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Another Strahan case—loss of legal professional privilege

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Another *Strahan* case - Loss of Legal Professional Privilege

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Legal professional privilege is the privilege of the client, but lawyers need to ensure that the privilege is not unintentionally lost. Sometimes it is lost by waiver, but it can be lost in other ways. The Full Court of the Family Court, in another appeal in the protracted *Strahan* litigation, *Strahan & Strahan* [2013] FamCAFC 203 recently considered whether, in the circumstances of the case, the wife had lost the protection of legal professional privilege over certain documents. The wife unsuccessfully argued that it had been maintained.

Requirements for legal professional privilege

Legal professional privilege protects certain confidential communications between a legal practitioner and a client from voluntary disclosure. It is the communication rather than the document itself which is privileged. The privilege belongs to the client not the legal practitioner.[1] Communications with a person not acting in a legal capacity (eg an accountant) are not privileged unless they are acting as an agent of the lawyer or client.

The requirements to establish that legal professional privilege exists are:

1. The communication must pass between the client and the legal practitioner;
2. The communication must be for the dominant purpose of enabling the client to obtain legal advice or for the dominant purpose of actual or contemplated litigation;
3. The communications must be confidential.

The common law privilege protects both oral and written communications. Communications are protected if they are for the "dominant purpose"[2] of either:

(a) obtaining legal advice or help from a legal practitioner; or
(b) for use in actual, pending or reasonably anticipated legal proceedings

The "dominant purpose test" has replaced the "sole purpose test" for common law privilege. The test for determining the dominant purpose of a communication is objective; the subjective motive of the person who made the communication or prepared the document is not relevant.[3]

Statutory privilege and common law privilege are largely the same.[4]

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[1] *Baker v Campbell* (1983) 153 CLR 52
[2] *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49. See also *Grant v Downs* (1976) 135 CLR 674
[3] *Esso* at 66

The statutory privilege is set out in the *Evidence Act 1995 (Cth)*. Definitions are in s 117 and include:

> ***"confidential communication"*** *means a communication made in such circumstances that, when it was made:*
>
> *(a) the person who made it; or*
> *(b) the person to whom it was made;*
>
> *was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.*
>
> ***"confidential document"*** *means a document prepared in such circumstances that, when it was prepared:*
>
> *(a) the person who prepared it; or*
> *(b) the person for whom it was prepared;*
>
> *was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.*
>
> ***"lawyer"*** *includes an employee or agent of a lawyer.*

Section 118 provides for protection of certain legal advice:

> *Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:*
>
> *(a) a confidential communication made between the client and a lawyer; or*
> *(b) a confidential communication made between 2 or more lawyers acting for the client; or*
> *(c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer;*
>
> *for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.*

Section 119 deals with "litigation privilege":

> *Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of:*
>
> *(a) a confidential communication between the client and another person, or between a lawyer acting for the client and another person, that was made; or*

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[4] One difference is that common law privilege, unlike s 118 *Evidence Act*, applies to third party communications even if the third party was not an agent of the client (*Westpac Banking Corporation v 789 TEN Pty Ltd* [2005] NSWCA 321 at 29; *Commissioner of Taxation v Pratt Holdings Pty Ltd* [2005] FCA 1247 at 138-8)

(b) the contents of a confidential document (whether delivered or not) that was prepared;

for the dominant purpose of the client being provided with professional legal services relating to an Australian or overseas proceeding (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party.

When can the privilege be lost?

Broadly, loss of legal professional privilege may occur:

- By statute;[5]
- By waiver;
- By a document being circulated widely or being publicly available. The privilege only applies to confidential communications.

Often, legal professional privilege is lost because the client or their lawyer refers to the advice given to the client. Although reference can be made to the giving of advice, the substance or conclusion of the legal advice should not be stated. An example of a statement which was found to amount to implied waiver was:

> "The Board's lawyers have been instructed to vigorously defend the claim and have advised that the plaintiff's claim will not succeed."[6]

Loss of legal professional privilege by waiver is dealt with in s 122 of the *Evidence Act*. The privilege can be waived if a client knowingly and voluntarily disclosed to another person the substance of the advice.[7] A legal practitioner is considered to have the authority to waiver a client's privilege even if acting without the client's express instructions.[8]

If the privilege is found to have been waived, the privilege may not have been lost if one of the statutory exceptions applies. The disclosure is still protected if it was made:

(a) in the course of making a confidential communication or preparing a confidential document; or
(b) as a result of duress or deception; or
(c) under compulsion of law; or
(d) if the client or party is a body established by, or a person holding office under, an Australian law - to the Minister, or the Minister of the State or Territory, administering the law, or the part of the law, under which the body is established or the office is held.[9]

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[5] For example, offences under Commonwealth taxation legislation
[6] *Switchcorp Pty Ltd v Multimedia Ltd* [2005] VSC 4235
[7] Section 122(1) *Evidence Act*
[8] *Esso* at 79
[9] Section 122(2) *Evidence Act*

Usually, if privilege is waived with respect to one document in a sequence of documents, then the whole sequence (or class) of documents will have to be disclosed.

Confidentiality of a document can be maintained even if it is disclosed to a third party. The privilege will be maintained if it is disclosed for a limited purpose and on strict terms as to confidentiality. It may then be possible to maintain the claim of privilege against the rest of the world.

Privilege over documents can be maintained even if the disclosure was made by mistake. The High Court confirmed this in *Expense Reduction Analyst Group Pty Ltd & Ors v Armstrong Strategic Management & Ors*[10] subject to certain provisos. The High Court noted that in large commercial cases, mistakes are more likely to occur than in the past, presumably because of technology, the sheer size of some litigation and the use of non-lawyers to perform the task (although the High Court was not critical of the use of non-lawyers). However, courts will normally only permit an error to be corrected if a party acts promptly. If the party to whom the documents have been disclosed has been placed in a position, as a result of the disclosure, where it would be unfair to order the return of the privileged documents, relief may be refused.

"Fairness" (as defined by the High Court in *Mann v Carnell*[11] is the governing principle. In *Hooker Corporation Ltd v Darling Harbour Authority*[12] no claim of legal professional privilege was made for notes disclosed on discovery and inspected by the opponent. Rogers J found that as the failure to claim privilege was inadvertent, it was unfair to find that privilege was lost.[13]

Strahan & Strahan

In *Strahan & Strahan*[14] the Full Court determined the wife's appeal against the trial Judge's rejection of her claim of legal professional privilege in respect of the production of specific documents.

[10] [2013] HCA 46; (2013) 303 ALR 199
[11] (1999) 201 CLR 1
[12] (1987) 9 NSWLR 538
[13] At para 49
[14] (2013) FLC 93-570

Murphy J (with whom May and Thackray JJ agreed), did not analyse each document, but his analysis of some is instructive. He said:

> The table ... plainly reveals ... that, many, if not all, of the descriptions comprised "...mere general assertions of the purpose of creation of the documents..." That is clearly "...insufficient to discharge [the] onus..." ... For example:
>
> - Item 245 is described as "Letter communication from my lawyer to another party bona fide for the purpose of seeking and giving professional advice." Leaving aside the fact that that "advice privilege" apparently claimed in respect of item 245 does not cover "third party communications", that description by no means indicates the "dominant purpose" of the communication;
>
> - Item 7 of Schedule B is described as a "[c]ommunication between my lawyers and another party – Australian Federal Police." Again, leaving aside the fact that it is not apparent whether or not the "communication" was, in fact, a communication capable of attracting legal professional privilege, the description does not contain even a general assertion of the purpose. Rather, it is preceded by a generic heading which asserts that privilege is claimed on the basis that the document is a "...confidential communication between ... my lawyer acting for me and other parties..." Such descriptions are patently deficient and, in the words of the Full Court of the Federal Court in *Barnes* [*Barnes v Commissioner of Taxation* [2007] FCAFC 88] "unsatisfactory".[15]

Murphy J concluded that he "did not consider that the descriptions ... meet the requirements set out in the authorities ... the descriptions are, at best, general statements of purpose. In many instances there is no statement of purpose at all."[16]

There was greater force to the rejection of the wife's arguments that privilege had not been lost, as she had been given and had taken the opportunity to provide a more fulsome description of the documents over which privilege was claimed. She had two opportunities and there was a two month adjournment to allow for the redrafting of the wife's claims for privilege.

The trial Judge agreed with the husband that "the description given for many of the documents, over which privilege is claimed, was not a sufficient description to establish the necessary basis" for the privilege.

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[15] At para 33
[16] At para 32

Both parties referred to the decision of the South Australian Supreme Court in *Kadlunga Proprietors v Electricity Trust of South Australia*,[17] particularly the statement of White J that:

> ...it is both necessary and desirable that the description of a particular document for which protection is claimed should be sufficient to disclose quite readily (without disclosing contents) whether or not it is in fact a document to which the head of privilege relied upon can extend.[18]

Murphy J discussed the authorities and concluded:

> Further, there is in my view a very significant distinction between identifying documents in a manner that would enable production and describing documents in a manner which enables a court to "...rul[e] that the privilege [claimed] does not in fact attach", particularly where the "dominant purpose test" is "...much harder to apply than the sole purpose test.."...
>
> Plainly, then, what might be sufficient to "...facilitate the production of a particular document..." may well be insufficient to enable the court, if required, to determine whether privilege attaches, especially where the test is now established as "dominant purpose". Similarly, whilst "[a] court has power to examine documents in cases where there is a disputed claim, and it should not be hesitant to exercise such a power", (*Esso* at [52], per Gleeson CJ, Gaudron and Gummow JJ), a court is not *obliged* to examine documents which are said to be subject to legal professional privilege and, indeed, there may be good reason for the trial judge not to inspect the documents (see, for example, *Grant v Downes* [1976] HCA 63; (1976) 135 CLR 674 at 677, per Barwick CJ).[19]

Murphy J quoted from the Full Court of the Federal Court in *Barnes* with respect to the claim for privilege made in the affidavit in that case.[20] This passage usefully sets out why the claim for privilege failed. In summary:

- the claim was based on "assertions, conclusions and generalised comments";
- there was an absence of evidence from the originators of the documents;
- lack of clarity as to why specific documents came into existence;

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[17] (1985) 39 SASR 410

[18] At 414. Although it was held in the Queensland Court of Appeal decision of *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 2)* [1999] 1 Qd R 163 that *Kadlunga* was wrongly decided, this passage appears to be correct. Both cases were, however, decided prior to the High Court decision in *Esso Australia Resources Ltd v Commissioner of Taxation (Cth)*[1999]HCA 67; (1999) 201 CLR 49 where the High Court rejected the "sole purpose test".

[19] Paras 27-8

[20] *Barnes v Commissioner of Taxation* [2007] FCAFC 88 - at paras 16, 18

- it was unsatisfactory that the Court was left to consider the documents on their face and determine as best as it could whether the documents were privileged;

- "verbal formulae and bare conclusory assertions of purpose" were insufficient to substantiate a claim for privilege. Focussed and specific evidence was required;

- generalised evidence not challenged in cross-examination did not necessarily mean that it was accepted, particularly if it was manifestly inadequate;

- mere general assertions of the purpose of creation of the documents were insufficient to discharge the onus to provide evidence of the thought processes behind, or the motive and purpose of advice being sought in respect of, each particular document;

- it was insufficient to show that one purpose for creating the document was to obtain legal advice; the evidence must permit a conclusion that it was the dominant purpose.

Murphy J said that whilst the test applied in *Grant* was incorrect, the following statement of Stephen, Mason and Murphy JJ in *Grant* remained applicable:

> He may succeed in achieving this objective [of successfully claiming legal professional privilege] by pointing to the nature of the documents or by evidence describing the circumstances in which they were brought into existence. *But it should not be thought that the privilege is necessarily or conclusively established by resort to any verbal formula or ritual*...[21]

Murphy J also rejected the argument that the trial Judge ought to have inspected the documents before rejecting the claim of privilege. The wife's counsel had not submitted that it was necessary and on one occasion rejected the need for the trial Judge to do so. There was no principle which required the trial Judge to inspect them to cure deficiencies in the description of documents alleged to be subject to privilege.

Public interest

It is in the public interest that confidential professional communications between solicitor and client are not restricted by any fear of disclosure. However, the privilege cannot extend to protect communications directed against the public interest. Where there is a competing public interest principle, legal professional privilege may or must give way. In *R v Bell; Ex p*

[21] This passage appears in para 28 of *Grant v Downs*. A transcription error has been corrected in this article

Lees[22] a husband obtained an interim order for custody of a child. The wife disappeared with the child. The wife instructed a solicitor to act for her in property matters. She told the solicitor her address, but requested that it be kept confidential. The High Court unanimously held that the information given to the solicitor in those circumstances was not privileged.

Disclosure under the *Family Law Rules 2004*

Under the *Family Law Rules 2004* disclosure is more informal than it was under the *Family Law Rules 1984.* Affidavits of Documents are not normally prepared although they may be relied on in large cases where disclosure is an issue in dispute. In most cases, parties exchange lists of documents in their possession which are relevant to the proceedings.

The 2004 Rules require that the existence of privileged documents be disclosed, but they need not be produced.[23] In practice, despite the requirements under the Rules, unlike in Affidavits of Documents, parties usually do not list the documents over which privilege is claimed.

The procedure for resolving disputes over a claim for privilege is set out in r 13.13. If a party claims privilege from production of a document, another party may, by written notice challenge the claim. The party making the claim must file an affidavit setting out details of the claim within 7 days of receiving the notice. An application to the Court may be necessary to resolve the dispute.

Conclusion

Legal professional privilege must be considered in the process of disclosure in family law proceedings. The possibility that it may be lost through the actions of the client or their lawyer cannot be overlooked in even the simplest of cases. Whilst most lawyers are alert to loss of privilege by waiver, insufficient attention is given to loss by claiming it only in general terms. Broad statements stating that the documents ought to be protected are insufficient. More detailed statements are required whilst not being so detailed as to detract from the privilege being claimed.

 The writer thanks Hannah Aroni for her assistance with this article.

[22] (1980) 146 CLR 141. See also s121(2) *Evidence Act 1995*
[23] Rule 13.12(a)