Piper Alderman

In-house counsel legal professional privilege – beware the multiple purpose communication

The recent Federal Court decision in Dye v Commonwealth Securities comments on the nature of the requirement of independence of in-house counsel in the context of claims for privilege and serves as a warning about multiple purpose communications. Dispute Resolution Partner, Anne Freeman examines the judgment.

Vivienne Dye, a former public relations manager and analyst, made a complaint against Commonwealth Securities to the Human Rights and Equal Opportunity Commission and also made various workers' compensation claims in relation to alleged sexual harassment. Proceedings were then brought by Ms Dye in the Federal Court for the alleged breaches by Commonwealth Securities of the *Trade Practices Act* 1974 (Cth), the *Sex Discrimination Act*, 1992 (Cth), as well as for breach of contract.

Ms Dye sought access to certain documents over which a claim for privilege had been asserted by Commonwealth Securities, a number of which comprised communications involving a Mr Fredericks, Legal Counsel in the Legal Services Division of the Commonwealth Bank.

Independence

It was submitted on behalf of Ms Dye that none of the documents in question was privileged because Mr Fredericks provided both legal and non-legal advice, the argument being that if he had been consulted in something other than his professional capacity, he did not have sufficient independence to satisfy the criteria for the claim for legal professional privilege. In the context of considering this, Justice Katzmann distinguished the circumstances of this case with *Rich v Harrington*, a case in which a PriceWaterhouseCoopers partner had brought proceedings against her partners alleging direct and indirect sex discrimination and victimisation. In that case, Justice Branson of the Federal Court allowed the applicant access to documents over which privilege had been claimed, comprising communications with lawyers within the firm's own Office of General Counsel (OGC) because the relationship between the firm was not such that advice given about Ms Rich's allegations was of an objectively independent character. This was because of the nature of Ms Rich's allegations which "cast aspersions of a personal, rather than a purely professional, kind on general counsel's partners… [and because] the general counsel and the deputy general counsel were themselves likely respondents in the litigation in prospect".

Although Justice Katzmann considered that Justice Branson might have overstated the content of the requirement that legal professional privilege will arise only where the advice has an independent character (Justice Katzmann noting that other authority suggested that independence involved no more than an inquiry into whether the lawyer was consulted in his or her professional capacity), Her Honour distinguished the role of Mr Fredericks from that of the OGC. The in-house lawyers of Commonwealth Securities were not partners of it, nor were they actual or potential parties to the claim by Ms Dye. Ms Dye's allegations were made against individual employees, rather than the firm as a whole, as was the case in *Rich*, such that her allegations were not likely to engage Mr Frederick's "personal loyalties".

Purpose

Mr Fredericks had multiple responsibilities, including some of which could have affected his independence, including a human resources function and managing workers' compensation. That mean it was necessary to analyse precisely in what capacity Mr Fredericks sent or received the relevant communications, and the purpose of those communications.

Her Honour was invited to inspect the documents in issue, and she did so. She also took into consideration the evidence of Mr Fredericks as to the nature of the documents. Of significance, Her Honour noted with respect to the latter that Mr Fredericks was not the author, sender or recipient of all the communications. This meant Mr Fredericks was really not able to speak to the purpose of those communications.

Mr Fredericks' description of the documents or their purpose were not particularly informative, often failing to identify any purpose, the thinking behind, or the circumstances giving rise to, the creation of the documents.

A number of the communications were emails which included Mr Fredericks and others. Many of those communications, on their face, had mixed purposes – the seeking of legal advice but also human resources advice from other recipients than Mr Fredericks. Because Mr Fredericks did not, and in any event, could not, properly give evidence as to the dominant purpose of such a communication when he was not the creator of the communication, the Court could not be satisfied that the privileged purpose was the dominant one and could not, therefore, uphold the privilege claim.

The decision provides a warning to in-house counsel wishing to avail themselves of the privilege. Communications with multiple purposes should be avoided, if possible, where one of the purposes is a privileged one. Privilege will be far easier to maintain in circumstances in which the only recipient is the in-house counsel.

It is also important, in any challenge to a privilege claim, that admissible evidence as to the purpose of the communications is led. This may well involve evidence from people other than the relevant in-house counsel.

High Court Octaviar ruling – variation to the terms of a charge

On 1 September 2010 the High Court in Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd dismissed the appeal from the decision of the Queensland Court of Appeal and in doing so provided relief to many secured creditors. The decision reaffirms the long accepted practice of drafting the terms of a company charge to include liability under documents to be agreed in the future. Corporate Lawyer, Paul Henry explains.

Overview

The decision of the High Court in *Public Trustee of Queensland v Fortress Credit Corporation (Aus) 11 Pty Ltd* finally resolves the uncertainty which arose from the first instance decision of Justice McMurdo.

The case concerned the granting of a company charge which was expressed to secure all money owing under a "Transaction Document". The term "Transaction Document" was defined (in another document) to include each document which the parties agreed in writing to be a "Transaction Document".

In the first instance decision, Justice McMurdo held that including a further document, which increased the liabilities secured by the charge, as a "Transaction Document" amounted to a variation of the terms of the charge for the purposes of section 268(2) of the *Corporations Act 2001 (Cth)* (the Act).

Under section 268(2) of the Act, any variation in the terms of a charge which has the effect of increasing the amount of the debt or the liabilities secured by that charge must be notified to ASIC. Failure to notify ASIC will render the charge void as security against a liquidator or administrator to the extent that it secures an increased liability (section 266(3) of the Act).

The Queensland Court of Appeal overturned the decision of Justice McMurdo finding that the obligation to notify ASIC is only triggered where the terms of the charge document itself are varied. Since the charge document provided for additional documents to be added to the definition of "Transaction Document" the addition of a further document did not constitute a variation in the terms of the charge.

High Court decision

The High Court unanimously found that "there was no variation made to the terms of the charge, either in their text or in the rights and obligations to which those terms gave rise." By lodging a copy of the charge instrument a person who searched the ASIC register of charges would be put on notice that they needed to look elsewhere to ascertain the precise nature and details of the liabilities secured. The particular amount of the liability secured does not need to be specified nor does the nature of that liability need to be described in great detail. Therefore whilst a person would need to conduct further investigations into the nature of the "Transaction Documents" to ascertain the exact liabilities under the charge, this is not contrary to the policy of the Act's charge notice provisions. The High Court recognised that the charge notice provisions do not purport to create a perfect and complete register of all details of a registrable charge.

Outcomes

The crucial question in determining whether notice must be lodged is whether there has been a variation in the terms of the charge or whether there is merely a variation in its operation.

The High Court has confirmed that the long accepted practice of increasing the liability secured by a charge by adding or amending transaction documents without notifying ASIC will not ordinarily amount to a variation in the terms of the charge.

Secured creditors who did not react to Justice McMurdo's first instance decision can feel relieved that the High Court has emphatically re-established the status quo.

Energy and resource licences and the Personal Property Securities Act

The Personal Property Securities Act (PPSA) will significantly change the way in which entities grant and take security interests in personal property including certain types of licences, rights and authorities. In this article Corporate Lawyer, Llon Riley looks at how the PPSA will apply to financiers and those entities that take security interests in energy and resource licences.

The *Personal Property Securities Act 2009 (Cth)* (PPSA) is scheduled to apply from May 2011. With this drawing closer it is important for financiers and those entities that take security interests in energy and resource licences to understand how their interests may be effected by the PPSA.

This article only deals with energy and resource licences and does not contemplate other types of licences, authorities, rights or entitlements (eg. contractual rights under an intellectual property licence or statutory rights and entitlements under fishing, gaming and liquor laws) which may be subject to the provisions of the PPSA.

What will the PPSA govern?

The PPSA establishes one national regime for security interests over personal property. It rationalises the numerous Commonwealth, State and Territory laws and registers which currently deal with security interests in personal property. The national regime will consist of the PPSA, the Personal Property Securities Regulations (PPS Regulations) and the Personal Property Securities Register (PPS Register).

The PPSA governs security interests in tangible and intangible personal property which is any kind of property (including a licence) other than land, fixtures, water rights and certain licences and authorities granted under Commonwealth, State or Territory laws which are declared not to be personal property.

In the PPSA environment a security interest will be any interest in personal property that is provided for by a transaction that in substance secures payment or performance of an obligation without regard to the form of the transaction or the identity of the person who has title to the property. The PPSA concept of security interest is significantly different from the formal or traditional concepts of security interests currently used (eg. a mortgage or a charge).

Certain licences may be personal property

Under the PPSA certain types of licences are considered to be personal property. A licence will be personal property if it is transferable (irrespective of whether the rights under the licence are exclusive or there are restrictions on transfer) and the licence is:

- a right, entitlement or authority to explore for, exploit or use a resource (eg. a mining, petroleum or gas tenement)
- a right, entitlement or authority to provide a service
- a right, entitlement or authority to manufacture, produce, sell, transport or deal with personal property, or
- an intellectual property licence.

While energy and resource licences can be personal property, the PPSA enables the Commonwealth, States and Territories to declare by legislative amendment certain energy and resource licences not to be personal property. If an energy and resource licence is declared not to be personal property, the provisions of the PPSA (including those provisions relating to the attachment, perfection, registration and enforcement of security interests) will not apply to these licences.

The PPSA will not apply to certain energy and resource entitlements

At the time of writing it is likely that all onshore and some offshore energy and resource licences will be declared not to be personal property. It will be vital for financiers and those who take security interests in energy and resource licences to determine whether the energy and resource licence they have security over has been declared not to be personal property for the purposes of the PPSA. Some energy and resource licences that are, or are likely, to be excluded from the PPSA include:

- in New South Wales, an exploration licence, assessment lease, mineral claim, mining lease and opal prospecting licence granted under the *Mining Act 1992 (NSW)*

- in Queensland, a mining tenement (ie. an exploration permit, mineral develop licence and mining lease) under the *Mineral Resources Act 1989 (Qld)*
- in Victoria, certain permits and licences under the *Mineral Resources (Sustainable Development) Act 1990,* authorities under the *Petroleum Act 1998 (Vic)*.

Continuation of Commonwealth, State and Territory energy and resource regimes

Irrespective of whether an energy and resource licence is declared not to be personal property, the relevant Commonwealth, State or Territory laws which govern those licences will continue in effect. Consent and approval requirements for the taking of security over energy and resource licences are likely to continue to apply even if these are subject to the PPSA.

Despite certain exclusions, the PPSA applies to energy and resource licences

Whether or not an energy or resource licence is excluded from the application of the PPSA, financiers and those who take security interests in these types of licences will still need to be aware how the provisions of the PPSA may affect them.

Registration of security interests

To the extent that an energy or resource licence is personal property, a security interest registration will need to made on the PPS Register. If a financier, or other entity, has a security interest in an energy or resource licence that is personal property and does not properly register its interest on the PPS Register, its security interest will be subordinate to any other registered interest in the property. This means that another entity that claims a security interest in the property of the licensee and who has registered that interest (eg. a bank that has an all assets charge over the licensee's property) will have priority over the financier or other entity.

It should be noted that the PPS Register is not a document register but rather a notice based register of interests. A physical or electronic copy of the security agreement will not be lodged with the PPS Register.

Offshore energy and resource licences

As it is likely that most offshore energy and resource licences will be personal property for the purposes of the PPSA, security interests granted in these licences will be subject to the provisions of the PPSA. Security interests will need to be properly registered on the PPS Register to benefit from the rules relating to perfection and priority of security interests. Further, security agreements which include offshore energy and resource licences should be drafted to:

- adequately describe the collateral in accordance with the requirements under the PPSA and PPS Regulations
- to the extent possible, address the contracting out of the enforcement provisions in chapter 4 of the PPSA
- define terms that reflect the concepts and language used in the PPSA, and
- have consideration for the priority, perfection and registration issues relating to security interests.

Security interests in offshore energy and resources licences will also need to comply with the form, registration, consent and approval requirements specified by the *Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)*.

Joint venture cross charges

Joint venture participants in the energy and resource industry usually enter into joint venture agreements which include a cross charge given by each participant in favour of each of the other participants. Joint venture cross charges usually take the form of a fixed charged over land, the resource tenements, fixtures and certain plant and equipment, and a floating charge over all other assets. In the PPSA environment, joint venture cross charges will need to be reviewed to comply with the provisions of the PPSA.

To the extent that the cross charge relates to personal property, the cross charge should be drafted to take into consideration the provisions of the PPSA. Joint venture cross charges will need to reflect the new security principles (eg. the attachment, perfection, registration, priority and enforcement principles) in the PPSA and the traditional concepts of security (eg. a mortgage or a charge) for all other forms of property. This duality of security interest principles will be vital to ensuring joint venture participants have effective security.

Once the PPSA applies and to the extent that the joint venture cross security relates to personal property, the concepts of a fixed and floating charge should be replaced with the concepts and terminology in the PPSA.

Minerals and resources produced from energy and resource licences

While it is likely that most energy and resource licences will be declared not to be personal property, the products extracted or derived from the exploitation of those licences (eg. minerals and hydrocarbons in any form) will be personal property. In addition, any income received from the sale or disposition of those minerals or hydrocarbons will be 'accounts' for the purposes of the PPSA. Security interests granted in the products extracted or derived from exploiting, or the income received or accounts relating to the use of the energy and resource licences will be subject to the provisions of the PPSA. Agreements dealing with these security interests will need to have regard to the provisions of the PPSA.

The PPSA will require some very significant changes to the way businesses operate. Businesses need to be aware of theses changes and understand how they may affect them.

Reversal of fortune - Rosenberg and ASIC

Dispute Resolution Partner, Simon Morris discusses the recent decision of the Administrative Appeals Tribunal setting aside a banning order prohibiting Tricom Managing Director, Lance Rosenberg, from providing financial services.

Rosenberg was disqualified by ASIC from providing financial services on the basis that he had engaged in misleading and deceptive conduct in relation to financial products by engineering transactions that created a false market or the appearance of a false market in listed securities. Rosenberg was disqualified for four years. By the AAT setting aside the disqualification the ban is to be treated as if it never came into effect.

Rosenberg was the Managing Director of the Tricom Group of Companies now Stonebridge Capital. Tricom's operations included a securities margin lending business through which it lent a percentage of the value of stock pledged by its customers to secure borrowings.

The money Tricom lent was secured against the client's share portfolios and legal title in shares securing the borrowings were, as a condition of the borrowing, transferred to Tricom. Tricom's obligation was to restore to the client borrower their securities on the repayment of the borrowings.

Tricom's business operations were funded from borrowings from, amongst other organisations, Opes Prime. Tricom's borrowings from Opes were secured by Tricom transferring legal title in those securities transferred to it by its clients to Opes. Opes' obligation was to restore to Tricom the securities on repayment of its borrowings. To further complicate matters Opes funded its operations through money lent to it by ANZ and Merrill Lynch. Opes' borrowings were secured by the transfer of legal title in the securities to its lenders.

The effect of these borrowing arrangements was that title in Tricom's customers securities ultimately ended up with the ANZ and Merrill Lynch as security for Opes' borrowings.

Pursuant to the terms of these lending arrangements, on the discharge of a loan the lender is obliged to restore to the borrower the equivalent stock provided by the borrower to secure the borrowing. Meeting its obligation to restore equivalent stock to the borrower may involve the lender going into the market to purchase the equivalent number of the client's securities. No issues arise until a lender in the chain is by reason of insolvency incapable of meeting its obligations to restore on-lent stock to its borrower.

In early 2008 Opes fell into financial difficulties and in March 2008 Receivers and Administrators were appointed to it. When Rosenberg heard that Opes had appointed administrators, concerned about the implications for Tricom and its clients, he sought urgent advice from senior Tricom staff, insolvency practitioners and other persons expert in the market as to how Tricom could secure the return of the securities on-lent by it to Opes.

Two options were identified to recover the on-lent stock. Firstly, that Tricom borrow money to finance the transfer of stock from Opes to Tricom or secondly, that Tricom entities enter into special crossings agreements to buy and sell the on-lent stock thereby triggering Opes' obligation to restore on-lent stock to Tricom.

Unable to secure an immediate commitment from its bankers, Rosenberg caused a series of special crossings to be entered into between the two Tricom entities in respect of the on-lent securities. The price nominated in the special crossings were considerably below the prevailing market value. The pricing of the special crossing trades reflected the amount that had been borrowed against the stock and was required to discharge Tricom's obligations to Opes.

A special crossing is conducted off-market and may be at any agreed price regardless of the market price. The time, price and volume of stock traded by special crossing are notified to the market via the ASX's integrated trading system and bear a code that tells the market that the stock has traded by a special crossing. There is no requirement to explain why a stock has been traded by special crossing or the why the trade may be below the prevailing market price.

Prior to executing the special crossings, Rosenberg spoke with two ASX compliance officers and explained what Tricom intended to do. Neither ASX officer expressed a view about the legality of the proposed transactions.

Prior to the obligation to deliver stock under the special crossings crystallised, each of the special crossings were cancelled. Tricom had in the meantime secured bridging finance to finance the securities back from Opes to Tricom.

There you would expect that things would have ended, until ASIC formed the view that the proposed special crossing transactions were a contrivance that was misleading and deceptive and created the false appearance of a market in each of the securities because Tricom was on both sides of the transactions. ASIC disqualified Rosenberg on this basis.

Immediately on being notified of the ban, Rosenberg made application to the AAT seeking orders staying the ban, preventing ASIC publicising the ban and suppressing his identity in the AAT review process. The AAT agreed with Rosenberg reasoning that the effectiveness of the hearing and the application for review would be materially impaired if the ban was not stayed and Rosenberg's identity suppressed pending the review. Persuasive for the Tribunal in granting the stay was the effect, irrespective of whether the decision under review was ultimately set aside, the ban would have on Tricom's two hundred plus employees and Rosenberg's professional reputation.

ASIC appealed to the Full Court of the Federal Court (Justices Moore, Downes and Jagot). Justice Downes, in addition to being a Federal Court judge, is the President of the AAT. The appeal was dismissed on the basis that the AAT stay and suppression order was made within the AAT's power. However, in a joint judgment Justices Downes and Jagot profoundly disagreed with the Tribunal's approach in preferring Rosenberg's private interest over the public interest in full disclosure. Their Honours reasoned that the purpose underlying the statutory disqualification scheme was protection of the public and therefore that it is the public interest which informs the competing interests between those effected by a banning order. Their Honours held that *"information is the key to effective trading in any market. It takes the place of regulation in ensuring fairness. A market that is not fully informed is not operating properly ….. the critical matter is that the market is fully informed. If the banning order is not disclosed, but subsequently upheld, is not the investor entitled to complain that all the circumstances should have been made public?"*

The public interest was in a fully informed market which required full disclosure irrespective of the private reputational and financial cost to the banned individual, their employer and employees. Stays of administrative decisions made for public protective purposes and identity suppression orders will be hard to come by in the AAT from now on.

On the substantive review of ASIC's decision the AAT formed the view that Rosenberg did not contravene the *Corporations Act* and that the preferable decision was that the banning order be set aside.

A person can only be disqualified from providing a financial service by ASIC, in the exercise of its administrative power, if ASIC finds that the person has contravened a financial services law or is likely to do so in the future. The gateway finding underpinning ASIC's decision to ban Rosenberg was that the special crossings, notwithstanding their being notified to the market, were an act of market manipulation and misleading and deceptive.

ASIC's conclusion that a false and misleading appearance in a market was created by the special crossings, even given the somewhat unique factual circumstances of the trades in question, is novel and it is unremarkable that the Tribunal rejected the proposition. Similarly given that the information disclosed to the market about the special crossings was objectively accurate it is equally unremarkable that the Tribunal rejected the contention that Rosenberg had engaged in misleading and deceptive conduct.

A finding of contravention triggers a discretion, not an obligation, in ASIC to disqualify. The discretion should only be exercised if ASIC is of the view it is in the public interest for it to do so. What emerges from the facts is that Rosenberg was a highly capable market participant, acting with appropriate levels of advice in exceptional and trying circumstances that were unlikely to be repeated. His motivations and objectives were to secure outcomes that were for the benefit of Tricom clients. The AAT concluded that, irrespective of its findings on the contravention, no protective or deterrent purpose was served by disqualifying Rosenberg from providing financial services in these circumstances.

Disqualification of persons from undertaking vocational work on the basis that the person is not a fit and proper person or is a threat to the community has profound consequences (and are intended to do so) for the banned individual's livelihood, life prospects and their dependants. The negative reputational effect on the banned individual's business can also be significant with flow on consequences for the livelihoods of others.

Commonly disqualification orders are based on a finding that the banned person has breached a law in the performance of their work and can be made either by the corporate regulator (commonly ASIC or Australian Prudential Regulation Authority) exercising administrative power or by a superior Court exercising judicial power on the regulator's application.

When the exercise of an administrative discretion to disqualify seriously miscarries, it raises questions about the appropriateness of the corporate regulator retaining, as a part of its administrative functions, the power to make banning orders. In this regard APRA has recently had its administrative power to disqualify senior managers of insurance companies and superannuation funds on the fit and proper ground revoked by legislative amendments. The removal of APRA's administrative banning power was prompted by industry concerns about the exercise of its disqualification powers.

The arguments in favour of disqualification through the exercise of administrative power are cost and speed of delivery of outcome. Neither argument withstands much scrutiny. Administrative decision making, affording natural justice as it must, is no less time consuming or labour intensive than equivalent judicial processes. Very often a contested administrative decision will be more costly and time consuming both for the regulator and the citizen than the judicial alternative. A contested administrative decision starts with the regulator disclosing its preliminary findings to the citizen and requiring that the citizen show cause why he or she not be disqualified, then the citizen responding to the show cause notice, followed by a hearing before a delegate of the regulator (where evidence may be taken and legal argument takes place) and then an internal appeals process. If the citizen seeks a review in the AAT, there is a complete re-hearing before the AAT with rights of appeal to the Federal Court.

Often this multi layered process results in the expenditure of a disproportionate percentage of a corporate regulator's legal budget and the incurring of costs that are prohibitive for any citizen, other than the extremely wealthy or those funded by an insurer or a supportive employer. The legal cost disincentive is exacerbated by the AAT, in most cases, having no power to make costs orders in favour of a successful litigant.

Most of the procedural steps listed above are avoided when disqualification orders are sought from a Court.

It is writer's view that the public interest in being protected from the dishonest and the incompetent and in the transparent and efficient exercise of executive power is best served by disqualification powers being reserved for the exercise of judicial power by superior Courts in either their civil or criminal jurisdictions. Moreover, that the perception of the provision of natural justice is better achieved by the trial process and the deterrence purpose better served by hearings being conducted in open Court and by the provision of judicial reasons.

It is suggested that procedural and substantive justice, and the relevant public and private interests, would have been far better served in the Rosenberg matter if ASIC had sought disqualification orders in a Court based on a claim that financial services laws had been contravened rather than by exercising its administrative discretion.

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