
Australian Securities and Investments Commission v Australian Lending Centre Pty Ltd (No 2) [2011] FCA 1057

Background

The defendants sought to inspect 160 documents recording communications between the plaintiff ASIC and proposed witnesses (including draft affidavits and statements, sworn affidavits and statements, email correspondence and file notes of conversations). ASIC resisted production on the basis of privilege.

In Commonwealth courts, the law of client legal privilege as it applies to questions of evidence is found in the *Evidence Act 1995* (Cth) ss 118 and 119, while questions of discovery and document production are determined by common law. Justice Perram observed that a joint report produced in 2005 by the Australian Law Reform Commission, the New South Wales Law Reform Commission and the Victorian Law Reform Commission recommended that the provisions of the uniform Evidence Acts should apply to all these materials, and that the recommendation was taken up in NSW and Victoria, but not by the Commonwealth. His Honour put it politely at [9]: “The rationality of this position – particularly given a sensible recommendation from not one but three law reform commissions that it be fixed six years ago – is not at once obvious”.

As this matter concerned pre-trial procedures and was decided in the Federal Court of Australia, the common law applied.

Were the communications confidential?

The Court determined that the relevant documents satisfied the requirement of confidentiality, notwithstanding the fact that the witnesses were under no obligation to keep the substance of the statements confidential.

Under the Evidence Act it is sufficient – to establish confidentiality – that one of the parties to the communication is under an obligation not to disclose its contents. As for the position under the common law the Court determined, on the authority of *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 22)* (1988) 14 NSWLR 132 (*‘Ritz Hotel’*), that it is sufficient to establish confidentiality that the materials are confidential in the hands of the person from whom production is sought.

The ruling in *New South Wales v Jackson* [2007] NSWCA 279 was concerned with the NSW Act, and not the common law. Nevertheless, Perram J looked into the reasoning in that case in order to examine critical differences in the operation of the Act and that of the common law.

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In *New South Wales v Jackson*, Giles J (with whom Mason and Beazley JJ agreed) considered *Ritz Hotel* and at [55] distilled from that case a rather circular logic regarding the establishment of privilege under the common law. The reasoning was thus:

1. A legal communication can only attract client legal privilege if it is confidential; and
2. Under the common law, confidentiality will depend upon whether the communication is confidential in the hands of the person from whom the material is sought; and
3. A legal communication is confidential in the hands of the client or their lawyer or a third party involved in the preparation of material for litigation because the communication is protected from compulsory disclosure, that is, it is protected by client legal privilege; so
4. When considering whether privilege applies to protect a communication from disclosure at common law it is sufficient that the confidential nature of the communication springs from the fact of its being privileged.

The implication of this logic in this case, according to Perram J, is that it is sufficient to establish litigation privilege that ASIC consulted with third party witnesses to prepare witness statements in contemplation of litigation. It seems that the question of confidentiality is short-circuited by this reasoning, and does not arise.

Justice Perram observed that ‘even if that were not so’, he would have accepted ASIC’s secondary argument that the requirement of confidentiality was satisfied because the materials were sought from ASIC, and ASIC came into possession of them in circumstances attended by an obligation of confidentiality. ASIC was, after all, required under s 127 of the *Australian Securities and Investments Commission Act 2001* (Cth) (‘ASIC Act’) to take all reasonable measures to protect information collected in performance of its functions from unauthorised use or disclosure.

The defendants argued that s 127 does not create a real obligation of confidentiality because it is subject to a series of statutory exceptions, but that argument was rejected. The judgment points out at [20] that the High Court attested to the strength of the obligation of confidentiality arising from s 127 in the decision in *Johns v Australian Securities Commission* (1993) 178 CLR 408, where it was said that that the statutory obligation is sufficient to bring into play the common law obligation to afford the party having the benefit of the statutory obligation procedural fairness.

Were the communications created in contemplation of litigation?

The Court applied the authority of *Mitsubishi Electric Australia Pty Ltd v Workcover Authority (Vic)* (2002) 4 VR 332 at 341 to find that litigation will be contemplated where it is a real prospect as distinct from a mere possibility.

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It was determined that litigation became a real prospect on 16 January 2009 following ASIC's resolution that the defendants' suspected contraventions should be investigated. As such, client legal privilege could only apply to the documents coming into existence on or after 16 January 2009.

Were the communications created for the dominant purpose of litigation?

According to the Court, the evidence was sufficient to establish that all of the documents relating to the witnesses were created for the purpose of the anticipated litigation. The defendants' evidence about a parallel investigatory purpose was insufficient to overcome the evidence presented by ASIC, especially since the defendants failed to cross-examine the head of the team responsible for the investigation into, and the commencement of the present proceedings against, the defendants ([30]-[33]).

The position of signed affidavits

The Court held that since the sworn affidavits were never served on anyone, they maintained their confidential nature.

Buzzle Operations Pty Ltd v Apple Computer Australia Pty Ltd (2009) 74 NSWLR 469 and *Australian Competition and Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547 were distinguished. Those cases both stand for the principle that sworn affidavits and signed witness statements that have been served are not privileged. These cases were distinguished because, in the present case, the affidavits were not in fact served.

Comment

The reasoning in the obiter dictum in *New South Wales v Jackson* regarding confidentiality, which was applied in this case, is circular and somewhat unconvincing.

In *Cadbury Schweppes Pty Ltd v Amcor Limited* [2008] FCA 88 Gordon J noted at [10] that:

“in contrast to the settled confidentiality requirement of the advice privilege, the authorities are divided as to whether litigation privilege may attach to communications (or documents summarizing communications) between a third-party, independent witness and a client even where they are not confidential.”

And that:

“The picture becomes even more complicated if one makes a further distinction, as some authorities do, based on whether such witness statements are found in the hands of the witness or in the hands of the lawyer.”

Her Honour went on to say at [11] that in spite of numerous statements by the High Court suggesting that confidentiality is a key requirement in both categories of client legal privilege, “the High Court has never squarely confronted the issue, leaving the field open for lower courts to take opposing views”.

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The full text of this decision can be found here:

<http://www.austlii.edu.au/au/cases/cth/FCA/2011/1057.html>

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