

15 August 2014

Anthony Lo Surdo SC

### LEGAL PROFESSIONAL PRIVILEGE – COMMUNICATIONS WITH NON-LAWYERS

It is not uncommon, especially in cases involving large-scale commercial transactions for a client to consult with non-lawyer advisers. For example, in a substantial merger or acquisition, legal and non-legal advice might be sought on the structure, bid vehicle, terms and conditions of any offer or agreement, finance of the bid vehicle, due diligence of the assets and liabilities of the target and assessment of the financial metrics of the target pre and post-acquisition.

The limitation on claiming legal professional privilege in relation to communications involving non-lawyer third-party advisers was recently considered by Beach J in *Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited* (No. 4) [2014] FCA 7 (1 August 2014). The substantive proceedings involved a claim by Asahi for damages arising from alleged misleading or deceptive conduct in the course of a share sale transaction. Asahi retained several leading commercial and financial advisory services to assist with the due diligence for the acquisition. Subpoenas were issued to a number of these advisers. Asahi claimed legal professional privilege over the communications contained in a number of the documents produced by those advisers.

Beach J summarised and applied the following propositions (derived from *Pratt Holdings Pty Ltd v Commissioner of Taxation* (2004) 136 FCR 357):

1. "A communication made by a third party adviser to a client's lawyer if made for the requisite dominant purpose of the client obtaining legal advice from the lawyer will be privileged. Direct evidence of purpose can come from the third party adviser, the lawyer or the client. The purpose may also be readily inferred given the directness of the communication from the third party adviser to the client's lawyer. Further, it is not necessary to ask whether the third party adviser was acting as the agent of the client, including in making the communication to the client's lawyer. The absence of such an agency does not deny the existence of the privilege attaching to the communication, although its presence may fortify it. In terms of the

third party adviser's status, the important characterisation is 'not the nature of the third party's legal relationship with the party that engaged it but, rather, the nature of the function it performed for that party'. "(Pratt at [41]).

2. "A communication made by a third party adviser to a client if made for the requisite dominant purpose of the client then obtaining legal advice will be privileged. Again, direct evidence of purpose can come from the third party adviser or from the client; it can also come from the lawyer, but that usually may not be as probative if the lawyer was not a party to the communication."
3. "Where a third party such as an accountant, broker, merchant banker, financial adviser, due diligence specialist and others of a non-legal genus perform work for a client in a non-litigation setting, care needs to be taken with analysing the precise purpose for each communication. Take a substantial acquisition or merger. A client may engage and seek advice from a number of non-legal advisers as well as consulting lawyers.... In short, legal and non-legal advice might be sought on the same topic so that the topic in all its dimensions is fully analysed by and for the client. The various advices given by the non-legal advisers 'will rarely be capable of attracting privilege for the reason that they will almost invariably have the character of discrete advices to the principal as such, with each advice, along with the lawyer's advice, having a distinctive function and purpose in the principal's decision making...' (Pratt at [46]). Even where all such advices are interrelated, that is, they provide a collective basis for an informed decision by the client, this does not deny the force of the previous point that non-legal advices will rarely attract privilege."
4. "If non-legal advices are provided to a client who then chooses to provide them to its lawyers, that does not

clothe the original non-legal advices with privilege. They ordinarily will have been prepared for a non-legal purpose. But copies that might subsequently be created by a client and given to its lawyers may attract privilege (*Propend*). Generally, privilege does not extend to non-legal advices to the client simply because they are at the same time or later 'routed' to a legal adviser."

5. "Even if a client, in procuring a non-legal advice from a third party adviser has it in mind at the time that it requests that advice that it will also submit the non-legal advice to its lawyer, that may just demonstrate a multiplicity of purposes for the creation of the non-legal advice. But in such a scenario, the privileged purpose is unlikely to be the dominant purpose. Each communication and the reason for its creation needs to be carefully reviewed."
6. "A client may have conducted itself so as to demonstrate that the procurement and use of the non-legal advice was not for its communication to its lawyer, but rather to principally advise the client on the very subject matter of that non-legal advice. Further, the less the client performs the role of a conduit of that non-legal advice through to its lawyer and the more it 'filters, adapts or exercises independent judgment' in relation to that advice, the less likely the dominant purpose test is likely to have been satisfied (*Pratt* at [47]). From such behaviour of the client, it can more readily be inferred that the dominant purpose for the creation of the non-legal advice was for a non-privileged purpose."

The Court ultimately upheld the claim for privilege in respect of some documents or parts of documents and dismissed the claim in relation to others.

The case serves as a timely reminder of the fact that privilege turns on purpose and that unless evidence is adduced to establish that the dominant purpose of the creation of the communication is one to which privilege attaches any claim for privilege will fail.



**Anthony Lo Surdo SC**  
12 Wentworth Selborne  
Chambers

Level 12, 180 Phillip St,  
Sydney NSW 2000  
(+61) (02) 9223 3181  
[losurdo@12thfloor.com.au](mailto:losurdo@12thfloor.com.au)