Trouble in Paradise Papers: privilege may not found a cause of action

Claire Roberts reports on *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 (14 August 2019)

Legal professional privilege is not a legal right that may found a cause of action. The High Court unanimously held in *Glencore International AG v Commissioner of Taxation* [2019] HCA 26 that it is an immunity against the exercise of powers which would otherwise compel the disclosure of communications. Where disclosure does not need to be compelled – because the party wanting to use a document, or information, already has it – any injunction must be sought on an alternative basis.

Background

The 'Paradise Papers' are a collection of documents taken from offshore entities and made available to the International Consortium of Investigative Journalists. A significant portion of the documents were taken from electronic files of the law firm Appleby (Bermuda) Limited (Appleby). Appleby clients affected by the data breach included Apple, Nike, and members of the British royal family. (The 'Paradise Papers' followed the earlier 'Panama Papers' leak, which had involved documents from the Panama firm Mossack Fonseca).

The plaintiffs (Glencore) asked the defendants to return documents that Glencore claimed were subject to legal professional privilege (the Glencore documents) and to provide an undertaking that the Glencore documents would not be relied on or used. When these requests were refused, Glencore brought a proceeding in the High Court's original jurisdiction seeking to restrain the defendants from using the Glencore documents, and also for delivery up.

The High Court did not consider the underlying question of whether the Glencore documents were privileged, and concluded that a submission about s 166 of the *Income Tax Assessment Act 1936* (Cth) did not require determination in the circumstances of the case.

A right best characterised as an immunity

The High Court considered the history of privilege as a right. Early examples of the use of privilege – such as to shield a witness from the obligation to answer questions in Court – were consistent, the Court said, with the notion of privilege as an immunity rather than a substantive cause of action (see [15] – [18]).

The Court also addressed the policy

rationale behind privilege: the public interest in encouraging parties to access legal advice. This was, the Court noted, a critical right. To the extent that the interest came into tension with the public interest of fairly conducted litigation, privilege was paramount: *Grant v Downs* (1976) 135 CLR 674. This was not so as to further a client's personal interests but to enhance the administration of justice generally (at [10], [27] – [30]).

The plaintiffs contended that this policy basis supported the view that privilege was actionable. The Court's view was that public policy was not a ground for change in and of itself: policy considerations might guide the development of law, but can only do so where settled principles provide an avenue. The Court did not consider the possibility of creating a new, actionable right to be open to it in these circumstances (at [13], [40] – [42]).

While privilege is a substantive immunity, the Court concluded, it is not an actionable right. A right to resist disclosing information or documents does not serve as a sword in circumstances where disclosure has already happened.

Domestic and foreign cases distinguished

The plaintiffs had argued that a number of domestic and international cases supported the case it sought to advance. The Court found that these could be distinguished.

Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd (2013) 250 CLR 303 did not stand for a 'broader proposition' which would allow privilege to be asserted as the basis of an injunction (at [36]). In Expense Reduction, a case about inadvertent disclosure by solicitors, the Court did not need to consider the availability of an injunction because case management powers were sufficient to make the orders requested.

Two key foreign cases were found to be principally concerned with whether there had been a loss of the necessary quality of confidentiality to found an injunction.

In *Lachaux v Independent Print Ltd* [2017] EWCA Civ 1327, a publisher in a defamation case was prohibited from using information provided to it in breach of confidence. The High Court found that that case turned on its unique facts and contained commentary that supported the interpretation the High Court had taken of earlier authorities (at [37]).

In *Wee Shuo Woon v HT SRL* [2017] 2 SLR 94, hacked emails were posted online, but similarly found to retain a confidential character. In that case, the Court of Appeal of Singapore considered it significant that the emails comprised only a small proportion of the data stolen, so the applicant must have known that they were confidential and privileged when he searched to find them. Again, the High Court in this case indicated that the centrality of confidentiality of that case meant that it provided no support for privilege as a cause of action (at [38]).

Alternative course of action

The Court suggested that the equitable basis on which Glencore might seek an injunction was an apprehended breach of confidential information (see particularly [6], [19], [34]-[39]). That right is well established.

While it was not necessary to decide the point, the Court did indicate that Glencore would need to overcome difficulties to obtain an injunction to protect the confidential nature of the Glencore documents. First, the fact that the Glencore documents have been widely disseminated is relevant to the question of whether they retain a confidential character. Secondly, there had been no allegations about the defendants' conduct or knowledge in obtaining the Glencore documents (see particularly [7], [33]). The Court also expressed concern about a hypothetical circumstance in which the defendants could be tasked with assessing tax obligations on a basis known to be wrong (at [33]). BN