

## **ELDERS RURAL FINANCE LTD v TAPP**

In the Supreme Court of the Northern Territory of Australia

No. 3 of 1992

Delivered 27 March 1992

Heard at Darwin 27 February 1992

Judgment of Martin J.

### **CATCHWORDS:**

**Legal Practitioners** - Solicitor and client - Inspection of Trust Account - Right of cestui que trust to inspect account

**Legal Practitioners** - Solicitor and client - Liens - Firm claiming lien over all files and documents held on behalf of client - Non-payment of accounts - No right to inspect or take copies of documents unless costs paid or secured

Legal Practitioners Act, s120

*Leeper v Primary Producers Bank* (1935) 53 CLR 250 at 261, applied

*Vale v Oppert* (1875) 10 Ch App 340, applied

*Lewis v Powell* (1897) 1 Ch 678, considered

Halsbury's Laws of England 4th Ed, Vol 44, paragraph 229

**Legal Practitioners** - Solicitor and client - Rights and privileges - Legal professional privilege - Legal practitioner formerly acting for both parties to action - Retainer terminated before commencement of action - Limited privilege in respect of documents relating to transactions between parties

*Council of Stirling v Casley-Smith* (1989) 50 SASR 297, considered

**Legal Practitioners** - Remuneration - Non-payment of account - Lien claimed over all documents and files held on behalf of client - Dispute as to amount due - No steps taken by client to have amount determined by taxation - Solicitor held to have retaining lien

Legal Practitioners Act, s120

*Leeper v Primary Producers Bank* (1935) 53 CLR 250 at 261, applied

*Vale v Oppert* (1875) 10 Ch App 340, applied

*Lewis v Powell* (1897) 1 Ch 678, considered

Halsbury's Laws of England 4th Ed, Vol 44, paragraph 229

**Practice** - NT - Interlocutory proceedings - Application for 3rd party discovery - 3rd party a legal practitioner formerly acting for both parties to action - Retainer terminated before commencement of action - Limited privilege in respect of documents relating to transactions between parties

Supreme Court Rules, s32.07

*Council of Stirling v Casley-Smith* (1989) 50 SASR 297, considered

**Practice** - NT - Interlocutory proceedings - Application for 3rd party discovery - 3rd party a legal practitioner - claiming lien - non-payment of accounts - No right to discovery unless account paid or secured

Legal Practitioners, Act s120

*Leper v Primary Producers Bank* (1935) 53 CLR 250 at 261, applied

*Vale v Oppert* (1875) 10 Ch App 340, applied

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Halsbury's Laws of England 4th Ed, Vol 44, paragraph 229

## **REPRESENTATION:**

### *Counsel:*

Defendant/Applicant:	Paul Ian Gabrynowicz
Plaintiff:	David Graham Alderman
3rd Party/Respondent:	John Edward Reeves

### *Solicitors:*

Defendant/Applicant:	Mildrens
Plaintiff:	Ward Keller
3rd Party/Respondent:	Cridlands

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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA

No. 3 of 1992

BETWEEN:

ELDERS RURAL FINANCE LIMITED,  
FOSTER'S BREWING GROUP LIMITED  
and ELDERS LIMITED  
Plaintiffs

AND:

CHARLES WILLIAM TAPP  
First Defendant

AND:

WILLIAM REX TAPP, JOE TAPP,  
BEN TAPP, WILLIAM TAPP and  
DANIEL TAPP  
Second Defendants

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 27 March 1992)

This is an application by the defendants that Cridlands Pty Ltd discover

to them all and any professional files held by that company on behalf of the defendants in their capacity as former solicitors for the defendant (sic) that now may be within the possession or power of Cridlands Pty Ltd. The application is made pursuant to r. 32.07 whereby discovery may be had upon the application of a party in respect of a person who is not a party.

The affidavit in support of the application by the solicitor for the defendants discloses that Cridlands Pty Ltd were, from 1969 until 1991, the solicitors for the first defendant and the other defendants and asserts that they have within their possession numerous professional files created and held on behalf of the first defendant and others of the defendants in respect of a variety of matters appertaining to the relationship between the first defendant, and other defendants and the plaintiffs. In the original affidavit sworn on 17 January, the solicitor went on to say that the first defendant desired to examine the file (sic). In his later affidavit of 5 February, however, he referred to the pleadings, in particular those parts whereby the defendants say that certain security documents held by the plaintiffs are voidable and refers to parts of the defence going to "unconscientious conduct" on the part of the plaintiffs. He says that he is informed by one of the other defendants that the first defendant executed all of the security documents in consultation with or through the office of Messrs Cridlands; that all the records concerning those transactions are held by those solicitors, and that it is desirable that all and any files held by those solicitors in respect of the transactions referred to should be inspected by the solicitors for the defendants for the proper preparation of their defence. He is able to identify the files in general terms only, but as being files standing in the name of the first defendant regarding loans from the plaintiffs and the purchase by the first defendant of certain property in the Northern Territory.

Attention is also drawn to the defence whereby it is alleged that the plaintiffs enabled the first defendant to "improvidently squander certain funds described as the BTEC monies" whilst those monies were held in a trust account of those solicitors and that it was therefore desirable that the following documents and files held by them be inspected by the solicitors for the defendants:

"(a)The trust account or accounts which in general terms would be the C W Tapp trust account for the period from 1984 to 1991 maintained by Cridlands or its predecessor firm. This would consist of statements and vouchers for receipts and payments with supporting documents and authorisations.

(b)Any file which in general terms has as its subject matter C W TAPP RE: BTEC".

The third party, Cridlands Pty Ltd, and its predecessors, constitute a firm of solicitors which has carried on that business in the Territory for many years. One of its directors disclosed in an affidavit filed in opposition to this application that it acted for the first defendant for a period in excess of 20 years and that they had received instructions on a variety of matters. Inspections carried out to the date of the affidavit, 26 February 1992, revealed that Cridlands currently held only one file which was specifically referred to in the affidavit in support of the application, that being related to the purchase of a particular property. However, it appears that another file relating to the purchase of another property had been held, but that it had not been located and it is likely that it had been destroyed because it was "archived over 7 years ago". It is further deposed that approximately 21 files opened in the name of the first defendant

had been "archived" since 1 January 1984, but that not all of them had been extracted from storage.

Order 32 contemplates an affidavit of discovery being made by the non party from whom it is sought. On an application under that order the Court may make an order for the costs and expenses of the person against whom the order is made and it may make an order conditional upon the applicant giving security for those costs and expenses (r. 32.11). Cridlands Pty Ltd seek protection by way of an order for such security pointing out that the work involved in locating, inspecting and particularising all the files which might possibly have some bearing upon questions in the proceedings, as between the plaintiffs and the defendants, would take a considerable amount of time including that of a solicitor as well as that of clerks.

Those solicitors also assert, and it is not denied, that in about November 1991 the first defendant terminated the firm's retainer. They go on to say that at that time the first defendant had not paid costs for work done for and on his behalf by the firm. The costs rendered and unpaid amount to some thousands of dollars and the solicitors also claim that there is work for which accounts have not been prepared, in respect of work in progress, which also amounts to a substantial sum. The accounts which are claimed to be outstanding were rendered on or before 14 January 1991, and although it was said upon the hearing of this application that the defendants disputed the amount said to be due to their former solicitors, they had taken no steps within the one month provided for in s. 120 of the *Legal Practitioners Act* to require the amount payable to be determined by taxation. It was not suggested that there were no costs unpaid. The accounts were rendered to the first defendant only and it is not alleged that any costs are owing to the solicitors by any of the second defendants. Similarly, it was

claimed that the work in progress for which bills had not been rendered was performed only on behalf of the first defendant. The firm accordingly claims a solicitor's lien "over all files and documents it holds for and on behalf of C W Tapp and/or the other defendants because of the non payment of the accounts referred to .....". There is no evidence that any files are held on behalf of the other defendants.

"A solicitor has, no doubt, a right to hold papers of his client, which come to him in the course of business in his professional capacity, until his bill is paid" per Starke J. in *Leeper v Primary Producers Bank* (1935) 53 CLR 250 at 261. On the other hand, "A solicitor has no right to set up a lien acquired in the cause against the rights of the other parties in the cause to production" per James LJ. in *Vale v Oppert* (1875) 10 Ch App 340 and see also *Lewis v Powell* (1897) 1 Ch 678. Looking at the pleadings, however, it is plain enough that the relevant defences raised go to the transactions entered into between the plaintiffs and the first defendant and the relationship between them. In these circumstances the second defendants have no better right than the first defendant and the solicitors have a retaining lien over the property in their possession against all of the defendants. Accordingly, none of the defendants has any right to inspect the documents or take copies of them unless the costs outstanding are paid or are properly secured. (Halsbury 4th Edition Vol. 44 paragraph 229). Cridlands, being a stranger to the action, ought not to be put to the trouble and expense of making an affidavit of documents involving extensive searches so long as the lien exists.

The same considerations do not apply in relation to the trust account records of the first defendant kept by Cridlands Pty Ltd. Indeed, an application for discovery is hardly necessary in respect of them. A cestui que trust must surely always

be entitled to inspect his accounts with the trustee. If, as appears in this case, there have been differences in the method of keeping of trust accounts by those solicitors over the years the position is not changed. During the course of the hearing it was suggested that the accounts in whatever form they are kept be made available for inspection or copies of them be provided to the first defendant so that he might more closely delineate the particular transactions in respect of which he wishes to have access to supporting documentation.

An appearance was also made on behalf of the plaintiffs, upon the return of a summons, they having, of course, received notice of the application. But it has been held that the rule requiring service upon all other parties does not imply that they have a right to raise objections. A potential difficulty was raised because Cridlands had on occasion acted for both the plaintiffs and the first defendant and in relation to the same transaction between them. In so far as there were any privileged communications between the plaintiffs or any of them and those solicitors then it is their duty to recognise the documents concerned and to ensure that their clients' privilege is not breached. As to the right of one party to object to another inspecting stranger's documents, see *Council of Stirling v Casley-Smith* (1989) 50 SASR 297. In any event, the scope of the privilege is very limited.

The application for discovery of the documents properly the subject of a lien held by Cridlands Pty Ltd is adjourned and may be brought on for further hearing when the right to the lien has been discharged or waived. If the application is renewed it will be necessary for the defendants to have provided adequate security for the payment of the reasonable costs and expenses to be incurred by Cridlands Pty Ltd in complying with any order sought. The application in so far as it relates to the trust

account records of Cridlands Pty Ltd is also stood over.