

expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson

Experts' privileges reviewed (Part I)

“ . . . whether or not the documents were prepared by the expert . . . the whole purpose of the exercise was to prepare . . . a report for use in the proceedings and I am prepared to accept that this was the dominant purpose overall . . . ”

New Cap Reinsurance Corp Ltd (In Liq) v G S Christensen & Ors [2008] NSWSC 93

Background

Over the course of 2008, numerous judgments were handed down dealing with the circumstances where privilege attaches to the work of experts.

Over the next few issues of *Expert Update* we are going to examine cases that dealt with, inter alia, the test used to determine whether privilege is available over reports, as opposed to documents used in the preparation of those reports, and the factors considered in determining the dominant purpose where an expert's report was commissioned for more than one purpose.

New Cap Reinsurance Corp Ltd (In Liq) v G S Christensen & Ors

An earlier related proceeding¹ to this case involved an application by Renaissance that the plaintiffs make available documents over which the plaintiffs had claimed privilege - namely, communications between solicitors and an expert accountant called by the plaintiffs to provide an opinion as to the solvency of New Cap Re. Justice White considered the question of whether the expert's instructions, notes, and draft reports attracted privilege, and whether privilege was waived by the sending of the final report to instructing solicitors. His answer, in essence, was that they did attract privilege, because they were created for the dominant purpose of providing the plaintiff with legal services.

In the latter proceeding (Christensen), the abovementioned expert's report had been filed and it was proposed that it be relied upon, with Justice White again to hear that matter at trial. Justice Hamilton was asked to consider whether or not privilege subsists in respect of the considerable number of documents created by the expert and used in the preparation of the expert's report, together with his instructions.

The evidence relied on by the plaintiffs in support of the claim for privilege was an affidavit of the expert in which he swore that all the documents:

¹ *New Cap Reinsurance Corporation Ltd (In Liq) & Anor v Renaissance Reinsurance Ltd [2007] NSWSC 258*. For a summary of that case see *Experts: a privileged class? Expert Update Issue 7, July 2007*.

were created for the dominant purposes [sic] of preparing my report in these proceedings

The expert was not cross examined on his affidavit. The claim for privilege was made under s 119(b) of the Evidence Act 1995. Over a number of objections, including what were said to be inconsistencies in the expert's affidavit, Justice White found the dominant purpose test was satisfied, commenting:

... I am prepared to accept [the expert's] word that the dominant purpose for which the documents referred to were prepared was the client being provided with professional legal services. I am assisted in coming to that conclusion by the inherent probability that that was so. I accept that, whether or not the documents were prepared by [the expert] or in his office or came into his office for use in the exercise he was carrying out, the whole purpose of the exercise was to prepare in the end a report for use in the proceedings and I am prepared to accept that this was the dominant purpose overall of the preparation of the documents. In my view that statement is not displaced by statements by [the expert] as to other purposes that he had along the way as, for instance, in relation to the communication of draft reports to the solicitors during the process, as was dealt with by White J in his judgment.

Turning to the question of whether privilege had been lost through the service of the expert's report, his Honour noted that service was a result of a direction of the Court and therefore under compulsion of law, as referred to in s 122 of the Evidence Act. Hence, he went on to say that no waiver had occurred at the present time as:

... neither the service of the report nor any indication pursuant to direction that it is intended to rely on it makes it mandatory upon the plaintiffs to tender that report when the time comes at the trial. They remain free to do so or not do so as they then choose.

... the relevant material has not yet been used by the plaintiffs by tender and the plaintiffs remain free not to use it in their discretion. Until the material is tendered, there is not an inconsistency which attracts the operation of s122 (1). [Which does not prevent the adducing of evidence given with the consent of the client or party concerned.]



expert update

Uncovering the latest Expert Witness news with Ferrier Hodgson



John Temple-Cole
Partner, Sydney
phone: 02 9286 9919
email: john.temple-cole@fh.com.au

Significance

Similar to the findings in the earlier related New Cap v Renaissance proceedings, the judgment here affirms the general case that documents, including an expert's draft reports, instructions and workings, will likely attract privilege, as long as they were created for the dominant purpose of litigation. His Honour was willing to look beyond what were said to be other possible purposes for the creation of the documents, to the overall dominant purpose for their existence.

For more information about our forensic services, please contact:

Sydney: Andrew Ross
+61 2 9286 9906
andrew.ross@fh.com.au

John Temple-Cole
+61 2 9286 9919
john.temple-cole@fh.com.au

Melbourne: Greg Meredith
+61 3 9604 5118
greg.meredith@fh.com.au

George Kompos
+61 3 9604 5150
george.kompos@fh.com.au

Adelaide: Peter Holmes
+61 8 8100 7600
p.holmes@sa.fh.com.au

Jean-Pierre du Plessis
+61 8 8100 7600
jduplessis@sa.fh.com.au

Brisbane: Tim Michael
+61 7 3831 4833
tmichael@qld.fh.com.au

Hong Kong: John Tudorovic
+852 2820 5610
jtudorovic@fh.com.hk

Singapore: Tim Reid
+65 6416 1400
tim.reid@fh.com.sg

FORENSIC ACCOUNTING

FINANCIAL INVESTIGATIONS & FRAUD

BUSINESS VALUATION

FORENSIC IT



FERRIER HODGSON
FORENSICS