
Samenic Ltd (formerly Hoyts Cinemas Ltd) v APM Group (Aust) Pty Ltd [2011] VSC 194
(12 May 2011)

Background

The defendants were engaged in the development and construction of a site owned by the plaintiff. In the substantive proceedings the plaintiff sued the defendants for loss from a fire that occurred on the site on 3 November 2004.

Immediately after the fire the third defendant's insurer retained a loss adjuster and a forensic expert. The expert attended the scene on the same day to investigate the cause of the fire. Two days later the insurance company retained Deacons to provide legal advice in respect of any claims arising from the fire.

In the present proceedings the second defendant sought access to the report produced by the forensic expert, while the third defendant objected to production on the basis of client legal privilege.

Confidentiality

The Court rejected the second defendant's claim that no obligation of confidentiality attached to the production of the expert report. According to the judgment, an obligation of confidentiality need not be created or evidenced by a contract; it 'can inhere in the document, the circumstances of its creation, and the interests it purports to protect'. It was held, at [22], that the expert report was confidential by its nature and the private interests for which it was commissioned.

Dominant Purpose

The primary question in this matter was whether the expert report was prepared with the dominant purpose of providing legal advice. The second defendant argued that the report was brought into existence in the ordinary course of the insurer's business of investigating the causes of the fire, and legal advice was not the *raison d'être* of the report.

Justice Mukhtar found that it was not fatal to the claim for privilege that the loss adjuster and the forensic expert were retained two days before the legal advisors. His Honour pointed out that the courts should 'look at the substance of the matter when looking at purpose', and accepted that for an incident of this nature and magnitude it is essential that forensic investigations take place as soon as possible, and it is only natural to expect the insurer to hire loss adjusters and investigators first ([24]).

The courts are careful to ensure that lawyers are not used, in insurance cases, as a mere conduit for information in order to attract privilege to documents that are created in the ordinary course

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of business and would otherwise be discoverable. In this matter the Court concluded at [25] that – despite the fact that the expert report did not address a specific legal question – the lawyers were engaged genuinely and not as a device. It was accepted that in fire cases of this magnitude it was plausible and reasonable for the insurer to engage lawyers for advice or legal management and strategy, and that it was necessary that a report be prepared to resource those lawyers with forensic evidence.

The Court acknowledged that the forensic report may not have been brought into existence for the sole purpose of legal advice, and that the insurer would also have needed such a report for its own business purposes as a loss bearing entity. The Court resolved, at [26], that the provision of legal advice was the dominant purpose of the forensic report, after affirming the rationale of the privilege: “the fundamental importance in a modern State of full and unreserved communication between client and lawyer and the freedom for client and lawyer to make investigations without being required to divulge the outcome.”

On these bases it was held that the expert report was protected by client legal privilege, and the third defendant’s objection to the subpoena for its production should be upheld.

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