

***Roe v Western Australia* [2010] FCA 1436**

Gilmour J, 17 December 2010

Issue

The issue before the Federal Court was whether legal professional privilege (LPP) had been waived in relation to a draft connection report as a result of the reading of two affidavits prepared by an expert witness engaged by the Kimberley Land Council (KLC).

Background

In the Goolarabooloo and Jabirr Jabirr Peoples' claimant application, an application under s. 66B(1) to replace the applicant was heard by Justice Gilmour. During the s. 66B hearing, his Honour upheld a claim of LPP asserted by the KLC in relation to a draft connection report prepared by a consultant anthropologist (Ophelia Rubinich) for the KLC for use in litigation. This case deals with Gilmour J's reasons for judgment. It was contended privilege had been waived or, in any event, that the report was producible because it was used by Ms Rubinich in the formulation of the opinions expressed in her affidavit evidence. The affidavits concerned issues as to the ancestral descent of certain Goolarabooloo and Jabirr Jabirr People. The affidavits did not refer to the report.

Legal professional privilege

Counsel for Mr Roe referred to the common law principles of LPP in relation to expert reports and related documents as distilled by Justice Lindgren in *Australian Securities & Investments Commission v Southcorp Ltd* [2003] FCA 804 (*ASIC v Southcorp*) at [21], which include that privilege cannot be maintained in respect of documents used by an expert to form an opinion or write a report, regardless of how the expert came by the documents.

Ms Rubinich's evidence was that the report was 'used' to find secondary sources. She also said some things in the report were 'a one-line opinion based on the secondary source' and these opinions had been repeated in her affidavits in the s. 66B proceedings. Gilmour J found that Ms Rubinich's use of the report did not 'constitute relevant use in the sense employed by Lindgren J in *ASIC v Southcorp*'. According to the court:

[T]he Report was used ... as a convenient reference to enable her to locate the relevant and important secondary sources. Her opinions in the Report were based in part on those secondary sources. The same secondary sources were relied upon by her for the purpose of making her affidavits for the purposes of this hearing—at [18].

The evidence persuaded his Honour that Ms Rubinich did not use the report 'to formulate opinions expressed in her affidavits'. Rather: 'Those opinions were based on materials in both affidavits which she quite properly has identified'—at [19].

Decision

For the reasons summarised above, 'the claim for client privilege asserted by the KLC' was upheld—at [21].