

Northern Territory of Australia v Roberts [2009] NTCA 5

PARTIES: NORTHERN TERRITORY OF
AUSTRALIA

AND

PARKS AND WILDLIFE
COMMISSION

v

KRYS JANE ROBERTS

TITLE OF COURT: COURT OF APPEAL OF THE
NORTHERN TERRITORY

JURISDICTION: CIVIL APPEAL FROM THE SUPREME
COURT EXERCISING TERRITORY
JURISDICTION

FILE NO: AP 1 of 2009 (20613533)

DELIVERED: 2 November 2009

HEARING DATES: 2 November 2009

JUDGMENT OF: MILDREN, RILEY & REEVES JJ

APPEAL FROM: Master Coulehan

CATCHWORDS:

Supreme Court Act, s 53(1)

Attorney General (NT) v Maurice (1986) 161 CLR 475; *Australian Competition & Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547; (2009) 254 ALR 198; *Cook v Union Steamship Co (Ltd)* (1904) 27 NZLR 933; *Health & Life Care Ltd v Price Waterhouse* (1997) 69 SASR 362; *In re Holloway* (1887) 12 PD 167; *Nilsen Industrial Electronics*

Pty Ltd v National Semiconductor Corporation (1994) 48 FCR 337;
Nationwide News Pty Ltd (T/as) Centralian Advocate v Bradshaw (1986) 41
NTR 1; *Renahan v Leeuwin Ocean Adventure Foundation Ltd and The*
Commonwealth of Australia [No 2] (2005) 15 NTLR 28; *Ritz Hotel Ltd v*
Charles of the Ritz Ltd (1988) 14 NSWLR 132; *Trade Practices Commission*
v Stirling (1979) 36 FLR 244; *Wheeler v Le Marchant* (1881) 17 ChD 675;
referred to

REPRESENTATION:

Counsel:

Applicants:	T Anderson
Respondent:	A McLaren

Solicitors:

Applicants:	Solicitor for the Northern Territory
Respondent:	A McLaren

Judgment category classification:	C
Judgment ID Number:	mil09455
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Northern Territory of Australia v Roberts [2009] NTCA 5
No AP 1 of 2009 (20613533)

BETWEEN:

**NORTHERN TERRITORY OF
AUSTRALIA**
First Applicant

PARKS AND WILDLIFE COMMISSION
Second Applicant

AND:

KRYS JANE ROBERTS
Respondent

CORAM: MILDREN, RILEY & REEVES JJ

EX TEMPORE REASONS FOR JUDGMENT

(Delivered 2 November 2009)

MILDREN J:

[1] This is an application for leave to appeal from the decision of the Master.

Leave to appeal is required because the Master's decision was an interlocutory judgment.¹ The principles upon which this Court will act in determining whether or not to grant leave are discussed in *Nationwide News Pty Ltd (T/as) Centralian Advocate v Bradshaw*.²

¹ See s 53(1) of the *Supreme Court Act*.

² (1986) 41 NTR 1.

- [2] In short, what must generally be shown by the applicant is that the correctness of the judgment appealed from is sufficiently doubtful to justify the granting of leave and, in a case like the present, where the appeal is from an interlocutory judgment from the exercise of a discretion in a matter of practice or procedure, that the interests of justice make it desirable to grant leave.

Background Facts

- [3] The proceedings to which this application relates concerns an alleged crocodile attack which occurred on vacant Crown land on the banks of the Elizabeth River, approximately 100 metres from the Elizabeth River boat ramp on 10 June 2003. The respondent's Statement of Claim essentially alleges that the respondent relied on a negligent statement by a senior employee of the applicants to the effect that the area was safe and free from crocodiles or, alternatively, that the applicants owed a duty of care to warn her of the danger posed by crocodiles in the area.
- [4] The respondent alleges that the negligent statement was made by a Mr David West, at the relevant time the Regional Manager of Parks and Wildlife (North) for the Department of Infrastructure, Planning and Environment.
- [5] In anticipation of having the proceeding listed for trial, the Court made orders on 2 May 2008 in relation to the filing and serving of lay witness statements, which would comprise the witnesses' evidence in chief.

- [6] The respondent filed and served an unsigned witness statement dated 27 May 2008 from one Rebecca Colmann of London, United Kingdom, stating that she heard a person who claimed to work for Parks and Wildlife inform the respondent at the Elizabeth River boat ramp in June 2003 that there had not been any crocodiles sighted in the area for years.
- [7] The respondent alleges that relying on this information, she attended at the location and, whilst sitting on some rocks about two feet away from the water, cast out her fishing line when a crocodile attacked her, as a result of which she suffered personal injury.
- [8] The applicants sought an order for the production and inspection of a letter identified in the respondent's list of documents to which the respondent claims legal professional privilege. This letter was received by the respondent's solicitor, apparently on 20 February 2008 after the commencement of this proceeding. The witness' statement, so it is said, was based on the information provided in the letter. The witness' statement was prepared by the respondent's solicitor.
- [9] It was not suggested that the letter was not a privileged communication. There are authorities to the effect that a communication received from a third party by a party's solicitor after commencement of the proceedings, for

the purpose of enabling the solicitor to prosecute or defend an action is subject to legal professional privilege.³

[10] It is not suggested that these cases were wrongly decided.

[11] The applicants claim that because it can be inferred that the unsigned witness statement which was served on the applicants leading up to the settlement conference was drafted from the letter, any privilege which attached to the letter had been waived.

[12] The Master found that there had been no express waiver so that any waiver must be implied. The Master held that in the ordinary course there is no waiver of legal privilege in respect of source material.⁴

[13] In this case there is a reference to the letter in the draft statement which has been disclosed which is the subject of the application. However, the statement does not go so far as to say that the statement reproduces the whole of the letter in full. If that had been the case, as was submitted by counsel for the applicant, Gibbs CJ said in *Attorney-General (NT) v Maurice*:⁵

Thus it has been held that the privilege in respect of a document is not waived by the mere reference to that document in pleadings or in an affidavit, although the position will be different if the document is

³ See *Trade Practices Commission v Stirling* (1979) 36 FLR 244 at 246; *Wheeler v Le Marchant* (1881) 17 ChD 675; *Cook v Union Steamship Co (Ltd)* (1904) 27 NZLR 933; *In re Holloway* (1887) 12 PD 167; *Health & Life Care Ltd v Price Waterhouse* (1997) 69 SASR 362 at 370.

⁴ *Attorney General (NT) v Maurice* (1986) 161 CLR 475 at 481 per Gibbs CJ; at 489 per Mason & Brennan JJ; at 493 per Deane J; at 469 per Dawson J; *Ritz Hotel Ltd v Charles of the Ritz Ltd* (1988) 14 NSWLR 132 at 134-135.

⁵ (1986) 161 CLR 478 at 481 (omitting citations).

reproduced in full in the pleading or affidavit.⁶ These cases may be explained by saying that it is not unfair or misleading to refer to a document in a pleading or affidavit which is not put into evidence, but that if the document is set out in full the privilege is waived.

[14] What the applicant wants the Court to do is to look at the document and to see whether the document sets out in full what is in the letter, word for word and, if not, to see what has been left out and, apparently, to advise the applicant one way or the other. My view is that that is not an appropriate course. In my view, counsel for the applicants' submission that the Court should inspect the documents for that purpose is misconceived.

[15] Counsel for the applicants submitted that the Master was wrong in not comparing the terms of the letter with the draft statement. But, in my view, there was no necessity to do that in this case. To constitute a waiver of privilege or to act inconsistently with maintaining the privilege, more is required than the mere fact that the draft statement was prepared based on the information contained in the letter or that the letter was referred to in the statement.⁷ Nor have the applicants shown that there is any unfairness to the applicant in the respondent maintaining the privilege.⁸ As there are no other circumstances which the applicants can pray in aid of the application, the decision of the Master is not attended with sufficient doubt to require the granting of leave. Nor have the applicants established that the interests of justice require the granting of leave. In this case, we know because we have

⁶ *Buttes Gas & Oil Co v Hammer (No 3)* [1981] QB 223 at 252 per Donaldson LJ.

⁷ *Renahan v Leeuwin Ocean Adventure Foundation Ltd and The Commonwealth of Australia* [No 2] (2005) 15 NTLR 28.

⁸ *Renahan v Leeuwin Ocean Adventure Foundation Ltd and The Commonwealth of Australia* [No 2] (2005) 15 NTLR 28 at [13]-[16].

been told that the plaintiff no longer intends calling the witness.

Apparently, the witness is unable to be located.

[16] Counsel for the respondent submitted that, in any event, the draft statement was still subject to legal professional privilege notwithstanding that it had been filed in accordance with the Court's order and served on the applicants.

[17] I do not think that this submission can be maintained. The submission was based upon the decision of Olney J in *Nilsen Industrial Electronics Pty Ltd v National Semiconductor Corporation*,⁹ however that case has since been disapproved.¹⁰

[18] I would refuse the application.

RILEY J:

[19] I agree.

REEVES J:

[20] I agree.

⁹ (1994) 48 FCR 337.

¹⁰ See *Australian Competition & Consumer Commission v Cadbury Schweppes Pty Ltd* (2009) 174 FCR 547.