy, and provides a checklist to assist parties to avoid unintentionally waiving privilege.

The facts

Asahi Holdings (Australia) Pty Ltd (**Asahi**) through its nominee, Independent Liquor (NZ) Limited (**ILNZ**), agreed to purchase the shares in a beverage company (**Company**). It was a condition of the sale that Asahi obtain insurance in respect of certain warranties given by the sellers. Asahi entered a warranty insurance policy which provided cover for Asahi and ILNZ against breaches of those warranties by the sellers (**Policy**).

Pursuant to the Policy, the insurer was liable to indemnify Asahi for any loss it would have been entitled to claim against the sellers for breach of the insured warranties.

Asahi and ILNZ (**Applicants**) later made a claim under the Policy for loss occasioned by alleged breaches of a number of the insured warranties. They also commenced proceedings against the sellers and a number of their directors and employees (**Respondents**), claiming they breached certain warranties and misrepresented the financial position of the Company.

Relevantly, the Applicants' then solicitors had prepared a report for Asahi and ILNZ in anticipation of the litigation with the Respondents, containing a number of memos which particularised the conduct alleged to have caused the Respondents to misrepresent the financial position of the Company, such as inflating or overstating the Company's earnings (**Report**).

A complete copy of the Report was voluntarily provided by the Applicants to their insurer to support the Applicants' claim under the Policy,[1] with many (but not all) of the pages marked '*Privileged and Confidential*'.

A redacted copy of the Report was also disclosed to the Respondents during the course of the proceeding. The Respondents sought disclosure of the unredacted version, however the Applicants resisted the request on the basis the redactions attracted legal professional privilege.

The Respondents asserted that the protection conferred by the privilege was lost when a copy of the Report (in its entirety) was provided to the insurer, a third party.

Issues

Bromberg J was required to consider whether the privilege attaching to the Report was waived by the Applicants providing an unredacted copy of the Report to their insurer.

He referred to the guiding principles of waiver of privilege as outlined in *Mann v Carnell*,[2] and relevantly noted that:

a. The key question was whether the Applicants' conduct in providing the unredacted copy of the Report to the insurer was *inconsistent* with maintaining confidentiality in the redactions as against the Respondents;

b. The test of inconsistency was an objective test, meaning waiver might be implied despite the Applicants' subjective intention to maintain confidentiality in the Report; and

c. While the Applicants' voluntary disclosure of the Report to the third party insurer did not necessarily waive privilege, the inconsistency described above would usually only be established through a voluntary act of disclosure.

Decision

It was found by the Court that the confidentiality in the Report was *prima facie* protected by litigation privilege rather than advice privilege, meaning the Report was prepared between the Applicants and their solicitors for the dominant purpose of securing a fair trial. An essential element of maintaining the confidentiality was not disclosing the contents of the Report to the Applicants' opponents.

The Court accepted the Respondents' submission that there was *not* a commonality of interest between the insurer and the insured Applicants (unlike many situations involving an insurer and insured, such as when an insurer assumes the conduct of litigation on behalf of an insured). In doing so the Court recognised that, in relation to both the claim under the Policy and the claim against the Respondents in the proceeding, it was in the Applicants' interests to establish that the Respondents engaged in misleading or deceptive conduct. Conversely, the insurer and the Respondents had a common interest in disproving the allegations of misleading or deceptive conduct. As a result there was a

> Where common interest privilege does not apply between an insurer and its insured, any privilege in information provided to the insurer may be waived to other third parties.

divergence of interests between the Applicants and the insurer.

The Court attached significance to this potential for competing interests because the Applicants had voluntarily disclosed privileged information to a potential opponent when they provided the unredacted Report to their insurer.

The Applicants argued that the privilege attaching to the unredacted version of the Report had not been waived by its disclosure to the insurer because the Report had been disclosed for a limited and specific purpose and in a confidential context. In support of this, the Applicants relied on:

a. Their use of the words '*Privileged and Confidential*' when disclosing the Report to the insurer;

b. An implied obligation on the insurer to maintain confidence, consistent with the insurer's '*duty of utmost good faith*'; and

c. An alleged commonality of interest between the Applicants and the insurer, based on, *inter alia*, a common interest in assessing the sellers' liability (an interest the Court viewed as insignificant).

The Court observed that objectively the Applicants must have provided the unredacted Report to the insurer to enable the insurer to assess the claim under the Policy. The Applicants must also have (objectively) appreciated that if a dispute arose under the Policy and the insurer rejected the Applicants' claim, the insurer could use the information in the unredacted Report in any relevant proceedings against it which would result in the Report passing into the public domain.

The Court held:

a. The disclosure of the unredacted version of the Report to the insurer for use by the insurer was *inconsistent* with the maintenance of confidentiality which the privilege was intended to protect;

b. An implied and complete waiver of privilege had occurred, because the Applicants could not control the insurer's further dissemination of the unredacted Report once it had been disclosed; and

c. An agreement of confidentiality as between the Applicants and the insurer (as asserted by the Applicants) could not be implied in the circumstances.

Comments

This case serves as a useful reminder that the objective test of inconsistency prevails over a party's subjective intention to preserve the privilege attaching to a document when disclosing it to a third party.

Asahi Holdings was not a case where common interest privilege applied because the insurer was a potential opponent and Asahi was not compelled under the Policy (pursuant to any disclosure obligations) to disclose the privileged report.

The only documents that will ever attract legal professional privilege are documents which, at the time they were created, were for the dominant purpose of obtaining legal advice or aiding in the conduct of litigation.

Helpful questions to ask *before* providing such documents to a third party include:

a. Do I wish to maintain privilege in the document?

b. Am I obliged to provide the document to the third party?

c. Is there a possibility my interests could diverge from the third party's interests in the future?

d. Should I seek an express agreement from the third party in relation to the use and dissemination of the document prior to disclosing it?

Marking the document as '*Privileged and Confidential*' will not (of itself) influence a Court's view on whether confidentiality has been maintained.

It is also not enough to rely on an assumption that the third party will, or is obliged to, maintain confidentiality in relation to the document. A party should endeavour to be as clear as possible about the terms and conditions of any voluntary disclosure and, if necessary, expressly agree on the limitations applying to the third party's use of a document before it is disclosed.

In that regard and in an insurance context, this case is particularly interesting because insureds often provide documents to an insurer to support their claim under a policy in the belief they share a common interest and that confidentiality is not at risk. In most situations, the insurer and insured will have a commonality of interest and any privileged documents will remain privileged in the hands of the insurer on the basis of common interest privilege, but this is not always the case.

[1] The Applicants were not compelled under the Policy to provide the Report to the insurer.
[2] (1999) 201 CLR 1.

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