

In-house solicitors – does advice need an independent character?

In *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc*¹ ('Archer Capital') Wigney J considered whether that for the dominant purpose test with respect to legal professional privilege to be satisfied in respect of an in-house solicitor, it must also be established that the communication was sent or received by the solicitor in his capacity as an independent legal advisor. The challenge was with respect to whether privilege could be asserted over documents said to have passed between the in-house solicitor and employees of the respondent. The challenge was founded on an allegation that the in-house solicitor lacked independence.

His Honour Justice Michael Wigney held:

- whether the privilege arises is a question of fact. The advice is to have an "independent character" which flows from the nature of the professional relationship between the relevant legal adviser and their employer;²
- for privilege to attach to the communications it must be provided by the legal adviser who is consulted in a professional capacity in relation to a professional matter, and the communications are made in confidence and arise from the relationship of lawyer and client;³
- doubted there was "any reason in principle why to attract privilege in these circumstances it would be necessary to also satisfy some element of independence on the part of the employed solicitor, for example, by proving that the lawyer was not subject to pressure or other interference arising from the employment relationship... I doubt... there is a separate or distinct requirement to prove independence..."⁴
- "... any requirement of independence on the part of an in-house lawyer is an aspect of the relationship between the lawyer and the employer (client) and the capacity in which the lawyer is consulted".⁵

Wigney J's approach is different to that of Gillard J (in *Australian Hospital Care (Pindara) Pty Ltd v Duggan*⁶) and Boddice J (in *Aquila Coal Pty Ltd v Bowen Central Coal Pty Ltd*⁷) which relied on a presumption and evidentiary onuses respectively.

¹ [2013] FCA 1098.

² at [60] to [61].

³ at [62] citing Dawson J in *Waterford v The Commonwealth* (1986 – 87) 163 CLR 54 at 95.

⁴ *ibid* [73].

⁵ *ibid* [73].

⁶ [1999] VSC 131.

⁷ [2013] QSC 82.