

CITATION: *Rhys Studders v James Kincaig Russell [2018] NTLC 019*

PARTIES: Rhys Studders

V

James Kincaig Russell

TITLE OF COURT: LOCAL COURT

JURISDICTION: Criminal

FILE NO(s): 21752466

DELIVERED ON: 28th June 2018

DELIVERED AT: Darwin Local Court

HEARING DATE(s): 4th May 2018

JUDGMENT OF: Judge Fong Lim

CATCHWORDS:

Criminal – Commonwealth offence- “water” –“steal”- ownership of water- “belongs”- possession- riparian rights – proprietary interest

Criminal Code (Cth) sections 130.1, 131.1 (1), 132.1,

Defence Act 1903(Cth) section 72P

Water Act [NT] section 9(1), 9(2), 10, 11 & 12

ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors [2009] HCA 51

Embrey v Owen [1851]6 ex 353 at 369

REPRESENTATION:

Counsel:

Complainant: Ms Baxter

Defendant: Mr Bortoli

Solicitors:

Complainant: Commonwealth Director of Public Prosecutions

Defendant: Murphy & Associates

Judgment category classification: A

Judgment ID number: 019

Number of paragraphs: 31

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21752466

BETWEEN:

Rhys Studders
Plaintiff

AND:

James Kincaig Russell
Defendant

REASONS FOR JUDGMENT

(Delivered 28th June 2018)

JUDGE FONG LIM:

1. The defendant has been charged with two counts of theft of Commonwealth property, one of receiving stolen property and two counts of entering a defence premises without authority. He has pleaded guilty to being on defence premises without authority but not guilty of the balance of the charges.
2. The matter proceeded by way of agreed facts and submissions on legal issues.
3. Agreed Facts: there were significant agreed facts, the most relevant are
 - a. The Royal Australian Airforce (RAAF) base Tindal outside of Katherine is Commonwealth land pursuant to section 89 of the Crimes Act (Cth)
 - b. As at 25 June 2017, the defendant did not apply for and was not issued with a Defence Pass, and as such he was required to be signed in and escorted by a Defence Pass holder at all times whilst on the base.

- c. At approximately 10:00 AM on Sunday the 25th of June 2017 the defendant drove his tanker truck onto Carson Drive, Tindal. The defendant drove the vehicle past two sets of signs identifying the land as Commonwealth Land and warning against trespassing. The defendant then drove his truck through an open gate and past the fenced boundary of the domestic area of the RAAF Base
- d. The defendant approached a water standpipe on the Commonwealth Land, adjacent to Newham Circuit, approximately 1.5 kilometres inside the Commonwealth Land boundary. The defendant filled his truck with approximately 15,000 litres of water, valued at approximately \$150
- e. At 25 June 2017, the water standpipe dispensed water that has been treated at the Katherine water treatment plant, including filtration through sand filters, addition of chlorine as a disinfectant, and fluoridation. The Power and Water Corporation charges the Department of Defence for the water from the standpipe and issues Power and Water Corporation bills addressed to 'Department of Defence, Accounts Payable.
- f. The defendant returned to the standpipe on the RAAF Base where he filled his truck with water for a second time
- g. The defendant was approached by Corporal GONDA and asked to produce his Defence Pass and his authorisation to remove the water. When questioned, the defendant stated that his truck was hired to Fulton Hogan. The defendant showed GONDA his Northern Territory drivers' licence 1264040
- h. The defendant did not hold an authorised Defence Pass or any other authorisation, permission or lawful excuse to be on Commonwealth Land, namely RAAF Base Tindal, and had no specific authorisation or specific permission to take the water.

4. The Defendant accepts he was on Commonwealth land without permission however does not accept that the water taken by him was owned by the Commonwealth.
5. **Can water be owned?** - Water, like air, has always been viewed as a public asset for everyone to enjoy. However as society became more sophisticated governments decided there was a need to regulate the use of water to ensure the continued availability for all. In the Northern Territory the Water Act defines water as¹:
 - a. The water flowing or contained in a waterway ;or
 - b. Groundwater.
6. The rights to “use, flow and control of all water is in the Territory is vested in the Territory”².
7. The Water Act then goes on to set out the conditions under which a person is authorised to extract water from either a waterway or groundwater and regulates how authorisation can be given and what must be considered in the granting of that authorisation. The Water Act treats water as a public asset the use of which is regulated by the Northern Territory government. The riparian rights to water of a landowner are recognised in sections 10, 11, and 12 of that Act.
8. The Water Supply and Sewerage Services Act (NT) requires a person to have a licence for the extraction of water and to supply that water to others for a fee.³
9. PowerWater is a corporation created by the Power and Water Corporation Act [NT] and one of the functions of that corporation is to:

¹ Water Act [NT] section 9 (1)

² Water Act [NT] section 9(2)

³ Water Supply and Sewerage Act [NT] sections 13 and 14

“acquire, store, treat, distribute market and otherwise supply water for any purpose”.⁴

10. PowerWater has acquired, treated and distributed the water subject of these charges.
11. **Who owned the water subject of this proceeding?** – Section 130.2 of the Commonwealth Criminal code defines property as:
 - a. Real property; and
 - b. Personal property; and
 - c. Money;and
 - d. A thing in action or other intangible property; and
 - e. Electricity; and
 - f. A wild creature that is;
 - i. Tamed; or
 - ii. Ordinarily kept in captivity; or
 - iii. Reduced (or in the process of being reduced) into the possession of a person.⁵
12. Section 131.1 makes it an offence to dishonestly appropriate the property of the Commonwealth with the intention of permanently depriving that Commonwealth of that property.
13. “Belongs” is defined as if a person has possession or control of the property or the person has a proprietary right in the property⁶. That definition clearly recognises the common law position that ownership does not rely on possession alone.

⁴ Power and Water Corporation Act [NT] section 14A

14. It is the submission of the Crown that the water subject of this proceeding was the personal property of the Commonwealth as the Commonwealth had paid for the water from PowerWater and by paying for the water it acquired the ownership of the water. The Crown submits the water belonged to the Commonwealth as it had possession or control of the water or a proprietary interest right or interest in the property.
15. A preliminary question is whether PowerWater owned the water supplied to the Commonwealth. The ownership of water is not addressed by the Water Act. That Act only regulates the “use, flow and control of the water” it does not vest “ownership” into the hands of the NT.
16. The Water Supply and Sewerage Services Act [NT] allows a person to apply for a licence to carry on water supply services and the Power and Water Corporation held such a licence at the time.
17. While common law holds the proposition that water is a public asset and does not in its natural state lend itself to private ownership it is accepted by the Defendant that PowerWater has ownership of the water it has extracted from the watercourse and groundwater and which it has treated for human consumption.
18. In *ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors* [2009] HCA 51 the High Court, when considering whether the revocation of bore licences was an acquisition of property, made comments about the “ownership” of water⁷. Their Honours, French CJ, Gummow J and Crennan J confirmed the public nature of water and that it was “beyond individual appropriation and ownership”. Their Honours also confirmed as water flowed over someone’s property that person did not own the water but had the benefit of that water whilst it flowed across the property. Their Honours, Hayne J, Keifel J and Bell J went on further to cite the decision in *Embrey v*

⁵ Criminal Code (Cth) section 130.1

⁶ Section 130.2 Criminal Code (Cth)

⁷ Page 19 of their Honours judgment

Owen⁸ that:

“ none can have property in water itself, except in the particular portion which he may choose to abstract from the stream and taken into his possession, and that during the time of his possession only”

19. It is important to note the decisions in ICM and Embery cases are a discussion about the ownership of water by the persons who own the land through which the watercourse runs or the groundwater is present in the context of bore licences. The riparian rights to water. Their Honours also go on to suggest that various statutory interventions may have eroded those rights⁹.
20. In the present case the court is considering whether, once the water has been taken into possession of Power and Water Corporation can the Corporation pass the ownership of that water on to another? The answer must be yes by acquiring and treating the water the Corporation has taken ownership of the water and has the ability to sell it to consumers.
21. By supplying water to Commonwealth and charging per kilolitre for the water the Corporation has given the Commonwealth the right to deal with the water as the Commonwealth sees fit. If it sees fit to allow public access to all of the taps on the base then it is entitled to do so. If it restricts access to certain apparatus which dispense water then it is entitled to do so. If it chose to pass on the cost of the water to the residents on the base for the use of the water it is entitled to do so.
22. Even if the Commonwealth has not acquired possession of the water as it is possible for a person to hold a proprietary right in a thing without holding possession of it and the Commonwealth could have acquired a proprietary right to the water by paying for the water.
23. It is clear from effect of the Water Act, the Water and Sewerage Supply Act and the Power and Water Corporation Act the Northern Territory Legislature

⁸ [1851]6 ex 353 at 369 [155 ER 579 at 585]

intended to create a system where, notwithstanding a landowner's right to water that flows across the land any extraction of that water and supply to another is regulated by the Crown.

24. The Crown submits that the water taken from the standpipe belonged to the Commonwealth because at the time it is dispensed from the stand pipe it has travelled through the meter and once through the meter the Commonwealth is charged for the water by PowerWater. The Commonwealth submits by incurring the liability to pay for the water it becomes the owner of that water, the water "belongs" to the Commonwealth.
25. The Defendant submits that the fact of the water travelling through meter does not alter the ownership of the water. In any event it is submitted the court has no evidence that the standpipe is the property of the Commonwealth and therefore whether the Commonwealth ever took possession of the water. The Defendant further submits that even if the Commonwealth took possession of the water at the time it passed through the meter then it lost possession once the water had passed through the standpipe into the Defendant's truck. Defence counsel argued this was analogous to the situation where a person who is on the defence base goes to a tap in their garden and fills their water bottle and drinks that water. The action of that person cannot be an act of stealing possession has passed to the person and once they have possession they ownership.
26. The Defendant also submits the PowerWater charges incurred do not alter the ownership of the water as they are charges for the service of supply of the water not the water itself.
27. I do not agree with Defence counsel's analogy for these reasons:
 - a. Even though the water in pipes leading to the tap would have the same status as the water in the standpipe, the tap, being either in a public area or in the yard of one of the houses on base is an

⁹ Page 42 paragraph 116

invitation for the tenant or member of the public in that area to use the water.

- b. Even though the intention of the person taking the water from the tap is to permanently deprive the Commonwealth of the possession of that water by drinking it that person would have done so with the implicit permission of the Commonwealth.
- c. The ownership of the standpipe is not relevant as it is only the vessel through which the water is dispensed.
- d. The ownership of the water passes to the Commonwealth as soon as it passes through the meter. The accounts issued to the Commonwealth show charges for kilolitres of water in addition to a “service charge” which is contrary to the submission by the Defendant that the charge from PowerWater is a charge for service not the water itself. PowerWater would not have the ability or claim that water back from the Commonwealth once it had completed its supply.
- e. The standpipe is clearly an apparatus which is not for domestic use or general use the Defendant was well aware of the requirement for a pass to enter into the property and the use for which that standpipe had been used in the recent past. He was aware that the water from that pipe was used for construction on the base, among other things. Not for general use by those who lived or visited the base.
- f. The ability of the Department of Defence to limit a person’s access to the standpipe and to direct the use of the water from that standpipe leads to the inference that the Department had a proprietary interest in the water and was asserting that interest by restricting access to the base and the pipe.
- g. The possession of the water may well have passed to the Defendant but the Commonwealth maintained a proprietary interest in the water

having paid for it and not given the Defendant permission to take possession of it. The water still belonged to the Commonwealth.

28. Defence counsel submitted that the ownership of water can only be maintained while it is in the possession of the person and further the court cannot be satisfied beyond a reasonable doubt that the Commonwealth ever took possession.
29. Certainly while the Commonwealth had not done anything to take physical possession of the water. The Commonwealth has incurred a liability to pay for the water once it travelled past the meter and had the power to restrict the use of that water. The standpipe is on Commonwealth land and a person's presence on that land is only by permission specifically granted. The Commonwealth has acquired a proprietary interest in the water.
30. A person's proprietary right to a thing does not cease because that this is intangible or not in that person's possession. Accordingly I find the Commonwealth has a proprietary interest in the water once it incurred the liability to pay for the water and the Defendant has deprived the Commonwealth of its proprietary right by taking the water for his own profit and purpose.
31. The Defendant is found guilty of all charges.

Dated this 28th day of June 2018

Tanya Fong Lim
LOCAL COURT JUDGE