

CASES AND TRIBUNAL DECISIONS

Waiving goodbye to Legal Professional Privilege

The Queensland Local Government Superannuation Board v Lynda Allen [2016] QCA 325

[Link to decision](#)

Background

The plaintiff sought declarations that the decisions of a superannuation fund to decline her claim for total and permanent disability (TPD) benefits were void and that she was entitled to that benefit under the trust deed.

As part of disclosure the trustees' 'complaints log' was disclosed. That log revealed that legal advice had been sought as to whether, following a request for review, the board of trustees had to review, for a third time, its decline determinations. It further revealed that the legal advice had been received and was to the effect that the decision should be further reviewed.

Another document disclosed and headed 'The Queensland Local Government Superannuation Claim Submission for Consideration by the Board' similarly revealed the seeking, receipt and conclusions contained in that legal advice.

The plaintiff solicitor sought disclosure of the actual legal advice claiming that legal professional privilege had been waived.

Notwithstanding that there was evidence, the legal advice described was only one of four discrete issues addressed in the letter and that the actual legal advice was not before the board when its decision on review was made, Smith DC JA found it was a document that was relevant to the proceedings and found that in the circumstances, the principles of fairness and inconsistency dictated a conclusion that legal professional privilege was impliedly waived.

Decision

The decision of the District Court was appealed to the Court of Appeal of Queensland. The Court of Appeal held that a reference in the disclosed complaint log to legal advice was not inconsistent with the maintenance of legal professional privilege. The onus of proving that legal professional privilege applied was on the trustee, but having done so, the onus of proving that there was a waiver of that privilege was on the applicant and she failed to discharge that onus.

The issue of joint privilege was raised for the first time at the appeal on the basis that as the trustee had fiduciary obligations with respect to the beneficiary of the fund, any privilege that attached to advice provided to the trustee was a joint privilege for the benefit of the beneficiary. This was unsuccessful as it was held that the legal advice that was obtained was obtained for the benefit of the trustees (and not jointly) as it was a legal advice sought in relation to the day to day administration of the trust.

Implications

As claims themselves become more complex and adversarial, the need for legal advice to manage those claims also increases. This case serves as a reminder that the legal professional privilege that attaches to that advice can, and increasingly will be, challenged. Courts will look not only to the content of the documents, but who saw the documents and for what purpose, in determining if the actions of the insurer or trustee are consistent with the maintenance of the confidential nature of the advice.