Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes [2007] NTSC 39

PARTIES:	ALCAN (NT) ALUMINA PTY LTD (ACN: 095 409 260)
	v
	COMMISSIONER OF TAXES
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING APPELLATE JURISDICTION
FILE NO:	LA 12 of 2006 (20608545)
DELIVERED:	25 July 2007
HEARING DATES:	7 June 2007
JUDGMENT OF:	MILDREN J
APPEAL FROM:	Decision of Commissioner of Taxes

CATCHWORDS:

PRACTICE AND PROCEDURE – Court documents – access to affidavits by non-parties – principal of open justice – confidentiality – administration of justice – power to order documents filed in registry to remain confidential – general principles

Statutes:
Evidence Act (NT), s 21A(1A), s 21A(2)(d) , s 57 , s 58
Federal Court of Australia Act 1976 (Cth), s 50
Sexual Offences (Evidence and Procedure) Act (NT), s 6
Supreme Court Act (NT), s 17
Supreme Court Rules (NT), O 27.07(b), O 28.05, O 28.05(2), O 81A.39
Youth Justice Act (NT), s 49, s 50

Citations:
Applied:
Attorney-General v Leveller Magazine Ltd & Ors [1979] AC 440
Craig v South Australia (1994-1995) 184 CLR 163
John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors (2005) 220 ALR 248
Llewellyn v Nine Network Australia Pty Limited [2006] FCA 836
Mobil Oil Australia Limited & Anor v Guina Developments Pty Ltd & Anor (1996) 2 VR 34
Nine Network v McGregor & Ors (2004) 14 NTLR 24
R v Northumberland Compensation Appeal Tribunal, ex parte Shaw [1952] 1 KB 338; [1952] 1 All ER 122
Titelius v Public Service Board (1999) 21 WAR 201

REPRESENTATION:

Counsel:

Appellant:	B O'Loughlin
Respondent:	T Anderson

Solicitors:

Appellant:	Clayton Utz
Respondent:	Department of Justice

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Alcan (NT) Alumina Pty Ltd v Commissioner of Taxes [2007] NTSC 39
No. LA 12 of 2006 (20608545)

BETWEEN:

ALCAN NORTHERN TERRITORY ALUMINA PTY LTD (ACN: 095 409 260)
Appellant

AND:

COMMISSIONER OF TAXES
Respondent

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 25 July 2007)

[1] This application is made by the appellant under Rule 28.05(2) of the Supreme Court Rules for an order that certain documents or parts of documents filed in these proceedings remain confidential.

[2] Rule 28.05 provides:

> "(1) When the Registry of the Court is open, a person may, on payment of the proper fee, inspect and obtain a copy of a document filed in a proceeding.
>
> (2) Notwithstanding subrule (1) –
>
> (a) no person may inspect or obtain a copy of a document which the Court has ordered remain confidential; and

(b) a person not a party may not without leave of the Court inspect or obtain a copy of a document which in the opinion of a Registrar ought to remain confidential to the parties."

[3] It is to be observed that (1) the general rule is that all documents filed in the civil registry are open to be inspected by any member of the public upon payment of the prescribed fee; (2) the Court has a general discretion to order that any document or documents (or parts of documents) filed in the registry are to remain confidential with the result that those documents are not able to be inspected. Rule 28.05(2) does not purport to lay down any guidelines for the exercise of the Court's discretion. The discretion is therefore not subject to any restrictions, save that, like all discretions, it must be exercised judicially.

[4] At common law, there is no right of access to documents which are filed in a superior court and held as part of the court record: see *John Fairfax Publications Pty Ltd & Ors v Ryde Local Court & Ors* (2005) 220 ALR 248 at 255 [31]; 266 [100]-[101]. What is, or is not, part of the court record was discussed by Denning LJ (as he then was) in *R v Northumberland Compensation Appeal Tribunal, ex parte Shaw* [1952] 1 KB 338 at 351-352; [1952] 1 All ER 122 at 130-131, when his Lordship concluded that the record included the initiating proceedings, the proceedings and the adjudications, if any, but not the evidence, nor the reasons for judgment, unless the Court chooses to incorporate them into the record. In *Craig v South Australia* (1994-1995) 184 CLR 163 at 181 Brennan, Deane, Toohey, Gaudron and McHugh JJ held that the record of an inferior court for the

purposes of certiorari does not ordinarily include the transcript, the exhibits or the reasons for decision; but that that did not preclude incorporation of them by reference. But that case does not decide what is "the record" in the case of a superior court. In my opinion, it is open to a superior court to decide for itself what "the record" is. In this Court, Rule 81A.39 provides what is the record for the purposes of criminal proceedings. There is no similar rule for the purpose of civil proceedings, but I have no doubt that:

(1) the reasons for judgment or for a ruling published by a Judge of this Court or by the Court form part of the record because the ratio decidendi of such reasons are binding on inferior courts in the Territory, it is the reasons for judgment which are examined for error upon appeal and also because the reasons are filed in the registry;

(2) the transcript of proceedings are part of the record, but only if filed;

(3) exhibits are not part of the records because they are not filed;

(4) affidavits filed but not read or relied upon in open court are not part of the record;

(5) court orders are part of the record: see *John Fairfax* (supra) at [66]-[67]; *Titelius v Public Service Board* (1999) 21 WAR 201;

(6) the court books prepared for the hearing are not part of the record;

(7) affidavits filed and read or relied on in Court are part of the record.

[5] In the exercise of a discretion to order that documents remain confidential, one of the important considerations must be the principle of open justice: see, for example, *John Fairfax* (supra); *Titelius* (supra); *Llewellyn v Nine Network Australia Pty Limited* [2006] FCA 836. But that principle has application only to documents which form part of the record of the Court. There is therefore a distinction between the importance to be attached to documents which are and which are not part of the record.

[6] In the present case on 8 September 2006 I made an order before trial that certain affidavits and other documents which had not then been read or relied upon in Court should remain confidential. The case is now somewhat different because some of those documents have now become part of the Court's record because they have been relied upon in open court. Since that order was made, further affidavits and documents of a similar nature have been filed and relied upon in open court. The applicant seeks a confidentiality order in respect of those documents as well.

[7] The applicant does not seek to maintain confidentiality of all of that material, but only selected parts thereof. The grounds of the application are set out in the affidavit of Mr Sutherland, sworn 15 November 2006, a director of various Alcan entities in Australia. It does not appear that Mr Sutherland is a director of the appellant company, but he does swear to being authorised to swear this affidavit on the appellant's behalf.

[8] The question of what is, or is not, a document which ought to remain confidential to the parties has been discussed in the Federal Court by Rares J in *Llewellyn* (supra), who held that a similar rule in the Federal Court Rules imparted confidentiality of the nature to which s 50 of the Federal Court of Australia Act 1976 (Cth) refers, *viz*:

> "The Court may, at any time during or after the hearing of a proceeding in the Court, make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the Court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth. "

[9] That, with respect, seems to be a very narrow view of what is meant by the word "confidential". There is no similar provision in the Supreme Court Act (NT), although s 17 of the Act confers a power in unfettered terms to exclude the public or specified persons from the Court. There are also statutory powers to be found in s 57 and s 58 of the Evidence Act to make non-publication orders. As well, certain other statutes provide for the Court to sit in camera or for the non-publication of proceedings in certain circumstances, e.g. Evidence Act s 21A(2)(d) and s 21A(1A); Sexual Offences (Evidence and Procedure) Act s 6; and Youth Justice Act s 49 and s 50. In addition, the Court has a common law power to restrict publication in certain circumstances where it is necessary to do so in order to further the administration of justice: see, for example, *Attorney-General v Leveller Magazine Ltd & Ors* [1979] AC 440 at 450; *Nine Network v McGregor & Ors* (2004) 14 NTLR 24.

[10] Rule 28.05(2) does not seek to place any limits upon the discretion of a Judge to decide that certain documents are to remain confidential. In the case of documents which are part of the Court's record, the principles of open justice and the principles which guide the Court as to the making of non-publications orders are relevant to and elucidate the exercise of the discretion, but, in my opinion, do not confine it. In the case of documents which are not part of the Court's record it is difficult to see how the principles of open justice have any relevance.

[11] I note that the use of the expression "remain confidential" in R 28.05, which implies that the information with which the Rule is concerned is of a kind or class which is or was confidential.

[12] I see no reason to give the word "confidential" a meaning other than its ordinary English meaning according to societal norms from time to time. For example, Judges do not usually cause to be published personal information about litigants or witnesses, such as their telephone numbers or residential addresses, in written judgments. One of the reasons why this is so is to protect the privacy of the individuals concerned. Another is to prevent trawling over the internet which could lead to identity fraud. Keeping this kind of information routinely confidential might also be said to be something done in the furtherance of the administration of justice, which is in itself a broad expression, including situations of undue prejudice or undue hardship: see *Nine Network Australia Pty Ltd v McGregor & Ors* (supra) at

37 [38]. But, there is no doubt that, according to societal norms, personal information of that character would be regarded as confidential.

[13] I have no doubt that in the business world there are also norms about what is, or what is not, generally regarded as confidential. Obviously the information must be of a character that it is not required by law to be made public as at the time the order is made and is not otherwise in the public arena. If the information is of a kind which a business competitor could use to obtain a business advantage over the applicant, e.g. by enabling the competitor to engage in shadow pricing, I consider the business world would regard that information as confidential. There may also be documents or information which are subject to a confidentiality agreement with a third party. There could information of a detailed nature concerning a business' price structuring which could affect commercial negotiations between that business and a third party. The list of what is, or is not, confidential depends on the circumstances of the case. In the case of confidential business information of this kind the courts will usually take steps to protect the interests of a litigant because it is in the interests of justice to do so: see for example *Mobil Oil Australia Limited & Anor v Guina Developments Pty Ltd & Anor* (1996) 2 VR 34 at 39-40.

[14] The first question therefore is to consider if the information is of a kind that would ordinarily be regarded as confidential. If the answer to that question is in the affirmative, the second question is to consider whether, in the circumstances, the information ought to remain confidential. If the

information is of a kind which ought to be protected in the interests of the administration of justice, or if the withholding of the information is not likely to have any significant effect on the principles of open justice, then the information should be protected. Of course the order should protect no more than is absolutely necessary.

[15] Applying these principles to the present case, I am satisfied that the information which the applicant seeks to protect is information which is now part of the Court's record; and that it is information which would be regarded as confidential in the business world. I am satisfied that it is in the interests of the administration of justice that the information should remain confidential, because, otherwise it could be used unfairly to damage the applicant's business interests by its competitors or by third parties. Further, I am satisfied that the principles of open justice will not be effected should a confidentiality order be made because, in this case, as it happened, it was not necessary for me to consider that information in detail in the judgment which I have now published.

[16] The applicant has also sought the return of two affidavits which have been filed but have not been read, *viz* the affidavits of Ben Madsen sworn 4 August 2006 and Colin Hanna sworn 22 September 2006. Both of these affidavits contain information which I consider is confidential. The power to make an Order in these terms is authorised by Rule 27.07(b) where an affidavit contains irrelevant matter. As neither party relied on this material

at the hearing, I am satisfied that these affidavits are irrelevant and may be returned to the applicant's solicitors.

[17] There will be orders accordingly in terms of the minutes of order initialled by me and dated this day.
