

BY CC BRANSON QC

Misunderstanding the nature of Propend privilege

Propend privilege protects the selection and copying of documents which are provided for the dominant purpose of obtaining legal advice or for use in legal proceedings. That privilege does not have regard to the nature of the information contained in the copy documents and waiver of that privilege can occur only if there is disclosure of the reason why a particular document was selected by the client for copying and provision to the lawyer.

In the recent interlocutory decision of Stone J in *RCI Pty Ltd v Commissioner of Taxation* [2009] FCA 910 (19 August, 2009) the Commissioner sought to raise a novel point about the production of copies of eight documents sourced from the files of two firms of solicitors which came into the possession of the taxpayer's solicitors, Mallesons. The taxpayer contended that the copy documents were created and provided to Mallesons for the dominant purpose of obtaining legal advice in the proceedings. The Commissioner argued that privilege had been waived and that the copies were created deliberately to take improper advantage of the decision in *Commissioner of Australian Federal Police v Propend Finance Pty Limited* [1997] 188 CLR 501 (**Propend**).

In *Propend* the High Court held by majority (Brennan CJ, Gaudron, McHugh, Gummow and Kirby JJ) that legal professional privilege (**LPP**) attaches to copy documents if they were made solely for obtaining or giving legal advice or for use in legal proceedings. Following *Esso Australia Resources Limited v Commissioner of Taxation* [1999] 201 CLR 49 (**Esso**) such purpose need only be the dominant purpose. It matters not that the original document copied is not privileged because the purpose leading to the creation of the original and the copy may be different. In the usual case the communication which is protected is the selection of the document to be copied and the provision of the copy document by the client to the lawyer for the requisite purpose; and such communication

is different only in form from the oral communication of the contents of an original document.

The substantive proceedings concerned an amended assessment issued by the Commissioner for the income tax year ended 31 March 1999 arising out of the James Hardie Group restructure which was based upon a determination made under s 177F(1) of the *Income Tax Assessment Act 1936* that by operation of Part IVA an amount of \$478,237,746 should have been included in the assessable income of the taxpayer which company was part of the Group but did not trade or employ personnel.

The Commissioner filed notices to produce documents relating to taxation advice provided to the parent company James Hardie Industries Limited (**JHIL**) by Allens Arthur Robinson (**Allens**); correspondence and briefing papers regarding such advice passing between Allens and Coopers and Lybrand; and correspondence between Allens and the Chief Financial Officer of JHIL. The taxation advice was furnished in June 1998 with respect to a proposal which eventually did not proceed precisely in the manner the subject of that advice.

The claim for LPP was asserted by Mr Clough, a partner of Mallesons, who swore affidavits in which he deposed to the receipt of four of the eight disputed documents under cover of a letter from Allens dated 7 November 2006 following an inspection of Allens' files; the receipt of a further three documents under cover of a letter from Allens dated

24 November 2008; and the receipt of another document from PwC Legal who acted for the taxpayer until late 2005.

As noted the Commissioner sought to establish that the taxpayer had deliberately chosen to produce only copy documents subject to the *Propend* privilege and claim LPP in respect of them and not non-privileged original and copy documents. Pursuant to Order 33 Rule 12(1) of the Federal Court Rules a party to any proceedings may serve on another party a notice in accordance with Form 45 to produce at any trial or hearing in the proceedings any document which is in the possession, custody or power of the party served who shall produce the document without the need for any subpoena for production. This procedure is commonly used and relied upon because the issue of the notice is simple and expedient and it has the same coercive effect as a subpoena. That is, compliance with a notice to produce is mandatory unless excused by court order: *Microsoft Corp v CX Computer Pty Ltd* (2002) 187 ALR 362. Because the notice is served upon a party to the suit there will be an awareness of the issues and history of the matter and it follows that it is incumbent on the party served to make appropriate enquiries of its own resources and of any person or entity under the control of the party.

As noted above the taxation advice was not provided to the taxpayer (which was not a subsidiary of JHIL) but to JHIL by Allens and arguably also by Coopers & Lybrand. It must be emphasised that the notice to produce served upon the taxpayer did not oblige it to obtain from JHIL, Allens or Coopers & Lybrand the originals or copies of the "advice" documents in their possession. Strictly speaking any issue about the adequacy of the response by a party to a notice to produce or the sufficiency of discovery would not be dealt

with upon the hearing of an application to determine the validity of a claim for LPP however Her Honour felt disposed to have the broader question considered by reason of the imminence of the final hearing and the need to eliminate ambush or surprise. What is not clear from the judgment is the precise basis upon which the Commissioner contended that the taxpayer and/or its solicitors had acted improperly.

LEAVE TO CROSS-EXAMINE

Her Honour noted that the former position of not permitting the cross-examination of the claimant of LPP no longer held sway. The practice of the Court of Chancery was that an affidavit of discovery was conclusive as to the amplitude of discovery and in relation to protection from inspection of a document claimed to be subject to LPP. In *Brambles Holdings Ltd v Trade Practices Commission (No. 3)* [1981] 58 FLR 452, at 454, Franki J acted upon this practice; and in *Fruehauf Finance Corporation Pty Limited v Zurich Australia Insurance Limited* [1990] 20 NSWLR 359 at 366 Giles J did not permit such cross-examination whilst commenting that he regarded the practice as unsatisfactory.

A more permissive approach has developed in the Federal Court of Australia as stated in *National Crime Authority v S* [1991] 29 FCR 203 at 211, per Lockhart J; *Hartogen Energy Ltd (In Liquidation) v Australian Gas Light Co.* [1992] 366 FCR 577 at 561 per Gummow J; and *Re Compass Airlines Ltd* [1992] 35 FCR 447 at 462, per Beaumont and Gummow JJ. In *Esso* the majority judgment (Gleeson CJ, Gaudron and Gummow JJ) cited *National Crime Authority v S* as authority for the proposition that in appropriate cases there is power to allow cross-examination: *Esso* at 70. McHugh J in *Esso* at 74 referred to a growing acceptance that cross-examination is permitted as emerging from those three cases in the Federal Court. Stone J appears to have accepted at para [8] of the judgment that *Esso* does authorise cross-examination particularly now that the enquiry is directed to the dominant and not the sole purpose of the communication.

Often the nature of the document will illuminate the purpose for which it was brought into existence. So much is relevant to determining why an original document

was created and the subjective purpose of the author, viewed objectively, is critical. The position is otherwise where, as in the instant case, a document is chosen to be copied because it is required to provide advice or for use in legal proceedings. Once there is evidence on oath that a document has been copied and provided to a lawyer for such purpose there is little scope for testing the truth of the matter other than to suggest that the deponent has sworn a false oath. With great respect to the contrary view expressed by Stone

It should be borne in mind that Mr Clough swore an affidavit in February 2009 in which he described the source of the *Propend* documents. What is most curious is why the Commissioner did not issue subpoenas for production to JHIL, Allens and PwC Legal and upon production of the originals or other copy documents seek to establish that privilege had been waived by reason of material having been filed in the proceedings which disclosed the gist or conclusion of the legal advice contained in those documents.

“ Her Honour stated that the cross-examination of Mr Clough did not undermine the assertions made in his affidavit as to the source or purpose of the copy documents ”

J at para [8] of the judgment it is not abundantly clear why cross-examination should be allowed where *Propend* LPP is claimed simply because one has to ascertain the dominant and not the sole purpose of making the copy.

FORENSIC OBJECTIVE OF COMMISSIONER

As stated by Her Honour at para [14] of the judgment counsel for the Commissioner submitted that the taxpayer had chosen to produce “Propend copies” and claim LPP in respect of them so as to avoid its obligation to produce original non-privileged documents. It seems that the gravamen of the complaint made by the Commissioner concerned the failure of Mr Clough to satisfy himself that the taxpayer did not have in its possession, custody or power originals or other copies of documents relating to the 1998 legal advice to JHIL (and not to the taxpayer) which were not privileged. That is to say that the taxpayer should have pursued JHIL, Allens and PwC Legal vigorously to establish whether any such documents were extant and if so produce them in response to the process filed however the taxpayer was under no obligation to do so.

It is tolerably clear that Stone J treated the cross-examination of Mr Clough as a house-keeping exercise to ensure that the substantive matter proceeded smoothly and was not delayed or hindered by argument at the final hearing as to the provenance of documents relating to the taxation advice provided by Allens in June, 1998. At para [33] of the judgment Her Honour stated that the cross-examination of Mr Clough did not undermine the assertions made in his affidavit as to the source or purpose of the copy documents and concluded that given that the documents were either requested by Mallesons to provide advice to the taxpayer or were provided as part of a handover from PwC Legal to Mallesons it was reasonable to assume that they were created for that purpose. Indeed it is submitted that that is the only assumption that could have been made absent mendacity on the part of Mr Clough.

APPLICATION OF PROPEND

Stone J correctly held that the LPP issue was to be determined according to common law principles and not by regard to the *Evidence Act* 1995 (Cth). Given the conclusion reached by Her Honour at para [33] of the judgment she

was satisfied that by the application of *Propend* principles the copy documents were protected from disclosure by LPP. At paras [64] and [65] of the judgment Stone J stated that the communication that is protected by *Propend* is the communication between the taxpayer and its lawyers. It should be understood that this characterisation proceeds upon the basis that Mallesons were the agent of the taxpayer for the purpose of obtaining the copy documents which were provided to Mallesons by Allens upon request or as part of the handover on the taxpayer changing its solicitors from PwC Legal to Mallesons. It is submitted that Her Honour's decision on this matter is beyond challenge.

What is left unresolved is the basis upon which the Commissioner contended that *Propend* did not protect the eight copy documents. The reasons for judgment do not reveal any particularisation or evidence of improper conduct on the part of Mr Clough or his firm; on the contrary, the steps taken in relation to obtaining copies of the "advice" documents of Allens were in accordance with the conduct of a skilful and competent litigator. The other document was part of the handover of the litigation file.

WAIVER OF LPP

The Commissioner sought to establish that LPP had been waived as a result of their disclosure or the disclosure of their contents in documents filed in the proceedings and bore the onus of proving that there had been express or implied waiver: *The Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* [2002] 213 CLR 543. The basic concept of what constitutes waiver has undergone a shift in emphasis in the High Court cases on this topic. In *Attorney-General for the Northern Territory v Maurice* [1986] 161 CLR 475 and *Goldberg v Ng* [1993] 185 CLR 83 the Court enunciated unfairness as the criterion however in *Mann v Carnell* [1999] 201 CLR 1 it was held that inconsistency between the conduct of the privilege holder and maintaining confidentiality amounts to waiver where necessary informed by considerations of fairness.

Counsel for the Commissioner presented detailed submissions which tended to show that at least in relation to some

of the disputed documents there had been disclosure of the contents of the legal advice or the essential conclusion contained therein in documents filed in the proceedings by the taxpayer. Those submissions were directed to disclosure of material set forth in the original documents and did not have any regard to the nature of the communication consisting of the creation of the copy documents and their provision to Mallesons by Allens and by PwC Legal.

The Commissioner relied upon the principle that the voluntary disclosure of the gist or conclusion of legal advice amounts to waiver in respect of the whole of the advice to which reference is made including the reasons for the conclusion. In *Bennett v Chief Executive Officer of the Australian Customs Service* [2004] 140 FCR ("Bennett") it was held by the Full Court of the Federal Court that a letter from the Australian Government Solicitor which referred to the nature of certain advice to Customs amounted to waiver. As noted by Tamberlin J at para [13] of his judgment in *Bennett* various expressions are used such as references to "the substance", "effect" or "content" of the advice and in his view the weight of the authorities supports the position that the disclosure of the conclusion reached in or course of action recommended by an advice can amount to waiver in respect of the premises relating to the opinion even if the reasoning process is not disclosed. In *Seven Network Ltd v News Ltd (No. 12)* [2006] 230 ALR 544 Sackville J approved the observations of Tamberlin J in *Bennett*.

Her Honour rejected the Commissioner's submissions that a document (No. 2) stating that "no show stoppers" were identified amounted to disclosure of the legal advice discussed at a tax review meeting. As to three of the documents (Nos. 3, 5 and 7) Her Honour indicated there was a persuasive circumstantial case that there had been disclosure of the contents of the originals. As to a further three documents (Nos. 4, 6 and 8) Her Honour observed that these had been obtained in November 2008 whereas the evidence relating to these documents was filed three months previously so that the *Propend* privilege attaching to those documents could not have been waived by disclosure of documents before they were created.

Stone J held that the production of the copy documents did not involve the status of the original documents or whether there had been a waiver in respect of such documents and concluded that the Commissioner did not address the locus of the privilege claimed by the taxpayer because of his failure to distinguish between the provenance of the copy and original documents.

CONCLUSION

One is left with the impression that a great deal of time and energy was expended upon a futile mission because *Propend* protects the selection and copying of documents for the requisite purpose and such protection does not depend upon any enquiry as to the nature and contents of those documents. It is immaterial to consider whether the originals contained any legal advice which could be waived. All documents copied for the requisite purpose are protected including but not limited to any correspondence, notes, memoranda or other records whatsoever which have been selected. The *Propend* privilege does not have regard to the nature of the information contained in the document.

Waiver in relation to documents protected by *Propend* can occur only if there is disclosure of the reason why a particular document was selected by the client for copying and provision to the lawyer and does not arise because the contents of the original document are revealed. It should be concluded that absent evidence of improper conduct the Commissioner's challenge to the privileged status of the eight copy documents was misconceived.

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