

CITATION: *Peter Vasel v Michael Anthony & DWD Project Pty Ltd* [2022] NTLC 015

PARTIES: Peter VASEL

v

Michael ANTHONY

And

DWD PROJECT Pty Ltd

TITLE OF COURT: LOCAL COURT

JURISDICTION: CRIMINAL

FILE NO: 21916221 & 21916218

DELIVERED ON: 7 September 2022

DELIVERED AT: DARWIN

HEARING DATE(s): 12 April 2021 & previously

JUDGMENT OF: Greg Macdonald

CATCHWORDS:

Criminal law – Legal Professional privilege – Litigation privilege – Confidential communication – Dominant purpose – Anticipated proceeding – Waiver – *Evidence (National Uniform Legislation) Act 2011* (NT), s 117, s 119, s 122, s 131A

Waste Management and Pollution Control Act 1998

Local Court (Criminal Procedure) Act 1928

Evidence (National Uniform Legislation) Act 2011

ASIC v Southcorp (2003) 46 ACSR 438

R v Rolfe (No. 2) [2021] NTSC 45

R v Rolfe (No. 3) [2021] NTSC 46

REPRESENTATION:

Counsel:

Informant: Mr T Moses

Defendant: Mr D Robinson SC

Solicitors:

Informant: Hutton McCarthy

Defendant: Clayton Utz

Judgment category classification: B

Judgment ID number: [2022] NTLC 015

Number of paragraphs: 19

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

Claim Nos 21916221 & 21916218

BETWEEN:

Peter VASEL

Informant

AND:

Michael ANTHONY

First Defendant

AND:

DWD Project Pty Ltd
(ACN 601 276 108)

Second Defendant

REASONS FOR DECISION

(Delivered 12 September 2022)

Judge Macdonald

Background and Dispute

1. On 16 April 2019 the Informant Mr Peter Vasel, Director Environmental Operations, of the Northern Territory Environment Protection Authority (NTEPA), swore Information's in respect of Mr Michael Adrian Anthony and DWD Project Pty Ltd (the Defendants), alleging contraventions of s83(1) of the *Waste Management and Pollution Control Act* (the Act). The Information's were laid under s101 of the *Local Court (Criminal Procedure) Act*, including an averment by the Informant, and became proceedings 21916221 and 21916218 (Proceedings).
2. The contraventions charged by the Information's are said to have occurred over 1 May 2016 to 27 April 2018, and are alleged to include contraventions involving the use of building rubble, construction waste and concrete wash at Lots 5280, 10176 and 10177 Town of Darwin (the Lots).
3. The chronology of steps taken by the NTEPA in relation to the Defendants prior to the Proceedings is important. The laying of the Information's was against the

background of earlier measures taken by the NTEPA under the Act in relation to the Defendants and the Lots. On 27 April 2018 the NTEPA issued an Authorised Officer Direction (AOD) under s72(k) of the Act, which gave 4 directions and was endorsed with advice that failure to comply with the AOD was an offence carrying significant penalties. In addition, on 4 October 2018 Pollution Abatement Notices (PAN) were issued to the Defendants, also endorsed in the same manner as the AOD, and proscribed 27 remedial steps required by the Defendants.

4. On 27 July 2020 Hutton McCarthy wrote to the Registrar of the Local Court acting for the NTEPA, enclosing Summonses to Produce for issue by the Registrar. One summons was directed to Douglas Partners Pty Ltd, who had provided professional services to the Defendants in relation to the Lots. That summons was the subject of challenge, which was determined on 13 October 2020. The product of the summons was then subject to legal professional privilege (LPP) being raised by the Defendants for determination.

The Evidence

5. I note that the parties were content to proceed without formal written Application being made in relation to the original objection to the issue of the summons, or the subsequent issues concerning objection to Informant access on the basis of LPP. Douglas Partners Pty Ltd (DP) produced the documents within the terms of the summons to the Registry electronically (USB). The USB contained extensive documentation comprising in excess of 27GB of data.
6. Following various programming directions, Affidavits of Mr Mark Spain on behalf of the Defendants were made and filed on 2 December 2020 and 29 January 2021, and affirmed by Mr Thomas Hutton on behalf of the Informant on 4 December 2020.¹
7. In addition, at a hearing of the application on 7 December 2020, the Defendants provided a letter dated 1 November 2019 to the court on a confidential basis. That letter was from the Defendants' then lawyers, De Silva Hebron, to DP. The letter expressly referred to each of the Proceedings and instructed DP in respect of various activities, the product of which was "*to be admitted as evidence in these proceedings*". The letter also provided De Silva Hebron with a copy of Supreme Court Practice Direction No. 6 of 2015 concerning expert reports.
8. Of particular significance in the evidence are communications by the Defendants (and their lawyers and DP) with the NTEPA. That included provision of various information and reports by the Defendants to the NTEPA, including following a meeting which occurred on 30 October 2019. The outcomes of that meeting were reduced to writing and agreed between the parties on 12 February 2020. The agreement included that the Defendants would provide the NTEPA with "*all reports (with all the sampling and analysis results) all assessments/investigations conducted by Douglas and Partners*".²

¹ The court had earlier been provided with Affidavits filed in associated Supreme Court proceedings, being of Mr Spain sworn 5 May 2020 and Ms Chantal MacKenzie sworn 25 May 2020.

² Annexure TAH-7 to the Affidavit of Mr Thomas Hutton affirmed 4 December 2020, and I infer that the word *and* was intended to appear after the brackets.

9. The Defendants provided written submissions on 2 December 2020 and then revised written submissions on 3 February 2021, with the Prosecution also submitting in December. The Defendant's submissions did not refer to any legislative provisions other than the Act, nor to any authority. The Prosecution's submissions relied on the *Evidence (National Uniform Legislation) Act 2011* (ENULA), and various authority at general law and in relation to the application of s122 of that Act.

The law and conclusions

10. Division 1 of part 3.10 of the ENULA, particularly ss117 and 119 (when read with the extending provisions of s131A) must first be considered. The aspect of LPP raised by the Defendants in objecting to access to the documents produced under summons is generally referred to as 'litigation privilege', with that species of LPP now being provided for by s119 of the ENULA, being;

*Evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence **would result in disclosure of:***

- (a) *a **confidential communication** between the **client and another person**, or between a **lawyer acting for the client and another person**, that was made; or*
- (b) *the contents of a **confidential document** (whether delivered or not) that was prepared;*

*for the **dominant purpose** of the client being **provided with professional legal services** relating to an Australian or overseas **proceeding** (including the proceeding before the court), or an anticipated or pending Australian or overseas proceeding, in which the client is or may be, or was or might have been, a party (**emphasis** added).*

11. Consideration of the relationships between the Defendant's, their lawyers and DP is essential in determining whether LPP attaches to the documents produced under summons by DP. That consideration must be in light of the spectre presented by the AOD and PAN, and due to the essential precondition that any communication or document to which LPP is asserted must first be properly characterised as "confidential", within the meaning provided by s117, being;

***confidential communication** means a communication made in such circumstances that, when it was made:*

- (a) *the person who made it; or*
- (b) *the person to whom it was made;*

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

confidential document means a document prepared in such circumstances that, when it was prepared:

- (a) the person who prepared it; or
- (b) the person for whom it was prepared;

was under an express or implied obligation not to disclose its contents, whether or not the obligation arises under law.

12. The evidence is that the Defendants had engaged DP from at least 27 April 2018, being the date on which the first AOD was served by the NTEPA on the Defendants.³ I consider that from 27 April 2018 it would be open to conclude that proceedings were objectively anticipated by the Defendants. In addition to the warning of criminal sanction endorsed on the AOD and the prescribed obligations contained therein, the Defendants were aware of the activities which had been carried out on the Lots, and what was proposed by them for the future. An issue would exist concerning “*professional legal services*” (given the nature of DP), however the point of 27 April 2018 is not crucial to resolution of the LPP claim, as the Defendants do not claim LPP to any documentation prior to 15 October 2018.⁴
13. The PAN issued on 4 October 2018 was received by the Defendants on 12 October 2018, and caused the Defendants to seek legal advice.⁵ That document was in more compelling terms than the AOD and would have inevitably caused the Defendants significant apprehension of legal proceedings.
14. Engagement of DP at least from 27 April 2018 and De Silva Hebron from at least 15 October 2018 is entirely consistent with the Defendants taking steps to ameliorate the legal and regulatory difficulties created by their activities on the Lots. In my view it was clear that if the Defendants were unable to meet and satisfy the requirements then prescribed by the NTEPA, litigation would ensue. The question of “*dominant purpose*” should be approached from the point at which litigation was anticipated and engagement of professional services occurred, not from some point following the engagement and after steps seeking to reduce the likelihood of proceedings have been taken.
15. I also infer from the obvious commercial, professional and sensitive nature of the Defendants engagement of DP and subsequently De Silva Hebron that there was at least an implied obligation of confidentiality.⁶ No other conclusion is conceivable in the circumstances of the commercial relationship which obviously existed between those parties.

³ Paragraphs [20] to [24] of the Affidavit of Mr Thomas Hutton affirmed 4 December 2020.

⁴ Paragraphs [8] to [11] of Affidavit of Mr Mark Spain made 29 January 2021.

⁵ Paragraphs [11] to [15] of affidavit of Mr Mark Spain made 29 January 2021.

⁶ The evidence provided by the Defendants did not include and written retainer or contract for services between them and either DP or De Silva Hebron. Nor do I conclude that the relationship between the Defendants and DP was fiduciary in nature, attracting a 'duty of confidence'. However, communications between the Defendants and DP had the necessary confidential character.

16. However, that obligation could be waived through the terms of engagement, and also in accordance with instructions. Due to the Defendants' communications with the NTEPA (and other Agencies), including as a result of and following the meeting of 30 October 2019, consideration of s122 of the ENULA concerning waiver is also essential in determining the Defendants claim to LPP. The Informant relied on the decision of his honour Justice Lindgren in Subsequent decisions in *ASIC v Southcorp* (2003) 46 ACSR 438 at [21]. I also note the subsequent NT Supreme Court decisions in *R v Rolfe (No. 2)* and *R v Rolfe (No. 3)*, each of which considered LPP in the context of documentation produced under subpoena and questions of waiver.⁷
17. The LPP which, until the point of provision, attached to all documentation provided by the Defendants to the NTEPA (and other Agencies) has been waived.⁸ However, in my view communications as between the Defendants, DP and De Silva Hebron, and documents generated in the process of creating the documents then provided by the Defendants to the NTEPA, retained the LPP which attached to them.
18. I also note the content of paragraph [26] of the Affidavit of Mr Mark Spain, and the instructions provided to him by the Defendants, and that no further reports have been identified in the documentation produced by DP in response to the summons. In relation to the letter of instruction of 1 November 2019 from De Silva Hebron to DP, I conclude that some product of that engagement was provided by the Defendants to the NTEPA (and at least one other Agency).
19. What is not clear is the extent to which DP also produced documents "*to be admitted as evidence in these proceedings*". If the engagement has not resulted in the production of any such "evidence", then it would be my conclusion that the LPP which attaches to that letter has also been waived.

Rulings

- (i) Legal professional privilege (LPP) has been waived by the Defendants in relation to every document provided by either of them to the NTEPA or any other Agency of the Northern Territory of Australia.
- (ii) LPP has been waived by the Defendants in relation to the report, and documents comprising associated sampling and analysis results, assessments and investigations, referred to in paragraph 1(b) the Outcomes agreed by the parties on 12 February 2020.
- (iii) LPP has been waived by the Defendants in relation to the report referred to in paragraph 1(d) of the Outcomes of 12 February 2020.
- (iv) Subject to (i) to (iii) above, LPP applies to all documents comprising communications between the Defendants, De Silva Hebron and Douglas Partners (including internal communications), during the period 15 October 2018 and 30 January 2020.

⁷ [2021] NTSC 45 delivered by Mildren AJ on 18 June 2021 and [2021] NTSC 46 delivered by Grant CJ on 22 June 2021.

⁸ Paragraphs [20] to [28], [32] to [33], and [38] to [47] of Mr Hutton's Affidavit of 4 December 2020.

- (v) The Informant and the NTEPA have leave to inspect and copy any documents produced by Douglas Partners other than those within (iv) above.

Dated this 12th Day of September 2022



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Judge Greg Macdonald
Local Court Judge