Construction Contractor

Trade & Technical
Circulation : 8,883

March 2000

OPINION

P.32

When is a confidence not a confidence?

by DOUG JONES

IF YOU asked most people whether the courts should base their judgments on incomplete and thus potentially misleading evidence, they would probably argue - unless the question is not just an abstract one! - that justice is better served if the courts have access to all relevant facts.

But if you then asked them whether their private communications with their lawyers ought to be able to be exposed to full public scrutiny and placed before the courts, they would almost certainly react with horror.

This, in a nutshell, is the dilemma posed by "legal professional privilege", or "client legal privilege" as it is sometimes called. As High Court judges have put it, there is a "balancing of competing considerations".

The problem is that the interests of justice are served by the courts having the fullest possible access to the facts *and* by encouraging full and frank disclosure by clients to their lawyers. "Legal professional privilege" aims to achieve the latter objective, by limiting access by the courts to:

❑ Confidential communications between you and your lawyer for the purpose of obtaining or giving legal advice or assistance;

❑ Confidential communications between you and a third party, or between your lawyer and a third party, relating to litigation that is contemplated by you or already underway.

If a document or other form of communication is created *solely* for the purpose of being submitted to your legal advisers for advice or for use in actual or contemplated litigation, it is clear that you can claim legal professional privilege to prevent it being used as evidence in court, and also prevent the document being "discovered", or made available to the other side, before a trial.

This has been the law for a long time and continues to be the law. But it's also where the certainty ends.

Most communications that happen to be viewed by lawyers are not created *solely* with these legal purposes in mind. In corporations and government agencies, the main forms of communication, written and electronic documents, almost always serve several purposes, only one of which may be to obtain or provide legal advice or services. This is especially so when lawyers are "in house".

Should these documents, also, be able to be protected by legal professional privilege - even if the legal purposes are quite subsdiary? Prior to 1976, the answer was an unqualified "yes". It was sufficient if *one* of the purposes, no matter how slight, was to obtain or give legal advice or legal services.

From 1976 until 1995 in NSW, the ACT and Commonwealth jurisdictions and December 1999 in the other states, the answer was an equally unqualified "no".

This followed the High Court's decision, in *Grant v Downs*, that the *sole* purpose of the communication had to be to obtain or give legal advice or legal services. This new "sole purpose" test placed a very high hurdle in the way of anyone seeking not to disclose a document on the grounds of legal professional privilege.

Between 1995 and December 1999, hybrid applied in NSW, ACT and Commonwealth jurisdictions.

Under sections 118 and 119 of the NSW and Commonwealth Evidence Acts, introduced in 1995, if the *dominant* purpose in preparing a communication is to obtain or provide legal advice or legal services, legal professional privilege can be claimed to prevent the communication being used *as evidence in court.*

But the 1995 legislation left the application of legal professional privilege to the pre-trial "discovery" of documents quite uncertain.

Some judges decided the sole purpose test continued to apply for pre-trial discovery. They saw no great difficulty in the apparent inconsistency, as many "discovered" documents are prevented from being used in evidence on other grounds (e.g. hearsay) but can nonetheless open up new and crucially important lines of inquiry.

Professional privilege tested

OTHER judges decided the sole purpose test no longer applied for pre-trial discovery and had been replaced by the "dominant purpose" test, even though this was outside the reach of the new legislation. In some cases they said this was because the common law had changed to reflect the new legislation. In others they said the new legislation should be interpreted as applying to pre-trial discovery, as this was "evidence", or relied on court rules, or simply *assumed* the change had occurred.

In short things were a mess.

The good news is that the principles to be applied in determining legal professional privilege throughout Australia during *all* stages of the litigation process have now been clearly spelt out by the High Court in the *Esso Australia Resources Ltd v Commissioner of Taxation* case decided on 21 December 1999.

In short, the "dominant purpose" test will now apply throughout the litigation process. The bad news is that this test will be far from simple to apply in practice, and pre-trial costs and delays could be significantly increased.

In the *Esso* case there was a dispute about 577 documents which Esso claimed had been prepared for the dominant (but not sole) purpose of providing legal advice. All the judges rejected the argument that the NSW and Commonwealth Evidence Acts meant the common law had been changed. They said the common law must be the same throughout the country.

They also rejected arguments based on interpretations of the Evidence Acts and the rules of the Federal Court. So it came down to: should the High Court overturn the effect of its own 1976 decision of *Grant v Downs?*

By a majority of 4:2 they said "yes", and opted for the "dominant purpose" test instead.

The main judgment, by Chief Justice Gleeson and Justices Gaudron and Gummow, viewed this test as striking "a just balance", while the other majority judge, Justice Callinan, rejected the "sole purpose" test as inconvenient and having "a tendency to discriminate against corporations and other large organisations".

While the "dominant purpose" test is obviously easier to satisfy than the discarded "sole purpose" test, the meaning of "dominant" in this context has yet to be established by Australian courts. Protection won't depend just on the intentions or motives of the document's author or the individual(s) who decided the document should be prepared. Nor will a "verbal formula" be conclusive.

All the facts will need to be considered - and the High Court majority said courts "should not hesitate" to exercise their powers to examine documents subject to disputed claims for legal professional privilege and allow cross-examination of those making the claims.

This was one of the main concerns of the two dissenting High Court judges, Justices McHugh and Kirby. They argued the new "dominant purpose" test will lead to extensive interlocutory litigation, with cross-examination of those claiming the privilege, evidence from the other side about the purposes of the document and, in many cases, examination of the state of mind of the person creating each document.

Justice Kirby pointedly referred to "the explosion of pre-trial hearings of this kind" as "a blight on civil litigation in the United States".

They argued that the "dominant purpose" test will:

❑ Over-restrict the information available to the courts. Justice McHugh commented that "in the age of the Internet and freedom of information legislation" it seemed "contrary to the spirit of the times" to make *less* information available to judges and juries. Justice Kirby feared the courts would be "frustrated" in determining "where the truth lies in disputed matters".

❑ Depend on the form rather than the substance of communications. A single document serving multiple purposes will often be protected, whereas one of two separate documents together serving exactly the same purposes might not. Material that should not be protected will be "able to free-ride on the protected purpose".

❑ Unfairly favour large corporations and government authorities, which will now find it much easier than individuals to "hide" behind legal professional privilege.■

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