Savage & Ors v Modern Mustering Pty Ltd & Ors [2014] NTCA 06

PARTIES:	SAVAGE, Robert John, SAVAGE, Lilian Rose COOK, William John and COOK, Letitia Valerie trading as SUPLEJACK PASTORAL (NT) (A FIRM) v MODERN MUSTERING PTY LTD (ACN 112 371 543) and HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695) and LESLIE, Zebb Raymond AND BETWEEN: COOK, Robert v MODERN MUSTERING PTY LTD (ACN 112 371 543) and HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695) and LESLIE, Zebb Raymond

	AND BETWEEN:
	SAVAGE, Robert John, SAVAGE, Lilian Rose COOK, William John and COOK, Letitia Valerie trading as SUPLEJACK PASTORAL (NT) (A FIRM)
	v
	MODERN MUSTERING PTY LTD (ACN 112 371 543)
	and
	HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695)
	and
	LESLIE, Zebb Raymond
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 13 of 2013 (21132442), AP 1 of 2014 (21132488) and AP 2 of 2014 (21132442)
DELIVERED:	26 November 2014
HEARING DATES:	10 June 2014
JUDGMENT OF:	KELLY J

APPEAL FROM: MASTER LUPPINO

CATCHWORDS:

PRACTICE AND PROCEDURE – Discovery – Order for particular discovery

PRACTICE AND PROCEDURE – Legal professional privilege – Implied waiver of privilege – Effect of pleading reasonableness of settlement on legal professional privilege in advice re settlement and privilege re settlement negotiations – Pleading of reasonableness does not *ipso facto* amount to a waiver of privilege

PRACTICE AND PROCEDURE – Construction of settlement deed – Whether inference available raising an issue re abuse of process – No such inference available

Evidence (National Uniform Legislation) Act s 11, s 125

Supreme Court Act s 53(4)(a)

Supreme Court Rules r 29.08

Worker's Rehabilitation and Compensation Act

Banjo (NT) Pty Ltd v Ward Keller Pty Ltd [2006] NTCA 1; *Goldberg v Ng* (1995) 185 CLR 83; *House v The King* (1936) 55 CLR 499; *Mann v Carnell* (1999) 201 CLR 1, applied.

Burn Brite Lights (Victoria) Pty Ltd v Koyo Ltd [2002] SASC 360; *Rhyse Holdings Pty Ltd & Ors v McLaughlins (A Firm) & Anor* [2002] QCA 122; *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603, considered.

Cook v Modern Mustering Pty Ltd & Ors and Savage & Ors v Modern Mustering Pty Ltd & Ors [2013] NTSC 78; *DSE (Holdings) Pty Ltd v Intertain Inc* (2003) 127 FCR 499; *Liquorland (Australia) Pty Ltd & Anor v Anghie & Anor; Anghie & Ors v Liquorland (Australia) Pty Ltd & Anor* (2003) 7 VR 27; *Van der Lee & Ors v State of New South Wales & Ors*

[2002] NSWCA 286; *Yokogawa Australia Pty Ltd v Alstom Power Pty Ltd* (2009) 262 ALR 738, referred to.

REPRESENTATION:

Counsel:

Appellant:	N Christrup
First & Second Respondent:	R Williams QC with Professor L McCrimmon

Solicitors:

Appellant:	Hunt & Hunt as town agents for Curwoods Lawyers
First & Second Respondent:	Paul Maher

Judgment category classification:	B
Judgment ID Number:	KEL14008
Number of pages:	24

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Savage & Ors v Modern Mustering Pty Ltd & Ors [2014] NTCA 06
No. AP 13 of 2013 (21132442), AP 1 of 2014 (21132488) and
AP 2 of 2014 (21132442)

BETWEEN:

ROBERT JOHN SAVAGE, LILIAN ROSE SAVAGE, WILLIAM JOHN COOK AND LETITIA VALERIE COOK trading as SUPLEJACK PASTORAL (NT) (A FIRM)
Appellant

AND:

MODERN MUSTERING PTY LTD (ACN 112 371 543)
First Respondent

AND:

HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695)
Second Respondent

AND:

ZEBB RAYMOND LESLIE
Third Respondent

AND BETWEEN:

COOK, Robert
Appellant

v

MODERN MUSTERING PTY LTD (ACN 112 371 543)
First Respondent

and

HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695)
Second Respondent

and

LESLIE, Zebb Raymond
Third Respondent

AND BETWEEN:

SAVAGE, Robert John,
SAVAGE, Lilian Rose
COOK, William John and
COOK, Letitia Valerie trading as SUPLEJACK PASTORAL (NT) (A FIRM)
Appellant

v

MODERN MUSTERING PTY LTD (ACN 112 371 543)
First Respondent

and

HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695)
Second Respondent

and

LESLIE, Zebb Raymond
Third Respondent

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 26 November 2014)

[1] These proceedings consist of three appeals against interlocutory decisions of the Master ordering particular discovery of various documents in two related actions. As leave to appeal was granted by a single judge, the Court of Appeal is constituted by a single judge.[1]

Background

[2] The related actions arise out of a helicopter accident in 2008 in which Mr Robert Thomas Cook ("Cook") was severely injured. Cook was at the relevant time an employee of the appellant in two of these appeals[2] ("Suplejack"). Suplejack contracted the first and second respondents in all of the appeals to provide aerial mustering services on its cattle station, and the third respondent in all appeals was a helicopter pilot employed by the second respondent.

[3] On 30 September 2008, the third respondent was flying a helicopter in the course of providing the aerial mustering services. Cook was on board the helicopter. The helicopter crashed resulting in Cook sustaining severe injuries.

---

1 *Supreme Court Act* s 53(4)(a)

2 AP 13 of 2013 and AP 2 of 2014

[4] Cook commenced proceedings against Suplejack seeking statutory benefits pursuant to the *Workers Rehabilitation and Compensation Act* (NT) ("the Act") ("the Work Health proceeding") and later commenced a common law action[3] naming all three respondents as defendants ("the common law proceeding").

[5] Suplejack settled the Work Health proceeding for a lump sum payment to Cook of $10.5 million (inclusive of Suplejack's liability for future payments) and commenced proceedings[4] to recover the payments made under that settlement from the respondents ("the recovery proceeding"). The common law proceeding also continues on foot.

[6] It was a term of the deed of settlement of the Work Health proceeding that Cook appoint Andrew Spearritt of Curwoods Lawyers as his solicitor in respect of the common law proceeding. Mr Spearritt was the solicitor engaged by QBE (Suplejack's Work Health insurer) for the purposes of the Work Health proceeding. It was a further term of the deed of settlement that QBE would pay any costs liability incurred by Cook in the common law proceeding after the settlement date.

Proceedings before the Master

[7] On 7 October 2013, the respondents (as defendants in the recovery proceeding) filed a summons seeking orders for specific discovery by Suplejack of (*inter alia*) the following categories of documents:

---

3 No 12 of 2011

4 No 119 of 2011

…

(d) all documents relating to, evidencing, recording or constituting negotiations which lead to the agreement contained in the deed between Robert Cook, Suplejack Pastoral NT and QBE Insurance (Australia) Limited made on 17 December 2012;

(e) all advices, including notes or memoranda of advice provided orally, to the parties trading as Suplejack Pastoral NT and/or to QBE Insurance (Australia) Limited on the reasonableness of the settlement effected by the deed of release dated 17 December 2012;

(f) all documents evidencing the calculation of the damages, and the components of the damages claimed by, or payable to, Mr Robert Cook which formed the basis of, or were relevant to, the amount agreed to be paid to Mr Robert Cook under the deed between Mr Robert Cook, Suplejack Pastoral NT and QBE Insurance (Australia) Limited;

(g) copies of documents containing written legal advice including advice provided by correspondence, on the potential liability to pay damages as compensation to Robert Thomas Cook and in respect of the quantum of such damages and compensation; and

(h) a copy of any retainer agreement brought into existence pursuant to clause 20 of the deed made on 17 December 2012.

[8] On the same day, the respondents (as defendants in the common law proceeding) filed a summons seeking [in paragraph 1(a)] an order for specific discovery by Cook of all documents which evidence or constitute a retainer or contract of retainer by Cook of Andrew Spearritt to act as Cook's legal representative in the common law proceeding.

[9] On 20 November 2013, the Master handed down a decision allowing the applications for specific discovery in both actions.

[10] On 17 December 2013, the Master made orders implementing his decision of 20 November.

(a) In the recovery proceeding, orders were made in the terms of paragraph [1][d]-[g] of the defendants' summons of 7 October 2013 (set out in [7](d), (e), (f) and (g) above).

(b) On both the common law and recovery proceedings the Master made the following order:

> Within 14 days of the authentication of this order the plaintiff make discovery of all documents which evidence or constitute a retainer or contract of Andrew Spearritt by Robert Thomas Cook in respect of proceedings number 12 of 2011 [ie the common law proceeding] (including but not limited to documents negotiating or proposing terms of the retainer, any formal retainer document whether executed or otherwise, any costs disclosure document, all documents requesting or seeking instructions from Mr Cook all documents, including file notes of telephone conversations, which evidence Mr Cook providing instructions to Mr Spearritt including documents evidencing invoicing and payment of legal costs in the proceedings) by Mr Cook of Andrew Spearritt to act as Mr Cook's legal representative in proceeding number 12 of 2011 by placing those

> documents in a sealed envelope (which shall remain sealed until further order) and filing the envelope at the registry.

This order elaborated upon the order requested in paragraph [1][a][5] on the defendants' summons in the common law proceeding, and (it appears), paragraph [1][h][6] of the defendants' summons in the recovery proceeding.

[11] On 14 January 2014, Cook filed a list of documents in the common law proceeding and Suplejack filed a list of documents in the recovery proceeding claiming legal professional privilege over certain documents. The documents over which legal professional privilege was claimed were placed in sealed envelopes in accordance with the Master's order of 17 December.

[12] At some point between 14 January and 6 February 2014 the Master inspected the documents in the sealed envelopes and on 6 February 2014 ordered Suplejack to produce for inspection the documents numbered 2.4 ('Letter from Curwoods Lawyers to Robert Cook') and 2.8 ('Dispute Resolution Agreement') on its list of documents in the recovery proceeding, and ordered Cook to produce for inspection the document numbered 2.5 ('Email from Curwoods Lawyers to Hunt & Hunt Lawyers') on his list of documents in the common law proceeding. This decision was communicated to the parties by email. No further reasons were given.

---

5 See [8] above.

6 See [7] above.

[13] Cook sought and was granted leave to appeal against the order of 6 February in the common law proceeding, and, in the recovery proceeding, Suplejack sought and was granted leave to appeal against both the order of 6 February 2014 and the order of 17 December 2013 referred to in [10](a) above.

AP 13 of 2013: Appeal by Suplejack against the order of 20 November for discovery of otherwise privileged documents relating to the settlement of the Work Health proceeding

[14] In AP 13 of 2013 Suplejack was granted leave to appeal against the orders for particular discovery of the following categories of documents:[7]

(a) all documents relating to, evidencing, recording or constituting negotiations which lead to the agreement contained in the deed between Robert Cook, Suplejack Pastoral NT and QBE Insurance (Australia) Limited made on 17 December 2012,

(b) all advices, including notes or memoranda of advice provided orally, to the parties trading as Suplejack Pastoral NT and/or QBE Insurance (Australia) Limited on the reasonableness of the settlement effected by the deed of release dated 17 December 2012,

(c) all documents evidencing the calculation of the damages, and the components of the damages claimed by, or payable to, Mr Robert Cook which formed the basis of, or were relevant to, the amount agreed to be

[7] These are the categories of documents set out in [7](d), (e), (f) and (g) above.

paid to Mr Robert Cook under the deed between Mr Robert Cook, Suplejack Pastoral NT and QBE Insurance (Australia) Limited, and

(d) copies of documents containing written legal advice, including advice provided by correspondence, on the potential liability to pay damages as compensation to Robert Thomas Cook and in respect of the quantum of such damages and compensation.

[15] The grounds of appeal are twofold. Suplejack maintains that:

(a) the Master made errors of fact and law in holding that the documents referred to above were relevant to a matter in issue between the parties; and

(b) the Master made an error of fact and law in holding that legal professional privilege over such documents had been waived.

Principles: Appeal from a Discretionary Decision

[16] An order based on the exercise of a discretion is open to review where there has been some error in the exercise of the discretion, such as, *inter alia,* acting upon the wrong principle or allowing extraneous or irrelevant matters to guide or affect the decision: *House v The King.*[8]

[8] (1936) 55 CLR 499 at 505 (per Dixon, Evatt and McTiernan JJ)

Implied Waiver of Privilege

[17] Suplejack contends that by pleading that the settlement of the Work Health proceeding was reasonable, the only issue it has raised is whether, as a matter of objective fact, the settlement reached was reasonable. That being the case, neither the documents relating to the negotiations nor the legal advice obtained in relation to the settlement are relevant to any issue in the recovery proceeding. Further, both the legal advice and the negotiation documents are privileged, being subject to legal professional privilege and negotiation privilege.

[18] In written submissions, the respondents contended that whether or not Suplejack intended to rely on the legal advice which was ordered to be discovered was not relevant to the issue of whether or not the legal advice was discoverable, and relied on *Burn Brite Lights (Victoria) Pty Ltd v Koyo Ltd*.[9] However, the issue in this appeal is not whether the documents the subject of the Master's orders would be discoverable if not the subject of legal professional privilege, but whether legal professional privilege in those documents has been waived.

[19] The documents referred to in [14](b), (c) and (d) above would be subject to legal professional privilege if that privilege has not been waived. Similarly,

---

9 [2002] SASC 360 at [14]

the documents referred to in [14](a) above would be subject to negotiation privilege if that privilege has not been waived.

[20] A person impliedly waives legal professional privilege where the conduct of the person is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect, such inconsistency being informed, where necessary, by considerations of fairness in all the circumstances of the particular case, not some overriding principle of fairness operating at large.[10] Disclosure of legal advice for the purpose of explaining or justifying the client's actions, will waive privilege if such disclosure is inconsistent with the confidentiality which the privilege serves to protect.[11]

[21] In deciding to order discovery of the documents in question, the Master accepted the submission that, once reasonableness of a settlement has been pleaded, a waiver of privilege attaching to any legal advice leading to that settlement occurs, citing the following extract from the judgment of Brennan CJ in *Unity Insurance Brokers* in support:[12]

> "The plaintiff must show that the sum accepted in settlement was reasonable. The test of reasonableness is, as Hayne J says, an objective one. Evidence of the advice which the insured received to induce it to accept the settlement is not proof in itself of the reasonableness of the settlement advised. The factors which lead to the giving of the advice are factors relevant to the reasonableness of the settlement but the only relevance of advice given by the insured's

---

[10] *Mann v Carnell* (1999) 201 CLR 1 at 13 (per Gleeson CJ, Gaudron, Gummow and Callinan JJ); *Goldberg v Ng* (1995) 185 CLR 83 at 96 (per Deane, Dawson and Gaudron JJ)

[11] *Mann v Carnell* (1999) 201 CLR 1 at 15 (per Gleeson CJ, Gaudron, Gummow and Callinan JJ)

[12] *Cook v Modern Mustering Pty Ltd & Ors and Savage & Ors v Modern Mustering Pty Ltd & Ors* [2013] NTSC 78 at [37] and [38]

> legal advisers to settle is that it tends to negative the hypothesis that the insured acted unreasonably in accepting the settlement."[13]

[22] In my view, this part of the appeal should be allowed. The appellant has not impliedly waived privilege over any legal advice received in relation to the settlement of the Work Health proceeding or in relation to the other documents ordered by the Master to be discovered in the order of 17 December 2013.

[23] The passage from *Unity Insurance Brokers* cited by the Master does not establish the proposition that once reasonableness has been pleaded, there is an implied waiver of privilege attaching to any legal advice leading to that settlement. That passage says that the only relevance of legal advice given in relation to a settlement is that it tends to negative the hypothesis that the insured acted unreasonably in accepting the settlement.

[24] In *Unity Insurance Brokers*, Brennan CJ was concerned with the situation in which the reasonableness of an insured's conduct was at issue. His Honour said at [3]:

> "When a claim is met by an arguable defence, a compromise is a natural and foreseeable result. Therefore it is a natural and foreseeable result of whatever creates an arguable defence to a claim that the claim will be compromised. In the present case, whatever weakness there was in the insured's case against the insurer was attributable to the broker's negligent breach of its retainer or its negligence. The acceptance in settlement of the insured's claim against the insurer of a sum less than a full indemnity was something which occurred in the natural course of events or which was in contemplation of the parties at the time of the engagement of the

[13] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 at 608-609

> broker or was reasonably foreseeable at the time of the broker's negligence. A shortfall below a full indemnity was not so remote from the insurer's breach of retainer or negligence as necessarily to fall outside the area of compensable loss. The critical question is whether the insured's acceptance of a sum less than a full indemnity should be regarded as a result of breach of contract or of negligence. If the sum accepted in settlement were a reasonable sum to accept in settlement of the insured's claim for an indemnity against the insurer, a shortfall in the amount of the indemnity is, as a matter of common sense and experience, the result of the broker's negligence. But if the sum accepted were unreasonably low, the insured could not establish that the entire shortfall was the result of the broker's negligence. As the insured was obliged to act reasonably to mitigate any loss suffered by reason of the broker's breach of retainer or negligence, the loss incurred by the acceptance of an unreasonably low sum in settlement could not be attributed to the broker's wrongful conduct, either because the acceptance of such a sum was not a reasonable step to take in mitigation of the insured's loss or because it was not foreseeable that the insured would act unreasonably."[14] *[emphasis added]*

[25] That is not the issue here. In the present case, what must be shown by Suplejack (and what has been pleaded) is that the settlement was "reasonable", that is to say objectively reasonable, not that Suplejack acted reasonably in the circumstances.[15] For example, Suplejack may have obtained legal advice that, unbeknown to it, was plain wrong. It might be said that it was nevertheless reasonable for it to have acted on the faith of that advice. However, if that resulted in Suplejack settling the Work Health proceeding for a sum that was objectively not reasonable, then it would not succeed (or not succeed in full) in the recovery action. It would avail Suplejack nothing to say that it had acted reasonably in relying on legal

---

[14] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603 per Brennan CJ at 607-608

[15] See also the analysis of the issues arising from a similar pleading in *Yokogawa Australia Pty Ltd v Alstom Power Pty Ltd* (2009) 262 ALR 738 at [23], [57] and [126] in particular.

advice and, more importantly, Suplejack does not assert any such thing in its pleading. In those circumstances, it seems to me that the legal advice is not relevant to any issue in the recovery proceeding, and there is nothing in Suplejack's pleading that the settlement reached was reasonable that is inconsistent with maintenance of privilege in any legal advice obtained in relation to the settlement.

[26] The principle was articulated by this Court in *Banjo (NT) Pty Ltd v Ward Keller Pty Ltd*[16] as follows:

> [9] The appellant's loss as a result of the alleged negligent advice was the loss of the right of renewal of the lease. The lease was in fact renewed, but as a result of compromise, a feature of which was the allegedly unfavourable settlement of the appellant's claim for repairs and maintenance against the lessor. The issue at trial is not the appellant's state of mind or the legal advice given to the appellant relative to the settlement of the repair and maintenance claim against the lessor but whether as an objective fact that settlement was reasonable and constituted a financial loss to the appellant.
>
> …
>
> [11] … The respondent is not precluded from showing, at trial, that the claim against the lessor was in fact worthless, so no question of fairness arises. In other words, there is no inconsistency between the conduct of the appellant in the manner in which the appellant proposes to present its case at trial and the maintenance of the confidentiality and in those circumstances there is no implied waiver: see *Mann v Carnell* (1999) 201 CLR 1 at 13 (para[29]). Implied waiver does not arise because the respondent may wish to show that

[16] [2006] NTCA 1 at [9] and [11]

> the true cause of the appellant's loss was that the appellant settled relying on its new solicitor's advice.[17] (emphasis added)

[27] It will be different where a plaintiff pleads that he acted reasonably, and one of the factors going to the asserted reasonableness of his conduct is his reliance on legal advice. Such a pleading will be inconsistent with maintenance of privilege in that advice. It may also be different in cases where a plaintiff, by its pleading, puts its state of mind in issue, and where that state of mind is, or may have been, informed or affected by legal advice.[18] It will depend on the facts of the individual case.

[28] The respondents relied on the decision of the Queensland Court of Appeal in *Rhyse Holdings Pty Ltd & Ors v McLaughlins (A Firm) & Anor.*[19] However, that case is not authority for the proposition that a party who pleads the reasonableness of a settlement *ipso facto* waives privilege in relation to any legal advice received in relation to the settlement. In *Rhyse Holdings* the appellant pleaded that "the Defendants by their legal advisers undertook substantial investigations in relation to the allegations of the Plaintiffs made in the Statement of Claim in this action" in support of its claim against the third party respondents that it was reasonable to compromise the plaintiffs' claim. The question for the court in that case was whether those references

---

[17] This is because the implied waiver of privilege can only come about as a result of an act of the person entitled to the privilege, not the act (or wish) of another party.

[18] as for example in *Liquorland (Australia) Pty Ltd & Anor v Anghie & Anor and Anghie & Ors v Liquorland (Australia) Pty Ltd & Anor* (2003) 7 VR 27 and *DSE (Holdings) Pty Ltd v Intertain Inc* (2003) 127 FCR 499

[19] [2002] QCA 122

in the statement of claim put in issue the substance of legal advice received by the appellants and, accordingly, whether there was inconsistency between such reliance and the appellant's continued claim of privilege with respect to those investigations and the resultant advice.

[29] Each of these cases depends upon its own facts. The test is always that enunciated in *Mann v Carnell*:[20] namely, whether the conduct of the party in question is inconsistent with the maintenance of the confidentiality which the privilege is intended to protect. As the High Court in *Mann v Carnell* emphasised, this must be assessed "in all the circumstances of the particular case".

[30] In my view, by simply pleading that the settlement of the Work Health proceeding was reasonable, Suplejack has not acted inconsistently with the maintenance of privilege in relation to legal advice received in relation to that settlement or the negotiations leading to the settlement. Further, on the same analysis, there is no inconsistency between Suplejack's pleading and the maintenance of confidentiality in the other documents ordered to be discovered (documents relating to negotiations and calculation of damages in relation to the settlement).

---

20 *Supra* note 11, at 15

AP 1 of 2014 and AP 2 of 2014: Appeals by both Suplejack and Cook against orders for discovery of documents relating to the retainer of Mr Spearritt by Cook

[31] Both Suplejack and Cook were granted leave to appeal against the orders of the Master of 6 February 2014 that they produce for inspection certain documents[21] relating to the retainer by Cook of Mr Spearritt to act as Cook's solicitor in the common law proceeding.

[32] Mr Spearritt was the solicitor appointed by QBE (Suplejack's Work Health insurer) to defend the Work Health proceeding, and under the terms of the deed of settlement of the Work Health proceeding, Cook was obliged to retain Mr Spearritt to act for him in the common law proceeding. The basis for the Master's order was that the appointment of Mr Spearritt, in the circumstances, raised a "question" as to whether the common law proceeding amounted to an abuse of process. The alleged abuse of process was a suspicion that Cook may have given up or assigned his rights in the common law proceeding to QBE so as to provide QBE with a right of subrogation it would not otherwise have (QBE not being Cook's insurer).

[33] The respondents' contention in relation to the discovery of these documents, which the Master accepted, was summarised by the Master as follows.

> The argument put on behalf of the First and Second Defendants that an abuse of process might be occurring has its genesis in subrogation principles. As those principles apply to a policy in the nature of a worker's compensation insurance policy, the insurer only has the

[21] In the case of Suplejack, documents 2.4 and 2.8 on its list of documents of 14 January 2014 and in the case of Cook, document 2.5 on his list of documents dated 14 January 2014.

> right to subrogate in the name of the employer, Suplejack in this case. It has no right of subrogation to any common law claim by the employee, Cook in this instance. The First and Second Defendants submit that it can be inferred from the facts that the insurer is improperly making use of the name of Cook in the Common Law Action and is achieving an ulterior purpose namely, circumventing the absence of subrogation rights to the claim by Cook. Mr McCrimmon argues that as a result the First and Second Defendants are prejudiced as they are unnecessarily defending two sets of proceedings. It is well known that concurrent proceedings, albeit usually in different courts, can be an abuse of process. The use of court proceedings to secure a collateral advantage may also amount to an abuse of process.[22]

[34] The respondents argued, and the Master accepted, that there had been "a de facto assignment of the common law proceeding by Cook to QBE", or, at least, that an inference could be drawn from the deed of settlement that that might be the case, thus raising "a question" in the proceeding.

[35] The appellants (Suplejack and Cook) contend that this reasoning is flawed. The "ulterior purpose" alleged to constitute an abuse of process is the use of the common law proceeding to benefit QBE, rather than Cook. This "ulterior purpose" assumes that Cook has no continuing interest in the common law proceeding. That there was "a question" that this was so, was an inference the Master drew from clause 20 of the settlement deed which was in evidence before him. However, there is nothing in the deed of settlement from which such an inference could be drawn. Under that deed, QBE, as the employer's insurer, is to pay Cook a total of $10,500,000.[23]

---

[22] *Cook v Modern Mustering Pty Ltd & Ors and Savage & Ors v Modern Mustering Pty Ltd & Ors* [2013] NTSC 78 at [56]

[23] un-numbered clause on pp 2 and 3 of the deed

Cook must co-operate with QBE in the recovery action and QBE will pay his reasonable expenses in doing so.[24] Cook will appoint Mr Spearritt as his solicitor in the common law proceeding,[25] and QBE will pay any costs liability incurred by Cook in the common law proceeding after the settlement date.[26] If Cook recovers compensation or damages (the only suggested potential source of which would be the common law proceeding), Cook must pay to QBE the amount of the damages he receives or an amount calculated by reference to s 54 of the Act[27] whichever is less.[28]

[36] It follows that under s 54 of the Act (and clause 23 of the deed) the maximum amount that Cook could ever be liable to repay to QBE is the discounted present value of the amount paid by QBE to Cook under the terms of the settlement or the amount Cook recovers from the common law proceeding, whichever is the lesser. In other words, the deed of settlement is unambiguous: any amount which Cook recovers from the respondents in excess of that amount is for Cook's benefit, Cook has not assigned the excess to QBE.

[37] It seems to me that the appellants' contention must succeed on this ground alone. The Master proceeded on a mistaken view of the construction of the

---

24 Clauses 18 and 19

25 Clause 20

26 Clause 21

27 This is the section which provides a statutory mechanism for employers' insurers to be reimbursed the amount paid to workers from other sources of compensation received by a worker.

28 Clause 23

deed of settlement in holding, as he did, that an inference could legitimately be drawn from that deed that gave rise to a "question" as to whether the common law proceeding was an abuse of process because Cook had assigned all of his rights in the common law action to QBE and allowed it to make improper use of Cook's name.

[38] The settlement deed does not assign all of Cook's rights in the common law action to QBE. It simply incorporates a procedure for repayment of amounts paid out to a worker by the employer's insurer which is contemplated by the Act, and set out in ss 54 and 176.

(a) Section 54 provides for employers' insurers to be reimbursed the amount paid to workers from other sources of compensation (including a judgment for damages) received by a worker.

(b) Section 176 provides that if an injury in respect of which compensation is payable under the Act is caused under circumstances that appear to create a legal liability in some person other than the employer to pay damages in respect of the injury, the person entitled to compensation may take proceedings against that third party to recover damages and may also make a claim against the employer for compensation. If the person receives compensation from the employer and recovers damages from the third party in respect of the same injury, the worker must repay to the employer such amount of the compensation as does not exceed the amount of damages recovered from the third party. The Act

also provides that the employer has a first charge on the damages payable by the third party.

[39] The appellants contended further that, even if the Master had not been mistaken in this way, the appropriate order would have been an order for general discovery of documents relating to that potential issue, rather than specific discovery of documents relating to the retainer of Mr Spearritt. Provided the requirements of Rule 29.08 had been satisfied (ie that such documents relate to a question in the proceeding and that there were grounds for a belief that they may be in the possession of Cook), I see no reason why it would not have been appropriate to make an order for special discovery. However, as I have said, I do not accept that there is any room in the deed of settlement for an inference to be drawn that there has been an "improper subrogation" of QBE to the rights of Cook under the common law proceeding, so the question does not arise. The retainer documents do not relate to a question in the proceeding.

[40] Finally, the appellants argued that the Master did not properly address the question of privilege. On this issue the Master held that s 11 of the *Evidence (National Uniform Legislation) Act* ("UEA") empowers the court to order inspection of documents which may establish an abuse of process notwithstanding any claim of privilege in respect of those documents. Section 11 provides:

11 General powers of a court

(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.

(2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

[41] The Master adopted the approach sanctioned by *Van Der Lee & Ors v State of New South Wales & Ors*[29] in which the New South Wales Court of Appeal said that when there is evidence that could demonstrate an abuse of process, even if that evidence is subject to privilege, the court may receive it on the *voir dire* and thereafter if it is found to reveal an abuse of process, the court can then rule it admissible notwithstanding the claim for privilege.[30] Apparently the Master inspected the documents which had been provided to the court and then advised the parties by email of the documents that were required to be produced for inspection.

---

[29] [2002] NSWCA 286

[30] In that case defendants in proceedings relating to the landslide at Thredbo cross-claimed against Lend Lease Corporation and others ("the claimants"). The claimants filed notices of motion seeking orders that the cross claims be stayed or dismissed as an abuse of process. They sought to adduce evidence of a without prejudice discussion which they submitted showed that the predominant purpose of the proceedings against them was not to recover damages, contribution or indemnity, but to compel Lend Lease Corporation to make a contribution to the settlement of the claims by indemnifying certain former executives. Adams J held that s 131 of the UEA precluded evidence of the conversation and that it did not come within any of the exceptions in s 131(2). He also held that s 11 of the Act did not change this position. He was also not satisfied that the proceedings amounted to an abuse of process. While holding that s 11(2) of the UEA allows the admission of evidence of without prejudice negotiations which could be evidence of an abuse of process, the Court of Appeal refused leave to appeal holding that joinder of the claimants in that context was not an abuse of process.

[42] The appellants contend that the Master should have considered the effect of s 125 of the UEA which deals with the loss of legal client privilege in the case of misconduct, and that the failure to refer to that section and to consider the matters set out therein, amounted to an error of law. Further, it was contended that there was no evidence from which the Master could have been satisfied that the requirements of s 125 for loss of privilege had been satisfied. I did not hear considered argument about the scope and effect of s 125 and its inter-relationship with s 11 and, in the circumstances, it is not necessary for me to make any finding on this contention, having decided that the appeal should be allowed on another basis.

[43] The appellants further contend that by simply inspecting the documents and advising the parties by email which documents were required to be produced, the Master failed to give adequate reasons for his decision. That may be so. A judicial officer is required to provide reasons for a decision adequate to enable the parties to determine the basis upon which the order in question has been made so that, ideally, the Master should have informed the parties why the particular documents he determined should be produced were relevant to the question he had identified in his reasons of 20 November 2013. However, it is not necessary for me to decide this point: detailed arguments were not addressed on this matter on the hearing of the appeal and I have determined that the appeal should succeed on another basis.

[44] Orders:

(a) All three appeals are allowed.

(b) The following orders of the Master are set aside:

(i) the order of 17 December 2013 that Suplejack make specific discovery of the categories of documents set out in [7]; and

(ii) the order of 6 February 2014 ordering Suplejack to produce for inspection documents 2.4 and 2.8 on its list of documents dated 14 January 2014; and

(iii) the order of 6 February 2014 ordering Cook to produce for inspection document 2.5 on his list of documents dated 14 January 2014.