
AED Oil Ltd & Ors v Elizabeth Back & Ors (No 3) [2010] VSC 403

10 September 2010

Background

The plaintiffs claimed that the defendants breached a range of contractual, professional and fiduciary duties. The plaintiffs sought access to communications between the first defendant and their lawyers. The first and fourth to ninth defendants objected to the issue of subpoenas on the basis of client legal privilege.

The plaintiffs claimed, first, that the evidence did not establish that any of the documents were privileged. Secondly, insofar as privilege might attach to the documents, all but documents 6 and 14 had already been produced for inspection by the second defendant, Mr Venebles, such that privilege was waived with respect to all but those two documents.

Was the evidence sufficient to establish privilege?

Justice Judd noted in the judgment, at [33], that the ‘evidence in support of the claims for privilege is unacceptably general’. His Honour acknowledged that the preparation of detailed affidavit evidence in respect of very large numbers of documents can be burdensome and that the courts may give some latitude in these cases. In the present matter, however, the defendants maintained a claim of privilege over a mere 17 documents, and should have prepared evidence to explain the circumstances in which the relevant documents were created and why their content was confidential.

The affidavit material before the Court was so general that it was considered to be of little assistance other than to state, as a broad proposition, the category into which the claimants would place each document.

The Court inspected the relevant documents and found, at [34]-[54], that many of them did not, by their own content, provide compelling evidence to support a claim of privilege. Many of them were found to record commercial advice, rather than legal advice. It was held, however, that some parts of some communications between the defendants and their solicitors could be characterised as confidential communications for the purpose of giving or obtaining advice, and were thus prima facie privileged.

The *CLPWatch* website is maintained by the Federal Litigation Section of the Law Council of Australia. The aim of the site is to keep legal practitioners up to date on cases affecting Client Legal Privilege

The site can be found at www.lawcouncil.asn.au/sections/federal-litigation/clpwatch/

Was Mr Venebles capable of waiving the privilege?

Of the 17 documents in contention, Mr Venebles disclosed all but Documents 6 and 14 to the plaintiffs in the discovery process. Documents 6 and 14 were not found to be prima facie privileged.

The defendant argued that Mr Venebles had no authority to waive privilege over the relevant documents, because at the time he produced the documents he had ceased to be an officer of any of the defendant entities.

The Court rejected this argument. It was held Mr Venebles' resignation as an officer of the entities did not relieve him of his obligation to protect their confidential information. Since the defendants did not put on any evidence to the effect that Mr Venables breached of his duty to the client by disclosing the information, the Court inferred that there was no such breach. Justice Judd concluded, therefore, that the prima facie privilege that attached to some of the documents was waived when Mr Venables disclosed the documents to the plaintiffs (at [58]).

Comment

Privilege over confidential legal advice belongs to the client, and it is only the client that can waive the privilege. The conclusion, in this case, that a former officer of the client could and did waive privilege over confidential communications likely proceeds from the assumption that the client consented to the disclosure.

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