

Legal professional privilege and third parties

Price v Decision Advantage Pty Ltd [2001] VSC 131, Supreme Court of Victoria, 4 May 2001

In *Price v Decision Advantage Pty Ltd* Mandie J considered whether documents sent by a solicitor to a third party were subject to legal professional privilege on the grounds that they were brought into existence for the dominant purpose of either providing legal advice to a party with a common interest or for obtaining information from that party for use in anticipated or contemplated litigation. The case warns those providing documents to third parties to request assistance and information in preparing a case to be mindful of the risk of loss of privilege of information contained therein.

The facts

During discovery a dispute arose as to whether documents 60 and 1 were subject to privilege. Document 60 was a briefing paper from the defendant's solicitors, Ebsworths to Macquarie Bank. Document 1 was the covering letter from Ebsworths to Macquarie.

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Attempts were made in both documents to ensure confidentiality. For example, document one, was marked "private and confidential", and expressly stated that it was prepared "for the purposes of anticipated litigation" and "provided ... on a confidential basis to assist the Bank with any enquiries it may consider it appropriate to pursue." Similarly, document 60, was endorsed "Confidential", "Client Legal Privilege" and "Prepared for the purposes of litigation".

Both documents appeared on their face to be prepared by the defendant's solicitors to communicate with the bank and request assistance with employment related investigations of the plaintiff, Price and Dr Castagna, a bank consultant. However both documents included statements indicating broader purposes, namely that the Bank should investigate Castagna's conduct for allegations of breach of fiduciary duties by nondisclosure and receipt of personal benefits.

The privilege claim

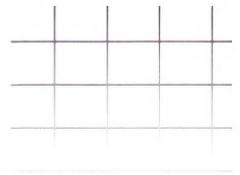
The defendants claimed that privilege for both documents as they contained "confidential legal advice concerning alleged improper conduct ... in which Macquarie Bank and the corporate defendants have a common interest" and were prepared by the defen-

dant's solicitors "for the purpose of anticipated litigation".

The decision

His Honour stated the relevant test of legal professional privilege at para 5: "Legal professional privilege at common law protects the contents of documents brought into existence for the purpose of seeking or giving legal advice or, to some extent, for the purpose of preparing for existing or anticipated legal proceedings. It must be shown that such purpose is the dominant purpose for making the document or bringing it into existence (see *Eso Australia Resources Ltd v Commissioner of Taxation* (1999) HCA 67; 168 ALR 123). Typically, protected documents of the kinds mentioned will be communications between lawyer and client. Documents passing between lawyer or client on the one hand and third parties (who are not agents of the lawyer or client) on the other hand may also be protected. For present purposes (and in brief), a document passing from a client's lawyer to a third party will be protected by privilege if:

- (a) it is already a privileged document (e.g. legal advice to the client) and the third party has a "common



interest" with the client in receiving the contents thereof; or

- (b) it has been made or brought into existence for the dominant purpose of use in or preparation for existing or anticipated litigation including the purpose of obtaining evidence or information for that litigation."

After inspecting the documents His Honour rejected the privilege claims and made orders permitting inspection. He said that the documents did not take the form of legal advice or conveying

legal advice, even if their contents reflected such advice, but rather they were produced to request the Bank to conduct certain investigations (para 10). Furthermore the documents were not brought into existence for the dominant purpose of obtaining the Bank's assistance with the defendant's investigations of Price and Castagna. Although this was one purpose, the request for the Bank to investigate Castagna's conduct was also made "because of the corporate governance issues raised" (para 11). **PL**

ACCC v Daniels [2001] FCA 244 (16 March 2001)

The recent decision of *ACCC v Daniels* concerns the statutory right of the ACCC to request provision of documents pursuant to s 155 of the Trade Practices Act because it has a reasonable belief that an offence may have been committed. The decision means that a corporation cannot refuse to comply with s 155 compliance because the documents are subject to the privilege.

Warnings to potential witnesses impede the course of justice

***Deacon v Australian Capital Territory* Supreme Court of the Australian Capital Territory (BC 2001 00156), 8/2/01 Higgins J. (unreported)**

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Practitioners mindful of the non-disclosure provisions¹ of *Crimes Act 1914* (Cth) will be interested in this recent unreported decision of the Supreme Court of the Australian Capital Territory. This decision is intriguing as it sheds new light on the ambit of s 70 *Crimes Act*.²

The plaintiff, Deacon, a former employee of Canberra Hospital, brought an action against the defendant, seeking damages for personal injuries allegedly

sustained when pushing a hospital bed.

In the course of preparing their case, the plaintiff and his solicitor attended Canberra Hospital to view the surface of the floor at the site of the injury and to speak to potential witnesses. This excursion resulted in a series of communications from the ACT Government Solicitor.³ Not only did the Government Solicitor take exception to the visit to the hospital, but they also advised that neither past nor present employees of the hospital could make ▶

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