

update

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Friday Facts: Advice privilege explained

Clients quite often seek legal advice from their lawyers which requires the need to obtain an expert opinion in order to provide the legal opinion required.

The common law principle of “advice privilege” usually applies to protect the confidentiality in the expert opinion which is obtained for that purpose.

However in the recent decision of *Orica Australia Pty Ltd v Limit (No. 2) Ltd (“Orica”)*, Master Evans of the Supreme Court of Victoria took a narrow approach to advice privilege departing from the approach previously adopted by the Full Court of the Federal Court of Australia in *Pratt Holdings Pty Ltd v Commissioner of Taxation (“Pratt”)*.

Legal professional privilege is a common law principle which provides that confidential communications between a lawyer and their client for the purpose of obtaining legal advice or in anticipation of litigation are confidential and therefore are not required to be disclosed in evidence.

In *Pratt*, the Full Court of the Federal Court advocated that in order to determine whether the opinion of a third party was subject to legal professional privilege it was necessary to determine whether it was obtained for the dominant purpose of obtaining legal advice. If it was, the opinion would remain subject to legal professional privilege and remain confidential.

However, in the recent decision of *Orica*, Master Evans was not prepared to afford legal professional privilege over an expert report which had been obtained by *Orica* for the purpose of obtaining legal advice.

The *Orica* case involved a cargo ship which put into port after cargo aboard the ship

shifted during a voyage from Canada to Australia. The cargo had been purchased by *Orica* and loaded on board the ship by a stevedore, *Logitec*. As a result of the incident, some of the cargo was lost and *Orica* believed that it had a potential insurance claim and also a potential claim against *Logitec*.

Orica requested that a marine surveyor be engaged to inspect the ship, investigate what caused the cargo to shift and provide an opinion on these matters. *Orica* said that the purpose of the request was to enable them to obtain legal advice in relation to a potential claim against *Logitec*.

The inspection was originally arranged by *Orica*’s global claims manager, *Marsh*, but *Orica*’s lawyers formally engaged the marine surveyor.

Shortly afterwards, the shipowner made a claim against *Orica* for loss and expenses incurred as a result of the incident. A dispute arose between the parties as to whether the correspondence between *Orica*’s lawyers and the marine surveyor was subject to legal professional privilege.

Master Evans considered the common law position of advice privilege and found that the documents in dispute were created for the dominant purpose of obtaining advice in relation to the incident, or circulating that advice to staff members.

However, his Honour went on to say that “advice privilege has been confined narrowly to communications between the solicitor and client or an agent of the plaintiff acting as a conduit for such communications.”

His Honour adopted this narrow interpretation and found that the communications were not protected by advice privilege because the marine surveyor was engaged to express an opinion on the cause of the incident and, therefore, his function went beyond acting as a conduit for the purpose of obtaining legal advice.

The *Orica* decision is a clear departure from the decision of the Full Federal Court in *Pratt*.

Given that the reasoning of Master Evans is contrary to the findings in *Pratt* and other decisions advocating the dominant purpose test, there may well be an appeal of the *Orica* decision. However, unless the decision is overturned, clients should be aware that third-party communications may not necessarily be privileged from production in a Victorian court, even if the dominant purpose of the communication is to obtain legal advice.

For more information

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