

Krok v Szaintop Homes Pty Ltd (No 1) [2011] VSC 16
(08 February 2011)

Background

The applicant – a beneficiary under a discretionary trust – sought access to four documents in the possession of the respondent trustee. The trustee resisted production on the basis of client legal privilege.

Though the beneficiary sought merely to inspect the documents, the Court determined the application as though it concerned the adducing of evidence, in accordance with s131A of the *Evidence Act 2008* (at [8]).

Establishing privilege

Justice Judd rejected the trustee’s argument, which was based on the authority of *Avanes v Marshall* [2007] NSWSC 191 (‘*Avanes*’), that the question of whether a trustee may maintain privilege against a beneficiary should be determined according to whether the beneficiary has a proprietary interest in the document. His Honour found that the question of whether a trustee may maintain a claim of privilege against a beneficiary must be resolved by reference to the ordinary principles applicable to the protection of privileged information and documents, and obligations of disclosure in litigation ([14]).

His Honour said that the approach in *Avanes* – which would require the court to use its discretion to determine whether a trustee has the right to withhold a document on the basis of client legal privilege – ‘seems inconsistent with the nature of the privilege’ (at [13]).

Justice Judd ruled, at [17], that the evidence advanced in support of a claim for privilege must, at minimum, establish the purpose for which the document was made, identify the maker and the party for whom the document was prepared, and establish the elements of confidentiality.

It was held at [17] that the evidence advanced on behalf of the trustee was insufficient to support a claim of client legal privilege. The trustee had presented no evidence going to confidentiality – nothing to suggest that the retainer required that the communications be kept confidential from the beneficiary. This lack was particularly significant in light of the joint privilege argument made by the beneficiary. Nor was it submitted that the trustee was acting on its own behalf, in order to protect its personal interest.

On these bases, the Court rejected the trustee’s claim that it was entitled to refuse to disclose any of the documents to the beneficiary on the ground of client legal privilege ([17]-[27]).

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/

Joint Privilege

Justice Judd found that the trustee's claim must also fail on another basis. It was held that any privilege in advice obtained by the trustee was held jointly with the beneficiary, because the advice was sought and obtained by the trustee in discharge of its obligation to administer the trust, and not for its own personal benefit ([28]).

This was so regardless of whether the advice related to matters that arose before the trustee decided to exercise a power in the discretionary trust ([30]).

Conclusion

His Honour found that the trustee failed to make out her claim of privilege with respect to the documents in question. Further, any such privilege – if it could be established – would be held jointly with the beneficiaries, including the applicant. The Court therefore ordered disclosure of the documents.

The full text of this decision can be found here:

<http://www.austlii.edu.au/au/cases/vic/VSC/2011/16.html>