For Your Eyes Only – Owners Corporation Records & Legal Professional Privilege

A strata managing agent acting for an owners corporations involved in a legal proceedings usually holds sensitive documents relating to the proceedings. Other parties in those proceedings may wish to access those records. One of those parties or an associate may own a lot in the scheme and assert a right to inspect such records under section 182 of the Strata Schemes Management Act 2015 ("the Act").

The problem for owners corporations and their managing agents in these situations is how best to preserve legal professional privilege. A recent case, *The Owners — Strata Plan No. 74602 v Eastmark Holdings Pty Ltd [2013] NSWCA 221* ("Eastmark Case"), gave some guidance.

Some issues remain, but the position appears to be as follows:

1. Communications between an owners corporation or its strata managing agent and the owners corporations' lawyers may be protected by legal professional privilege. This may occur where the communication was for the dominant purpose of providing the owners corporation with legal advice or legal services in connection with pending or anticipated proceedings.

2. Such communications may also be protected from inspection under section 182 of the Act, with the Eastmark Case stating at [26] That "…While Eastmark , in its capacity as a lot owner, may be entitled to access to certain of the disputed documents, it is not entitled, in its capacity as a potential defendant in adversarial proceedings brought against it by the Owners Corporation, to access to documents that relate to those disputes."

3. If the owners corporation or its strata manager gives such a lot owner access to such advice without qualification, privilege may be lost and the lot owner may be able to use the advice in the proceedings.

We suggest that, in order to best protect the interests of owners corporations:

1. In the case of hardcopy communications relating to legal proceedings or other advice provided to the owners corporation, particularly correspondence to its solicitor providing instructions and correspondence from its solicitor providing advice, such documents should be kept in a separate folder marked "privileged".

2. In the case of electronic communications, such as e-mail correspondence, these should be kept in a separate directory, also marked "privileged".

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4. Strata managing agents should exercise caution before permitting anyone to access legal advice which is or may become the subject of legal proceedings, by means of a section 182 inspection. A lot owner not involved in the proceedings to which the advice relates may be entitled to such access. A lot owner involved in the proceedings to which the advice relates is not. In either case, the agent should either:

   - deny access on the basis that the advice is privileged; or
   - at the least, advise the party seeking access, in writing, before access is granted, that access is being permitted for the sole purpose of a section 182 inspection, without waiving any privilege which may be attached and reserving the right to claim such privilege.

This procedure will maximise the owners corporation's prospects of claiming privilege, should the need arise.

It can be quite difficult to determine whether privilege attaches to a particular document. It would be appropriate to obtain legal advice if there is any doubt.

Key takeaways

- Legal professional privilege protects communications between owners corporations and their lawyers.
- Access to privileged documents can be denied to lot owners involved in legal proceedings.
- Documents should be organised to maintain privilege, marked as 'privileged'.
- Caution is advised when granting access to legal advice during section 182 inspections.
- Legal advice should be sought if there is uncertainty about document privilege.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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