BUDDLE FINDLAY

Legal update on litigation and dispute resolution - July 2020

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29 July 2020

Privilege against self-incrimination – application to partnerships

In *Deloitte Touche Tohmatsu v Sadie Ville Pty Ltd* [2020] FCFCA 23, the Full Court of the Federal Court of Australia rejected an appeal by Deloitte Touche Tohmatsu (Deloitte) that sought to resist disclosure of its audit files to Hastie Group Ltd. The files were to be used in a civil claim against Deloitte, in relation to the actions of one of its partners, Mr Reuben Saayman.

In that claim, it was alleged that the actions of Mr Saayman could constitute offences that attract criminal and civil liability. Deloitte resisted disclosure on the basis that it was not required to disclose documents that could incriminate the partnership, because the entire partnership might be liable for an offence committed by one partner.

While the Court allowed Mr Saayman to withhold the files, it did not allow Deloitte to do the same. It explained that under the Australian Partnership Act, the members of a partnership cannot be prosecuted for an offence that is committed by a single partner. Instead, the partnership will become vicariously liable to pay any penalty that might be imposed on that partner if they are successfully prosecuted. As there was no risk that Deloitte would be prosecuted (the risk instead being that it would share in the consequences of a successful prosecution of a specific partner), it therefore could not claim the privilege against self-incrimination.

You can find the full judgment here.

Legal advice privilege – 'dominant purpose' rule applies to in-house lawyers

In *Civil Aviation Authority v Jet2.com Ltd* [2020] EWCA Civ 35, the English Court of Appeal dismissed an appeal by the Civil Aviation Authority (CAA) that sought to withhold correspondence regarding drafts of a letter sent to Jet2. The correspondence took place between senior CAA executives, including in-house lawyers, and concerned public criticism of Jet2 by the CAA.

The judgment clarifies the law on legal advice privilege (LAP), holding that the dominant purpose rule applies to claims of LAP regarding communications to and from in-house lawyers by members of the corporate entity they serve. This means that LAP will apply only if the main purpose of the correspondence was to seek or give legal advice.

The Court also considered whether emails with multiple purposes and sent to multiple addressees might meet the dominant purpose test. As LAP extends to all communications that seek or give legal advice (including information provided to keep the lawyer informed of the situation), the Court observed that LAP will attach to multi-addressee emails if the same email, sent only to an in-house lawyer, would also attract LAP.

However, the Court cautioned that LAP will not attach to an email sent to the lawyer to keep him or her informed of the situation or when that email seeks non-legal advice. The Court did not address situations when a lawyer receives a multi-addressee email that simultaneously seeks legal and non-legal advice from its various recipients, leaving the status of LAP in those circumstances unclear.

You can find the full judgment here.

Waiver of legal advice privilege – need for reliance

Two recent English decisions have considered when a reference to privileged information in proceedings will waive the privilege in that information, with differing outcomes.

In the first decision, the English High Court in *TMO Renewables Ltd v Reeves* [2020] EWHC 789 (Ch) considered whether reference to a privileged document in a witness statement waived privilege.

TMO Renewables Ltd (TMO) obtained a report from EY on losses that TMO alleged were caused by the defendants. The report (along with the basis on which the loss had been calculated and the value of the loss) was referred to in a witness statement from one of TMO's liquidators to rebut a claim by the defendants that the allegations were baseless. The defendants applied for disclosure of the report.

The issue for the Court was whether the maker of the witness statement was "deploying in court material which would otherwise be privileged". The Court affirmed that merely referring to a document or its effects does not waive privilege, even when facts contained in the report are disclosed to provide authority to a court. However, quoting or summarising a document or referring to a document to persuade a court as to the merits of the case will waive privilege.

On the facts, the reference to the report was only made to rebut an allegation upon which the case did not turn at that point in time. The use of the report did not seek to convince the Court of the merits of the case and references to EY, the methodology and conclusion were broad generalisations necessary to provide the Court with a sufficient basis for the claims. Privilege was therefore not waived.

The outcome in this case may be contrasted with *PCP Capital Partners v Barclays Bank* [2020] EWHC 1393, which concerned an application by PCP Capital Partners LLP (PCP) for the disclosure of documents related to another proceeding, on the grounds that Barclays Bank PLC (Barclays) had waived privilege over these documents by referring to relevant legal advice in their witness statements.

The Court found that while there is no clear test to determine whether privilege is waived in these circumstances, waiver will generally occur when there is sufficient reference to the legal advice and the party waiving relies on that reference to advance their case on an issue before the court.

The Court also addressed the distinction between referring to the effect of the legal advice and content of that advice. Generally, reference to the effect (or outcome) of legal advice will not constitute a waiver, though the rule cannot be applied mechanistically. Determination of whether there is a waiver should be "viewed through the prism" of whether there was reliance on the privileged material, the purpose of reliance, and the general context of the case.

Accordingly, the Court found that while Barclays' witness statement only referred to the effect of the legal advice, the content of that advice could be inferred, and as the inference was relied upon the privilege protecting the advice had been waived.

You can find the full judgments here and here.

Without prejudice communications – litigants cannot 'cherry pick' settlement correspondence

The High Court of Hong Kong in *Poon v Poon* [2019] HKCFI 3003 considered the admissibility of 'cherry-picked' settlement discussions in a dispute concerning the estate of the litigant's father.

The plaintiff in this case sought to introduce evidence of telephone conversations, meetings and WhatsApp messages to show that the defendant's positions in settlement discussions and litigation were inconsistent. The defendant (who administered the estate) applied to have the statements excluded as inadmissible.

In examining whether the statements demonstrated that the defendant made the communication with the intention to settle the dispute, the Court refused the plaintiff's invitation to confine its analysis to the statements themselves. Instead, the Court applied the conventional approach in its assessment of the intention underlying the meetings and correspondence, by considering whether the whole context showed that the objective intention of those interactions was to find a resolution to the dispute. The plaintiff's subjective view, and the picture painted by his selective presentation of the evidence, was not sufficient.

The Court found against the plaintiff and struck out the relevant statements from the plaintiff's witness statement.

You can find the full judgment here.

Privilege and auditors – who makes the call?

A recent decision of the England High Court has held that it is auditors, rather than clients, who should ordinarily assess whether information sought by regulators is subject to legal professional privilege.

In *A v B* [2020] EWHC 1491 (Ch), the Financial Reporting Council Ltd (FRC) investigated the claimant's (known as 'A') 2018 financial statements, of which 'B' was the auditor.

In June 2019, the FRC sought the production of the audit file in relation to the 2018 audit of A's financial statements, about which B's solicitors informed A's solicitors. In response, A's solicitors told B's solicitors that A did not consent to the disclosure of any

materials that were subject to legal professional privilege.

Following correspondence, A then issued proceedings for a declaration in November 2019. Among other things, the relief it sought was that the Court issue a declaration requiring B to withhold the production to the FRC of certain documents on the grounds of A's assertion of privilege. In A's view, it was enough for it to assert privilege to prevent B complying with the FRC's request for production of certain documents. B's position, however, was that it was entitled to and should make the determination of questions of legal professional privilege itself.

The Court held that it was for B, the auditor, not A, the client, to determine whether a document at issue is privileged. It was B, not A, upon whom the duty to disclose the information was imposed.

However, the Court held that if B were to make the wrong decision, it would be liable to A for having failed to maintain privilege, which it was under a duty to maintain. In addition, the Court held that parties in B's position will be under a duty to tell parties in A's position about the statutory notice and their intended disclosure of privileged or potentially privileged information. If A were to object, it could protect its rights by proceedings (and if appropriate, an injunction) against B based on the terms of the underlying relationship between A and B. Were the regulator a necessary party, it would be open to A, B, or the Court to join the regulator to those proceedings, and the identity of the party bearing the burden of the argument might vary according to the precise nature of the underlying issue.

This case raises an important procedural question for parties: which is, who determines the initial claim to privilege? By answering the question in favour of auditors, it does not undermine the extent of legal professional privilege in the context of disclosure to auditors. The judgment affirms the well-established principles that disclosure of privileged information to auditors on a confidential basis and for the limited purpose of an audit will not usually amount to a waiver of legal professional privilege. However, given the Court's conclusion, any disclosure of information to auditors that is potentially subject to claims of legal professional privilege should be carefully considered and only done having taken legal advice.

Read the judgment here.

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