SUPREME COURT OF QUEENSLAND

CITATION:	*GSM (Operations) Pty Ltd v Suwenda* [2010] QSC 33
PARTIES:	**GSM (OPERATIONS) PTY LTD** ACN 085 950 803 (first plaintiff) **BILLABONG INERNATIONAL LIMITED** ACN 084 923 956 (second plaintiff) **v** **SUWENDA, Suzi Ann** (first defendant) **SUWENDA, Rory** (second defendant) **SUWENDA, Daniel Wayan** (third defendant)
FILE NO/S:	SC 6832 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 January 2010
DELIVERED AT:	Brisbane
HEARING DATE:	12 January 2010
JUDGE:	Margaret Wilson J
ORDER:	**1. that the application be dismissed;** **2. that the letter from Mr Fluit to the Registrar of 1 January 2010, to which is attached a copy of Professor Juwana's opinions, be placed in an envelope, sealed and marked not be opened without an order of the Court;** **3. that the applicant/plaintiffs pay the respondent/defendants' costs of and incidental to the application to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS – where plaintiffs are engaged in the marketing and distribution of Billabong products – where first plaintiff is the owner of the trademark "Billabong" and associated intellectual property and is a wholly owned subsidiary of the second plaintiff – where defendants are alleged to have been active partners in a business arrangement recognised and established under Indonesian law – where plaintiffs allege licence to conduct the Billabong Indonesian business subject to termination

rights – where plaintiffs seek declarations with respect to the termination or expiration of agreement and entitlement to possession of marketing materials – where plaintiffs filed an application for summary judgment – where defendants sought an adjournment of that hearing – where defendants' solicitor swore affidavit naming professor of law at Indonesian university "who had previously provided opinions on the applicable law" regarding the termination of licences – where plaintiffs bring an application for an order that defendants provide "a copy of the opinions" referred to solicitor's affidavit, pursuant to rule 222 and/or rule 223(1)(b) of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether document attracts legal professional privilege – whether r 222 and/or rule 223(1)(b) engaged

Uniform Civil Procedure Rules 1999 (Qld), r 211, r 222, r 223(1)(b)

Balnaves v Smith [2008] 2 Qd R 413, considered
Century Frilling Limited v Gerling Australia Insurance Company Pty Ltd [2004] 2 Qd R 481, considered
Dubai Bank Limited v Galadari (No 2) [1990] 1 WLR 731, considered
Kennedy v Wallace [2004] FCAFC 337, cited
Lillypond Constructions Pty Ltd v Homann [2006] 1 Qd R 411, considered
Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd [1992] 1 Qd R 91, cited
Marubeni Corporation v Alafouzos [1986] CA Transcript 996, applied
RP Data Limited v Property Data Solutions Pty Ltd [2006] QSC 214, considered
Rubin v Expandable Limited [2008] 1 WLR 1099, considered
Quilter v Heatly (1883) 23 Ch D 42, considered

COUNSEL: T P Sullivan SC for the applicant/plaintiffs.
R E O'Sullivan for the respondent/defendants.

SOLICITORS: Clayton Utz for the applicant/plaintiffs.
Shand Taylor Lawyers for the respondent/defendants.

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MARGARET WILSON J

No 6832 of 2009

GSM (OPERATIONS) PTY LTD & ANOTHER Plaintiffs

and

I WAYAN SUWENDA & OTHERS Defendants

BRISBANE

..DATE 18/01/2010

JUDGMENT

HER HONOUR: The plaintiffs are engaged in the marketing and distribution of Billabong products. The first plaintiff is the owner of the trademark "Billabong" and associated intellectual property. It is a wholly owned subsidiary of the second plaintiff.

The defendants are alleged to be, and at all material times to have been, active partners in a business arrangement which traded under the name CV.Bali Balance, "CVBB". That arrangement is a Commanditaire Vennootschap (CV), an arrangement recognised and established under the laws of the Republic of Indonesia.

The plaintiffs allege that by an agreement in writing dated 24 June 2004, CVBB was granted a license to conduct the Billabong Indonesian business for the period 1 July 2004 to 30 June 2009, subject to termination rights. The plaintiffs seek (inter alia) declarations with respect to the termination or expiration of the agreement and the entitlement to possession of marketing materials.

On 19 November 2009, the plaintiffs filed an application for summary judgment. The return date was 8 December 2009. The defendants sought an adjournment of that hearing. In support of their application for an adjournment, they relied on a affidavit of a solicitor, Mr Ronald Marinus Fluit, sworn 2 December 2009, and filed by leave on 8 December 2009.

In paragraph 15, Mr Fluit deposed that there were "two other

witnesses who will be asked to provide affidavit evidence in opposition to this application. Both reside in Indonesia. One of the witnesses is Paramita Ersan... The other witness is Professor Hikmahanto Juwana, Professor at Faculty at Law, University of Indonesia in Jakarta. The professor has previous [sic] provided opinions on the applicable law regarding the termination of CVBB's licenses."

The application for summary judgment was adjourned and is presently listed for hearing on 25 January 2010.

This is an application by the plaintiffs for an order that the defendants provide "a copy of the opinions" of Professor Juwana referred to in paragraph 15 of Mr Fluit's affidavit, pursuant to rule 222 and/or rule 223(1)(b) of the UCPR. Those rules provide:

> "**222 Inspection of documents referred to in pleadings or affidavits**
>
> A party may, by written notice, require another party in whose pleadings, particulars or affidavits mention is made of a document-
>
> (a) to produce the document for the inspection of the party making the requirement or the solicitor for the party; and
>
> (b) to permit copies of the document to be made.
>
> **223 Court orders relating to disclosure**
>
> (1) The court may order a party to a proceeding to disclose to another party a document or class of documents by-
>
> ...
>
> (b) producing for the inspection of the other party in accordance with this part the document, or each document in the class."

On or about 1 January 2010, Mr Fluit sent an email to the solicitors acting for the plaintiff. He said that he was unable to obtain his client's instructions in relation to the application for production of documents, and was therefore not in a position actively to oppose the application. He went on,

"However, to best protect our client's position, we are sending a copy of the relevant document to the Supreme Court of Queensland, marked as 'Privileged' in a sealed envelope, to the attention of the judicial officer hearing the application. It will therefore be available to your clients should the Court determine against our client.

Please note that despite the use of the word 'opinion', there is only one document in which several opinions are expressed.

Whilst we are unable to specifically conclude the factual basis as to the obtaining of the 'opinions' contained in the document, we take the view that on its face, it appears to fulfil the criteria to attract the defence of privilege specifically to deny the order sought in the application."

Since then, Shand Taylor Lawyers have assumed conduct of the defence.

In an affidavit sworn and filed on 7 January 2010, Kate Maree Grossman, a solicitor in the employee of Shand Taylor Lawyers, referred to interviews she conducted with the first and third defendants on 5 and 6 January 2010. She said she had been

informed by them and verily believed that Professor Juwana had been retained by their Indonesian lawyer in about July 2009 (before the filing of their defences in this proceeding) to provide certain advices on the matter of the jurisdiction of this Court to hear and determine the proceedings, that as a result of advice received from her that any advices received from Professor Juwana would be the subject of a claim for legal professional privilege, the first and third defendants objected to production of any advices or opinions obtained from Professor Juwana, that they were not aware of the existence of a document or documents meeting the description contained in paragraph 15 of Mr Fluit's affidavit, and that they had not provided instructions to Mr Fluit to retain Professor Juwana for the purpose of his preparing a report under the provisions of part 5 of the UCPR on any issue arising on the pleadings in the proceedings.

The first defendant also swore an affidavit, which was filed by leave on 12 January 2010. She said that the defendants had not been shown a copy of Mr Fluit's affidavit nor had their instructions been sought in relation to it. She said that the defendants had not sought an opinion from Professor Juwana on the applicable law regarding the termination of CVBB licenses and had not instructed Mr Fluit to seek any such opinion. They have not seen any written opinion from Professor Juwana about the applicable law regarding the termination of CVBB's licences. As far as she was aware, Professor Juwana had not provided an opinion to the defendants on that question.

In RP Data Limited v Property Data Solutions Pty Ltd [2006] QSC 214, Helman J referred to the well established distinction between the general duty of disclosure by a party to a proceeding provided for in rule 211 of the UCPR and disclosure by way of production of a document for inspection in response to a requirement pursuant to rule 222. As his Honour explained, the former duty arises in respect of documents in the possession or under the control of the disclosing party, and which are directly relevant to an issue defined by the pleadings. The latter arises in the words of Lindley LJ in Quilter v Heatly (1883) 23 Ch.D 42 at 50, "to give the opposite party the same advantage as if the documents referred to had been fully set out in the pleadings" or in the affidavits. See also Mantaray Pty Ltd v Brookfield Breeding Co Pty Ltd [1992] 1 QdR 91 at 97 per Williams J.

In Century Drilling Limited v Gerling Australia Insurance Company Pty Ltd [2004] 2 QdR 481 at 484 - 485, Holmes J said of rule 222-

"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 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."

By rule 222, a party may require production of a document of which "mention is made" in an affidavit. In Lilypond

Constructions Pty Ltd v Homann [2006] 1 QdR 411 at 414, Mackenzie J held that rule 222 requires a clear and unambiguous reference to a document before it can operate. Douglas J reached a similar conclusion in Balnaves v Smith [2008] 2 QdR 413, after a review of authorities on cognate rules in other jurisdictions, such as New South Wales and England, requiring "reference" to be made to a document. There it has been held that there needs to be a "direct allusion" to the document, an inferred or implied reference being insufficient. See also RP Data Limited v Property Data Solutions Pty Ltd.

The current English rule, CPR 13.14(1), entitles a party to inspect a document "mentioned in" various documents, including affidavits and witness statements. In Rubin v Expandable Limited [2008] 1 WLR 1099, the Court of Appeal applied the direct allusion test to the current English rule. In that case the following appeared in a parties witness statement,

"... after Mr Zaid [the party's solicitor] had interviewed Mr Clarke, he [Mr Zaid] wrote to me enclosing a copy of his note of the meeting and drawing my attention to the discrepancies

..."

The solicitor for another party requested a copy of Mr Zaid's letter, claiming a right of inspection under CPR 13.14{1}(b). In discussing the direct allusion test, Rix LJ referred to Dubai Bank Limited v Galadari (No 2) [1990] 1 WLR 731, a

decision on the former English rule. There, Slade LJ drew a distinction between a reference by inference (which he considered not within the rule) and a direct allusion (which he considered the rule required). He also spoke of the real difference between a reference to the effect of a document and the contents of a document.

As Rix LJ said in Rubin v Expandable Limited, it would appear that the latter would come within the rule.

His Lordship said,

"It appears therefore that a reference to a conveyance, guarantee, mandate or mortgage ... would be a reference to a document, as would a reference to the contents of such documents. But the mere reference to the effect of some transaction or document, such as to say that a property was conveyed, or that someone had guaranteed a loan, would not be sufficient."

In Rubin v Expandable Limited, Rix LJ concluded that "he wrote" was not a mere reference to a transaction otherwise to be inferred as a effected by a document, but a direct allusion to the act of making the document itself. Therefore the document was "mentioned in" the witness statement, and subject to any question of legal professional privilege had to be produced.

I turn to paragraph 15 of Mr Fluit's affidavit in the present

case. He deposed that the professor had previously provided opinions on the applicable law regarding the termination of CVBB's licenses. In my view that was not a direct allusion to a document. Opinions may be contained in documents or they may be expressed orally.

The peculiar feature of this case is that it is clear from Mr Fluit's email of 1 January 2010 that the opinions to which he referred are contained in a document. Indeed, a copy of the document has been provided to the Court and I have perused it.

Is rule 222 engaged where the affidavit does not contain mention of a document, but there is other evidence establishing unequivocally that the opinions of which mention is made are contained in a document?

In Marubeni Corporation v Alafouzos [1986] CA Transcript 996, the affidavit was in these terms:

"The plaintiffs have obtained outside Japanese legal advice which categorically states that this agreement does not render performance of the sale contract illegal in any way whatsoever."

During argument, it was conceded that the advice "almost certainly" would have been contained in a document. Despite that concession, Lawton LJ regarded it as clear that there had not be a reference to a document in the affidavit. Not without "some doubt", Lloyd LJ was prepared to assume that

there was a reference to a document.

In my respectful opinion, the approach of Lawton LJ is to be applied to rule 222 of the UCPR. Paragraph 15 of Mr Fluit's affidavit contains a direct allusion to opinions but not a direct allusion to a document containing opinions. Accordingly, in my view, the rule is not engaged.

Even if the rule is prima facie engaged, mere mention of a document does not amount to waiver of legal professional privilege if it otherwise exists.

A foreign lawyer's advice may attract legal professional privilege. See Kennedy v Wallace [2004] FCAFC 337 at paragraphs 198 - 2002. A mere statement of principles of Indonesian Law may be a statement of fact. But that is different from an opinion upon the application of those principles to the affairs of the defendants. In my view, the document does attract legal professional privilege.

In the circumstances, the application is dismissed.

I will direct my associate to place the letter from Mr Fluit to the Registrar of 1 January 2010, to which is attached a copy of Professor Juwana's opinions, in an envelope which is to be sealed and marked with particulars of the Court proceeding and as not to be opened without an order of the Court.

...

HER HONOUR: In view of my conclusion that rule 222 is not engaged because there is no direct allusion to a document in paragraph 15 of Mr Fluit's affidavit, I think the respondent/defendants are entitled to their costs of this application.

Accordingly, I order that the applicant/plaintiffs pay the respondent/defendants' costs of and incidental to the application to be assessed on the standard basis.
