SUPREME COURT OF QUEENSLAND

CITATION:	*Century Drilling Limited & Anor v Gerling Australia Insurance Company Pty Limited* [2004] QSC 120
PARTIES:	**CENTURY DRILLING LIMITED** ACN 002 975 439 (first plaintiff) **CENTURY ENERGY SERVICES PTY LIMITED** ACN 069 875 716 (second plaintiff) **v** **GERLING AUSTRALIA INSURANCE COMPANY PTY LIMITED** ACN 069 085 196 (defendant)
FILE NO/S:	SC No 9534 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	21 May 2004
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2004
JUDGE:	Holmes J
ORDER:	**Application dismissed**
CATCHWORDS:	PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – GROUNDS FOR RESISTING PRODUCTION – IRRELEVANCE – LEGAL PROFESSIONAL PRIVILEGE – OTHER GROUNDS – where the plaintiffs seek production of a loss adjuster's report which is referred to in an exhibit to an affidavit filed on behalf of the defendant pursuant to rule 223(1) of the *Uniform Civil Procedure Rules* – the defendant opposes the application on the grounds that the document was referred to in an exhibit rather than in the body of an affidavit, that the affidavit is no longer relevant and that the document is privileged – whether the defendant is entitled to withhold production of the document. *Uniform Civil Procedure Rules* 1999, r222, 223, 212(2), 431, 435 *ACN 007 528 207 Pty Ltd (in liq) v Bird, Cameron & Ors* [2002] SASC 144

Australian Rugby Union Ltd v Hospitality Group Pty Ltd & Ors (1999) 165 ALR 253
Beneficial Finance Corporation Ltd & Others v Price Waterhouse (1996) ANZ Ins Cas 76,642
Beneficial Finance Corporation Ltd & Others v Price Waterhouse (1996) 68 SASR 19
Commissioner of Australian Federal Police and Anor v Propend Finance Pty Ltd (1997) 188 CLR 501
Pratt Holdings Pty Ltd v Commissioner of Taxation [2004] FCAFC 122
DSE (holdings) Pty Ltd v Intertan Inc and Anor (2003) 203 ALR 348
Esso Australia Resources Ltd v Federal Commissioner of Taxation (1999) 201 CLR 49
GSA Industries (Aust) Pty Ltd v Constable [2002] 1 Qd R 1146
Leader Westernport Printing Pty Ltd v IPD Instant and Duplicating Pty Ltd (1988) 5 ANZ Insurance Cases 60-856
Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd [1992] 1 Qd R 91
Maxelow Pty Ltd v Herberton Shire Council [2001] QSC 250
Quilter v Heatly (1883) 23 Ch D 42
Rafidain Bank v Agom Universal Sugar Trading Co Ltd & Anor [1987] 1 WLR 1606
Re Hinchliffe [1895] 1 Ch 117

COUNSEL: DJS Jackson QC for the applicant plaintiffs
GW Diehm for the respondent defendant

SOLICITORS: Corrs Chambers Westgarth for the applicant plaintiffs
Moray and Agnew for the respondent defendant

[1] The applicant plaintiffs seek an order, pursuant to r 223 of the *Uniform Civil Procedure Rules* 1999, for production by the respondent defendant of a document described as a loss adjuster's report. The existence of the document came to light when it was referred to in an exhibit to an affidavit, filed in connection with an application, now resolved, for the striking out of certain paragraphs of the defence. The issues raised by the present application are:

1. whether r 222, which enables a party to require another party "in whose pleadings, particulars or affidavits mention is made of a document" to produce that document, applies where that mention is made in an exhibit to an affidavit;

2. whether r 222 applies where the affidavit is not the subject of any current application to the court;

3. whether privilege attaches to the document in question here, so as to provide good reason for not ordering production;

4. whether, if privilege would otherwise attach so as to preserve the document from the duty of disclosure, that privilege is abrogated by r 212(2), which

provides that "a document consisting of a statement or report of an expert is not privileged from disclosure".

Background

[2] The plaintiffs claim that the defendant, as their insurer, has breached the policy of insurance by refusing to indemnify them for the loss by fire of various pieces of equipment forming part of a drilling rig. In its defence the defendant alleges that the rig was in fact misappropriated prior to the fire and that the plaintiffs failed to disclose various relevant matters prior to renewal of the contract of insurance.

[3] In connection with the striking out application, an affidavit of Louise Hope was filed which exhibited a letter dated 18 November 2002 from a Mr Thorpe, of GAB Robbins, Chartered Loss Adjusters, to the solicitors for the defendant. That letter included this paragraph

> "I refer to our recent discussions in relation to the above matter. You were seeking documentation and statements to support the chronology provided in our previous report".

What Mr Thorpe describes as "our previous report" is the report of which inspection is now sought.

Does r 222 apply to a document mentioned in an exhibit to an affidavit?

[4] Mr Diehm, for the respondent, said that the *Uniform Civil Procedure Rules* provided some basis for concluding that an exhibit should not be regarded as part of the affidavit which makes reference to it. Rules 430-434 of the *Uniform Civil Procedure Rules* deal with the content of affidavits. Rule 431 requires that an affidavit be in the "approved form": that is, Form 46 to the Rules. Form 46 makes provision in its terms for reference to exhibits. Rule 435 is concerned with the requirements for exhibits, and begins:

> "(1) A document to be used with and mentioned in an affidavit is an exhibit."

Rule 435(8) requires an exhibit to be filed at the same time as the affidavit.

[5] Having reviewed those rules, I think that Mr Diehm is correct in saying that they distinguish between affidavits and exhibits.

[6] Mr Jackson QC, for the applicant, relied, however, on *Re Hinchliffe.*[1] In that case, an affidavit was made which included reference to counsel's opinion, marked and annexed to it. The court seems to have regarded the notion of annexure and exhibit as interchangeable. And although reference was made to annexure, it seems that it was not the practice in the relevant division of the court to file exhibits with the affidavit. It was held that a party was entitled to production of the exhibit referred to. Lord Herschell LC, in concluding that inspection of the documents could not be refused, said,

> "They form as much part of the affidavit as if they had been actually annexed to and filed with it".[2]

---

1 [1895] 1 Ch 117

2 At p 120

Lindley LJ gave his opinion to similar effect: there was a right to inspect

> "an exhibit referred to in the affidavit so as to be made part of it, just as if it were annexed to the affidavit".[3]

AL Smith LJ, in reaching the same conclusion, elaborated:

> "When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense." [4]

[7] In *Beneficial Finance Corporation Ltd & Others v Price Waterhouse*,[5] Olsson J relied on *Re Hinchliffe* for the proposition that an exhibit to an affidavit stood on the same footing as the affidavit itself. He had before him an application under the Supreme Court rules for production of an insurance policy referred to in an exhibit to an affidavit. Rule 59 of the *Supreme Court Rules* (SA), with similar effect to r 222, required production for inspection of a document referred to in a pleading or an affidavit. The rule's applicability does not seem to have been strongly challenged; Olsson J referred to the respondent's "virtual" concession that it applied,[6] with submissions being made that he should exercise his discretion to relieve the respondent from its effect. But his Honour considered it beyond doubt, in any case, that SCR 59 applied to exhibits as falling within the compass of affidavits. If it were otherwise, he said, the rule could be rendered nugatory.[7] In the course of his reasons he said this:

> "The policy of the rule is plain. It is aimed at ensuring that a person against whom an affidavit is used is entitled to demand production of primary evidentiary material referred to and relied upon, in order to verify the truth of statements made concerning it". [8]

For reasons which will become apparent, I agree with that proposition, but not with the result reached by Olsson J.

[8] An appeal against Olsson J's decision to order production was allowed.[9] Of the judgments on appeal, the reasoning of Perry and Cox JJ does not assist on the present point; it turned on a view that the rule should not be construed so as to require a party to produce a document referred to solely for the purpose of opposing its production. Lander J was the only member of the court to address directly the question of whether the rule extended to documents referred to in exhibits. His view was that *Re Hinchliffe* merely required production of exhibits to an affidavit; it was

> "not authority for the proposition that where a party exhibits a document to an affidavit any other documents referred to in that exhibit become subject to immediate and summary production". [10]

---

3 At p 120
4 At p 120
5 (1996) ANZ Ins Cas 76,642 at 76,652
6 At p 76,652
7 At p 76,652
8 At p 76,652
9 *Beneficial Finance Corporation Ltd & Others v Price Waterhouse* (1996) 68 SASR 19
10 At p 49

Lander J considered that a requirement that any document referred to in an exhibit be produced was capable of causing significant hardship.[11] Equally, he did not think that where a document was referred to in a pleading, the rule would require production of any document referred to in the document mentioned in the pleading:

> "The qualification for the production of the document is that the pleading refers directly to that document, or the document is exhibited to an affidavit, not that the document referred to in the pleading or exhibited in the affidavit in turn refers to another document making that last mentioned document subject to production".[12]

[9] Burley J applied what was said by Lander J in *ACN 007 528 207 Pty Ltd (in liq) v Bird, Cameron & Ors*,[13] to hold that documents referred to in a bill of costs exhibited to an affidavit were not susceptible of production for inspection under SCR 59 of the South Australian rules.

[10] A rule in similar terms, entitling any party to inspect documents referred to in pleadings or affidavits, was first introduced in England in the *Supreme Court Rules* made under the *Judicature Act* 1875. In *Quilter v Heatly*,[14] the issue arose as to whether an applicant was entitled to an order under that rule for inspection of documents immediately, as opposed to after delivery of the defence. Chitty J decided in the negative, and his judgment was successfully appealed; but, interestingly, in his judgment he attributed to Jessel MR a remark that the object of the new practice embodied in the rule was to prevent the invention of "fictitious deeds or documents" in the statement of claim.

In his judgment on the appeal, Jessel MR did not disavow the comment, but was less expansive, saying only:

> "It is reason enough why the Defendant should be allowed to see them that the Plaintiff has made them part of his statement of claim."[15]

Lindley LJ observed:

> "These rules were evidently intended to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings."[16]

[11] In this Court, and to similar effect, Williams J in *Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd*[17] referred to O 35 r 14, the predecessor of r 222, as

> "designed to put the opposite party in the same position or advantage as if the documents in question had been fully set out in the pleadings."

[12] It is, I think, tolerably clear that the rationale of the rule is this: access to documents referred to in pleadings, particulars and affidavits should be given because it can be

---

11 At p 49
12 At p 49
13 [2002] SASC 144
14 (1883) 23 Ch D 42
15 At p 48-49
16 At p 50
17 (1992) 1 Qd R 91 at 97

assumed, such reference having been made, that those documents are relied on by the party referring to them; or at least are regarded by it as material to its case. Clearly enough, if a party is foolish enough to refer in its pleadings or affidavits to a document which is not material, it may still be required to produce it for inspection; but the point of the rule, as it seems to me, is to give the other party an opportunity to verify the existence and content of the document which the other party, by including it in pleadings or affidavits, has identified as material.

[13] But those considerations do not apply to a document merely referred to in an exhibit. An exhibit will, in the ordinary course, be provided in its entirety; but it does not follow that its entire content will be relevant or relied upon. That a particular document is referred to in an exhibit may be a matter of pure happenstance, rather than any indication that the party relying on the exhibit relies also on the document. The affidavit's deponent has sworn to the existence of the exhibit, and probably its context and relevance; but in the case of a document referred to in the exhibit itself, he has sworn nothing. It is, as Lander J observed, similar to the position with respect to pleadings: reference to a document in pleadings denotes reliance on it for some purpose; but reference within that document to a further document does not necessarily indicate anything as to the latter's significance. For those reasons, I think that there is a very great difference between reference to a document in an affidavit and reference to a document in an exhibit, and that there is every reason to apply the rule to the first, but not the second.

Does r 222 apply to affidavits filed in applications no longer current?

[14] In case I am wrong in my approach to r 222, I should say that I do not think that the applicant would be precluded from seeking production of a document merely because the affidavit referring to it had been filed in an application completed before the request for inspection. In *Rafidain Bank v Agom Universal Sugar Trading Co Ltd & Anor*,[18] Nourse LJ dealt with a submission that since the documents were referred to in affidavits in an application which was now spent, and the pleaded case was not based on them, they could not be said to be fundamental to the defence. He did not seem to regard the fact that the application was no longer on foot as of any relevance:

> "Those are points which do not impress me at all. The documents would never have been referred to in the affidavits on the Order 14 summons unless the first defendants had taken the view that they were of material significance in the action."[19]

[15] It may be that the fact that the application was resolved would provide a reason for exercising a discretion not to order production, if in fact the documents sought were no longer of relevance to any issue remaining to be litigated. But I do not think that the completion of the application renders the rule inapplicable to affidavits used in its course.

[16] What was referred to as a report in Mr Thorpe's letter of 18 November 2002 was provided to me for examination. The letter was not entirely accurate in speaking of "the chronology provided in our previous report". What the material provided to

---

18 [1987] 1 WLR 1606 at 1612

19 At p 1612

me for examination consists of is a letter signed by Mr Thorpe, referring to two accompanying documents, one of which, as the subsequent reference indicates, is a chronology. Both of the two accompanying documents appear to have been prepared by third parties. The covering letter identifies each of the documents but contains nothing else of substance. While the reasons for the defendant's attaching significance to the letter and accompanying documents are not entirely clear to me, I do not think it can fairly be said that they have lost any materiality they may have had by reason of the completion of the striking out application. I would not be disposed to exercise a discretion in favour of the defendant on that score.

Does privilege attach to the documents?

[17] The documents here will be privileged if prepared and produced to the solicitors by the defendant, or by a third party at its direction,[20] for the dominant purpose of obtaining legal advice.[21] Ms Hope had originally deposed that the letter from Mr Thorpe had been requested for the purpose of the defendant's obtaining legal advice, but her affidavit was silent as to any other possible purpose or the context in which the request was made. However, a further affidavit filed by agreement puts it beyond any doubt that the request for the letter and accompanying information was made for the dominant, if not sole, purpose of preparing legal advice for the defendant, and that the loss adjusters were acting at the direction of the defendant in providing information for the purposes of obtaining that advice. The accompanying documents were, as I have already noted, apparently the work of other parties, and there is no reason to suppose that in their original form they were privileged; but it is evident that they were copied by the loss adjusters and communicated to the solicitors, at the latter's request and at the defendant's direction, for the purpose, which was dominant, of their giving legal advice.[22]

[18] Given that the documents emanated from the loss adjusters at the direction of the defendant, and were communicated to the defendant's solicitors for the dominant purpose of obtaining legal advice, I consider that legal advice privilege attaches to the documents, subject to any abrogation by r 212(2).

Do the documents constitute "a statement or report of an expert"?

[19] I think it is unnecessary to decide for the purposes of this application whether Mr Thorpe, as a loss adjuster, can for some purposes properly be described as an expert; what is more to the point is whether the documents here constitute an "statement or report of an expert". (I will consider the letter and accompanying documents together as forming what Mr Thorpe in his letter of 18 November 2002 referred to generally as a 'report'.)

[20] It is undoubtedly true, as Cullinane J observed in *Mazelow Pty Ltd v Herberton Shire Council*,[23] that it is unnecessary, in order to be characterised as an expert

---

20 *Australian Rugby Union Ltd v Hospitality Group Pty Ltd & Ors* (1999) 165 ALR 253; *Leader Westernport Printing Pty Ltd v IPD Instant and Duplicating Pty Ltd* (1988) 5 ANZ Insurance Cases 60-856; *GSA Industries (Aust) Pty Ltd v Constable* [2002] 1 Qd R 1146; *DSE (holdings) Pty Ltd v Intertan Inc and Anor* (2003) 203 ALR 348; *Pratt Holdings Pty Ltd v Commissioner of Taxation* [2004] FCAFC 122.

21 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49.

22 *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501

23 [2001] QSC 250

report or statement, that a document "be constituted wholly or substantially by expressions of opinion". His Honour gave as an example "the presentation of data established by scientific means", which might well warrant such a description. But in this case, the material of which production is sought is no more than a letter accompanying two other documents, neither of which appears to have been prepared by Mr Thorpe. I do not think that the letter can possibly be regarded as "a statement or report"; it does not purport to add any information to what is contained in the accompanying documents or offer any opinion on them. Nor do the documents taken together constitute a "statement or report of an expert". Clearly enough, Mr Thorpe in this instance has acted as nothing more than the conduit by which the documents were obtained and provided to the defendant's solicitors; and there is nothing which smacks of expertise in the process. I would regard, therefore, both the letter and the accompanying documents as privileged.

[21] If, then, my view of r 222 as having no application to a document mentioned in an exhibit is wrong, I would in any event exercise my discretion against ordering disclosure in the present context. There was no more than a passing reference in Mr Thorpe's letter of 18 November 2002 to the material, and I do not think the circumstances warrant requiring production of it notwithstanding its privileged status.

Order

[22] For these reasons, the application for production is dismissed. I will hear the parties as to costs.