

## Asahi sends cold shivers down insurers' spines

**Asahi Holdings (Australia) Pty Ltd v Pacific Equity Partners Pty Limited (No 2) [2014] FCA 481**

### Highlights

The Federal Court's recent ruling on legal professional privilege in the context of disclosure of legal advice between an insured and its insurer sent a cold chill down the spine of insurers and lawyers. Not unlike the feeling of taking a swig of a cold bottle of the namesake beer after a spell in the sun.

At first blush the head note of the case might have suggested that the implicit assumption of common interest privilege underlying much interaction between an insured's and insurer's legal advisers may have been cast into doubt.

Careful consideration of the Court's detailed reasons, however, reveals that the case does no more than call for careful consideration of the particular facts of any given interaction when making disclosures of legal advice. That is, it leaves many of the common communication practices between insureds and insurers unthreatened while reminding practitioners to pause and consider the underlying principles of privilege prior to disclosure.

### Facts

Asahi, via a nominee company (Asahi), purchased a business, Flavoured Beverages Group Holdings Limited (**FBGHL**) from the shareholders of that company (**Sellers**). In the share sale agreement, the Seller provided certain warranties to Asahi including warranties as to the accuracy of key financial information about the business contained in the due diligence material furnished by the Sellers in connection with the sale.

In consideration for the provision of such warranties, the share sale agreement required Asahi to take out a policy of Warranty Insurance which insured Asahi against breaches of the Insured Warranties given by the Sellers up to a maximum of \$150 million.

Following the purchase, Asahi developed concerns that the Sellers had misrepresented FBGHL's 'rolling last 12 months normalised earnings before interest, taxes, depreciation and amortisation' to various dates in 2011 (FBGHL's EBITDA)

For the purpose of anticipated litigation, Asahi's solicitor prepared a report (**Report**) itemizing some 29 adjustments said to be necessary to be made to the FBGHL's EBITDA in order to reflect the true financial position of FBGHL at the relevant time. That report, in turn, contained references to other financial information and records of interview compiled for Asahi by its lawyers and a firm of accountants.

The Report was subsequently provided by Asahi's solicitor to the warranty insurer when a claim was lodged under the policy in respect of the alleged breaches of warranties relating to the financial performance of the business made by the Sellers prior to Asahi's purchase. The Report was marked as "Privileged and Confidential".

Subsequently, Asahi also commenced litigation against the private equity firm which had overseen the sale process, Pacific Equity Partners (PEP), and the Sellers. During the course of that litigation, Asahi provided the Report, with several redactions, to PEP, claiming that the redacted information was privileged. PEP sought to argue that Asahi had already waived privilege over the entire document as it had already provided the document to a third party, namely the warranty insurer.

## **Principles**

The Court reviewed the relevant cases governing the loss of litigation privilege through disclosure and restated the key principles:

1. the communications made or materials to be protected by litigation privilege are those which are made confidentially between the client and the legal representative or otherwise come into existence for the dominant purpose of the litigation, and which are to be kept away from the opposing party.
2. the confidentiality purpose which litigation privilege serves to protect is to keep hidden from one's opponent or adversary (whether actual or potential) material that may prejudice the privilege holder or advantage his or her opponent.
3. litigation privilege will be lost where a party voluntarily discloses the privileged material to a third party in a manner inconsistent with the maintenance of the privilege.
4. whether any particular disclosure will result in the loss of privilege will depend on all the circumstances of the particular disclosure including the relationship between the privilege holder and the party to which disclosure is made and the terms of disclosure.
5. the privilege will not be lost by the confidential disclosure of privileged material from the privilege holder to a party which shares a significant common interest in the litigation with the privilege holder for the purpose of advancing that common interest.
6. even where a privileged document is provided to a third party without such commonality of interest, the confidentiality in the disclosed communication may be preserved. If the basis upon which privileged material is made available is restricted so as to secure the confidentiality, the act of disclosure may not be inconsistent with the maintenance of the confidentiality which the privilege serves to protect.

## **Decision**

Applying the above principles, the Court held that Asahi had waived privilege by providing the document to the warranty insurer.

The important holdings of the Court relevant to that outcome included:

1. The Report was not a document which recorded communications between the client and the lawyer. It does not provide the lawyer's opinion on the law, the client's prospects of success or the strategy which ought to be adopted in the litigation. As

such, the relevant principles are those concerning litigation privilege rather than advice privilege.

2. The coverage provided by the warranty insurance policy was a first party loss (as opposed to a liability policy which insures the party against whom a claim is made). That is the insurer agreed to indemnify Asahi for its own financial loss occasioned by the Sellers' breaches of warranty. In order to succeed in establishing a valid claim under the policy, Asahi had to prove that the Sellers had breached the relevant warranties. The Court noted, in respect of the relationship created between the insured and insurer under such a policy, that:

*"Unlike many situations where an insurer and its insured may have a commonality of interest, the...particular and somewhat unique terms of both the Policy and the [share sale agreement], have, in the context of the claims made by [Asahi] against the Insurer and [PEP and the Sellers] created an alignment of interest as between the Insurer and [PEP and the Sellers] and a corresponding divergence of interests as between [Asahi] and the Insurer and [Asahi] and [PEP and the Sellers]."*

3. The placement of the words "Privileged and Confidential" on the Report and on the cover letter under which it was sent to the warranty insurer was not sufficient to secure the confidentiality (as per principle 6 above) so as to prevent such disclosure waiving the litigation privilege. In order to secure the confidentiality, the terms of the disclosure would need to maintain the privilege holders' control over the further dissemination of the privileged material. The words "Privileged and Confidential" alone fell well short of achieving that. Further, neither the terms of the warranty policy nor the insurer's duty of utmost good faith created the necessary confidentiality obligations necessary for the insured to maintain control over the dissemination of the Report by the warranty insurer.

## Implications

Nothing in the Asahi case casts doubt on the established principles of common interest privilege where a sufficient commonality of interest exists, as will be the case in most instances where an insured and its liability insurer have a common interest in defeating a claim made against the insured by a third party adversary. That is even the case where indemnity is yet to be extended by the insurer. The Court was at pains to distinguish the present case from that line of authority.

Where, however, there is doubt as to whether there exists a sufficient commonality of interest to come within the principles of common interest privilege, any disclosure of privileged material should be on terms of robust and express confidentiality requirements, agreed to by the party to whom disclosure is made, which provide the privilege holder with effective control over further dissemination of the privileged material.

Liability insurers may wish to give consideration to including confidentiality obligations in claims co-operation clauses which would add further protection against the inadvertent waiver of privilege where an insured provides privileged material to the insurer.



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