CITATION:	*Stark Investments (NT) No. 2 Pty Ltd, Dendle Holdings Pty Ltd & Idsenga Investments Pty Ltd trading as Stark Investments v Ware* [2018] NTSC 58
PARTIES:	STARK INVESTMENTS (NT) NO. 2 PTY LTD, DENDLE HOLDINGS PTY LTD & IDSENGA INVESTMENTS PTY LTD TRADING AS STARK INVESTMENTS v WARE, Graham
TITLE OF COURT:	FULL COURT OF THE SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	48 of 2018 (21824171)
DELIVERED:	6 September 2018
HEARING DATE:	17 July 2018
JUDGMENT OF:	Kelly, Barr and Hiley JJ

CATCHWORDS:

WORKERS COMPENSATION – PROCEDURE – Special case stated by Work Health Court to Supreme Court – referred to Full Court – legally privileged surveillance materials – whether Work Health Court has power to make orders prior to hearing prohibiting the use at hearing of evidence the subject of a claim for legal professional privilege unless privilege waived by specified date – question answered in the negative.

EVIDENCE – LEGAL PROFESSIONAL PRIVILEGE – Work Health Court – statutory requirement for expedition with little formality and technicality – power under Court rules to make orders for fair, effective, complete, prompt and economical determination of matters before Court – held that legislation and rules of Court did not abolish or cut down employer's legal professional privilege.

Supreme Court Act (NT), s 21(a)
Supreme Court Rules, r 65.01
Return to Work Act (NT), s 2(c), s 110A, s 110B, s 115(1)
Work Health Court Rules, r 3.04(1)

Baker v Campbell (1983) 153 CLR 52; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475; *Cockerill v Collins* [1999] 2 Qd R 26, followed

State of Victoria v Davies [2003] VSCA 65, (2003) 6 VR 245, applied

Esso Australia Resources Limited v Commissioner of Taxation (1999) 201 CLR 49, *The Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* (2002) 213 CLR 543, *Halpin v Lumley General Insurance Ltd* [2009] NSWCA 372; 78 NSWLR 265, referred to

REPRESENTATION:

Counsel:

Applicant:	N Christrup
Respondent:	K Sibley

Solicitors:

Applicant:	Minter Ellison
Respondent:	Maurice Blackburn

Judgment category classification:	B
Number of pages:	10

IN THE FULL COURT
OF THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Stark Investments (NT) No. 2 Pty Ltd, Dendle Holdings Pty Ltd & Idsenga Investments Pty Ltd trading as Stark Investments v Ware [2018] NTSC 58
No. 48 of 2018 (21824171)

IN THE MATTER of section 115(1) of the *Return to Work Act*

AND IN THE MATTER of a Special Case stated by the Work Health Court in Proceedings No 1748487 for the opinion of the Court

BETWEEN:

STARK INVESTMENTS (NT) NO. 2 PTY LTD, DENDLE HOLDINGS PTY LTD & IDSENGA INVESTMENTS PTY LTD TRADING AS STARK INVESTMENTS
Applicant/Employer

AND:

GRAHAM WARE
Respondent/Worker

REASONS FOR JUDGMENT

(Delivered 6 September 2018)

THE COURT:

Introduction

[1] On 22 May 2018, Judge Neill, a judge of the Work Health Court, reserved a question of law and stated a special case for the consideration of the Supreme Court pursuant to s 115(1) *Return to Work Act*. The special case stated was as follows:-

SPECIAL CASE formulated for the opinion of the Court in pursuance of section 115(1) of the *Return to Work Act*.

1. On 4 March 2015, the respondent (Worker) made a claim for workers' compensation in relation to an injury suffered to his left arm sustained on 14 February 2015.

2. The workers' compensation insurer for the applicant (Employer), CGU Workers Compensation, accepted liability in respect of the claim on behalf of the Applicant and commenced to make weekly payments of compensation in the amount of $2,466.37.

3. On 6 July 2017, by Notice of Decision pursuant to section 69 of the *Return to Work Act*, the Employer reduced the Worker's entitlement to weekly benefits on the basis that he could earn $1,249 in his most profitable employment, effective 20 July 2017, with the result that then weekly payments of $2,731.75 (indexed to 2017) would be reduced to $1,112.06. The decision was made in accordance with the opinions to be found in:

   3.1 Vocational Assessment Report, Konekt, dated 17 February 2017 and accompanying Labour Market Analysis, Konekt undated, and

   3.2 Medical report, Dr M Wyatt, dated 15 May 2017.

4. The Worker applied for mediation to the Work Health Authority and a Certificate of Mediation was issued on 31 August 2017 with 'no change' recorded.

5. The Worker appealed the Employer's decision and made application to the Work Health Court, Proceeding No 21748487. The parties have exchanged pleadings, including a counter-claim.

6. In the course of making orders before a trial listed for hearing on 25 June 2018, on 29 March 2018 Judge Neill upheld the Employer's claim of legal professional privilege over various surveillance material and gave permission to the Worker to file an amended interlocutory application seeking:

   1. That the Employer have 7 days to produce the privileged documents and other privileged material identified in items 156 to 163 inclusive of the Employer's List of Documents filed on 23 January 2018 (privileged material);

   2. Should the Employer maintain the claim for privilege and refuse to produce the privileged material before the trial listed for 25 June 2018, then the Court orders:

   a. The Employer is not at the trial permitted to cross-examine witnesses in the Worker's case on matters arising from privileged material; and

b. The Employer is not at the trial permitted to use or introduce the privileged material into evidence,

so as to ensure the efficient case management of the trial.

7. The application was made in accordance with a ruling of Judge Neill in *Bretherton v Allianz* [2017] NTLC 13 dated 31 March 2017, contrary to an earlier ruling by Chief Judge Dr Lowndes in *Baird v Northern Territory* [2007] NTMC 23. The Employer opposed the orders sought in the amended interlocutory application and requested that a question of law raised by the application be reserved for the consideration of the Supreme Court.

8. On 29 March 2018, Judge Neill ordered that pursuant to section 115(1) of the *Return to Work Act* a question of law arising out of this proceeding be reserved for the consideration of the Supreme Court and a special case be stated.

Question of law

The question reserved for the opinion of the Supreme Court is:

> Does the Work Health Court have the power to make orders prior to the hearing of a proceeding prohibiting the use at the hearing of evidence currently the subject of a claim for legal professional privilege unless that claim is waived by a specified date, as proposed by orders 1 and 2 in the worker's amended interlocutory application dated 29 March 2018?

[2] A single judge of the Supreme Court referred the special case to the Full Court, pursuant to s 21(1) *Supreme Court Act*, read with r 65.01(a) Supreme Court Rules.

Decision

[3] The answer to the question is 'no'.

[4] Legal professional privilege is a substantive general principle of the common law".[1] As Deane J observed in *Attorney-General (NT) v Maurice*:[2]

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1 *Baker v Campbell* (1983) 153 CLR 52 at 88, 95-96 and 131-132; *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 480 and 490-491.

2 *Attorney-General (NT) v Maurice* (1986) 161 CLR 475 at 490, citations omitted.

> It is a substantive general principle of the common law and not a mere rule of evidence that, subject to defined qualifications and exceptions, a person is entitled to preserve the confidentiality of confidential statements and other materials which have been made or brought into existence for the sole purpose[3] of his or her seeking or being furnished with legal advice by a practising lawyer or for the sole purpose of preparing for existing or contemplated judicial or quasi-judicial proceedings. … it is not to be sacrificed even to promote the search for justice or truth in the individual case or matter and extends to protect the citizen from compulsory disclosure of protected communications or materials to any court or to any tribunal or person with authority to require the giving of information or the production of documents or other materials.

[5] In *The Daniels Corporation International Pty Ltd and another v Australian Competition and Consumer Commission*,[4] the majority of the High Court described legal professional privilege as "an important common law right or, perhaps, more accurately, an important common law immunity".

[6] A party entitled to legal professional privilege may waive the privilege, but has the right to choose when to waive the privilege. In the adversarial system, it is for the parties to make a forensic decision about when, and in what manner, they deploy their legally privileged materials.

[7] The orders sought by solicitors for the worker in the amended interlocutory Application,[5] would, if granted, impinge on the employer's privilege. The second order would force the employer to make a choice in relation to

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3 At the time *Attorney-General (NT) v Maurice* was decided, the 'sole purpose test' of legal professional privilege prevailed, established in *Grant v Downs* (1976) 135 CLR 674. However, in 1999, the majority of the High Court substituted 'dominant' for 'sole' – see *Esso Australia Resources Limited v Commissioner of Taxation* (1999) 201 CLR 49.

4 *The Daniels Corporation International Pty Ltd and Another v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

5 Par 6 of the special case stated.

waiver of privilege, without knowing the true or full forensic value of the privileged material (which would not be known or fully known until the worker had given evidence and been cross-examined).

[8] In *State of Victoria v Davies*,[6] it was observed by Batt J, albeit *obiter*, that a court cannot make an order, without the authority of statute or of valid rules of court, to (1) compel a party entitled to legal professional privilege in a document to abandon or waive that privilege by requiring that it be produced before trial to an opposing party against the will of the first-mentioned party or (2) prevent the party from tendering or using the document in a hearing where the party has not already disclosed it to the opposing party. In our view, his Honour's statement is correct.

[9] The express justification contained in par 6, sub-par 2 of the proposed orders in the special case stated was "to ensure the efficient case management of the trial." In this Court, counsel for the respondent worker contends that the general principles of case management and the power contained in the Work Health Court Rules combine to enable the Court to limit the use of privileged material in the event that privilege is not waived prior to the hearing.

[10] In our view, however, the provisions of the *Return to Work Act* and the Work Health Court Rules relied on by counsel for the worker do not expressly or by necessary intendment abrogate or otherwise detract from a

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6 *State of Victoria v Davies* [2003] VSCA 65; (2003) 6 VR 245.

party's legal professional privilege. True it is that one of the stated objects of the *Return to Work Act* is to ensure that the scheme for rehabilitation and compensation of injured workers is "fair, affordable, efficient and effective",[7] but that is directed at the entire scheme (including insurers, insurance premiums and the office of the Nominal Insurer), and not specifically court proceedings. It says nothing about legal professional privilege.

[11] Counsel for the worker relies on s 110A(2) *Return to Work Act*, which provides that proceedings are to be conducted with as little formality and technicality, and with as much expedition as the legislative requirements and a proper consideration of the matter permits. Provisions of this kind are often used in legislation, and the instant use is not a warrant to abrogate or cut down a party's legal professional privilege. Counsel also relies on s 110A (3) *Return to Work Act*, which provides that the Work Health Court is not bound by any rules of evidence but may inform itself on any matter in such manner as it thinks fit. This provision also is often used in legislation, in the past to enable courts, tribunals and boards to avoid the technicalities of the rules of evidence at common law. However, it has no relevance to the within special case, given that legal professional privilege is a substantive common law right, not a rule of evidence.

[12] In contrast to the statutory provisions referred to in the previous paragraph, it may be noted that s 110B *Return to Work Act* does abrogate legal

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7 *Return to Work Act* s 2(c)(i).

professional privilege (or 'client legal privilege') in relation to medical reports, hospital reports and other medical documents that relate to a claim for compensation under the Act, but it does so expressly.

[13] Counsel for the worker also relies on r 3.04(1) of the Work Health Court Rules, which gives the Work Health Court power to make orders relating to the conduct of the proceeding that the Court thinks "are conducive to its fair, effective, complete, prompt and economical determination". Rule 3.04(2) then sets out a non-exhaustive list of the subject matter of the orders the Court may make, which we would characterise as matters of practice and procedure. Yet again, we see nothing which expressly or by necessary intendment abrogates or otherwise impinges on a party's legal professional privilege.

[14] Counsel for the respondent worker relies also on the decision of the New South Wales Court of Appeal in *Halpin v Lumley General Insurance Ltd* to contend that case management issues are now a significant factor in the directions given by the court in pre-trial matters and the orders made by the court in anticipation of and during the course of a hearing.[8] In general terms, that proposition is correct. The decision in *Halpin* concerned the operation of the *Civil Procedure Act 2005* (NSW), and the *Uniform Civil Procedure Rules 2005* (NSW). The legislative and regulatory regime was similar to, but not the same as that in operation under the Northern Territory *Return to*

8 Respondent's outline of submissions, par 7; *Halpin v Lumley General Insurance Ltd* [2009] NSWCA 372; 78 NSWLR 265.

Work Act and the Work Health Court Rules. The defendant insurer in *Halpin* had obtained a pre-trial order partially exempting it from a direction that all lay and expert evidence and reports be served prior to trial. The order permitted the defendant to withhold affidavits relating to investigations which supported the insurer's defence that the insured had provided false information in support of the claim. The plaintiffs' appeal against the order was dismissed. We would firstly observe that legal professional privilege (or client legal privilege) was not argued in *Halpin*. Moreover, although counsel for the respondent worker referred this Court specifically to the decision of Basten JA, his Honour's decision rather seems to assist the applicant employer, at least indirectly, in the observations made at [31] and [34]:

> In one sense, the principles contained in the new statutory provisions and rules do not affect the issue in the present application. The reasonable entitlement of a defendant to preserve pre-trial confidentiality in the results of its investigations, in the face of suspected fraud, remains a legitimate interest. The [case management] provisions do not give rise to an obligation on the part of all parties in all circumstances to place all their cards on the table before the trial commences. If that were so, cross-examination would need to be conducted by questions on notice. In some cases the uncovering of deceit or fraud might become significantly more difficult. There is no suggestion that the provisions relied upon were intended in any sense to be a fraudster's charter.
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> …. it is true to say that the risk of an adjournment would be increased by the withholding of the evidence. However, it is by no means certain that the defendants would ultimately need to rely upon the evidence. Matters put to the applicants in cross examination might either be accepted, plausibly denied, or explained away. The fear that they may tailor their evidence by forewarning of what was to come would be avoided, possibly giving their answers a greater degree of credibility.

[15] The worker's contention referred to in [9] is contrary to the well settled principle, re-stated by the majority of the High Court in *The Daniels Corporation*, that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.[9] In a separate judgment, McHugh J observed that courts do not construe legislation as abolishing, suspending or adversely affecting rights, freedoms and immunities which the courts have recognised as fundamental unless the legislation does so in unambiguous terms, that is, the legislature must make its intention to do so "unmistakably clear".[10]

[16] General procedural rules of the kind relied on by counsel for the worker are insufficient to adversely affect a party's legal professional privilege. So, for example, in *Cockerill v Collins*,[11] the Queensland Court of Appeal held that a general procedural rule of the District Court of Queensland, authorising a judge at any time to give such procedural directions as the judge thought proper, was not to be read as authorising directions derogating from the appellant's legal professional privilege with respect to (in that case) an expert engineer's report. We adopt, with respect, the following statement by Fitzgerald P:[12]

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9 (2002) 213 CLR 543 at [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

10 (2002) 213 CLR 543 at [43] per McHugh J.

11 *Cockerill v Collins* [1999] 2 Qd R 26.

12 [1999] 2 Qd R 26 at 28.

> The prevailing theory with respect to the proper performance of the judicial function in modern society encourages active case management to reduce issues, avoid surprise and embarrassment, minimise cost and delay, and provide expeditious and efficient justice. However, the adversarial system is not wholly without advantage, and public or private interests will not always necessarily be best served by full disclosure of all evidence, or all evidence in a particular category, prior to trial. More particularly, justice will not necessarily be served by compelling a waiver of all or part of a litigant's legal professional privilege with respect to evidence, or possible evidence, pre-trial. The respondent submitted that legal professional privilege does not exist to confer or preserve tactical advantages at a trial. Irrespective of whether that is an accurate statement with respect to a purpose of the privilege, advantages with respect to the conduct of trial are undoubtedly one of the benefits which routinely result from its existence.
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> The important public interest served by legal professional privilege has been consistently affirmed by the High Court. At least since *Baker v Campbell*, generally expressed statutory powers which are literally wide enough to deny or derogate from legal professional privilege have been construed so as to leave the privilege intact. Legislation which would adversely affect legal professional privilege given its literal effect is read down so as to avoid that result unless the language used clearly reveals an intention to do so. Obviously, a similar approach must be adopted to the construction of subordinate legislation.

[17] In the present case, s 110A of the *Return to Work Act* and r 3.04 of the Work Health Court Rules do not assist the respondent worker. We are of the view that the proposed orders in par 6 of the special case stated are not within the power of the Work Health Court to make. Accordingly, we have answered the question in the negative.
