

Lawrie v Carey DCM and Anor [2016] NTSC 23

PARTIES: DELIA PHOEBE LAWRIE

v

CAREY DCM

And:

WADE LEE JEREMIAH

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
EXERCISING ORIGINAL
JURISDICTION

FILE NO: 17 of 2016 (21615168)

DELIVERED: 29 April 2016

HEARING DATE: 27 April 2016

JUDGMENT OF: MILDREN AJ

CATCHWORDS:

SEARCH WARRANT – Validity – whether invalid on its face – requirements for validity – *Police Administration Act* (NT) s 117(5) – whether warrant disclosed adequately particulars of the purpose for which the search was authorised.

LEGAL PROFESSIONAL PRIVILEGE – Claim for privilege in relation to documents seized under a search warrant – no admissible evidence to support the claim for privilege – whether court should exercise its discretion to inspect the documents in the absence of any evidence.

Criminal Code Act (Northern Territory) 118.

Evidence (National Uniform Legislation) *Act* 2011 s 118, 119.

Inquiries Act (NT) s 4A.
Police Administration Act (NT) s 117, 118A.
Police Powers and Responsibilities Act 2000 (Qld) s 73.

Oustley v The Queen (1997) 192 CLR 69, distinguished.

Alcoota Aboriginal Corporation and Another v Gray (2001) 161 FLR 95; *AWB Ltd v Cole and Another* (No 5) (2006) 155 FCR 30; *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523; *Caudle v Seymour* (1845) 10 QBD; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; *Dobbs v Ward* (2002) 2 Qd. R. 667; *Wright v Queensland Police Service* (2002) 2 Qd. R. 667; *Grant v Downs* (1976) 135 CLR 674; *State of New South Wales v Corbett and Another* (2007) 230 CLR 606, referred to.

Different Solutions Pty Ltd v Commissioner, Australian Federal Police (No 2) [2008] FCA 1686; *George v Rockett* [1990] 170 CLR 104; *Hancock v Rinehart (Privilege)* [2016] NSWSC 12; *Kennedy v Wallace* (2004) 142 FCR 185; *R v Tillett; ex parte Newton* [1969] 14 FLR 101; *Rinehart v Rinehart* [2016] NSWCA 58, followed.

Broom, Legal Maxims, 10th Ed.

REPRESENTATION:

Counsel:

Plaintiff:	A Scott
First Defendant:	C Retallick
Second Defendant:	A Moses SC and J Alderson

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	Solicitor for the Northern Territory
Second Defendant:	Australian Government Solicitor

Judgment category classification:	B
Judgment ID Number:	Mil16540
Number of pages:	24

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

Lawrie v Carey DCM & Anor [2016] NTSC 23

No. 17 of 2016 (21615168)

BETWEEN:

DELIA PHOEBE LAWRIE
Plaintiff

AND:

CAREY DCM
First Defendant

AND:

WADE LEE JEREMIAH
Second Defendant

CORAM: MILDREN AJ

REASONS FOR JUDGMENT

(Delivered 29 April 2016)

[1] This is an application by originating motion supported by summons on the motion for the following declarations:

- (a) that a warrant issued on the 27th of January 2016 by the first defendant for search and seizure of things at premises described as the Northern Territory Government Department of Corporation and Information Services premises (the first warrant) is invalid;
- (b) that things seized under a warrant issued by the first respondent on the 4th of February 2016 (the second warrant) and executed on the business premises of a certain barrister, Mr. Wyvill SC,

other than those previously disclosed by the plaintiff in the Supreme Court matter....(File No. 21434660) which commenced on the 30th of July 2014:

- (i) are subject to legal professional privilege;
 - (ii) therefore, may not be seized under the second warrant;
and
 - (iii) must be returned to the said barrister.
- (c) the things seized under a warrant issued by the first respondent on the 27th of January 2016 (the third warrant) and executed on the business premises of a certain solicitor, Ms. Spurr, other than those previously disclosed by the plaintiff in the Supreme Court matter (File No. 21434660) which commenced on the 30th of July 2014;
- (i) are subject to legal professional privilege;
 - (ii) therefore, may not be seized under the second warrant;
and
 - (ii) must be returned to the said solicitor.

[2] The first defendant has submitted to the jurisdiction and has been given leave not to take any further part in these proceedings.

Background facts

[3] On the 3rd of August 2012 the then Minister of Lands and Planning made a decision pursuant to a Cabinet decision made on the 10th of July 2012 to grant a Crown lease of a site located in Darwin to a Union. The decision was made without calling for expressions of interest or public tender.

- [4] Ultimately, there was a change of government and the new government withdrew the offer for the grant of the lease.
- [5] On the 5th of December 2013, the Legislative Assembly of the Northern Territory decided that an enquiry into the decision to grant the lease was necessary as a consequence of which the Administrator appointed Mr. John Lawler as a Commissioner to conduct an Inquiry pursuant to s 4A of the *Inquiries Act* (NT). One of the purposes of the Inquiry was to review the antecedent issues leading to the former government's decision to grant a Crown Lease to the Union and to assess the involvement of "relevant persons" in that decision, including the plaintiff who was then a Minister in the former government.
- [6] On the 20th of December 2013, the plaintiff engaged Ms. Spurr to represent her and the former Minister of Lands and Housing, Mr. Gerry McCarthy for the purposes of the Inquiry. The letter of engagement dated that day indicates the terms of the costs agreement between the parties which includes details of how the work and disbursements will be charged and paid for. It is asserted that the solicitor engaged the barrister to act as counsel on the same date on a pro bono basis.
- [7] The Inquiry commenced on the 6th of January 2014, during the course of which Mr. McCarthy and the plaintiff gave evidence. Mr. Wyvill SC was granted leave to represent them during the enquiry. Subsequently for various reasons which it is not necessary to go into at this stage, Ms. Spurr advised

the Commissioner by letter dated 14 April 2014 that she and Mr. Wyvill SC “will no longer be representing Ms. Lawrie and Mr. McCarthy in this matter” because “our clients have exhausted their ability to access pro bono legal assistance.”

- [8] The Inquiry concluded on the 26th of May 2014 when the Commissioner’s Report was handed to the Administrator. That report contained a number of criticisms of the plaintiff’s conduct (the adverse findings).
- [9] On the 30th of July 2014 the plaintiff filed an Originating Motion in this Court in which the Commissioner was the defendant claiming that the adverse findings and associated recommendations damaged her reputation and seeking a declaration that, in reporting adversely to the plaintiff, the Commissioner had failed to observe the requirements of procedural fairness, and for an order in the nature of certiorari to quash the report. At this stage the plaintiff was represented by Ms. Spurr and Mr. Wyvill SC.
- Subsequently, in late 2014 Ms. Spurr and Mr. Wyvill SC filed affidavits in that action in which they asserted that they were not expecting to receive any adverse findings against the plaintiff. An affidavit by Ms. Lawrie to similar effect was also sworn or affirmed on the 14th of November 2014. It is alleged that each of these deponents made false statements which they knew to be untrue. At some stage Mr. Wyvill SC withdrew from those proceedings and other legal representation was obtained before the matter went to hearing in late January 2015. I note that according to the reasons published by Southwood J, the affidavits of the plaintiff, Spurr and Wyvill

were not read, they were not called to give evidence, and allegations set out in paragraphs 6-12 of the Statement of Facts and Issues referred to in his Honour's Judgment at para [222], although filed in court, were abandoned.

[10] On the 1st of April 2015, Southwood J delivered judgment. His Honour dismissed the application and made a number of findings which were relied upon by the second defendant in his sworn information in support of the warrants which were ultimately issued by the first defendant. It is not necessary to refer to them as no challenge is made along the lines that the material placed before the learned magistrate was insufficient to justify the issue of the warrants.

[11] On the 2nd of April 2015, a letter was sent to Mr. Wyvill SC from Southwood J's associate indicating that his Honour had determined that his conduct during the Inquiry and his representation of the plaintiff, including whether he had sworn a false affidavit, should be referred to the Law Society for investigation, and that the Law Society would be asked to consider whether there are any matters which should be referred to the Director of Public Prosecutions. On the 7th of April 2015 a referral was made to the NT Police by the Attorney-General.

The validity of the first warrant

[12] The first warrant is in the following terms:

Northern Territory of Australia

Police Administration Act, Section 117(2)

SEARCH WARRANT

TO SEARCH A PLACE

TO: Wade Lee Jeremiah, a member of the Police Force:-

WHEREAS I, Deputy Chief Magistrate Michael Carey, a Justice within the meaning of the Police Administration Act, pursuant to Section 117(2) of that Act, being satisfied by information on oath placed before me on the 27th day of January 2016, that there are reasonable grounds for believing that there is a place described as:-

Department of Corporate and Information Services

Northern Territory Government

Level 3, Darwin Plaza

41 Smith Street Mall, Darwin

the following thing(sic):

Electronic records kept and maintained by the Northern Territory Government (“NTG”), specifically relating to all email communications sent and received from the following persons:-

-Delia Phoebe Lawrie

-Michael Gleeson

-Catherine Tilmouth

-Mandy (or Amanda) Taylor; and

-Charlie Phillips

Between the period 18 December 2013 and 1 April 2015.

Being a thing related to or in connection with an offence against a law in force in the Northern Territory, namely an offence of making a false statement in statements required to be under oath or solemn declaration - Section 118 of the Criminal Code Act (Northern Territory).

AUTHORISE YOU, with such assistance as you think necessary to enter and search the place described above, if necessary by force, and to seize the thing described above, that is found at the place.

This warrant is subject to the caveat that in the event that any person named in the said warrant claims legal professional privilege on behalf of Delia Lawrie in respect of any of the documents that are proposed to be seized pursuant to this warrant, then those documents the subject of that claim are to be sealed and delivered to the registry of the Court of Summary Jurisdiction, Nicholls Place Darwin and therein held until the question of client legal privilege has been determined by the Court.

This Warrant expires on the 8th day of February, 2016 unless sooner executed.

DATED THE 27TH DAY OF JANUARY 2016.

Signed _____(Michael Carey DCM)_____

JUSTICE OF THE PEACE

[13] It is not in contention that the warrant was executed on the 28th of January 2016. It was allegedly executed in the absence of, or of any notice to any of the persons whose emails were the subject of the warrant. It is not in dispute that almost 12,000 emails have been produced in electronic form in answer to the warrant. No challenge is made to the sufficiency of the evidence provided to the learned magistrate in respect of the issue of the warrant. What is asserted is that the warrant is bad on its face.

[14] The power to issue the warrant is contained in s 117 (2) of the *Police Administration Act* (NT):

Where an information on oath is laid before a justice alleging that there are reasonable grounds for believing that there is at a place anything relating to an offence, the justice may issue a search warrant authorising a member of the Police Force named in the warrant to enter and search the place and seize anything relating to an offence found in the course of the search at the place.

[15] Section 117 (5) provides:

There shall be stated in the warrant issued under this section the following particulars:

- (a) the purpose for which the search or entry is authorised;
- (b) a description of the nature of the things authorized to be seized;
and
- (c) the date, not being a date later than 14 days after the date of issue of the warrant, upon which the warrant ceases to have effect.

[16] Section 118A of the Act, which was inserted into the Act in 2007, provides:

A member of the Police Force who executes a warrant issued under section 117 or 118 may, in addition to seizing anything of a nature described in the warrant, seize any other thing:

- (a) found in the course of executing the warrant; and
- (b) that the member believes on reasonable grounds is connected with any offence.

[17] The power of search and seizure conferred by s 117 (2) of the Act requires strict compliance with the statutory provisions which authorize not only the issue of the warrant, but also with its execution. In *George v Rockett*¹ the High Court, in a joint judgment of all seven justices, said in relation to s 679 of the *Criminal Code* (Qld):

State and Commonwealth statutes have made many exceptions to the common law position, and s.679 is a far-reaching one. Nevertheless, in construing and applying such statutes, it needs to be kept in mind that they authorize the invasion of interests which the common law has always valued highly and which, though the writ for trespass, it went to great lengths to protect. Against that background, the enactment of conditions which must be fulfilled before a search warrant can be lawfully issued and executed is to be seen as a reflection of the legislature's concern to give a measure of protection

¹ [1990] 170 CLR 104 at 110-111.

to these interests. To insist on strict compliance with the statutory conditions governing the issue of search warrants is simply to give effect to the purpose of the legislation.

[18] Similarly, in my opinion a warrant that does not, on its face, strictly comply with s 117 (5) will be bad.² However, compliance with s 117 (5) does not, by itself, necessarily carry with it the result that the warrant is good, notwithstanding that in *Oustley v The Queen*³ the High Court considered that in the circumstances of the legislative provisions to which consideration was then being given, a different conclusion was reached. But in that case, as reference to the judgments of the majority show, there were detailed statutory provisions as to what must be shown on the warrant, and the warrant in that case was not a search warrant but a warrant for the installation of a listening device. As McHugh J said:

The express mention of seven matters to be contained on the face of the warrant issued under the Act must be regarded as excluding the need for any other specified matters to be disclosed. This conclusion is reinforced by the fact that the Act is dealing with a warrant of a very different kind from that considered in cases of arrest and search of premises.

However, in this case, s 117 (5) lists only three matters which must be shown on the face of the warrant which is in fact a search warrant. For example, nowhere does s 117 specifically require that the warrant must be signed and dated by the justice issuing the warrant, but the section envisages that the act of issuing the warrant would require it to be signed by the issuing justice as a matter of inference, and s 117 (5)(c) requires that the

² See for example, *R v Tillett; ex parte Newton* [1969] 14 FLR 101 at 112-113 per Fox J.

³ (1997) 192 CLR 69.

warrant must have a date on it not “later than 14 days after the date of the issue of the warrant” which by inference requires the warrant to be dated. Furthermore, it has long been held that in order for a warrant to be valid, it must disclose matters going to jurisdiction appearing on its face, in other words, that the issuing justice himself or herself was satisfied by information on oath that there were reasonable grounds for believing that there is at a place anything relating to an offence.⁴ And it is also necessary that the warrant should refer to a particular offence and authorize seizure by reference to that offence.⁵

[19] There is much discussion in the authorities about the question of the particularity with which reference to the offence is required on the face of the warrant, and the purpose which is served by this requirement. On the one hand, reference to the particular offence is necessary or otherwise the warrant would be, in effect, a general warrant. It serves the purpose of limiting the boundaries of the search, not only in the minds of the police executing the warrant, but also so as to inform the person whose premises are being searched to know the object of the search. The concern of the common law, and of the legislature, is to protect as much as is reasonably possible, the privacy of the individual whose premises are being searched, whilst at the same time establishing a balance between “long established

⁴ *R v Tillett; ex parte Newton* [1969] 14 FLR 101 at 107-108 per Fox J, applying *Caudle v Seymour* (1845) 10 QBD at pp 452-453; 116 ER at pp 172-173; Broom, *Legal Maxims*, 10th Ed. at 646.

⁵ *R v Tillett; ex parte Newton* [1969] 14 FLR 101 at 112-113; *State of New South Wales v Corbett and Another* (2007) 230 CLR 606 at 631-632 per Callinan and Crennan JJ, Gleeson CJ concurring.

individual rights against the public interest in combating crime.”⁶ In this context it has been said that the particular offence need not be stated with the precision of an indictment.⁷ In *Different Solutions Pty limited v Commissioner, Australian Federal Police (No 2)*⁸ Graham J referred to a number of authorities which discussed this question. First, the prevailing view in the Federal Court of Australia is that the warrant does not need to state the offence with sufficient particularity to enable the person whose premises are being searched to know the *exact nature* of the search.⁹ Secondly, it is not necessary for the warrant to disclose the *exact object* of the search; rather a broad approach was directed.¹⁰ It is not essential that the warrant contain the name of the alleged offender.¹¹ If more than one offence is rolled up in the warrant, this does not invalidate the warrant on grounds analogous to duplicity.¹² Reference to the wrong section will not in itself invalidate the warrant.¹³ But if the reference to an incorrect section has the result that the warrant does not specify any offence, or makes the warrant ambiguous so that it is not possible to tell what offence is referred to, it may invalidate the warrant.¹⁴ His Honour said:

⁶ *State of New South Wales v Corbett and Another* [2007] 230 CLR 606 at 630 per Callinan and Crennan JJ, Gleeson CJ concurring. See also Kirby J at 611-612.

⁷ *Beneficial Finance Corporation v Commissioner of Australian Federal Police* (1991) 31 FCR 523 at 533 per Burchett J; cited with approval in *State of New South Wales v Corbett and Another*, *supra* fn 5, at pp630-631.

⁸ [2008] FCA 1686.

⁹ At paras [99]-[101].

¹⁰ At para [101].

¹¹ At para [102].

¹² At para [103].

¹³ At para [104].

¹⁴ At para [104].

To avoid invalidity, a search warrant must disclose the nature of the offence/s sufficiently to indicate the permissible area of search in relation to which s3E of the Crimes Act is capable of operating, in otherwise intelligible terms (see generally per Jackson J in *Parker v Churchill* at 340; see also Burchett J in *Beneficial Finance* at 543 and *Harts* at 152.

[20] But I do not read these decisions as laying down any universal principle so that in all cases it is sufficient to merely provide a short description of the offence and reference it to the section number and that alone will suffice if the section number is correctly quoted. Section 117 (5)(a) requires that the warrant must have stated on the warrant the purpose for which the search or entry is authorised. Whether or not reference of that kind will suffice as expressing the purpose will depend on the circumstances.

The plaintiff's first contention

[21] Counsel for the plaintiff, Mr. Scott, submitted that the warrant was invalid because it purports to authorize seizure of things that are neither related to nor connected with any offence. First, it was put that it purportedly authorized seizure of electronic records relating to all email communications sent to and received from the persons named in the warrant over the period 18 December 2013 and 1 April 2015. These persons, other than the plaintiff, were members of the plaintiff's parliamentary office during the period specified in the warrant. It was put that it would be extraordinary if every email communication by each of these individuals over such a lengthy period was connected with the offence named in the warrant. That may or may not be so, but there was no challenge to the breadth of the warrant in

these terms on the ground that the information before the learned magistrate failed to establish any such connection. In the absence of any such challenge, I must assume that there was such evidence, extraordinary as that may appear to be at face value.

[22] Secondly it was put that the warrant did not purport to limit that range of the records to those which might be connected or related to any offence. It authorized seizure of all email communications involving the persons named therein, including emails about subject matter which was at large. It is true, just looking at the “thing” described in the warrant, that the emails are not limited to emails which passed between the persons named in the warrant, or with persons such as Ms. Spurr and Mr. Wyvill SC, but included emails of any description about any subject matter whatever to and from anybody in the whole world. That impression is reinforced by the full stop in the warrant after the words “between the period 18 December 2013 and 1 April 2015.” However, the warrant must be construed as a whole, and in my opinion the words “being a thing related to or in connection with an offence against a law in force in the Northern Territory, namely an offence of making a false statement in statements required to under oath or solemn declaration- Section 118 of the Criminal Code Act (Northern Territory)” were clearly intended to confine the “thing” to emails of that description. The plaintiff’s first contention therefore cannot be accepted.

The plaintiff's second contention

[23] Mr. Scott's second submission was that even if the words referring to the offence alleged were words of limitation they were insufficient to define properly the scope of the warrant. Mr. Scott referred to the fact that the alleged offence did not refer to who it was said made the false declaration, when it was said that this happened, the nature of the false declaration, what it related to or in what context this is said to have occurred. First, Mr. Scott referred me to *Dobbs v Ward*¹⁵ where Holmes J (as she then was) asked whether it was permissible for a warrant to state a broader range of evidence which may be seized than the evidence as to which a satisfaction under s 69 of the relevant Queensland Act had been achieved by the issuer. Her Honour concluded that :

In accordance with that principle, s 73(1)(c) should be construed as limiting the evidence which the warrant must state may be seized under the warrant to that evidence of the commission of the offence as to which the issuer has formed his satisfaction under s 69. Although the searcher has, under s. 74(1)(h), wider powers of seizure on the basis of opinion formed in the course of the search, the issuer has no power to issue a warrant which extends in terms of the evidence to be seized beyond that as to which he is satisfied that there are reasonable grounds of suspicion. Thus it would be no answer to say that as long as the issuer had formed the necessary view under s 69 in relation to some of the material sought, it did not matter that a larger range of material was sought by the warrant.

[24] Counsel for the second defendant, Mr. Moses SC sought to distinguish *Dobbs v Ward* on the basis that it dealt with significantly different legislation, but in my opinion the approach of Holmes J was sound and the

¹⁵ (2003) 1 Qd. R. 158 at 165.

same approach to the construction of s 117 of the *Police Administration Act* (NT) leads to the same conclusion. But the difficulty is that, as there was no challenge to the issue of the warrant based upon what material was before the learned magistrate so as to give rise to the satisfaction which he reached, I am not in a position to conclude that the range of material which the warrant authorized to be seized extended beyond the bounds of which he held the relevant satisfaction.

[25] Secondly, Mr Scott referred me to *Wright v Queensland Police Service*.¹⁶ In that case, the first applicant was charged with perjury as a result of some evidence she gave as a judgment debtor in an oral examination in the Magistrates Court on the 5th of June 2001. A warrant was obtained from a magistrate by telephone authorising the search of certain premises. It is not clear from the judgment what “things” the warrant authorized the search to be in relation to. Section 73 of the *Police Powers and Responsibilities Act 2000* (Qld) required that the warrant provide “brief particulars of the offence”. Holmes J said:¹⁷

It is clear that the purpose of stating the offence is to set some boundaries for the search itself. In *Bradrose Pty ltd v Commissioner of Police, ex parte Bradrose Pty Ltd* the principle that the description of the offence should be such as to enable the persons affected “to know the exact object of the search” was adopted. That expression has been used with some regularity in the Federal Court in the context of search warrants issued under s 10 of the *Crimes Act 1914* (Cth). In more recent times, however, the question has been stated more broadly as to whether the warrant discloses the nature of the offence “so as to indicate the area of search”, although McHugh J in

¹⁶ (2002) 2 Qd. R. 667.

¹⁷ At 676 [31-32].

Oustley referred to the need for a warrant to be sufficiently precisely worded to enable a person affected “to know the object of the search”.

[32] Whether one takes a narrow or broad approach to that necessity, it seems clear that the insertion merely of the name of the offence and section could not meet it. Nor is it an answer to say that the second applicant at least would have known the details of the offence alleged, having been charged. The question of whether a warrant meets the requirements of the Act, must, in my view, be answered objectively by reference to its contents. A reader without ancillary information would not have known from its face by whom the offence was alleged to have been committed, let alone where and when. Having regard to the need for the person affected to be able to understand the bounds of the search to be conducted, and the Act’s stated purpose in s. 4(e) “to ensure fairness and to protect the rights of person whom police officers exercise powers under this Act” it is clear that the requirement for brief particulars cannot be met by a bald naming of the offence and relevant section.

[26] I accept the criticism made by Mr. Moses SC that *Wright* dealt with quite different legislation, particularly in that s 73 of the Queensland Act has no exact counterpart in s 117(5) of the Northern Territory Act, but nevertheless it seems to me that the purposes of both provisions are the same, notwithstanding that the Northern Territory Act does not have an expressed purpose such as was contained in s 4(e) of the Queensland Act. It may fairly be assumed that in drafting s 117, the Legislative Assembly had in mind the need for the balance which is referred to in cases such as the passage I have quoted previously from *George v Rockett*. Does mere reference to the name of the offence and the statutory provision meet the requirements that that warrant provided particulars of the purpose for which the search was authorised and the description of the nature of things authorized to be searched? In the peculiar circumstances of this case, in the absence of any

ancillary information the institution to which the warrant was addressed would not be in any position to say with even the faintest degree of clarity what documents amongst the nearly 12,000 emails have or might have a possible connection to the offence without knowing who it was is alleged to have committed the offence and where, when and, given the generality of the kind of offence relied upon, in what circumstances this is said to have occurred. I am not saying that in other cases of a different nature the same conclusion would be reached. For example, if the offence charged was possession of an illegal drug, namely cannabis plant material, it may not be necessary to say anything more than that. However, in this case the offence alleged was of an entirely different character, and, like the offence of perjury considered by Holmes J in *Wright*, inherently vague. In my opinion the warrant did not meet the requirements of the Act and is therefore invalid.

[27] In these circumstances it was not in contention that I should order that the documents seized under the first warrant should be returned to the Northern Territory Government Department of Corporation and Information Services.

The second and third warrants

[28] No argument was presented in relation to the second and third warrants that they were invalid. It was contended that the warrants did not authorise the seizure of privileged documents. Despite that, the course adopted in these proceedings is similar to that followed at first instance in *Commissioner of*

*Australian Federal Police v Propend Finance Pty Ltd*¹⁸. The way the matter was argued did not raise any questions about the question of whether or not the documents had been improperly seized. The only issue is whether legal professional privilege was attached to any of the documents in the possession of Ms. Spurr and Mr. Wyvill SC until they were seized, and if so, whether the plaintiff is entitled to have those documents returned to her or to them.

[29] No evidence, whether by affidavit or oral evidence, was given by the plaintiff, nor by Ms. Spurr or Mr. Wyvill SC in support of the claim for privilege. The only evidence was an affidavit by Mr. Collins, the plaintiff's present solicitor, who had examined the documents which had been seized. Mr. Collins has no personal knowledge of the matters to which he purports to give evidence in support of the claims. All there is before me is a bald assertion that the plaintiff claims that legal professional privilege attaches to certain documents, and that his examination of the documents "all purport to be concerned with the then anticipated Supreme Court proceedings", or "all purport to be concerned with matters relevant to Ms. Spurr's retainer" or contain "various drafts of documents and confidential file notes that purport to relate to the Stella Maris inquiry and the Supreme Court proceedings", all matters no doubt of his honest professional opinion. There was no indication whether the basis of the privilege was advice privilege within s 118 of the *Evidence (National Uniform Legislation) Act 2011* (the Uniform Evidence

¹⁸ (1997) 188 CLR 501 at 536-538 per Gaudron J.

Act), or litigation privilege within s 119 of the Uniform Evidence Act. There was nothing to indicate, for example, that certain documents were part of the brief to counsel, or that other specified documents were confidential communications between the plaintiff and Ms. Spurr for the dominant purpose of obtaining legal advice.

[30] Objection was taken to the admissibility of much of Mr. Collins' affidavit in so far as it sought to establish a basis for establishing the claim to privilege, which I upheld. In *Kennedy v Wallace*¹⁹ Black CJ and Emmett J said that mere assertions not supported by any evidence was insufficient:

The appellant's decision to base his claim for privilege in this way was attended with considerable risk since, as Lockhart J observed in *National Crime Authority v S* (1991) 29 FCR 203 at 211, it is not sufficient for a party merely to assert a claim for privilege nor will an affidavit asserting the purpose for which a document was brought into existence followed by the category of legal professional privilege to which the document is said to belong necessarily be sufficient. Moreover, in the leading case of *Grant v Downs* (1976) 135 CLR 674, Stephen, Mason and Murphy JJ warned against the erroneous view that the privilege is "necessarily or conclusively established by resort to any verbal formula or ritual" (at 689). In the same case, their Honours also observed that whatever the facts may be, it is always for the party claiming privilege to show that the documents for which the claim is made are in fact privileged.

[31] In *Hancock v Rinehart (Privilege)*²⁰ Brereton J said [at para 7]:

To sustain a claim of privilege, the claimant must not merely assert it; but must prove the facts that establish that it is properly made. Thus a mere sworn assertion that the documents are privileged does not suffice, because it is an inadmissible assertion of law; the claimant must set out the facts from which the court can see that the assertion is rightly made, or in other words "expose... facts from

¹⁹ (2004) 142 FCR 185 at 189, para [12]-[13].

²⁰ [2016] NSWSC 12.

which the [court] would have been able to make an informed decision as to whether the claim was supportable.” The evidence must reveal the relevant characteristics of each document in respect of which privilege is claimed and must do so by admissible direct evidence, not hearsay.

[32] In that case, as in the present, the only testimonial evidence was an affidavit by Mrs. Rinehart’s current solicitor which contained no evidence of the circumstances in which and the purpose for which the documents were created. An offer was made to call the solicitor who made the affidavit but his Honour noted that he could not have done so:

...the solicitor in question had no contemporaneous involvement in the creation and receipt of the disputed documents, had no personal knowledge of the matters asserted, and could not have given evidence of those matters, other than inadmissible hearsay or opinion.

[33] Mr. Scott, referring to *Grant v Downs*²¹ and *AWB Ltd v Cole and Another (No 5)*²² submitted that I should myself inspect the documents to see if I am able to decide whether or not the claim for privilege could be supported. I accept that I have a discretion to do so,²³ but in the circumstances of this case, I declined to exercise my discretion for the reasons which follow.

[34] First, as there is no admissible evidence in the form of an affidavit properly providing particulars of the claim for privilege, both the parties and the court are at a disadvantage. This is a case where, to the knowledge of the plaintiff and her advisors, any claim for legal professional privilege was

²¹ (1976) 135 CLR 674 at 689.

²² (2006) 155 FCR 30 at 44 [44.]

²³ *Alcoota Aboriginal Corporation and another v Gray* (2001) 161 FLR 95 at 111 para [78]; *Rinehart v Rinehart* [2016] NSWCA 58.

disputed on the ground that the documents were evidence of communications made between Mr. Wyvill SC, Ms. Spurr and the plaintiff in the furtherance of activities and actions to provide advice, and to carry out illegal activities, for an improper purpose. It was asserted that until the plaintiff abandoned paragraphs [6] –[12] of the Statement of Facts and Issues in the Supreme Court proceedings before Southwood J, she had adopted and approved a conscious and deliberate strategy to abandon her participation in the Stella Maris inquiry to enable her to come to this court and wrongly maintain that she had been denied procedural fairness. Part of that strategy involved the making of false statements in letters sent to Commissioner Lawler as well as in affidavits filed in this Court in the proceedings before Southwood J. The burden of proving that contention was upon the second defendant. The plaintiff, no doubt in order to protect herself from the possibility of incriminating herself, chose, no doubt on good advice, not to file an affidavit herself in support of her claim, which meant that she was not liable to be cross-examined. The same might be said about the decision not to put on any affidavit by Ms. Spurr or by Mr. Wyvill SC. I do not go so far as to decide that this failure may give rise to an inference that their evidence would not have supported the claim for privilege, but it leaves the Court and the parties in a dilemma. It would require the Court to review some 300 documents, largely unaided by submissions by the plaintiff's present counsel, and entirely unaided by submissions by counsel for the second

defendant who would not have seen the documents. As was said in *Rinehart v Rinehart*²⁴ quoting with approval what Brereton J had said at first instance:

While the documents themselves may well illuminate the purpose for which they were created, to allow them to be used as evidence- let alone the sole evidence- in support of a claim for privilege, would be contrary to well-established practice. It would be grossly unfair to the other party; if the only evidence of purpose is to be inferred from the document itself, the party seeking access is deprived of any opportunity to test the asserted purpose, which would defeat rather than promote the intent of enabling claims to be tested and scrutinised.

[35] There is also a contest, well known to the plaintiff and her advisers, that any privilege attached to some if not all of the documents has been waived. It is difficult to see how that issue could be satisfactorily resolved without evidence.

[36] The next difficulty is reasons. It will be difficult to provide reasons which do not disclose the privileged material relied on. The parties are entitled to reasons.

[37] Next, the proposed course would place an unduly burdensome task upon the Court. Even if I were able to read and absorb each document in two minutes, I would be looking at 600 minutes of reading, plus who knows how much time in considering the documents in their context and in context with each other, all in circumstances where I will not have had the benefit of any admissible evidence in support of the claim and very limited assistance from submissions from the parties.

²⁴ [2016] NSWCA 58 at [30].

[38] The proposed course would mean that the limited assistance I could hope to receive from counsel for the plaintiff would be expressed in cryptic terms in order to preserve the privilege, a course that is likely to lead to misunderstanding and unfairness to the second defendant.

[39] The proposed course would also mean that there would be no opportunity for the parties to limit the issues by agreement.

Conclusions and orders

[40] I make the following orders:

1. Declare that the warrant issued on 27 January 2016 by the first defendant for a search and seizure of things at premises described as the Northern Territory Government Department of Corporation and Information Services premises is invalid.
2. Order that the documents seized under the first warrant should be returned to the Northern Territory Government Department of Corporation and Information Services.
3. The summons is otherwise dismissed.
4. I will hear the parties as to costs.
