Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor
[2005] NTSC 22

PARTIES:	TRACEY ANN RENEHAN BY HER LITIGATION GUARDIAN GERALDINE RENEHAN v LEEUWIN OCEAN ADVENTURE FOUNDATION LIMITED and COMMONWEALTH OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	No. 33 of 1998 (9803191)
DELIVERED:	5 May 2005
HEARING DATES:	20-21 April 2005
JUDGMENT OF:	MILDREN J

CATCHWORDS:

PRACTICE – subpoena duces tecum – application to set aside subpoena – whether subpoena offended *Navigation (Marine Casualty) Regulations 1990*

ESTOPPEL – issue estoppel – whether issue estoppel arises in respect of an issue determined in interlocutory proceedings – final determination

DISCOVERY – application for order to produce protected documents – documents created as result of inquiry under *Navigation (Marine Casualty) Regulations 1990* – whether public benefit in disclosure of information outweighs possible effect on future investigations – relevant factors

Legislation
Navigation (Marine Casualty) Regulations 1990 (Cwth) reg 8, reg 15(1), reg 15(5), reg 15(5)(a); *Navigation (Marine Casualty) Repeal Regulation 2003* reg 5

Followed
Conway v Rimmer [1968] AC 910; *Sankey v Whitlam* (1978) 142 CLR 1

Referred to
Christoforidis v Cygnet Bulk Carriers SA (2002) 122 FCR 1; *Australian National Airlines Commission v The Commonwealth of Australia and Another* (1975) 132 CLR 582; *Santos v Delphi Petroleum Pty Ltd*; [2002] SASC 272; BC200208003

REPRESENTATION:

Counsel:

Plaintiff:	M. Maurice QC & P.M. Barr QC
Department of Transport and Regional Services:	N. Christrup

Solicitors:

Plaintiff:	Cridlands
Department of Transport and Regional Services:	Minter Ellison

Judgment category classification:	A
Number of pages:	13

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

Renehan v Leeuwin Ocean Adventure Foundation Ltd & Anor
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No. 33 of 1998 (9803191)

BETWEEN:

TRACEY ANN RENEHAN BY HER LITIGATION GUARDIAN GERALDINE RENEHAN
Plaintiff

AND:

LEEUWIN OCEAN ADVENTURE FOUNDATION LTD and THE COMMONWEALTH OF AUSTRALIA
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 5 May 2005)

[1] This is an application to set aside a subpoena for the production of documents issued by the solicitors for the plaintiff and directed to the Department of Transport and Regional Services of the Commonwealth. The subpoena seeks the production of inter alia certain documents prepared for the purposes of or as a result of an investigation conducted in accordance with reg 8 of the Navigation (Marine Casualty) Regulations 1990 (Cwth) by a Captain Leverton as a result of an accident which occurred aboard the sail training ship *Leeuwin* on 12 June 1996. The plaintiff claims to have fallen

from the futtock shrouds of the main mast onto the deck below and has brought an action for damages against the defendants for negligence.

[2] Upon the return of the subpoena, counsel for the plaintiff, Mr Maurice QC, limited the call for the documents to the notes of an interview between Captain Leverton and a sail trainee, one Michael Baker, who was on board at the time and a witness to the accident.

[3] Mr Baker gave his consent to Mr Maurice seeing the notes in so far as they related to him and what he told Captain Leverton. Subsequently he extended that consent to include the Court and counsel and the legal advisors for the other parties in this suit.

[4] The Navigation (Marine Casualty) Regulations 1990, although repealed by reg 5 of the Navigation (Marine Casualty) Repeal Regulations 2003, still remain in force in respect of the confidentiality provisions which govern this case.

[5] Regulation 15 of the former Regulations relevantly provides as follows:

> **"15. Confidentiality**
>
> (1) Subject to subregulations (7) and (8), the Inspector or an investigator must not divulge information, or produce a document containing information, to which this subregulation applies, in whole or in part, except in the performance of duties or in the exercise of powers under these Regulations, to a court or any person other than:
>
> (a) in the case of evidence obtained under paragraph 10 (d) — the person who provided the evidence; or

(aa) in the case of a copy of, or an extract from, a record obtained under paragraph 11 (1) (c) or 12 (1) (c), or a record removed from a ship or premises under paragraph 11 (1) (e) or 12 (1) (e) — a person who would normally be entitled to have access to that record; or

(b) a Board appointed to investigate the incident to which the evidence relates; or

(c) the Executive Director; or

(d) the Minister.

(1A) Subregulation (1) applies to the following information:

(a) a statement (whether oral or in writing) obtained from a person by the Inspector or an investigator in the course of an investigation;

(b) not relevant

(c) not relevant

(d) not relevant

(e) not relevant

(f) not relevant

(g) not relevant

(2) A person to whom documents are produced or information is divulged under subregulation (1), and any person under the control of that person, is subject to the same rights and obligations under that subregulation as if the person were the Inspector or an investigator.

(3) A person may apply to a court for an order that a person who holds the information to which subregulation (1) applies, must disclose that information.

(4) A person may apply to a court for an order authorising the person to disclose information that is held by the person and to which subregulation (1) applies.

(5) A court may order or authorise the disclosure of information only if:

(a) the court is satisfied that the public benefit in the disclosure of the information outweighs any possible effect on the investigation to which the information relates or any future investigation; and

(b) the release is authorised by:

(i) in the case of a record of evidence given by a person under paragraph 10 (d):

(A) not relevant

(B) in any other case — the person who provided the evidence; or

(ii) not relevant

(iii) not relevant

(6) An order under subregulation (5) may:

(a) identify a particular person to whom the information must be disclosed; and

(b) specify the manner in which the information must be disclosed.

(6A) An order by a court under subregulation (5) may require information to be disclosed to the court.

(7) If a court orders a person to disclose information under subregulation (5), the person must disclose the information in accordance with the order.

(8) If a court authorises a person to disclose information under subregulation (5), the person may disclose the information in accordance with the order."

[6] The first submission made by Mr Christrup who appeared for the Department in answer to the subpoena, is that reg 15 prevents production of documents to a court. I was referred by Mr Maurice QC to *Christoforidis v Cygnet Bulk Carriers SA* (2002) 122 FCR 1 where Tamberling J held that reg 15 did not preclude production of documents to a court by subpoena.

However, reg 15 was subsequently amended and it is plain both by the text of the amendment, as well as by the explanatory statement issued by the authority of the Minister in respect of the amendment, that the purpose of the amendment was to overcome the decision in *Christoforidis v Cygnet Bulk Carriers SA*. It is clear now that reg 15(1) does preclude the production of documents to a court except in the circumstances set out in reg 15(1).

[7] As none of the circumstances set out in reg 15(1) applies in this case the subpoena must be set aside.

[8] However, counsel for the plaintiff applied informally to the Court for an order ordering and authorising the disclosure of the relevant information relating to the witness Baker. Normally such an application must be made by summons in accordance with the rules. However, Mr Christrup did not take objection to the informal manner in which the application was made and accordingly I heard it on its merits.

[9] It is plain that an order authorising or ordering the disclosure of the information could only be made if the Court was satisfied of both limbs of reg 15(5). There is no doubt that the release was authorised by Mr Baker and therefore the only question which arises is whether the Court is satisfied that the public benefit in disclosing the information outweighs any possible effect on the investigation to which the information relates or any future investigation.

[10] In my opinion the task of the Court when considering this question is to look at all of the circumstances. It is a weighing and balancing exercise. On the one hand, neither the plaintiff nor the Court will be aware of the contents of the document and what possible use may be made of it. Unlike documents produced on subpoena, the Court has no power to inspect the document in order to satisfy itself that the document may be of some use. The Court is left to draw inferences from the circumstances. In this case, Mr Baker is a witness called by the first defendant. He was an eye witness to the accident. His evidence could well be of considerable significance to the outcome of the trial. I have already heard his evidence in chief and part of his cross-examination. He clearly is a material witness. It is difficult to know precisely what use the notes might be to the plaintiff. Unless the notes are signed or initialled by the witness there may be difficulties in effectively cross-examining the witness using the notes. That is not to say that the notes could not be used in cross-examination in other ways, but the other ways are likely to be less effective. If the notes, for example, were unsigned and appeared to contradict his evidence in chief, it may be difficult for the plaintiff to contradict the witness by using the notes. The matter being a credit issue, the cross-examiner might be stuck with whatever answer the witness might give and not be in a position to contradict him, even if Captain Leverton were later to be called as a witness and were to be asked about this conversation.

[11] On the other hand an examination of the notes may reveal that there is nothing upon which to cross-examine the witness.

[12] The possible benefits to the plaintiff in these circumstances are impossible to judge. One can only say that there is a possibility of some benefit, but it is impossible to know how likely that possibility is.

[13] Nevertheless the interests of justice usually requires the disclosure of all relevant information. The notes may also lead to a chain of inquiry either with this witness or with some other witness.

[14] In my opinion the public benefit to which subregulation (5)(a) refers is the public interest described by Lord Reid in *Conway v Rimmer* [1968] AC 910 at 940 as "the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done".

[15] The balancing exercise in my view which is required in this case is similar to that described by Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 28-39:

> "The court must decide which aspect of the public interest predominates, or in other words whether the public interest which requires that the document should not be produced outweighs the public interest that a court of justice in performing its functions should not be denied access to relevant evidence."

[16] In *Australian National Airlines Commission v The Commonwealth of Australia and Another* (1975) 132 CLR 582 at 593 Mason J, as he then was, said:

> "...it is central to our conception of the administration of justice that documents relevant and material to the issues arising in litigation should not be withheld from the parties and that each party enjoys as an incident of his right to a fair trial the right to present as part of his case all the relevant and material evidence which supports or tends to support that case."

[17] The next question is if I were to order or authorise the disclosure of the information sought what possible effect might that have on any future investigation? It is conceded that there can be no possible effect on the investigation to which the information relates as that investigation was completed some nine years ago. So far as any future investigation is concerned, the information sought to be released could not, in my view, have any possible effect on any future investigation. There is in fact no investigation to which the Department can point and which is pending of a like or similar nature to the investigation conducted in 1996 by Captain Leverton. The evidence before me is that the type of equipment used on the *Leeuwin* and which is the subject of the accident which occurred in 1996 has since been replaced with an entirely different system. It would therefore appear to me to be most unlikely that a similar type of accident could happen in Australia, bearing in mind the small number of sailing ships of this type which sail in our waters. Counsel for the Department submitted that the fact that the witness had consented to the release of the information

was irrelevant, but as Mr Maurice QC submitted it is material in weighing the public interest. A considerable part of the Department's submission was that if an order is made in this case it may have ramifications to other investigations not only in respect of ships but also in respect of aircraft and it could have ramifications around the world because the fundamental purpose of these inquiries is to ensure that there is cooperation from those involved. I was referred to the Explanatory Statement accompanying Statutory Rules No. 199 of 2002 issued by the authority of the Minister for Transport and Regional Services at the time when reg 15 of the Navigation (Marine Casualty) Regulations 1990 was amended following the Federal Court's decision in *Christoforidis v Cygnet Bulk Carriers SA* (supra). In the statement it is said:

> "The purpose of the Regulations is to ensure that the confidentiality regime under regulation 15 of the principal Regulations applies to the production of documents to courts as well as disclosure of information in general and to make consequential amendments. This will ensure the future freeflow of safety information to the Australian Transport Safety Bureau (ATSB) for the purposes of marine safety investigations."

[18] Later in the Explanatory Statement it is said:

> "The amendment clarifies that the confidentiality provisions are applicable to the production of documents to a court, so as to ensure information collected by the ATSB will not be used for the purposes of blame apportioning court proceedings, except in accordance with the regime set out under subregulations 15(3) to 15(8)."

[19] I was referred to an affidavit sworn by Mr Stray, the Acting Director Safety Investigations of the Australian Transport Safety Bureau, sworn 9 May

2001. Mr Stray, believes as is apparent from his affidavit, that persons involved in transport investigations are likely to withdraw their voluntary cooperation with the ATSB if information of this kind is made available and that it is possible that information or highly critical data will not be brought to investigators' attention and that this will hamper safety investigations. That belief is based upon a number of specific instances which are referred to in his affidavit.

[20] Counsel for the Department of Transport and Regional Services, Mr Christrup, also referred to the affidavit of Stephen Pelecanos, the Chairman of the Board of Directors at Brisbane Marine Pilots Pty Ltd sworn 10 May 2001. Mr Pelecanos' affidavit refers to his belief that the disclosure of a witness's statement to investigators to third parties would seriously undermine the industry's confidence in the investigation process and result in a decreased level of cooperation by persons involved in such investigations. I was also referred to an affidavit by Christopher William Filor, sworn 23 March 2005, the Deputy Director Surface Safety Investigator, Australian Safety Bureau. In paragraphs 96-98 of his affidavit he refers to the involvement of the Australian Transport Safety Bureau in the investigation of transport safety matters in Australia and in other countries; the significant documents and other records relating to the matters investigated which it obtains and the fact that it has built up considerable trust and goodwill with various "key players" in the transport industry including pilots, mechanics, engineers and air traffic controllers. He also

goes on to say that he believes that the disclosure of information or production of documents for litigation purposes would "inevitably impact adversely" on to the ATSB's ability to operate as an independent safety investigator both within and outside Australia.

[21] However, none of the incidents to which he refers have any similarity to the position with which I am now dealing. In particular in none of those cases had the person concerned given his consent to the release of the relevant information.

[22] I could well understand how there could be concern if documents were to be released by order of the Court without the consent of people who were witnesses in the investigation. It may well be that should such a practice develop, potential witnesses may be advised by their employers or by their own solicitors not to divulge information to the Bureau. But, where the person concerned is not an employee of the owners of the vessel or a paid member of the crew thereof and upon whom he relies for his livelihood, there is little risk of an employer putting pressure on such a person to withhold information to an investigation; and so far as the individual himself is concerned, of course the information cannot be released without his consent.

[23] What the Department's argument really boils down to is that the need to protect the confidentiality regime can only be outweighed by the public benefit in disclosure of the information where there is an exceptional case.

I do not consider that the Regulations require that an applicant for an order needs to establish an exceptional case. In my opinion there is nothing in the regulations which supports that contention.

[24] Finally I should refer to the submission of Mr Christrup that the plaintiff is precluded from seeking an order by virtue of issue estoppel. It was submitted that a similar application was made before Master Coulehan in these proceedings which the learned Master rejected on 19 June 2001 and that the plaintiff was therefore estopped from bringing a second application. I reject that contention. Whilst I accept that issue estoppel can sometimes arise even in interlocutory applications (*Santos v Delphi Petroleum Pty Ltd*; [2002] SASC 272; BC200208003) as Lander J said at paras [394]-[400] whilst the fact that a decision made was at an interlocutory application is relevant but not decisive of the question of whether or not a judicial determination gives rise to an issue estoppel and precisely the width of the estoppel, "no issue estoppel can arise unless the issue decided by the previous determination is a final judgment. The premise upon which issue estoppel is based is that there has been a final determination of the issues".

[25] In my opinion there was no final determination of the issues by Master Coulehan. The learned Master was not called upon to decide whether or not an order ought to be made releasing any document under reg 15(5)(a) (see Master Coulehan's reasons at par 21).

[26] Accordingly I consider that the plaintiff has established her entitlement to an order requiring the disclosure of the information sought. The order is limited to the Court, the plaintiff's solicitors and counsel and the counsel and solicitors for each of the defendants.
