Dan Star's Federal Court Judgements

EVIDENCE

Legal professional privilege – Communication of legal advice to overseas regulator – Whether existence and waiver of privilege under common law principles

In Cantor v Audi Australia Pty Ltd [2016] FCA 1391 (22 November 2016), the Court (Bromwich J) upheld claims of legal professional privilege (LPP) and rejected claims of waiver of LPP.

The privilege dispute arose in the course of five parallel class actions by purchasers or lessees in Australia of various diesel engine models of Volkswagen, Audi or Skoda motor vehicles. The substantive proceedings concern whether the vehicles had certain software that detected when a test vehicle was being assessed for regulatory approval by the federal authority for motor transport in Germany (the German regulator). The applicants allege that the software affecting the operation of the vehicles during test conditions is a 'defeat device' forbidden under German and Australian law.

In September 2015, the German regulator commenced investigations into the software that affected laboratory test performance and its impact on approvals that had been given to vehicles. On 25 September 2015, the German regulator wrote to Volkswagon AG and other VW parties and by its letter ordered certain things and made certain requests (at [12]-[13]). Between 28 September 2015 and 6 October 2015, Volkswagon AG sought and obtained advice in writing from their law firm in Germany, Freshfield Bruckhaus Deringer LLP, which was provided in the form of a memorandum (the Freshfields document). On 7 October 2015, Volkswagon AG wrote to the German regulator and referred to and enclosed the Freshfields document. Subsequently parts of the Freshfields document were reproduced in documents of the German regulator to Volkswagon AG communicating administrative procedures as the regulator dealing with issues concerning the affected vehicles (the ordinances). Volkswagon AG claimed LPP over the communications comprising the Freshfields document and references to its contents in other documents (namely, the ordinances).

It was common ground that the issues in dispute as to the existence of LPP and its waiver were governed by Australian law and, relevantly, the common law (and not the *Evidence Act 1995* (Cth)): at [32].

The Court provided a detailed analysis of the legal principles and authorities on the existence of LPP (at

[56]-[74]) and implied or imputed waiver (at [75]-[99]). In relation to the latter, Bromwich J examined the different perspectives in different judgments in the major cases of Goldberg v Ng (1995) 185 CLR 83 (as well as in the Court of Appeal) and *Mann v Carnell* (1999) 201 CLR 1: (at [84]-[88]).

The Court held that LPP attached to the Freshfields document (at [117]). From considering the form, context and content of it, the Court said "it is plainly and unambiguously legal advice of the kind that would be expected to be provided by any competent lawyer, and especially by a major law firm': at [109]. Although not true of or required of all legal advices, the Freshfields document was not in the form of a submission, did not propose a solution, and was 'relatively pure legal opinion'. It satisfied the dominant purpose test (at [111]). In relation to the provision of it to the German regulator, "there was no evidence to show that Volkswagon AG had made any decision in relation to the use of the Freshfields document before it was furnished": at [112], [115].

LPP also attached to the subsequent communications by the letter to the German regulator and the ordinances by the German regulator (at [121]-[125]). The Court found at [122] that the covering letter referring to the Freshfields document "came under the umbrella of privilege that was maintained in relation to that document. It would be artificial in extreme to suggest that privilege is not maintained because any additional step is taken of this kind." The ordinances were communications from the German regulator back to Volkswagon AG (or Audi AG) as the holder of the privilege in relation the document (at [123]). They did not amount to fresh or new communications, distinguishable from the situation in *Seven Network Ltd v News Ltd* (2005) 144 FCR 379: at [124] (see also [121]).

The Court also found there had been no imputed waiver by third party communication and use (at [133]-[140]) or reliance in litigation (at [145]-[149]).

MIGRATION LAW

Migration agent engaged in fraud – Effect on visa applicant

The Full Court (Kenny, Griffiths and Mortimer JJ) considered fraud in an administrative law context in two appeals: *Singh v Minister for Immigration and Border Protection* [2016] FCA 141 *(Singh)* and *Gill v Minister for Immigration and Border Protection* [2016] FCAFC 142 *(Gill)*.

In both cases, the same migration agent had engaged in fraudulent conduct in the course of making separate visa applications for his two clients by providing false information to the Department concerning their skills. Both visa applications were refused and both visa applicants were unsuccessful in their separate merits review and judicial review applications. In both cases the Full Court allowed the appeals.

In *Singh*, it was held that the primary judge erred by dismissing the judicial review application on the ground of lack of utility.

In *Gill*, it was held that the primary judge erred in failing to address a question which was of central importance, namely whether the appellant's "indifference" or imputed general authority to his agent extended to whether or not the agent's conduct in assisting the appellant to make his visa application went so far as to include unlawful or dishonest conduct (at [48]).

Protection visa Jurisdictional error from erroneous assumption that formed a critical plank in the Tribunal's ultimate decision

In *ABA15 v Minister for Immigration and Border Protection* [2016] FCA 1419 (28 November 2016), the Federal Court allowed an appeal from of the Federal Circuit Court of Australia and set aside decision of the then named Refugee Review Tribunal (Tribunal).

The Tribunal found that the appellant, a Tamil citizen of Sri Lanka, did not satisfy the criteria for a protection visa under s 36(2)(a) or (aa) of the *Migration Act 1958* (Cth) (Act). A ground of review based on the Tribunal's assessment in relation to the appellant's credibility was dismissed (at [33]-[40]). However the Court (Charlesworth J) held that there was a jurisdictional error by the Tribunal in its determination of a factual finding that formed a critical plank in the Tribunal's ultimate conclusion that the appellant did not satisfy the grant of a visa under s 36(2)(aa) of the Act.

The Tribunal found that whilst the appellant would likely be arrested upon returning to Sri Lanka for departing illegally, he would only be incarcerated for up to a fortnight before being granted bail and would therefore not suffer significant harm ([at 14]). According to the Tribunal, bail is routinely given on the accused's recognisance, although the accused's relative must also provide surety (at [46]). The Court found at [49] that the Tribunal in its reasoning had assumed that a relative of the appellant would provide surety, thus bringing an end to his incarceration after a short period. This unstated assumption underpinned the Tribunal's factual finding that the appellant spending up to a fortnight in cramped and uncomfortable conditions did not constitute 'significant harm' under s 36(2)(aa) of the Act (at [50]). Such a finding was not logically supported, and not capable of being supported, by material before the Tribunal (at [52]).

This error did not affect the appellant's outcome under s 36(2)(a) of the Act (at [54]). However, the Tribunal's conclusion on s 36(2)(aa) was materially affected so as to amount to jurisdictional error (at [55]-[58]). One form of significant harm under s 36(2)(aa) involves degrading treatment or punishment. In determining whether the appellant would suffer 'degrading treatment or punishment' (for the purposes of the definition of 'significant harm' in s 36(2A)), the likely period of detention was clearly a relevant consideration. At [57]: 'a subjective intention to cause extreme humiliation may be more readily inferred in respect of a lengthy period of incarceration than it might in respect of a relatively brief period.' The Court held that it could not be safely concluded that the Tribunal would make the same conclusion as it did had it applied statutory criteria to a longer detention period.

The appellant also argued that the Tribunal breached its obligation under s 425 to put him on notice of the finding that his relative would provide surety to secure his bail (at [60]). In *Minister for Immigration and Border Protection v SZTQS* [2015] FCA 1069, the Court (Griffiths J) held that the s 425 was breached by failing to provide notice of a finding that a relative would provide surety. In that case, the finding was a 'crucial plank' in the Tribunal's reasoning towards the conclusion that there was no significant harm (at [66]). However in the present case Charlesworth J found that the Tribunal's assumption 'was not an issue dipositive of the Delegate's decision such that the appellant would otherwise have been on notice of the assumption, potentially forming a critical plank in the Tribunal's own reasoning on review of that decision': (at [70]).

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