

Purpose, privilege and duty – surviving the break down

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The recent decision of *Sharpe v Grobbel* [2017] NSWSC 1065 acts as a reminder for lawyers about their duty to claim privilege for clients even if they are no longer acting. It highlights the point in time in which common interest privilege arises and the threshold to be met to establish a forensic purpose notwithstanding a break down in commercial relationships.

Background

The proceedings centre around an unhappy falling-out between the four directors (and their related shareholder companies) of Climate Friendly Pty Ltd (Climate Friendly), an Australian company whose primary business relates to the development of land-based carbon projects in Australia.

The substantive proceedings concern the enforceability of a document (styled a Terms Sheet) executed by the directors of Climate Friendly, which the plaintiff directors allege binds the defendants to, *inter alia*, enter into a buy-back transaction which would reduce the third defendant's shareholding in Climate Friendly to approximately 50% and remove the casting vote currently held by the defendant directors. The defendants, for various reasons, contest that position.

Of import, Climate Friendly has filed a submitting appearance in the proceedings and is not legally represented in the proceedings.

Subpoena and plaintiffs' application to set aside

The defendant directors issued a subpoena upon Bakers who were retained by Climate Friendly to prepare the formal legal documents to implement the Terms Sheet (Subpoena). The Subpoena sought, *inter alia*, all documents recording or referring to advice provided by the law firm to Climate Friendly in relation to the proposed buy-back of Climate Friendly shares.

The law firm made a claim for privilege on behalf of Climate Friendly, which was not pressed by Climate Friendly (given its passive role in the proceedings). The plaintiff directors made an application to set aside the Subpoena on the basis that:

- the Subpoena was issued for no legitimate forensic purpose; and
- the documents sought were privileged from production.

Judgment

On the question of whether the documents sought by the Subpoena were for a legitimate forensic purpose, Brereton J held:

1. An issuing party is not required to show that it is 'likely' or 'on the cards' that documents sought under subpoena will materially assist its case. Instead, what is required is that the documents will add, in some way or another, to the relevant evidence in the case.
2. The question is whether the documents called for are 'apparently relevant or capable of providing a legitimate basis for cross-examination' or whether they are manifestly irrelevant and incapable of touching matters of credit (in which case the subpoena will be an abuse of process).
3. A stricter test would require an issuing party to be able to predict the contents of potentially relevant documents, and unduly constrain the ability of litigants to investigate the facts.
4. Examination of the communications between Climate Friendly and its lawyers could conceivably reveal instructions and advice either disadvantageous to Climate Friendly and advantageous to the plaintiff directors' interests.

As such, there was a reasonable basis for concluding that the material called for will likely add, 'in some way or another', to the relevant evidence in the case.

On the question of privilege, Brereton J held:

1. The documents in question were plainly confidential communications between Climate Friendly and Bakers, for the purposes of obtaining legal advice and assistance.
2. It is a solicitor's duty to protect a client's privilege (unless waived by the client), including by asserting a claim on behalf of the client if the solicitor is asked to produce privileged documents. The law firm properly made a claim for privilege on behalf of their former client, which did not lapse simply because Climate Friendly did not itself appear to sustain it. The Court is obliged to consider that claim.
3. Where solicitors act for multiple parties jointly, there is by reason of the joint retainer no privilege as between those parties. However, that principle goes further, and extends to circumstances in which multiple parties have a common interest in the subject matter of the communication, although only one of them retains a solicitor.
4. If two parties have a common interest in the communication at the time the relevant communication is created, it does not matter that they subsequently fall out.
5. Whether there is sufficient 'common interest' in the relevant communications is determined on the facts of the individual case.

Brereton J concluded that the law firm had been retained by Climate Friendly to implement a deal which had been negotiated between its principal shareholders. The communications from the law firm were not exclusively for Climate Friendly's benefit, but for the benefit of all interests who had joined in the Terms Sheet. Moreover, the defendant directors were, are and will remain directors of Climate Friendly and as such had (and have) every right to see the advice sought by Climate Friendly.

As such, Brereton J dismissed the plaintiffs' application, with costs.

The take away

To establish a legitimate forensic purpose a document must be 'sufficiently relevant' and 'could possibly throw light on the issues in the case'. To require a higher threshold would unduly constrain litigants and require them to attempt to predict the contents of potentially relevant documents which is almost impossible.

In establishing common interest privilege you need to look at the 'common interest' at the time the communication was made, regardless of the status of the current relationship.

It is important to remember that a solicitor has a duty to protect a client's privilege, requiring a claim for privilege to be made even where the client has failed to do so (or is incapable of acting).

Note: Dentons acted for the defendants in these proceedings.

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