Tovehead & Anor v Freeman [2003] NTCA 10

PARTIES:	TOVEHEAD PTY LTD AND BRANIR PTY LTD v FREEMAN, Kevin
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 24 2002 (20211055)
DELIVERED:	15 April 2003
HEARING DATES:	17 and 18 March 2003
JUDGMENT OF:	MARTIN CJ, MILDREN & RILEY JJ

REPRESENTATION:

Counsel:

Appellants:	J Reeves QC, I Meier
Respondent:	D Robinson, M Smith

Solicitors:

Appellants:	Cridlands
Respondent:	Ward Keller

Judgment category classification:	C
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Tovehead & Anor v Freeman [2003] NTCA
No. AP 24 of 2002 (20211055)

BETWEEN:

TOVEHEAD PTY LTD and BRANIR PTY LTD
Appellants

AND:

KEVIN FREEMAN
Respondent

CORAM: MARTIN CJ, MILDREN & RILEY JJ

REASONS FOR JUDGMENT

(Delivered 15 April 2003)

MARTIN CJ:

[1] This is an application for leave to appeal from the judgment of the Supreme Court wherein his Honour dismissed the appellant's application that the respondent be punished for contempt. The contempt alleged was that the respondent had breached orders, made by consent, that he be restrained from entering or using any part of Tipperary Station other than:

> "those parts of Tipperary Station known as 'the Sanctuary' and 'the Sanctuary area' (being those areas marked as stages I-IV and "Rhino/Hippo" and "Pygmy/Hippo/Tapir" on the plan attached to the summons dated 23 July 2002) or the roads necessary to be used for reasonable access thereto."

[2] A copy of the plan is annexed to these reasons. Each of the areas referred to in parenthesis in the order is marked, as is an area marked "Tipperary Station Complex". No issue has been raised going to the boundaries of any of those various areas as delineated. No ambiguity is suggested to arise from the plan.

[3] His Honour dismissed the summons after consideration of a no case submission made on behalf of the respondent at the close of the appellants' case. In so doing his Honour relied upon ambiguity in the terms of the order which it was alleged had been breached. His only reference to facts, other than the order, was to the allegations of breach, being entry by the respondent upon areas on Tipperary Station other than the areas described (incorporating the plan). Although not expressly referred to, there was attached to an affidavit in support of the application a plan identical to that attached to the summons upon which was identified the places where the alleged breaches occurred. They lie within the boundaries of the area marked "Tipperary Station Complex".

[4] At the close of the appellants' case, senior counsel for the respondent, Mr Southwood QC, submitted that the no case to answer issue should be determined before his client proceeded. His Honour did not require the respondent to go into evidence at that stage. The question of whether the respondent should be put to his election in regard to going into evidence if the no case submission was unsuccessful was not debated or ruled upon (see Borrie and Lowe – The Law of Contempt, 3rd Ed p 660).

[5] What cognisance his Honour took of the evidence put forward by the appellants is unclear. It was received de bene esse over objection from the respondent but no specific ruling appears from his Honour's reasons. That is because his Honour took the view that the order was ambiguous on its face, and since proof beyond reasonable doubt of a breach of the order was required before the question of any punishment arose (*Witham v Holloway* (1995) 183 CLR 525), the applicant failed by reason of the uncertainty of its terms.

[6] In coming to that opinion his Honour accepted the respondent's submission that the ambiguity lay in the words in brackets in the order:

> "While unambiguously describing an area of land by reference to a plan, as a matter of construction of the order, might be seen to qualify the words "the Sanctuary area" only, or alternatively both "the Sanctuary" and "the Sanctuary area".

[7] His Honour proceeded:

> "This being the case, it was submitted "those parts of Tipperary Station" referred to in the order accessible by the roads referred to were inadequately defined - they may or may not be confined to the words covered in brackets".

[8] The appellants' case related to entry onto areas marked on the plan as lying within the site marked "Tipperary Station Complex", an aircraft hangar and workshop, and the nearby area designated "air strip". The question that arose was whether the respondent was prohibited by the order from entering onto those areas.

[9] The ambiguity identified by the respondent was that the words in parenthesis might qualify only "the Sanctuary area" or might qualify both "the Sanctuary" and "the Sanctuary area". In the first case the words "the Sanctuary" were at large and not fixed in any way by description. If that be so, then it could not be shown that the places where the respondent allegedly breached the order occurred on an area on Tipperary Station outside "the Sanctuary". For the appellants it was put that the words in parenthesis qualified not only "the Sanctuary" but also "the Sanctuary area". The use of the words "those parts of Tipperary Station" and the word "or" in relation to roads led to the view that the word "and" between the words "the Sanctuary" and "the Sanctuary area" was intended to be conjunctive. If there was doubt about that the appellants contended that there was evidence available which would provide the matrix of facts surrounding the making of the consent order which would demonstrate that the construction put forward by the appellant was the true meaning of the words in question. In other words his Honour could look at the objective framework of facts within which the order came to be made.

[10] Because this type of proceeding is seen as being criminal in nature, the standard of proof required to establish contempt is that of beyond reasonable doubt (*Witham v Holloway* (1995) 183 CLR 525). That is so notwithstanding that the proceedings by which the charge is brought is an allegation of civil contempt arising from an allegation of failure to comply with an order or undertaking in civil proceedings. Civil procedural rules

apply although to succeed on the charge, the criminal standard of proof must be attained.

[11] The issue upon a no case submission in contempt proceedings is whether the defendant could lawfully be convicted on the evidence, that is, whether there is some evidence with respect to each element of the charge, which, if accepted, would either prove the element directly or allow such an inference to be drawn. In deciding a no case submission the Judge, whether sitting alone or with a jury, should not make factual findings (*Amalgamated Television Services v Marsden*, Court of Criminal Appeal, New South Wales (2001) 122 A Crim R 166).

[12] However, whether the person ought to be convicted depends on the tribunal being satisfied beyond reasonable doubt on the whole of the evidence before it, including, that of the defendant, if any (*May v O'Sullivan* (1955) 92 CLR 654 at p 658).

[13] The material upon which the appellants sought to rely before his Honour, and in respect of which no ruling as to admissibility was expressly made, included:

- that put forward by the manager of the appellants business at Tipperary Station. He asserted that there were within the boundaries of the Station, in the vicinity of the homestead complex, an area known as "the Sanctuary" or "the Sanctuary area" identified by a plan annexed to his affidavit, being the same plan as that attached to the consent order;

- slight reference by both counsel to a judgment in the Federal Court of Australia in proceedings between the appellants (plaintiffs) and the respondent's employer (defendant), and to what was described as an unsealed copy of that Court's order (also relied upon by the respondent in argument);

- evidence in an affidavit of the respondent, relied upon by the appellants, as to service of the order upon him and his understanding of the meaning of it.

[14] Objections were taken by the respondent to admissibility of much of the material upon various grounds, including that it was irrelevant, inadmissible as hearsay or contained expressions of opinion. Mr Reeves QC for the appellants responded to the objections and pressed the material with reference to the facts sought to be established by it, including by way of inference, as going to establishing the factual matrix in which the consent order to which the respondent was a party was made.

[15] On the interchanges between his Honour and Mr Reeves QC it is plain that his Honour felt himself bound by a majority view expressed by Windeyer and Owen JJ in *Australian Consolidated Press v Morgan* (1964) CLR 483 to look only at the order itself. If it was ambiguous, then the appellants must fail. It is to be inferred that his Honour was then of the view that the material was inadmissible because the law did not allow for a patent ambiguity to be overcome by reference to the matrix of facts at the time that

it was made so as to establish its true meaning. After time for consideration his Honour adhered to that view.

[16] The appellant contends that his Honour erred in failing to consider the evidence put forward with a view to establishing the true meaning of the undertaking. The respondent supports his Honour's approach in simply looking at the words themselves.

[17] With respect, I gain little assistance from some of the cases referred to by his Honour and relied upon in argument before this Court because they were not decided in the setting presented here, that is, where evidence was sought to be relied upon as an aid to construction.

[18] *Australian Consolidated Press v Morgan* was concerned with the alleged breach of an undertaking not to publish "any gallup poll results in respect of which the plaintiffs or either of them have the copyright". Although there was evidence as to the events giving rise to the undertaking, including as to the conduct of polls under "the gallup method" and the reports compiled by that method for publication, Barwick CJ pointed out at p 490:

> "The language of the undertaking gave rise at the hearing of the motion for contempt of widely divergent submissions of the parties as to its scope …".

It is clear from what follows that in addition to the material before the court at first instance, his Honour contemplated that further material would be

available upon the hearing of the suit going to the construction of the phrase in question. At p 505 Windeyer J said that he did not think:

> "that the meaning of the expression "Gallup Poll results", as used in the undertaking, was to be found by considering those words in the abstract and regardless of the practices and terminology of the act of conducting public opinion surveys".

His Honour referred to some of the evidence in the case which was plainly not limited to the words of the undertaking and further, at p 506, his Honour referred to his reading of literature on the subject, but which he said he did not use to reach any conclusion because it was not given in evidence and immediately followed by reference to "more complete evidence" when the suit was heard. He agreed with Owen J that the undertaking was not clear or that a breach of it was certainly established.

[19] Owen J, commencing at p 514, reviewed the several possible meanings to be given to the words in the light of the evidence then available and concluded that the undertaking remained ambiguous and lacked precision.

[20] In cases involving applications for punishment for contempt arising from alleged breaches of orders or undertakings reference is frequently made to the general principles set out in *Iberian Trust Ltd v Founders Trust and Investment Co* (1932) 2 KB 87 and *Redwing Ltd v Redwing Forest Products* (1947) 177 LT 387 (for example see the references in the reasons of Justice Owen at p 515 of *Morgan's* case).

[21] Consideration of those reports shows that in each case the background facts leading to the making of the order or the giving of the undertaking were taken into account in determining whether there was a breach. In *Iberian Trust*, at p 94, Luxmoore J indicated what he considered to be the proper form of order that should have been made taking those facts into account. In *Redwing* the decision of Jenkins J was made by simply comparing the terms of the undertaking with the alleged breach after rejecting a submission as to an alternative meaning. The statements of general principle relied upon in those cases and carried forward to the present day are not in question.

[22] *Microsoft Corporation v Markis* (1996) 139 ALR 99 is also distinguishable. It concerned the breach of an order, made by consent, restraining the respondent from reproducing or authorising the reproduction of the appellant's computer programs. Beaumont J, at p 116, identified the difficulty in construction which arose from a latent question, that is, the relevance, if any, of the consent or license of *Microsoft* for a "reproduction". If relevant, then a question of onus of proof arose. The uncertainty inherent in the order led to *Microsoft* failing.

[23] The appellant relies on two cases in which the evidence was received directed to the construction of an order or undertaking in contempt proceedings. In *S & M Motor Repairs v Caltex Oil* (1988) 12 NSWLR 358 the appellant had given an undertaking to the court not to pass off as Caltex petrol any petrol not supplied by Caltex. The question was what was meant by the words "pass off". Commencing at p 387 Priestley and Clarke JJA,

reviewed the history of the litigation as an aid to construction of the undertakings "in the factual matrix which was known to both parties". Their Honours also paid regard to the pre-existing contractual relationship between the parties. Kirby P at p 37, although differing in the result, paid regard to the same evidence.

[24] The Queensland Court of Appeal followed *S & M Motor Repairs v Caltex Oil* in *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* (2001) 2 Qd R 118 at 135. In the Full Court of the Federal Court it was held in *Yates Property Corporation v Boland* (1998) 89 FLR 78 at p 79 that resort can be had to the reasons given by a court for making an order where there is a suggestion that it may be unclear.

[25] In my opinion his Honour erred in taking too limited a view of the court's function when faced with an application to deal with a person for contempt of an order or undertaking which is said to be ambiguous, not clear or uncertain on its face. I consider that regard should have been had to admissible material and the terms of the order, including its subject matter, considered in a light thus shed upon them, if any.

[26] I would grant the application for leave to appeal, allow the appeal and remit the matter to his Honour to be further considered in accordance with these reasons.

MILDREN J:

[27] This is an application for leave to appeal pursuant to s 53 of the Supreme Court Act from a decision of Angel ACJ who dismissed a summons for contempt brought by the present applicants against the respondent.

[28] On 23 July 2002, the applicants issued a writ against Owston Nominees No 2 Pty Ltd (Owston) and the respondent seeking certain declarations and injunctions. The applicants claimed to be the holders of a Perpetual Pastoral Lease as tenants in common over an area commonly known as Tipperary Station. According to the endorsement on the writ, pursuant to judgment dated 25 February 2000, his Honour Einfeld J of the Federal Court of Australia held, inter alia, that:

> "(a) the first defendant (Owston) has or may have an entitlement to use or occupy those parts of Tipperary Station known as "the Sanctuary" and "the Sanctuary Area"; and
>
> (b) Sanctuary staff are not entitled to the use of houses in the Tipperary homestead complex without the agreement of the plaintiffs."

[29] The respondent, who is the second defendant in the action, is the manager of the Sanctuary and a servant or agent of Owston. In the action, the applicants claimed that the first and second defendants wrongfully claimed to have a right to use house premises on Tipperary Station known as "House 10 Boulevard" and pursuant to that wrongful claim, had occupied and continued to occupy, that house. Further, on or about 15 July 2002 the respondent, acting in his capacity as a servant or agent of Owston, entered

and purported to take possession of house premises on Tipperary Station known as "House 6 Mango Drive" without the consent of the applicants. The applicants have sought a declaration that they were entitled to possession of House 10 Boulevard and House 6 Mango Drive; a declaration that the defendants are not entitled to enter or use either of those properties or any of the houses located in the Tipperary homestead complex and a declaration that the defendants are not entitled to enter or use "any other part of Tipperary Station, other than those parts of Tipperary Station known as 'the Sanctuary'" and "the Sanctuary Area" (being those areas marked as stages I-IV and "Rhino/Hippo" and "Pygmy Hippo/Tapir" on the plan attached), or roads necessary to be used for reasonable access thereto. Orders restraining the defendants from entering or using the parts of the properties thus referred to are also sought.

[30] An interlocutory injunction was sought by summons filed on 23 July 2002.

[31] The summons was heard by Riley J on 1 August 2002 who made the following consent order:

> "1. Subject to order 2, until further order the first and second defendants be restrained from:
>
> (a) entering or using House 6 Mango Drive, or any of the houses located in the Tipperary homestead complex except House 10 Boulevard;
>
> (b) entering or using any other part of Tipperary Station, other than House 10 Boulevard and those parts of Tipperary Station known as "the Sanctuary" and "the Sanctuary Area" (being those areas marked as stages I-IV and

"Rhino/Hippo" and "Pygmy Hippo/Tapir" on the plan attached to Summons dated 23 July 2002) or the roads necessary to be used for reasonable access thereto."

There were other orders made by consent but they are not relevant to this appeal.

[32] By summons dated 26 September 2002, the applicants sought an order that the respondent be punished for contempt on the following grounds:

"(a) On or about 5 August 2002 the [respondent] breached the orders made by Justice Riley on 1 August 2002 in that he did enter and cause others to enter the airstrip and a hanger… which are situated on a part of Tipperary Station other than those parts of the station referred to in paragraph (b) of the said orders;

(b) Further, on or about 12 August 2002 the [respondent] breached the orders of Justice Riley in that he entered an area near the workshop… which is situated on a part of Tipperary Station other than those parts referred to in (b) of the said Order."

[33] At the hearing of the summons, after the applicants had closed their case, counsel for the respondent submitted there was no case to answer. Angel ACJ upheld that submission without calling upon the respondent to elect whether or not to call evidence on his own behalf. Complaint is made about the failure of the learned trial judge to put the respondent to his election and I will deal with that later.

[34] Angel ACJ held that the order of Riley J was ambiguous because the words in parenthesis in paragraph 1(b) of his Honour's order might qualify the words "the Sanctuary" or "the Sanctuary Area" or both. The plan, which was attached to the order of Riley J, did not clearly indicate the boundaries

of "the Sanctuary Area", or for that matter "the Sanctuary" (see the plan attached to these reasons). Nevertheless, it seemed to be accepted that the hanger and the area near the workshop referred to in the summons, and possibly the airstrip, were not within the words in parenthesis in Justice Riley's order and were therefore, not within "the Sanctuary Area". The question then remained as to whether the places concerned were within "the Sanctuary" and that depended upon whether that expression was the same as "the Sanctuary Area", i.e. whether the words in parenthesis referred to both "the Sanctuary" as well as "the Sanctuary Area" or only one of them.

[35] Angel ACJ held that the order was ambiguous. After considering a number of authorities, including *Evenco Pty Ltd v Australian Building Construction Employees and Builders Laborers Federation (Qld Branch)* [2001] 2 Qd R 118; *S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1988) 12 NSWLR 358; *Australian Consolidated Press Ltd v Morgan* (1964-1965) 112 CLR 483; and *Microsoft Corporation v Marks* (1996) 139 ALR 99, his Honour held that a finding of contempt would not be made where the terms of the relevant order or undertaking are misleading, unclear or ambiguous.

[36] His Honour concluded that:

> "In the present case, the nature of the ambiguity in the order, the circumstance that there is current litigation before this Court seeking recovery of land within the area in dispute (and an application pending before the Federal Court requesting clarification of its original orders which sought to clarify the relationships between the parties, viz-a-viz the Sanctuary and Tipperary Station), the standard

> of proof and the potential serious consequences that follow from contempt proceedings, the uncertainty on the face of the order is such that a finding of contempt will not be made."

Was the order of Riley J ambiguous?

[37] Counsel for the applicants submitted that the learned trial judge should have proceeded to decide what the true meaning of the consent orders was. Only then, so it was submitted, could he have properly determined whether the consent orders contained a relevant ambiguity. Instead the learned trial judge erred by simply agreeing with the respondent's submissions that paragraph 1(b) of the order was ambiguous and the learned trial judge necessarily failed to consider whether there was real doubt as to the true meaning and if so, whether that doubt or ambiguity was relevantly important or reasonable.

[38] According to the submission of the applicants, in deciding what the true meaning of the consent orders was, his Honour was required to take into account a number of matters, including the surrounding circumstances and factual matrix in which the consent orders were made. The difficulty with the applicants' argument is that even if the applicants' contention be correct, the materials available to the learned trial judge were inadequate for the purpose of resolving what the true meaning of the consent orders was. It is therefore unnecessary to decide whether the learned trial judge was correct in the approach that he took.

[39] Counsel for the applicants, Mr Reeves QC, sought to enlarge upon the background material by referring us to the judgment of Einfeld J. This was objected to by counsel for the respondent, Mr Robinson, on a number of grounds. It is sufficient I think, to observe that the respondent was not a party to that litigation and there is no evidence one way or the other as to whether he had ever read the judgment of Einfeld J. As Lord Wilberforce said in *Prenn v Simmonds* (1971) 3 All ER 237 at 239-240:

> "The time has long past when agreements, even those under seal, were isolated from the matrix of facts in which they were set and interpreted purely on internal linguistic considerations. There is no need to appeal here to any modern, anti-literal, tendencies, for Lord Blackburn's well-known judgment in *River Wear Comrs v Adamson* provides ample warrant for a liberal approach. We must, as he said, enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances which the person using them had in view. Moreover, at any rate since 1859 (*Macdonald v Longbottom*) it has been clear enough that evidence of *mutually known facts* may be admitted to identify the meaning of a descriptive term."

(Emphasis mine.)

[40] All that the evidence discloses in this case is that the respondent was served with a copy of Riley J's order. That being so, and there being no other evidence to show that the respondent knew or must have known that the terms "the Sanctuary" and "the Sanctuary Area" were synonymous, I am unable to see how reference to the extrinsic evidence would be of any assistance to the appellant, even if that were the correct approach to take, a matter I do not find necessary to decide.

[41] In those circumstances, one is left with the order and I have no doubt that the order is ambiguous upon its face and it is not possible to decide which of the two constructions is correct. In those circumstances, the learned trial judge was correct in upholding the no case submission whatever may be the test to be applied in deciding whether or not there is a case to answer. Even on the weakest test (the test applied in criminal proceedings following the decision of the High Court in *Doney v The Queen* (1990) 171 CLR 207), it is well established that where there are two possibilities one of which must result in an acquittal, and it is not possible to determine which of the two possibilities is more probable than the other because there is no evidence on which a judgment might be made in respect thereof, there is no case to answer: see for example, *Gebert, Haley & Black v The Queen* (1992) 60 SASR 110 at 115-116: *Questions of Law Reserved on Acquittal (No 2 of 1993)* (1993-94) 61 SASR 1 at 5-6.

Failure to call upon the respondent to elect.

[42] In this case the applicants have complained that the learned trial judge did not put the respondent to his election.

[43] In Australia there is no clear statement of principle as to whether or not a judge must in each case put a party to his election when making a no case submission in a civil case. In England the position is that where such a submission is made to a judge sitting alone without a jury, the judge must put the party submitting to an election; see *Alexander v Rayson* [1936]

1 KB 169. The position is otherwise in England where the judge is sitting with a jury; see *Young v Rank* [1950] 2 KB 510.

[44] The position in Australia is unsettled. In Victoria the courts have taken the view that there is a discretion in all civil cases, whether tried with or without a jury; see *Union Bank of Australia Ltd v Puddy* (1949) VLR 242; *Protean (Holdings) Ltd (Receivers and Managers appointed) v American Home Assurance Co* [1985] VR 187. In New South Wales the position is governed by rules of court which provide that the defendant cannot go into evidence without leave if the no case submission fails; see for example Part 34 Rule 8 of the Supreme Court Rules. In Queensland it is possible to put a no case submission without election if it is based on the want of evidence in support of a material element, but if the submission is based upon a ground that although there is evidence it is so weak and unsatisfactory to be not accepted, the party must be called upon to elect; see *Bank of NSW v Signorini; ex parte Signorini* [1966] Qd R 322.

[45] In South Australia there is a discretion and there is no general practice one way or the other; see *Copper Industries Pty Ltd (in liquidation) v Hill* (1975) 12 SASR 292 at 294; *Antique Pty Ltd v Securities and General Insurance Co Ltd* (1984) 112 LSJS 317; *Preston v Dowell* (1987) 45 SASR 111; *Residues Treatment & Trading Co Ltd v Southern Resources Ltd* (1989) 52 SASR 54.

[46] Submissions of no case to answer in civil cases are very rare in this Territory. To the best of my knowledge, there is no practice established one way or the other. In my view the learned trial judge had a discretion and I am unable to see how he exercised it wrongly.

The learned trial judge took into account irrelevant material.

[47] It was submitted on behalf of the applicant that his Honour erred in taking into account on the no case submission matters and circumstances favourable to the respondent, including matters that were not established by any evidence before him as follows:

> "1. In the existence of other litigation in the Supreme Court seeking recovery of land within the area in dispute;
>
> 2. that there were proceedings pending in the Federal Court seeking to clarify the original orders and the relationship between the parties; and
>
> 3. the potential serious consequences for the respondent."

[48] There was very little debate directed towards this issue by either party.

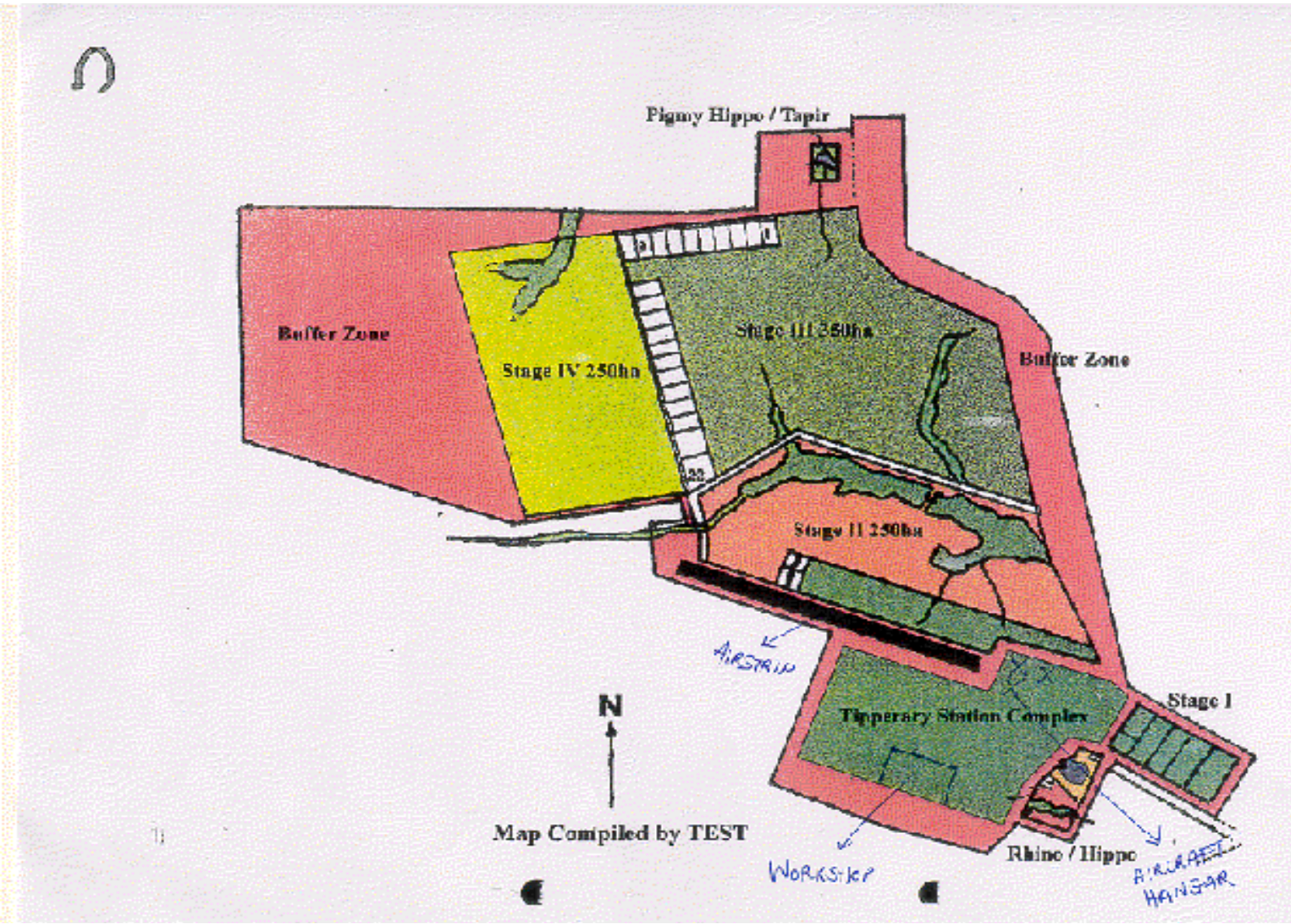
[49] The existence of the other litigation I am inclined to think is probably irrelevant. However, my impression is that the learned trial judge placed little weight upon that in arriving at his overall conclusion. In any event, I consider that the conclusion that his Honour reached was correct and that on the material before him, no other conclusion was reasonably open.

Conclusion

[50] In my opinion, the application for leave to appeal should be dismissed with costs.

Riley J

[51] I agree with the conclusions of Mildren J for the reasons he has expressed.


Pigmy Hippo / Tapir
Buffer Zone
Stage IV 250ha
Stage III 250ha
Buffer Zone
Stage II 250ha
AIRSTRIP
N
Tipperary Station Complex
Stage I
Map Compiled by TEST
Rhino / Hippo
WORKSHOP
AIRCRAFT HANGAR