Cook v Modern Mustering Pty Ltd & Ors
Savage & Ors v Modern Mustering Pty Ltd & Ors
[2013] NTSC 78

PARTIES:	ROBERT THOMAS COOK Plaintiff v MODERN MUSTERING PTY LTD First Defendant HAYES HOLDINGS (NT) PTY LTD Second Defendant ZEBB RAYMOND LESLIE Third Defendant
FILE NO:	12 of 2011 (21132488)
AND:	ROBERT JOHN SAVAGE, LILLIAN ROSE SAVAGE, WILLIAM JOHN COOK AND LETITIA VALERIE COOK Plaintiffs v MODERN MUSTERING PTY LTD First Defendant HAYES HOLDINGS (NT) PTY LTD Second Defendant

ZEBB RAYMOND LESLIE

Third Defendant

FILE NO:	119 of 2011 (21132442)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
DELIVERED:	20 November 2013
HEARING DATE:	14 OCTOBER 2013
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Applications for particular discovery – Relevant principles.

Legal Professional Privilege – Waiver – Waiver in respect of legal advice relative to a pleaded claim of reasonableness of a settlement.

Practice and Procedure – Abuse of process – Inherent powers of the Court to prevent abuses – Powers in respect of privileged documents.

Workers Rehabilitation and Compensation Act s 176(3)
Evidence (National Uniform Legislation) Act ss 11, 118, 119, 122, 131
Supreme Court Rules rr 1.09, 29.08(1)

Hopkins v Collins/Angus and Robertson Publishers Pty Ltd, unreported, Angel J Supreme Court, 21 May 1997.
Matzat v The Gove Flying Club Inc. & Ors [1996] NTSC 9.
Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor [2011] NTSC 53.
Mann v Carnell (1999) 201 CLR 1.
Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd (1998) 192 CLR 603.
Saccardo Constructions Pty Ltd v Gammon (No.2) (1994) 63 SASR 333.
Sarkis v Summitt Broadway Pty Ltd [2006] NSWCA 258.
BNP Paribas v Pacific Carriers Ltd [2005] NSWCA 72.
Yokogawa Australia Pty Ltd & Ors v Alstom Power Ltd (2009) 262 ALR 738.

State of Western Australia v Southern Equities Corporation Ltd (1996) 69 FCR 245.
Burn Brite Lights (Victoria) Pty Ltd v Koyo Australia Pty Ltd [2002] SASC 360.
In re Majory, A Debtor. Ex Parte The Debtor v FA Dumont Ltd [1955] 1 Ch 600.
Tickle Industries Pty Ltd v Hann (1973) 130 CLR 321.
Van Der Lee v State of New South Wales [2002] NSWCA 286.

REPRESENTATION:

Counsel:

Plaintiffs:	Ms Cheong
First and Second Defendants:	Mr McCrimmon
Third Defendant:	No Appearance

Solicitors:

Plaintiffs:	Hunt and Hunt
First and Second Defendants:	Paul Maher
Third Defendant:	Ward Keller

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

Cook v Modern Mustering Pty Ltd & Ors
Savage & Ors v Modern Mustering Pty Ltd & Ors
[2013] NTSC 78

No. 12 of 2011 (21132488) and 119 of 2011 (21132442)

BETWEEN:

Robert Thomas Cook
Plaintiff

AND:

Modern Mustering Pty Ltd
First Defendant

AND:

Hayes Holdings (NT) Pty Ltd
Second Defendant

AND:

Zebb Raymond Leslie
Third Defendant

AND BETWEEN:

Robert John Savage, Lillian Rose Savage, William John Cook and Letitia Valerie Cook
Plaintiff

AND:

Modern Mustering Pty Ltd
First Defendant

AND:

Hayes Holdings (NT) Pty Ltd
Second Defendant

AND:

Zebb Raymond Leslie
Third Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 20 November 2013)

[1] Before the Court are applications for orders for particular discovery in two actions.

[2] The two actions have common features. Action No. 119 of 2011 is a recovery action ('the Recovery Action') pursuant to section 176(3) of the *Workers Rehabilitation and Compensation Act* (NT) ('WRCA'). Action No. 12 of 2011 is a common law claim ('the Common Law Action') for damages for personal injuries based in negligence. The Plaintiffs in the Recovery Action ('Suplejack'), are the employers of the Plaintiff ('Cook') named in the Common Law Action. The Defendants in both actions are one and the same and they are the contractors of Suplejack and an employee of one of those contractors.

[3] The Plaintiffs in both actions seek orders against all three Defendants. The First and Second Defendants seek orders against the Plaintiffs in both actions. No orders were sought by the Third Defendant in either proceeding. There was no appearance by the Third Defendant at the hearing.

[4] An Order for particular discovery has already been made in respect of both actions. On 7 June 2013 the Plaintiffs in the Recovery Action were ordered to discover the following:-

1. The deed relating to the settlement of the proceedings pursuant to the WRCA;

2. All documents directly relevant, but not on a train of enquiry basis, to the calculation and composition of the lump sum sought to be recovered by the Plaintiffs from the Defendants;

3. All documents, other than those falling within paragraph 2, which were directly relevant to the pleading by the Plaintiffs that the lump sum was “reasonable”.

[5] The foregoing orders were mostly complied with. Although some of the current applications seek documents apparently covered by that Order, all parties appearing before me have agreed to provide any further documents claimed by the other which fall within the description in that Order and which have not yet been provided.

[6] Subject to that, in summary form the Plaintiffs seek against each Defendant, both in the Recovery Action and the Common Law Claim:-

1. Documents relevant to the reports or investigation of the subject accident;

2. Documents in the nature of agreements between each Defendant and certain specified persons, (mostly entities connected with the Defendants), in relation to the provision of aerial mustering services to Suplejack.

[7] In the Common Law Action the First and Second Defendants seek particular discovery from the Plaintiff of:-

1. Any documents evidencing the retainer of Andrew Spearritt by Cook;

2. Various images of aerial mustering operations taken at about the relevant time;

3. Documents in the nature of reports or investigations in respect of the subject action;

4. Cook's tax returns from and including the year commencing 1 July 2005.

[8] In the Recovery Action, the First and Second Defendants seek particular discovery against the Plaintiffs as follows:-

1. Various records, reports and investigations concerning the subject accident;

2. Wage records relating to the employment of Cook from and including the financial year commencing 1 July 2005;

3. Copies of written instructions issued to Cook in relation to the aerial mustering operations between 1 July 2005 and 30 September 2008;

4. All documents relevant to the negotiations leading up to the settlement of Cook's action against Suplejack pursuant to the WRCA, including all legal advice and notes of any oral advice;

5. All documents evidencing the calculation of the amount agreed to be paid to Cook in settlement of his claim pursuant to the WRCA;

6. A copy of any retainer agreement entered into between Cook and Andrew Spearritt in respect of action No. 12 of 2011.

[9] There is some agreed ground between the Plaintiffs and the First and Second Defendants in respect of all of the applications. The First and Second Defendants agree to orders in respect of the documents described in subparagraph 6(1) above. The First and Second Defendants oppose the making of the orders in respect of the documents described in subparagraph 6(2) above.

[10] The Plaintiffs seek corresponding orders against the Third Defendant. No agreement has been achieved with the Third Defendant in respect of the corresponding documents. I think that the documents sought as described in subparagraph 6(1) above are clearly discoverable as against the Third Defendant on the issues as they exist on the pleadings and appropriate orders will be made.

[11] In respect of the orders sought by the First and Second Defendants, firstly in respect of the Common Law Action, the Plaintiff opposes the orders summarised in subparagraph 7(1) above. The remaining orders are agreed to although the Plaintiff believes that it has provided all such documents and is prepared to review that upon the First and Second Defendants identifying any particular documents which they claim the Plaintiff has failed to provide.

[12] In respect of the Recovery Action the Plaintiffs agree to the provision of documents described in subparagraphs 8(1)-(3) above although again the Plaintiffs believe that full and proper discovery has been given. In the case of subparagraph 8(3), on its face the commencement date of the range specified (1 July 2005) appears wide. Indeed it is arguable that only instructions relating to the helicopter flight on the day of the crash are relevant. However as that was not argued, notwithstanding my concerns, I will make orders to reflect the parties' agreement.

[13] The Plaintiffs oppose the orders in respect of the documents described in subparagraphs 8(4)-(6) above.

[14] Consideration of the background facts and the pleadings will assist in putting the applications into context. Cook was at the relevant time an employee of Suplejack. Suplejack contracted the First and Second Defendants to provide aerial mustering services on its cattle station. The Third Defendant was a helicopter pilot employed by the Second Defendant.

On 30 September 2008, the Third Defendant was flying a helicopter in the course of providing the aerial mustering services with Cook on board. The helicopter crashed resulting in the Plaintiff sustaining severe injuries.

[15] Cook commenced proceedings against Suplejack seeking statutory benefits pursuant to the WRCA and later commenced the Common Law Action against all three Defendants.

[16] A settlement of the WRCA proceedings was negotiated on the basis of a lump sum payment of $10.5 million. That sum included Suplejack's liability for future payments. The settlement was recorded by way of a deed ('the Deed') that is vernacularly referred to as a Hopkins Deed.[1] Following that settlement Suplejack commenced the Recovery Action to recover the payments made as part of that settlement. The Common Law Action has continued since the settlement of the WRCA proceedings.

[17] As to the relevant parts of the pleadings, in the Common Law Action the latest Statement of Claim is that filed by the Plaintiff on 24 April 2013. That Statement of Claim sets out the Plaintiff's allegations in respect of the crash of the helicopter. All Defendants have admitted the allegations in that Statement of Claim that, at the relevant time, firstly the Third Defendant was flying the helicopter at the place alleged, secondly, the Plaintiff was on board, thirdly, an emergency landing became necessary and, lastly, the helicopter crashed during the emergency landing.

[1] A Deed which is in accordance with the decision of Angel J in *Hopkins v Collins/Angus and Robertson Publishers Pty Ltd*, unreported, delivered 21 May 1997

[18] Other than that, the remainder of the Plaintiff's allegations relating to the crash (paragraphs 19 to 24 of that Statement of Claim) are not admitted by the Defendants and to that extent those allegations are an issue on the pleadings.

[19] In consequence, the documents sought by the First and Second Defendants described in sub-paragraphs 7(2) and (3) above are claimed to be relevant as they go to the details as to how and why the crash of the helicopter occurred.

[20] That Statement of Claim also alleges, (at paragraph 50), an impairment of the Plaintiff's capacity to earn income as a result of his injuries and, at paragraph 32, that he will continue to suffer loss and damage as a result.

[21] Although all Defendants admit the impairment of the Plaintiff's capacity to earn income, the degree of impairment is not admitted. Hence the documents sought by the First and Second Defendants as described in sub-paragraph 7(4) above are asserted to be relevant to an issue in the proceedings, namely the income earned by the Plaintiff before the accident and any income earned by him following the accident.

[22] The latest amended Statement of Claim filed in the Recovery Action, (the Third Amended Statement of Claim filed 29 August 2013) alleges that the agreement for the provision of aerial mustering services required an employee of Suplejack, (which was Cook), to fly as a passenger in the helicopter to direct the Third Defendant to the areas where mustering

services where required (subparagraphs 11(v) and (vi)). That allegation is not admitted by any of the Defendants and hence the written instructions issued to Cook in relation to the aerial mustering services are relevant to the facts in issue in those proceedings.

[23] The Statement of Claim also contains allegations similar to those in the pleadings in the Common Law Action in respect of the crash of the helicopter. Again, all Defendants have only admitted that the helicopter was being flown by the Third Defendant with Cook on board, that an emergency landing became necessary and that a crash resulted. As the remainder of the Plaintiffs' allegations are not admitted by the First and Second Defendants, this then forms the basis for the order for particular discovery sought by the First and Second Defendants in respect of documents in the nature of investigations and reports described in sub-paragraph 8(1) above.

[24] Similar allegations to those in the Common Law Action are pleaded concerning Cook directing the Third Defendant to the areas where aerial mustering services were to be provided. Likewise, similar allegations are made in that Statement of Claim concerning Cook's capacity to earn income and the ongoing impairment of that capacity. As with the Common Law Action, the First and Second Defendants have not admitted those allegations and that is the claimed justification upon which the claim for particular discovery of written instructions to Cook and wage records described in sub-paragraphs 8(2) and (3) above.

[25] In terms of the relief sought, in the Recovery Action the Plaintiffs claim against each Defendant an indemnity for past and future compensation payments made by Suplejack to Cook pursuant to the WRCA (paragraphs 98(a), 99(a) and 100(a)). In addition judgment is sought for the amount of compensation paid to date by or on behalf of Suplejack to Cook (paragraphs 98(b), 99(b) and 100(b)). Paragraph 86 confirms that the lump sum payment made by Suplejack to Cook included an estimate of future compensation payable to Cook pursuant to WRCA and, at paragraph 87, it is pleaded that the lump sum settlement was "reasonable".

[26] Uniquely pleaded in the Common Law Action is the allegation that a duty of care was owed to Cook by the First and Third Defendants (paragraph 16-18) and additionally that the Second Defendant is vicariously liable for the Third Defendant's negligence (paragraph 34). Relevant to the orders sought by Cook is the allegation that the First and Second Defendants were contracted to provide aerial mustering services to Suplejack. Those allegations have been admitted by the First and Second Defendants. The Plaintiff's allegations in respect of aerial mustering services are only directed to the First and Second Defendants and therefore the Third Defendant has not pleaded in answer to those allegations. Therefore there is no issue on the pleadings in respect of aerial mustering services between the Plaintiff and the Third Defendant.

[27] These applications involve issues of discovery as well as the related issues of legal professional privilege and the settlement negotiation privilege. In

relation to the discovery issues, an order for particular discovery is made pursuant to Rule 29.08(1) of the *Supreme Court Rules* ('the Rules'). This provides as follows:-

> (1) Where at any stage of a proceeding, it appears to the Court from evidence or from the nature or circumstances of the case, or from a document filed in the proceeding, that there are grounds for a belief that a document or class of documents relating to a question in the proceeding may be or may have been in the possession of a party, the Court may order that party to make and serve on any other party an affidavit stating whether the document or any and if so what document or documents of that class is or has been in his possession and, if it has been but is no longer in his possession, when he parted with it and his belief as to what has become of it.

[28] In essence the Court has a discretion to order a party to a proceeding to provide discovery where there are grounds for a belief that a document or class of documents relating to a "question" in the proceeding may be in the possession of that party.

[29] The term "question" is defined in Rule 1.09 of the Rules to mean:-

> ***question*** means a question, issue or matter for determination by the Court, whether of fact or law or of fact and law, raised by the pleadings **or otherwise** at any stage of a proceeding **by the Court**, by a party or by a person, not **a party**, who has a **sufficient interest**. [Emphasis added].

[30] Relevantly this is not limited to 'questions' evident on the pleadings and a party is entitled to an order for discovery under Rule 29.08(1) provided that

party has a "sufficient interest" in the "question" to be decided and to which the documents relate.[2]

[31] In respect of privilege, a claim for client legal privilege, known as legal professional privilege at common law, is now governed by sections 118 and 119 of the *Evidence (National Uniform Legislation) Act* (NT) ('UEA'). The common law privilege relating to without prejudice negotiations is known as the settlement negotiation privilege under the UEA and is regulated by section 131 of that Act.

[32] Section 122 of the UEA deals with the waiver of privilege. That section largely adopts the common law principles relating to waiver established by the High Court in *Mann v Carnell*.[3]

[33] Dealing first with the claim by the Plaintiffs in both actions for discovery of agreements relative to the aerial mustering services referred to in the pleadings (see subparagraph 6(2) above), Mr McCrimmon, counsel for the First and Second Defendants, points out that there is no dispute on the pleadings in respect of the provision of those services. That is correct on my examination of the pleadings. Although a "question" for the purposes of Rule 29.08(1) may arise independently of the pleadings, no evidence has been adduced to enable the operation of that limb of the definition.

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[2] *Matzat v The Gove Flying Club Inc. & Ors* [1996] NTSC 9; *Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor* [2011] NTSC 53

[3] (1999) 201 CLR 1

[34] Ms Cheong, counsel for the Plaintiffs in both actions, submits that the requested documents could demonstrate, for example, that the aerial mustering services might have been provided by another party (presumably meaning a subcontractor), or that there may be a limit of liability as a term of any such agreement.

[35] This however is supposition only and is not evidence. As things stand that is fishing. Moreover, if there was any substance in the examples cited that would have already surfaced in the pleadings of the Defendants, and more so in respect of any possible limit of liability, as both would clearly be something to the advantage of all Defendants and it would therefore be in their interests to plead that.

[36] Accordingly the orders sought in paragraphs 2, 4 and 6 of the Plaintiffs' Summonses are refused. That includes the order sought against the Third Defendant where the position is even clearer given the absence of allegations in the Statement of Claim against the Third Defendant in respect of the aerial mustering services or agreements relative to those services.

[37] The argument of the First and Second Defendants in respect of the discoverability of the legal advice given to Suplejack in the WRCA proceedings is a two stage argument. First, it relies on the principle that where a recovery is sought for a liability crystallised by settlement as opposed to a judgment, it is necessary for the claimant to plead, and therefore prove, that the settlement was reasonable. The reasonableness of a

settlement is not presumed and must be proved.[4] Once reasonableness is pleaded, it is argued that a waiver of privilege attaching to any legal advice leading to that settlement occurs.

[38] This point is illustrated by extracts from two cases. Firstly, in *Unity Insurance,* Brennan CJ said:-

> "The plaintiff must show that the sum accepted in settlement was reasonable. The test of reasonableness is, as Hayne J says, an objective one. Evidence of the advice which the insured received to induce it to accept a settlement is not proof in itself of the reasonableness of the settlement advised. The factors which lead to giving of the advice are factors relevant to the reasonableness of the settlement but the only relevance of advice given by the insured's legal advisers to settle is that it tends to negative the hypothesis that the insured acted unreasonably in accepting the settlement."[5]

[39] Secondly, in *Saccardo Constructions Pty Ltd v Gammon (No.2)*,[6] King CJ said:-

> "As the issue in the proceedings against the third party is the reasonableness of the settlement, it seems to me to follow that it must be assessed in the light of the facts which were known or ought to have known by him and his legal representatives at the time of the settlement."[7]

[40] Mr McCrimmon also relied on *Sarkis v Summitt Broadway Pty Ltd*,[8] a decision of the New South Wales Court of Appeal. In that case Handley JA,

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[4] *Unity Insurance Brokers Pty Ltd v Rocco Pezzano Pty Ltd* (1998) 192 CLR 603; *Saccardo Constructions Pty Ltd v Gammon (No.2)* (1994) 63 SASR 333
[5] (1998) 192 CLR 603 at 608-609
[6] (1994) 63 SASR 333
[7] (1994) 63 SASR 333 at 336
[8] [2006] NSWCA 258

relying on and apparently approving of *BNP Paribas v Pacific Carriers Ltd*[9] said:-

> "I would emphasise however that in my opinion a party who seeks to prove a settlement of a disputed claim is reasonable waives legal professional privilege in relation to that settlement…"[10]

[41] In *Unity Insurance*, McHugh J thought that the disclosure of the legal advice leading up to the settlement was essential to establishing reasonableness. He said:-

> "…in most cases where the settlement is made on legal advice, the evidence of the relevant legal advisers is vital. This is because the risk involved in the litigation and the reasoning which led to the settlement are factors that will determine whether or not the settlement was reasonable."[11]

[42] Contrast the position taken in *Yokogawa Australia Pty Ltd & Ors v Alstom Power Ltd.*[12] There, the Full Court of the South Australian Supreme Court distinguished *Sarkis* and *Unity Brokers* on the basis that the principle does not apply unless a party seeks to actually rely on legal advice as proof of reasonableness. In that case, the operator of a power station entered into a contract to carry out works on the power station. The agreement between the operator and the contractor contained a provision which entitled the operator to liquidated damages in the event of a delay in the completion of those works. A delay occurred and the operator sued the contractor for damages arising from the delay. The contractor settled the claim with the operator

[9] [2005] NSWCA 72
[10] [2005] NSWCA 72 at para 15
[11] (1998) 192 CLR 603 at 616
[12] (2009) 262 ALR 738

and then sued a subcontractor on the basis of an allegation that the delay in completion of the works was caused by the negligence of the subcontractor. The claim against the subcontractor included a claim for damages for the amount of the settlement that the contractor paid to the operator by way of liquidated damages.

[43] The question of reasonableness in that case therefore arose in a different context to the current case as the central issue was not precisely the reasonableness of a settlement but who was responsible for the delay which resulted in the liability for contractual liquidated damages. Central to the decision in that case was a finding that it was not necessary for the party to rely on the legal advice to prove reasonableness.

[44] Although there is nothing in the pleading in paragraphs 86 and 87 of the Amended Statement of Claim in the Recovery Action to show that the Plaintiffs will rely on the legal advice to establish the reasonableness of the settlement, that absence is not determinative.

[45] In *State of Western Australia v Southern Equities Corporation Ltd*,[13] French J (as he then was) said:-

> "In my opinion the State has, on its pleadings, raised the issue of the reasonableness of its settlement. The documents generated in the lead up to that settlement may have relevance to that question."[14]

[13] (1996) 69 FCR 245
[14] (1996) 69 FCR 245 at 250

[46] His Honour determined this in application of the principle that without prejudice negotiations can be pleaded into evidence in such a way as to thereby waive privilege. Where the nature of the legal advice is an issue in the case, the privilege is not maintained.

[47] In *Burn Brite Lights (Victoria) Pty Ltd v Koyo Australia Pty Ltd*,[15] it was specifically asserted in that case that the relevant party would not seek to prove the allegation of the reasonableness of the settlement by adducing evidence of otherwise privileged communications. Master Burley in that case drew a distinction between the means by which a party might seek to prove a particular fact in issue and the question of the discoverability of documentation relevant to that question. He held that it was not open to a party to confine the ambit of discovery by opting to limit the evidence that party will rely on to prove the question in issue. His Honour noted, correctly in my view, that the reasonableness of any settlement must be assessed objectively and that any advice given by that party's legal advisers in connection with the settlement can be a relevant factor.

[48] In response Ms Cheong submitted that in the present case different considerations apply in the treatment of proof of the allegation of reasonableness of the amount paid because the Recovery Action was an action for the enforcement of a statutory indemnity. However no authority was cited for this proposition and I can see no justification for treating a statutory indemnity differently, whether on the authorities or on the wording

[15] [2002] SASC 360

of any applicable legislation. Indeed at least one case[16] applied the principle to a case of a statutory recovery.

[49] For those reasons, I agree that privilege has been waived as submitted by Mr McCrimmon. It is therefore appropriate that the Plaintiffs produce to the First and Second Defendants all written legal advice provided to the Plaintiffs in connection with the settlement of the proceedings pursuant to the WRCA, and any documents referred to in that advice. A corresponding order in respect of any notes made in respect of that advice is also appropriate.

[50] Dealing next with the application of the First and Second Defendants for particular discovery of documents evidencing the retainer of Mr Spearritt by Cook. The application is based on the possible existence of an abuse of process.

[51] Two of the provisions of the Deed are relevant to these orders. Clauses 20 and 21 of the Deed provide as follows:-

> 20. The Worker agrees to appoint Andrew Spearritt of Curwoods Lawyers as his solicitor and attorney in respect of the worker's negligence action in the Supreme Court of the Northern Territory (Claim Number 12/2011 – 21132488).
>
> 21. QBE agrees to pay any costs liability incurred by the Worker in the negligence action after 30 November 2012, the date of the signing of the Heads of Agreement.

[16] *Sarkis v Summitt Broadway Pty Ltd* [2006] NSWCA 258

The “Worker” is Cook. “QBE” is QBE Insurance (Australia) Ltd who is the insurer of the Worker’s employer, Supplejack.

[52] Clause 20 of the Deed contains an unusual provision in that Cook becomes obliged to appoint the solicitors who until then acted against him as his “solicitor and attorney” in respect of the ongoing conduct of the Common Law Action. Concurrently with that, those solicitors act for Suplejack through the same insurer in the Recovery Action against the same Defendants as in the Common Law Action.

[53] There was some argument concerning whether the appointment is of the firm or the nominated solicitor but I do not think anything turns on that for current purposes. There was also some debate as to the meaning of the term “attorney” used in clause 20. Its meaning is unclear as it may refer to attorney in the sense of being appointed with a Power of Attorney or it may simply be the term commonly used in the United States of America, something which would be unusual in itself.

[54] Subsequent to the hearing, an affidavit of Mr Spearritt was filed and relied on with the consent of all parties which states that he intended the latter meaning. As the parties are happy for me to interpret the term on that basis it is therefore essentially an agreed matter and I am happy to deal with it on that basis. Save for that, the affidavit as to the intention of the drafter of the document would not be conclusive as to the interpretation of the document.

[55] Proceeding on that basis, I query why such a provision is contained in the Deed. Cook could have appointed, without complaint, any solicitor and at any time to conduct the Common Law Action. That Cook is obliged to appoint the insurer's solicitors as consideration for the settlement is, I think, a critical factor in determining whether there is a "question" for the purposes of Rule 29.08(1).

[56] The argument put on behalf of the First and Second Defendants that an abuse of process might be occurring has its genesis in subrogation principles. As those principles apply to a policy in the nature of a worker's compensation insurance policy, the insurer only has the right to subrogate in the name of the employer, Suplejack in this case. It has no right of subrogation to any common law claim by the employee, Cook in this instance. The First and Second Defendants submit that it can be inferred from the facts that the insurer is improperly making use of the name of Cook in the Common Law Action and is achieving an ulterior purpose namely, circumventing the absence of subrogation rights to the claim by Cook. Mr McCrimmon argues that as a result the First and Second Defendants are prejudiced as they are unnecessarily defending two sets of proceedings. It is well known that concurrent proceedings, albeit usually in different courts, can be an abuse of process. The use of court proceedings to secure a collateral advantage may also amount to an abuse of process.[17]

[17] In re *Majory, A Debtor. Ex Parte The Debtor v FA Dumont Ltd* [1955] 1 Ch 600

[57] Ms Cheong opposes the orders requiring discovery and production of retainer documents though not conceding that any such documents exist. She argues that there is insufficient evidence to demonstrate an abuse of process. She submits that an inference that the employer's insurer has stepped into the shoes of Cook in the Common Law Action based on that cannot be drawn. She submits that there is nothing in any documents which demonstrates that the Plaintiff in the Common Law Action has given up his rights to the employer's insurers.

[58] Although I agree that there is no evidence sufficient to prove that allegation, Ms Cheong's submission would have force if the argument was about the proof of the allegations. That is because for that purpose, inferences can only legitimately be drawn if all other reasonably available inferences to the contrary can be ruled out. I do not need to decide that here as that goes to proof, not discoverability and discoverability is not conditional upon admissibility. The absence of any explanation for Cook being bound by the Deed to appoint the insurer's solicitors to conduct the ongoing claim, unusual as that is, and occurring as part of the settlement of WRCA proceedings, I think sufficiently establishes the requirements for orders for particular discovery.

[59] All that has to be demonstrated for the purposes of an order pursuant to Rule 29.08(1) is that there is a "question". The definition of "question" in the Rules does not require an issue to be apparent on the pleadings. It can be raised by other evidence. It is currently raised by the affidavit evidence of

the unusual provision in the Deed requiring Cook to appoint Mr Spearritt as part of the settlement of related proceedings, coupled with inferences which might be drawn from that. While the questions concerning the reason for the appointment remain unanswered, a "question" in the proceedings has been properly raised by the First and Second Defendants. They are parties and the possibility that they may be defending two sets of proceedings means that they have a "sufficient interest" in the issue as required by the Rule.

[60] As some of the possible documents that may fall within the orders I propose to make may carry privilege, section 11(2) of the UEA has application. That section provides:-

> **11 General powers of a court**
>
> (1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
>
> (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected.

[61] The section therefore empowers the Court to order inspection of documents which may establish an abuse of process notwithstanding any claim of privilege in respect of those documents. To ensure that privilege is protected as far as is necessary, I intend to adopt the approach in *Van Der Lee v State of New South Wales.*[18] That case concerned the equivalent provision under the Act in New South Wales. There the Court said that when there is evidence that could demonstrate an abuse of process, even if that evidence is

[18] [2002] NSWCA 286

subject to privilege, the court may receive it on the *vior dire* and thereafter if it is found to reveal an abuse of process, the court can then rule it admissible notwithstanding the claim for privilege.

[62] Accordingly, orders will be made in terms of paragraphs 1, 3 and 5 of each summons filed by the Plaintiffs in both actions save that in the case of order 5, which relates to the Third Defendant, that is subject to the Plaintiffs in each action filing proof of service of the summonses. The orders sought in paragraphs 2, 4 and 6 of each summons filed by the Plaintiffs are dismissed. In relation to the summonses filed by the First and Second Defendants in both actions, there will be orders in terms of paragraph 1 of each summons.

[63] I will hear the parties as to costs and any ancillary orders.