

expert update

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Experts' privileges reviewed (Part III)

'...The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary.'

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7) (Corrigendum dated 13 March 2008) [2008] FCA 323

Background

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

This is the final in a three-part series which examines a range of issues relating to privilege and whether it is available over reports, as opposed to documents used in the preparation of those reports, and the factors considered in determining the dominant purpose for the creation of an expert's report.

Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 7) (Corrigendum dated 13 March 2008) [2008] FCA 323

This case concerned the engagement of experts by these two competing confectionary companies. The experts were engaged to provide opinions in relation to the use of the colour purple in the packaging of the two companies' products.

Darrell Lea served a subpoena on Cadbury's expert witness, requesting:

Originals of all correspondence and notes evidencing communications between you and [solicitors] and/or counsel retained for the Applicant in relation to each of your retainer or instructions to provide expert evidence in relation to the subject matter of this proceeding, or relating to your evidence to be given in this proceeding, including letter(s) of engagement, drafts of your affidavits, file notes of any meetings which took place between [solicitors] and/or counsel retained for the Applicant with yourself and any other communications regarding the contents of your affidavits sworn and filed in this proceeding.

Originals of all correspondence and notes evidencing communications between you and QBrand Consulting in relation to your expert evidence in relation to the subject matter of this proceeding, or relating to your evidence to be given in this proceeding, including letter(s) of engagement, drafts of your affidavits, file notes of any meetings which took place between QBrand

“Proper understanding” of a document or communication will sometimes, but not always require that documents to which it responds or refers be available. It may very likely be so when the primary document contains a summary or excerpt from an earlier communication...’

Consulting and any other communications regarding the contents of your affidavits sworn and filed in this proceeding.

Senior Counsel for Cadbury, relying on s 199(b) of the Evidence Act, put forward arguments that evidence should not be adduced if that were to result in the disclosure of a confidential communication prepared for the dominant purpose of the client being provided with professional legal services. This led Justice Heerey to comment thus:

There is a clear line of authority which establishes that draft documents and other communications of a like nature with an expert witness proposed to be called in litigation are privileged under s 119(b) whatever may have been the position at common law.

Senior counsel for Darrell Lea did not dispute this proposition but relied on the statutory equivalent of waiver per s 122(2) of the Evidence Act.

Justice Heerey made reference to the finding of Brereton J in *ML Ubase*, where it was concluded that:

*In my opinion, service and tender of an expert witness’ report in proceedings does not constitute a waiver of the privilege which attaches to communications between the expert and the solicitors who instructed him or her, save to the extent that those communications are associated documents reasonably necessary to an understanding of the report. “Proper understanding” of a document or communication will sometimes, but not always require that documents to which it responds or refers be available. It may very likely be so when the primary document contains a summary or excerpt from an earlier communication, or responds to questions which are not themselves restated in it. **But I do not accept that “a proper understanding of the communication or document” involves an appreciation of the manner in which the opinions contained in the document have been formed over time, or the iterations and evolutions through which they have passed. The test is concerned with the comprehensibility of the primary communication or document: if it can be completely or thoroughly understood without more, then access to the related communications or documents is not reasonably necessary.***

Accordingly, for the purposes of s 126, one starts by looking at the substantive document (made admissible under s 122 or another of the applicable sections) and asking whether, in order to understand it thoroughly, it is necessary to know what is in the associated material. [Emphasis added].

In conclusion, his Honour upheld the claim of privilege:

In the present case senior counsel for Darrell Lea has not been able to point to any particular part of [the expert's] report of which it can be said that some further document is required to enable the report to be understood. Still less has it been possible to identify any such document.

This finding was made over objections that the role of QBrand Consulting had led to some ambiguity in the report of the expert. In his first affidavit, the expert had sworn that in preparing his affidavit he had been assisted by staff members of QBrand Consulting:

... with which firm I have a support arrangement in relation to this type of work. This assistance took the form of administrative tasks, assisting with drafting, preparation of exhibits and obtaining copies of relevant research materials. All opinions expressed in this affidavit are my own.

However, his Honour rejected this argument, concluding that this arrangement between the expert and a third party “does not to my mind indicate any uncertainty or ambiguity or confusion in the body of [the expert's] affidavit”.

Significance

Service of an expert's report is unlikely to constitute waiver of supporting documents and instructions, unless a document upon which an expert relied is required in order to understand the opinions contained in the expert's report.

It serves as a reminder, both to experts and those retaining them, that an expert's report should always be able to be properly understood on a standalone basis as the expert should have clearly communicated the facts, assumptions and reasoning used in formulating the opinions set out in the report. The report should avoid summarisation of other documents.

It also suggests that there is nothing inherently wrong with an expert utilising the services of others, even if they are not directly employed by the expert, so long as the opinions ultimately expressed are those of the expert. This point, however, clearly will turn on the facts of each particular case.



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