

SUPREME COURT OF QUEENSLAND

CITATION: *Brooks v Ticor Chemical Company Pty Ltd* [2002]
QSC 383

Brooks v O'Bryan & WorkCover Queensland
[2002] QSC 383

PARTIES: **RUSSELL DOUGLAS BROOKS**
(Applicant/Plaintiff)
v
TICOR CHEMICAL COMPANY PTY LTD
ACN 010 815 319
(Respondent/Defendant)

RUSSELL DOUGLAS BROOKS
(Applicant)
v
MICHELLE FRANCIS O'BRYAN
(First Respondent)
and
WORKCOVER QUEENSLAND
(Second Respondent)

FILE NO: S312/99
S473/2002

DIVISION: Trial Division

DELIVERED ON: 22 November 2002

DELIVERED AT: Rockhampton

HEARING DATE: 25 October 2002

JUDGE: Dutney J

ORDERS:

1. In S312 of 1999 the signature of the defendant on the Request For Trial Date be dispensed with;
2. Subject to the filing of the Request and the payment of any prescribed fees I order that the action be placed on the list of cases to be called over for the next civil sittings of the Supreme Court in Rockhampton;

3. Application S473 of 2002 is dismissed with costs.

CATCHWORDS: WORKERS' COMPENSATION – CONSTRUCTION OF STATUTE – RIGHT TO PROCEED FOR DAMAGES – whether s286(2) applies where worker injured prior to commencement of the *WorkCover Queensland Act* 1996 – meaning of s551

EVIDENCE – PRIVILEGE – LEGAL PROFESSIONAL – LEGISLATIVE INTENT – WAIVER - where documents are believed to relate to an offence under s482 *WorkCover Queensland Act* 1996 – whether legal professional privilege abrogated by the statute – where no clear intention appears in the statute – whether applicant/plaintiff waived privilege – whether unfair to maintain it

Re a solicitor's clerk [1957] 1 WLR 1219, referred to
La Macchia v Minister for Primary Industry (1986) 72 ALR 23, referred to
Mears v Coles Myer Limited [2000] QCA 342, followed

Attorney General (NT) v Maurice (1986) 161 CLR 475, followed
The Daniel Corporation International Pty Ltd v ACCC [2002] HCA 49 (7 November 2002), followed
Mann v Carnell (1999) 201 CLR 1, considered

COUNSEL: Mr G Crow for the Applicant/Plaintiff in S312/99 and Applicant in s473/2002
 Mr T Arnold for the Respondent/Defendant in S312/99
 Mr T Carmody SC for the First and Second Respondents in S473/2002

SOLICITORS: Kenny & Partners for the Applicant/Plaintiff in S312/99 and the Applicant in S473/2002
 Swanwick Murray Roche for the Respondent/Defendant in S312/99
 WorkCover Queensland for the First and Second Respondents in s473/2002

[1] There are two applications before the Court. Russell Douglas Brooks is the applicant in each. There is a common issue. The circumstances are these.

The issues

- [2] By S312 of 1999 Mr Brooks has brought an action for common law damages arising out of a work related accident in 1996. From his perspective, the action is ready for trial. The defendant, Ticor Chemical Company Pty Ltd, refuses to sign a request for trial dates because of an appeal against the dismissal of a complaint brought against Mr Brooks by WorkCover.
- [3] The complaint was brought in the Magistrates Court at Gladstone on 24 June 2002 and alleged fraud by Mr Brooks against WorkCover, in contravention of s482 of the *WorkCover Queensland Act 1996* ("the Act"). The fraud was in allegedly working while receiving weekly compensation and failing to notify WorkCover. The complaint was dismissed on a preliminary point on 16 October 2002. WorkCover has appealed to the Industrial Magistrate. The appeal has not been determined.

Application in S312 of 1999

- [4] Section 486 of the Act relevantly provides:

- “(1) *This section applies if a person is convicted of any of the following offences committed against WorkCover ... in relation to an application for compensation or a claim for damages –*
- (a) *an offence under section 482 ...*
- (2) *Any entitlement the person may have to compensation or damages for the injury, and any existing claim for compensation or damages, ends.*”

- [5] The respondent to the first application, the application to dispense with the request for trial dates, submits that a trial should not be held before the resolution of the appeal because if the appeal succeeds Mr Brooks will have lost his entitlement to common law damages.
- [6] Counsel for Mr Brooks on the other hand argues that because of the transitional provisions in section 551 of the Act, the fact that Mr Brooks’

injury preceded the coming into operation of the Act and the repealed Act had no analogue to s486 the appeal is irrelevant to Mr Brook's claim for common law damages and he should be entitled to proceed immediately to a trial.

[7] In the second application, S473 of 2002, Mr Brooks relies on the same transitional provision to resist a requirement that he provide documents under s468(2) of the Act believed to be relevant to an offence the person making the request reasonably believes has been committed against the Act. The offences relevant to the belief in the second application are the same offences the subject of the appeal in the first.

[8] Section 551 of the Act is as follows:

- “(1) This section applies if a worker sustains an injury before the repeal of the repealed Act.*
- (2) The repealed Act applies in relation to the injury as if the repealed Act had not been repealed.*
- (3) However, a person entitled to lump sum compensation, weekly payments or dependant allowances under a former Act is entitled to the benefit of every increase in QOTE.”*

[9] I should note that although Mr Brooks sustained his injury before the Act came into force the offences alleged, if committed, were committed after that date.

[10] Leaving aside for the moment the effect of s551, there is nothing extraordinary in applying s486 of the Act to a claim for damages arising from an injury suffered before the enactment of the current form of the section.¹ This is particularly so in these cases where WorkCover relies on applying the current provisions to conduct which was proscribed when it was allegedly carried out.

[11] What then is the effect of s551? In my view it is applicable only to the provisions of the Act which relate to the injury itself and proceedings

¹ See for example *Re a solicitor's clerk* [1957] 1 WLR 1219 and *La Macchia v Minister for Primary Industry* (1986) 72 ALR 23 where in each case it was held not to be giving retrospective effect to a statute to rely on conduct preceding the enactment of the power to cancel a right to exercise the power after the enactment.

consequent upon it. It would thus not, in my view, prevent a prosecution for fraud under s482 which was in force at the time of the commission of the offence since that section is purely an offence provision and does not concern the injury or the consequences of the injury in any real sense. Section 551 would apply to a provision such as s486(2) which purports to extinguish a common law claim for damages for an injury. Since that claim is a matter relating to the injury it is governed by the repealed legislation. In other words s486(2) does not apply to a claim arising from an injury suffered before the present Act came into force. This conclusion is consistent with the decision of the Court of Appeal in *Mears v Coles Myer Limited*² where a wide interpretation was given to s551.

[12] It follows from my interpretation of the legislation that the appeal to the Industrial Magistrate will not have any necessary effect on the action for common law damages irrespective of the outcome. Even were I wrong in this view s486(2) does not presently apply because the applicant has not been convicted. The applicant should not be held out of his trial because of the presence of an appeal by WorkCover in circumstances where a successful outcome will only mean that WorkCover can proceed to prosecute the charges at some future time if it chooses. In the exercise of my discretion I would not stay the proceedings nor prevent Mr Brooks from having his trial when the case is ready.

[13] In the application in S312 of 1999 I order that the signature of the defendant on the Request for Trial Date be dispensed with. Subject to the filing of the request and the payment of any prescribed fees I order that the action be placed on the list of cases to be called over for the next civil sittings of the Supreme Court in Rockhampton.

² [2000] QCA 342.

Application S473 of 2002

- [14] Applying the same reasoning to the second application, where the documents are believed to relate to an offence under s482, s468(2) of the current legislation would apply. This is not a claim for inspection that could fairly be described as in relation to an injury preceding the repeal of the prior legislation.
- [15] Whether any disclosure of the particular class of documents resisted can be compelled depends on whether legal professional privilege is available.
- [16] Senior counsel for the respondent argued that there is an implied exclusion of legal professional privilege contained in s468 by reason of the express preservation of the privilege against self incrimination. I disagree. The passage from the judgement of Deane J in *Attorney General (NT) v Maurice*³ to which I was referred by counsel for the applicant makes it plain that the privilege will not be taken away by stealth. If it is the intention of the legislature to abrogate it I would expect a statement to that effect to appear in the statute or to find some other clear indication that the only privilege preserved is the one to which specific reference is made. Neither appears in this Act. The position in relation to the privilege was confirmed recently by the High Court in *The Daniel Corporation International Pty Ltd v ACCC*⁴.
- [17] Subject to questions of waiver, I am not persuaded that legal professional privilege is not available in this case.
- [18] The argument in relation to waiver arises from paragraphs 8 - 12 of a voluntary statement Mr Brooks provided to WorkCover in response to the allegations of fraud. In that paragraph Mr Brooks said:

³ (1986) 161 CLR 475 at 490

⁴ [2002] HCA 49 (7 November 2002)

- “8. *I did remember mentioning to my solicitor, Chris Gillett, that I was having a go at driving vehicles for Reef City Ford just to get out of the house and to find out what my capabilities were.*
9. *I did not expect to make any significant income from the work and in fact I did not. The point of undertaking the work was not to earn an income but, as I have said, to give me some activity to get me out of the house and to see to what extent I could handle driving type activities.*
10. *Chris Gillett, my solicitor, told me that the Courts would look favourably on my attempting to undertake activities like this rather than ‘bludge on the system’.*
11. *I did not know that it was necessary that WorkCover be told that I was undertaking this work. If I had known, I would have assumed that my solicitor would attend to any formalities that might be required.*
12. *I was aware at the time that persons on disability pensions and the like could earn a certain amount of money a week without affecting their pension. It simply did not occur to me that I was not permitted to earn any money while in receipt of WorkCover benefits.”*

[19] There is no suggestion that the statement to WorkCover was compelled under any coercive power that organisation possessed. It was provided by Mr Brooks for the purpose of short-circuiting the threatened charges. It is not a document in the nature of a pleading nor is it a document intended for use in any actual proceedings.

[20] The rule in relation to an implied waiver of legal professional privilege is that it will be taken to be waived where it would be unfair to maintain it.⁵ The nature of the unfairness was discussed in the joint judgement of the majority in *Mann v Carnell*⁶ at [29] as follows:

“What brings about the waiver is the inconsistency, which the courts, where necessary informed by considerations of fairness, perceive, between the conduct of the client and maintenance of the

⁵ *Attorney General (NT) v Maurice* 919860 16 CLR 475 at 480 – 481, 487 – 488, 492 – 493, 497 – 498; *Goldberg v Ng* (1995) 185 CLR 83 at 96 – 97.

⁶ (1999) 201 CLR 1 at 13.

confidentiality; not some overriding principle of fairness operating at large.”

- [21] Professor Wigmore explained the notion of implied waiver this way in a passage approved by a majority of the court in *Maurice*:

*“[W]hen his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder.”*⁷

- [22] Having regard to the express disclosure of the substance of the relevant advice I regard it as inconsistent (and thus, relevantly, unfair) to permit Mr Brooks to rely on the privilege to withhold the documents, if any, in which the advice is contained or in which it is referred to.

- [23] It follows that I would refuse to make a declaration in the broad terms sought in the application in S473 of 2002. Legal professional privilege in relation to those documents identified in paragraphs numbered 1 and 2 of the letter from WorkCover to Peter Little dated 21 October 2002 and being exhibit “MFOB5” to the affidavit of Michelle Frances O’Bryan filed by leave on 25 October 2002 has been waived.

- [24] Application S473 of 2002 is therefore dismissed with costs.

⁷ Wigmore, *Evidence in Trials at Common Law* (1961), vol 8, par 2327, p636.