Construction

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JOINT INTEREST PRIVILEGE BETWEEN JOINT VENTURE PARTIES

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Joint venture parties tend to forget that when the honeymoon is over and disputes arise between them, either party may seek from the other disclosure of relevant communications they have exchanged with their own lawyers or other external advisors. Unless appropriate steps are taken beforehand, such communications are not necessarily protected by legal professional privilege.

In Australia, this issue came under scrutiny on 24 April 2011 in the case of *Alliance Craton Explorer Pty Ltd v Quasar Resources Pty Ltd & Anor* [2011] SASC 90. Alliance was in dispute with Quasar, its joint venture partner, in relation to a native title mining agreement which Alliance asserted Quasar was not authorised to enter into on behalf of the joint venture. It sought production of documents generated by Quasar, and an associated company (Heathgate), which included communications between Quasar and Heathgate and their lawyers. Quasar asserted legal professional privilege over the documents. Alliance argued seven grounds on which privilege did not apply, the following three of which were considered by the court:

1. The legal advice which gave rise to the privilege was sought or received by Quasar or Heathgate, as agent for the joint venture.

2. In relation to certain of the documents, Alliance contributed to the cost of the legal advice which was sought or received.

3. Even if the documents were originally privileged, there had been a waiver of that privilege in relation to most of the documents, by reason of Quasar's and Heathgate's disclosure to the Department of Resources as part of an application for a mining lease of the legal advice which they had received.

Legal advice giving rise to privilege sought and given as agent

Alliance contended that the privilege attaching to the documents was jointly shared with

Quasar and Heathgate. Joint privilege prevails against third parties but not as between those sharing in it[1]. The court, citing Sheller JA in *Farrow Mortgage Services Pty (in Liq) v Webb*[2], referred to two alternative circumstances in which joint privilege may arise:

1. Where the parties join in communicating with a legal advisor for the purpose of retaining his services or obtaining advice.

2. If one of a group of persons in a formal legal relationship communicates with a lawyer about a matter in which the members of the group share an interest.

Sheller JA's first alternative

As to the first alternative, Alliance argued that the existence of an agency between Quasar and the joint venture (and therefore between Quasar and Alliance) meant that the lawyers retained by Quasar were also retained by Alliance. The court rejected this, noting that *"it does not follow from the appointment of an agent to carry out some task that all contracts entered into by the agent which are directed to the fulfilment of that task are contracts which bind the principal"*. It was clear in this case from the correspondence that no retainer or relationship existed between Quasar and its lawyers, who at least on a subjective level never considered Alliance to be their client. On this basis, the court held that joint privilege under this first alternative failed.

Sheller JA's second alternative

As to the second alternative, the court took the view that it was a question of fact in each case whether there was a shared interest. In some cases, the parties' interests are not sufficiently aligned for such an interest to arise. For example, they may have sought the advice in different capacities (e.g. where a trustee seeks advice which concerns his character not as trustee but as mortgagee, the advice will be outside the otherwise joint interest with the trust) or where they are opposed (for example, a company seeking advice in an action against a shareholder will be outside the otherwise joint interest with the trust).

The factual enquiry required the court to consider whether a duty or obligation to disclose was implicit in the relationship between the parties.

Was there an implied shared interest?

Quasar argued that there was no implied shared interest because the advice sought from its lawyers was for its own private purposes. While accepting the argument in principle[3], the evidence however did not support this position: no witness had deposed to giving or receiving advice for Quasar's own private purposes (whether this was an omission or because it reflected the facts is not clear). The evidence appeared to show that, in all instances, the advice was requested and provided in pursuit of the interests of the joint venture. A joint interest privilege therefore prevailed and Alliance was entitled to disclosure of the communication between Quasar, Heathgate and their lawyers.

Contribution towards legal costs

The court also observed that Quasar had sought a contribution from Alliance to meet the costs of the legal advice which, although not of itself conclusive, supported a conclusion that the firm was retained for joint rather than private purposes.

Waiver

Alliance contended that even if there was no joint privilege, Quasar has waived its privilege over the communications. The waiver was said to arise from the provision of a single piece of legal advice to the Department of Primary Industries and Resources of South Australia (PIRSA) over which Quasar did not claim privilege and which Alliance claims amounts to a waiver of privilege in all communications with Quasar's lawyers.

Quasar relied on the Victorian Court of Appeal's decision in *British American Tobacco Australian Services Ltd v Cowel* [2002] VSCA 197 that a waiver occurs when the other documents sought are necessary for a proper understanding of the disclosed material. While the court favored the broader test in *AWB Ltd v Cole (No. 5)* [2006] FCA 1234, which considered whether the released material represents *"the whole of the material relevant to the same issue or subject matter"*, the overriding factor was one of fairness. The court noted that the disclosure to PIRSA was in relation to a discrete topic and it would be fair to allow Quasar to retain privilege in documents concerning other topics.

1 Phipson on Evidence, 14th Edition.
2 (1996) 39 NSWLR.
3 *Chatry Martin v Martin* [1953] 2 QB 286.

What lessons can be learned?

If joint venture parties wish to seek to preserve privilege in relation to advice from external advisors concerning their own private interests then, ideally, this should be set out in a retainer letter. Where there is an existing retainer which is in general terms, it should be updated to include the private advice being sought Another solution would be to agree a communication protocol that clearly demarcates the boundaries of the joint privilege.

Notwithstanding these possible arrangement parties should be aware that an Australian court will look at the substance of the relationship between the parties rather than the terms of the retainer letter or protocol. If the communications in question are so intertwined with the joint interests, then, on the basis of current authorities, no amount of careful drafting will avoid disclosure. Where that is the case, parties should exercise caution when discussing matters internally or with external advisors where these discussions could later form the subject of a dispute. Although often difficult or impractical to achieve, where sensitive documents are in issue or are likely to be generated, advice should be taken prior to the creation of such documents.

While a joint venture can often start out as having all the hallmarks of a *"marriage made in heaven"*, they can end up in divorce and acrimony. It is therefore important to protect against the consequences and seek legal advice at an early stage to protect, as far as possible, against disclosure of sensitive documents.

For more information, please contact Nick Longley, Partner, on +61 (0)3 8601 4585 or nick.longley@hfw.com, or Brian Rom, Associate, on +61 (0)3 8601 4526 or brian.rom@hfw.com, or your usual contact at HFW.

Lawyers for international commerce

HOLMAN FENWICK WILLAN
Level 41, Bourke Place
600 Bourke Street
Melbourne
Victoria 3000
Australia
T: +61 (0)3 8601 4500
F: +61 (0)3 8601 4555

hfw.com