

PARTIES: ELDERS RURAL FINANCE LIMITED,
FOSTER'S BREWING GROUP LIMITED
and ELDERS LIMITED

v

WILLIAM TAPP as representative
of the estate of CHARLES
WILLIAM TAPP (Deceased)

and

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

TITLE OF COURT: SUPREME COURT (NT)

JURISDICTION: SUPREME COURT (NT)

FILE NO: No 3 of 1992

DELIVERED: Darwin 21 June 1993

HEARING DATES: 7, 21 June 1993

JUDGMENT OF: Martin CJ.

CATCHWORDS:

Practice - Subpoena - Application to set aside -
Privilege - Discovery - Oppressiveness - Abuse of process
- Relevance -

The Commissioner for Railways v Small (1938) 38 NSWSR
564, considered.
*Southern Pacific Hotel Services Inc v Southern Pacific
Hotel Corporation Ltd* (1984) 1 NSWLR 710, referred to.

Practice - Subpoena - Solicitor's Lien - Assertion
against third party - Protection of value of lien - Balance
competing interests -

In re Hawkes; Ackerman v Lockhart (1898) 2 Ch 1, applied.
In re Aveling Barford Lien (1989) 1 WLR 360, applied.
Anderson v Lockhart (1991) 1 Qd R 501, applied.

Practice - Subpoena - Solicitor's lien - Inspection of
documents - Protection of value of lien - Party lien against
only inspect upon discharge of lien - Discharge only costs
or which accounts rendered.

Costs - Subpoena - Costs of compliance with -

Supreme Court Rules (NT), rr42.08, 1.10(1)(b), 0.63.

Costs - Interlocutory proceeding - Non-party - Discrete
application -

Supreme Court Rules (NT), r63.01(1).

REPRESENTATION:

Counsel:

Plaintiffs: D P Rydon
Defendants: A Wyville & I Briggs

Solicitors:

Plaintiffs: Ward Keller & Finlaysons
Defendants: Philip & Mitaros

Judgment category classification: B
Court Computer Code:
Judgment ID Number: mar93013
Number of pages: 10

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mar93013

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
Plaintiff

AND:

WILLIAM TAPP as representative
of the estate of CHARLES
WILLIAM TAPP (Deceased)
First Defendant

AND:

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

CORAM: MARTIN CJ.

REASONS FOR DECISION

(Delivered 21 June 1993)

Cridlands Subpoenas

The plaintiffs and the defendants have each issued and served upon Cridlands, a firm of Territory solicitors, a subpoena for the production of documents in these proceedings.

The plaintiffs seek "all documents held by the firm produced as a result of instructions received from Charles

William Tapp deceased" and goes on to give greater particularity without limiting the generality of the foregoing. The defendants seek "the contents of all files opened relating to any instructions given ... by the plaintiffs at any time from 1980 onwards relating to Charles William Tapp or the second defendants or relating to properties known as Killarney Station, Maryfield Station and Roper Valley Station ..."

Cridlands seek orders in each case that the subpoena be set aside, alternatively directions as to how the subpoena is to be complied with, and for an order that the party issuing the subpoena pay the reasonable expenses incurred in complying with the subpoena.

Upon the return of the summons documents said to be in answer to the subpoenas were brought into Court. The affidavit evidence relied upon discloses:

As to the plaintiffs' subpoena

That Cridlands have a retaining lien over all files and documents held on behalf of the deceased in relation to costs for work done on his behalf. Accounts rendered amount to approximately \$21,000 and for work for which no accounts have been rendered it is estimated costs amount to approximately \$7,400. It is not suggested that the solicitors terminated any retainer from the

deceased. Some 27 files have been located in response to the subpoena, but further search is being undertaken. Expenses estimated at about \$1,300 have been incurred and there may be more.

As to the defendants subpoena

There are ten files in the possession of Cridlands which fall within the ambit of the subpoena and some miscellaneous papers. Expenses estimated at about \$800 have been incurred and there may be more.

Privilege

No objection is yet taken by anyone going to legal professional privilege and there were suggestions during the hearing that that was not an issue.

Subpoenas for Discovery?

The common ground of objection to the subpoenas is that they seek discovery in the sense that they oblige the solicitors to identify which of the documents they hold are relevant to the issues between the parties.

Although, as Jordan CJ. put it in *The Commissioner for Railways v Small* (1938) 38 NSWSR 564 at p573: "a stranger to the cause ought not to be required

to form a judgment as to whether any of his papers throw light on a dispute which is to be litigated upon issues of which he is presumably ignorant", the subpoenas in this case do not require that to be done.

There is no other objection to the form of the subpoenas. It seems that the solicitors have been able to identify the files and documents which are described in particular or general terms. (As to oppressiveness and discovery as grounds for setting aside a subpoena, see *Southern Pacific Hotel Services Inc v Southern Pacific Hotel Corporation Ltd* (1984) 1 NSWLR 710 at p717). There is no basis for setting aside the subpoenas upon the basis that they are oppressive or seek discovery or an abuse of process. It is true that, subject to the lien operating in respect of the first defendant's document being removed, each party could have obtained their respective documents from the solicitors, made discovery to the other of them, carried out inspection and then given notice to produce. In the circumstances of this case and the issues raised, particularly those going to the mental capacity of the first defendant, that procedure may not have uncovered relevant material in the various files which might properly be retained by the solicitors as being their documents, not documents to which the client would be entitled. Records of communications between the deceased and the solicitors, whether in relation to matters in which he gave instructions, or in relation to matters in which the plaintiffs gave instructions concerning

him, may be important. The procedure adopted is not an abuse of process.

All parties to these proceedings are agreed that there may well be material on the files which will be relevant to an issue in the proceedings. The whole course of dealings between the plaintiffs and the defendants, and the deceased's business activities over many years past, are open to investigation. The files have "apparent relevance".

There is no basis to set aside either subpoena on these grounds. The application is refused.

Solicitors Lien

The solicitors lien, which is not disputed, operates only in respect of the documents held on behalf of the estate of the late Mr Tapp. These documents are the subject of the subpoena issued and served on behalf of the plaintiffs who are in no way in the same interest as the deceased. What concerns the solicitors is that production of the documents to the Court will nullify the value of the lien, as it might be expected that one way or the other the first defendant will have access to the documents and derive such benefit from them as may be available. The lien can be protected but the value of it lost.

There is nothing to indicate that there are amongst the documents any which are valuable in themselves (such as title

documents) which the first defendant might yet seek to obtain when the proceedings are finished and the documents returned to the solicitors.

It is the plaintiffs who may most suffer an injustice if the solicitor's files relating to instructions received from the deceased are not available for inspection, and, if appropriate, to be tendered in whole or in part. For if it is to be found anywhere evidence of legal advice sought by the deceased is likely to be contained therein. The plaintiffs say they should not be held out of access to the files because the deceased did not pay his solicitor's bills.

A solicitor who has a lien upon documents has no better right to retain them when ordered to produce them to a court than his client would have if they were in the possession of the client. The right can not be asserted against third parties who would be entitled to production as against the client (*In re Hawkes; Ackerman v Lockhart* (1898) 2 Ch 1 per Lindley M.R. at pp6-7; *In re Aveling Barford Lien* (1989) 1 WLR 360, *Anderson v Lockhart* (1991) 1 Qd R 501 per Ryan J. at p504).

The lien does not avail the solicitors from obeying the plaintiffs' subpoena to produce the documents the property of the deceased. Of course, in so far as the files contain documents which are not the property of the deceased then the lien has no effect.

Inspection of documents produced on defendants' subpoena

All of the documents the subject of the subpoena are to be produced to the Registrar.

The plaintiffs may first inspect the documents produced in response to the defendants' subpoena with a view to any objections being taken to inspection by the defendants.

Those objections are to be made within 7 days, whereupon the defendants will be at liberty to inspect all other documents produced on that subpoena forthwith. The question of inspection of any documents to which objection is made will wait pending determination of the objection, if any.

Inspection of documents produced on plaintiffs' subpoena

All of the documents the subject of the subpoena are to be produced to the Registrar forthwith. They are to be identified separately from those produced in response to the defendants' subpoena. The defendants may inspect those documents upon paying to Cridlands their costs for which accounts were rendered on or before 14 January 1991, for the purpose of making any objections to inspection by the plaintiffs. If those costs are not paid and any objections taken within 7 days the plaintiffs may inspect the documents. If costs are paid and objections taken to inspection by the plaintiffs within that

period, the plaintiffs will be at liberty to inspect all other documents produced on that subpoena forthwith. The question of inspection of any documents to which objection is made will wait pending determination of the objection, if any.

The defendants may inspect the documents produced on the plaintiffs' subpoena at any time after paying Cridlands costs for which accounts were rendered on or before 14 January 1991.

Cridlands will have to rely on the lien, for what it is worth, in respect of costs for which accounts have not been rendered. They have had plenty of time to prepare those accounts and have them taxed if required. The defendants should not be disadvantaged at this late stage in preparation for trial on that account.

Cridlands expenses and costs

Cridlands apply for an order pursuant to r.42.08 that each of the parties pay to them their expense or loss reasonably incurred in complying with the respective subpoenas. On the evidence it appears likely that that expense or loss will exceed by not less than \$100; the conduct money already given.

There is no good reason why such an order ought not to be made and there will be an order accordingly. Failing agreement between the respective parties as to the amount to

be paid, those expenses and loss are to be fixed by the Taxing Master and Order 63 shall apply (r1.10(1)(b)). This order does not encompass the legal costs of these proceedings. In respect of those costs Cridlands were unsuccessful in their application to have the plaintiffs' subpoena set aside and it is ordered that they pay the plaintiffs costs as agreed, or failing agreement, as taxed. (Costs orders may be made in respect to a person who is not a party (r63.01(1) definition of "party").

As to the costs between Cridlands and the defendants, each has been partly successful and there will be no order as to costs.

As between the parties, whatever is paid to Cridlands for expenses and loss and their respective costs of these proceedings will be costs reserved with the exception of one half of the defendants' costs in respect of which there will be no order as to costs.

This being a discrete application in the proceedings the usual rules as to costs in interlocutory proceedings are set aside, and the costs payable by Cridlands to the plaintiffs, if not agreed, may be taxed and shall be paid forthwith.