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Details of Filing

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Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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DYER V CHRYSANTHOU AND ANOTHER – NSD 426 OF 2021

SECOND RESPONDENT'S SUBMISSIONS ON INTERLOCUTORY APPLICATION FILED 18 MAY 2021

A. INTRODUCTION

1. The Second Respondent makes these submissions in support of an interlocutory application filed on 18 May 2021 (**Interlocutory Application**). By the Interlocutory Application, the Second Respondent seeks that the Applicant give discovery of documents falling within six overlapping categories. The Interlocutory Application is supported by an affidavit of the Second Respondent's solicitor Rebekah Giles sworn 18 May 2021 (**Giles**).

2. This matter has been listed for final hearing on an expedited basis, with the hearing commencing on Monday 24 May 2021. Accordingly, the Interlocutory Application has been brought on quickly. To the extent necessary, the Second Respondent seeks an order that rule 20.13 of the *Federal Court Rules 2011* (Cth) (**Rules**), in particular the requirements of rule 20.13(3), be dispensed with.

B. BACKGROUND TO THE PROCEEDINGS

3. In short compass, the proceedings concern whether the First Respondent ought to be restrained from acting for the Second Respondent in proceedings brought by him in this Court against the ABC Corporation and Louise Milligan (**Porter Proceedings**). The Applicant seeks a permanent injunction restraining the First Respondent from acting for the Second Respondent in the Porter Proceedings on the basis that the First Respondent is in possession of confidential information of the Applicant and there is a risk that the information could be misused in the First Respondent's carriage of the Porter Proceedings.

4. The primary basis for the application for a permanent injunction is that information was disclosed to the First Respondent at a conference that took place on 20 November 2020 attended by her solicitor, a junior barrister and one other person. The Applicant has identified in her evidence the topics that were said to have been discussed at that conference and maintains a claim for legal professional privilege over the content of those discussions. Neither the Second Respondent's solicitors nor the Second Respondent have seen the unredacted portions of the evidence relied upon by the Applicant or the unredacted version of the Concise Statement.

5. As is explained further below, an issue in the proceedings is whether the information alleged to be in the possession of the First Respondent by reason of the 20 November 2020 conference has the

requisite character of confidence. It is this issue which informs the relevance of the categories of discovery sought by the Interlocutory Application.

C. RELEVANT PRINCIPLES

6. The making of orders for discovery is now regulated by Div 20.2 of the Rules. Within Div 20.2, rule 20.11 provides as follows:

> **Discovery must be for the just resolution of the proceeding**
>
> A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

7. Rule 20.15 concerns "non-standard" discovery and is the applicable rule where discovery is sought by categories, as in the present case.

8. The Court's application of those rules were conveniently summarised by Middleton J in *Babscay Pty Ltd v Pitcher Partners (a firm)* [2019] FCA 480 at [94]-[95] as follows:

> [94] As to discovery, the Court can control its extent as it is a discretionary procedure. The discretion must be exercised in a way that best promotes the overarching purpose of the civil practice and procedure provisions set forth in s 37M of the Federal Court Act and the Rules: Power Infrastructure Pty Ltd v Downer EDI Engineering Power Pty Ltd (No 4) [2012] FCA 143 at [14] per Katzmann J. On applications for discovery, the Court has a broad discretion and will balance the costs, time and possible oppression to the producing party against the importance and likely benefits to the applying party: *United Salvage Pty Ltd v Louis Dreyfus Armateurs SNC* [2006] FCA 116 at [3] per Tamberlin J. If discovery orders are made, they can be tailored to suit the particular circumstances of the case: Taylor v Saloniklis [2013] FCA 679 at [7] per Besanko J.
>
> [95] In addition, the party seeking discovery bears the onus of satisfying the Court that the documents sought are necessary: *Trade Practices Commission v CC (New South Wales) Pty Ltd (No 4)* [1995] FCA 1418; (1995) 58 FCR 426 at 436 per Lindgren J. If ordering discovery from cross-respondents has "the very real potential to duplicate the discovery already provided by [another party]", the discovery may be oppressive and be refused or limited in operation: *BrisConnections Finance Pty Ltd (Receivers and Managers Appointed) v Arup Pty Ltd* [2015] FCA 1077 at [60] per Flick J.

9. See also the general principles set out by Flick J in *Construction, Forestry, Mining and Energy Union v Rio Tinto Coal Australia Pty Ltd* (2014) 232 FCR 560 at [91]-[99].

10. The "direct relevance" test applicable under rule 20.14 has been applied to an application for categories of discovery pursuant to rule 20.15. See e.g. *ACCC v Google LLC* [2020] FCA 1563 at [4]-[5] (Thawley J). The principles concerning "direct relevance" are well known and were summarised by Barker J in *Dennis v Chambers Investment Planners Pty Ltd* (2012) 201 FCR 321 at [18] to [33].

11. In this case, discovery by categories is appropriate, rather than an order for standard discovery, to avoid a potential debate at the hearing about whether there has been a failure by the Applicant to produce documents "directly relevant" to the issues in the case (as per rule 20.14). That is to say, in the short time available before the hearing, the use of categories will mean that the Applicant will not be burdened with the task of making an assessment of which documents in her possession, custody or control may support or adversely affect her case. In *Dennis Chambers Investments* at [36] Barker J observed that discovery by categories may be appropriate where disputation about the scope of standard discovery may be anticipated. That is so in this case, where the Applicant has indicated through her solicitors that she does not accept the relevance of the categories of documents sought in the interlocutory application[1] i.e. the very documents the Second Respondent submits would be discoverable if an order for standard discovery was made.

D. CATEGORIES OF DOCUMENTS SOUGHT BY THE INTERLOCUTORY APPLICATION

12. There are six categories of documents sought by prayer 1 of the Interlocutory Application. The Applicant has agreed to give discovery of the documents falling within category (d), namely any notes or records of any communications between the Applicant and the First Respondents of the communications or discussions that took place between the Applicant and the First Respondent and Messrs Bradley, Hooke and Richardson on 20 November 2020.[2] The remaining categories of documents (which it may be accepted overlap significantly) focus on any disclosures by the Applicant to any person or social media platform of the information, or any part the information, that the Applicant contends constitutes the confidential information disclosed to the First Respondent in the conference on 20 November 2020.

E. APPLICATION OF PRINCIPLES

13. The Second Respondent submits that orders for discovery in the form set out in the Interlocutory Application will facilitate the just resolution of the proceedings for the following reasons.

14. *First*, as noted in paragraph 4 above, one of the critical issues in the proceedings is whether the information the Applicant contends she disclosed to the First Respondent at the conference on 20 November 2020 was in fact confidential information. In his Concise Response, the Second Respondent has put the Applicant to proof on that issue. He does not admit the information (which he has not seen) was confidential and pleads at [19] that the Court must determine whether any information said to have been disclosed on 20 November 2020 was at the time in the public domain

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1 See Giles, RG-1, p. 81 at [7] (Letter from Marque Lawyers to Company (Giles) dated 18 May 2021)

2 Giles [27].

or was otherwise not confidential because it has been disclosed to third parties. The Second Respondent contends that if the information was not confidential at the time it was given or is no longer confidential then the application for injunctive relief should be dismissed.

15. The test for restraining a legal practitioner on the basis of possible misuse or the risk of misuse of confidential information requires the Court to consider and determine the following sequence of questions[3]:

    a. What is the relevant information?

    b. Is that information confidential?

    c. Does the legal practitioner have possession of that information?

    d. Is the legal practitioner proposing to act "against" the former client in the requisite sense?

    e. Is there a real risk that the confidential information will be relevant?

    f. Is there no real risk of misuse of the confidential information?

16. The Applicant bears the onus of answering question (a) with sufficient particularity and also satisfying the Court of affirmative answers to questions (b) to (e).[4] For the material to possess the character of confidential information, the information in question must be identified with precision. While that is an issue for the hearing, for the purposes of the present Interlocutory Application, the relevant question in the sequence above is question (b) – whether the information said to have been disclosed by the Applicant to the First Respondent in the conference on 20 November 2020 was at the time and remains confidential.

17. The test of confidentiality is not to be determined by the application of a precise formula.[5] Information disclosed in the context of a client lawyer relationship will not have the requisite character of confidence if the information is otherwise publicly available or has been otherwise disclosed in the conduct of the client's affairs.[6] As expressed by Professor Dal Pont (and cited with approval by Anderson J in *Re Timbercorp* at [77]), "[w]hether reflected in the framing of an implied term as to confidentiality or, more perhaps accurate, by reference to the equitable doctrine of confidentiality, the duty of confidentiality lasts as long as the information in question remains

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3 *Re Timbercorp Finance Pty Ltd (ACN 054 581 190) (in liq) and Others* (2019) 137 ACSR 189 (***Re Timbercorp***) at [64] (Anderson J).

4 *Re Timbercorp* at [64] (Anderson J).

5 *Re Timbercorp* at [74] (Anderson J), citing *Australian Medic-Care Co Ltd (a company incorporated in Hong Kong) v Hamilton Pharmaceutical Pty Ltd* (2009) 261 ALR 501 at [634].

6 *Re Timbercorp* at [76].

outside the public domain". But once confidential information is characterised as being released into the 'public domain', it forever loses its character as confidential.

18. In those circumstances, documents which evidence or record the disclosure of the alleged confidential information to third parties (other than those who attended the 20 November 2020 conference) will be directly relevant to the question of whether that information has the requisite character of confidence. They may also build a case for an inference that the Applicant had a regular practice of discussing with third parties, not under any obligation of confidence, the matters she is said to have discussed at the 20 November 2020 conference. The Second Respondent (who is the proper contradictor in the proceedings because he would be directly impacted by the relief if granted) is entitled to test the Applicant's contention that the information she allegedly disclosed to the First Respondent in the 20 November 2020 conference is truly confidential. Discovery of the documents sought by the Interlocutory Application will allow that testing to occur and facilitate a just resolution of the proceedings.

19. *Secondly*, the Second Respondent has a clear basis for seeking the categories of documents identified in the Interlocutory Application. It cannot be characterised as a fishing exercise. This is particularly in circumstances where there is evidence that since the Applicant's interview with the ABC on 9 November 2020 (the subject matter of which concerned the allegations made by AB against the Second Respondent)[7], the Applicant has made several statements to and given further interviews with the media about that same subject matter.[8] She has also since at least November 2020, published tweets about that same subject matter.[9] Further, on 13 May 2021, the Applicant's solicitor, Mr Bradley, released a statement on behalf of Dyer.[10] Ms Giles has exhibited to her affidavit over 15 public statements made by the Applicant about the matters the subject of the Porter Proceedings. She has some 4000 twitter followers. In that regard, it is clear that there is reason to believe based on the public statements made by the Applicant alone that she had a practice of discussing the subject matter of the Porter allegations widely and publicly. Evidence of that kind would be directly relevant to the question whether any information disclosed in the 20 November 2020 conference was truly confidential.

20. There is also some evidence that the Applicant and AB interacted over Facebook about the allegations made by AB against the Second Respondent, this forming a basis for the category of documents sought by paragraph 1(e) of the Interlocutory Application, including any disclosures of

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7 Giles [7].

8 Giles [11] (interview with the ABC on 1 March 2021); [12] (interview with the *Sydney Morning Herald*); [13] (interview with the ABC) [20]-[21] (interview with *The Guardian*).

9 Giles [8], [9], [10], [14]-[19]; [22]-[24].

10 Giles [25].

the relevant information in closed social media groups. The Applicant asserts that "[b]y their nature, such communications cannot amount to public disclosure and therefore are irrelevant to the issues in this proceeding".[11] That is not correct; whether information has entered the public domain is a question of fact and degree, taking into account the circumstances in which the information was disclosed and the extent of any existing publication of the information. See *Brand v Monks* [2009] NSWSC 1454 at [180] (Ward J (as the Chief Judge in Eq then was)). In other words, it would depend upon the evidence as to how many persons participated in the on-line discussion and whether they expressly or impliedly agreed to keep the information discussed in that forum confidential. The existence of that factual question does not render communications within such group irrelevant and therefore non-discoverable.

21. *Thirdly*, it is not to the point (as the Applicant has contended in correspondence), that it "would not be appropriate to require [the Applicant] to produce statement which are already in the public domain".[12] As Ms Giles deposes, while the Second Respondent's solicitors have undertaken searches for all public statements made by the Applicant concerning the allegations concerning the Second Respondent, Ms Giles cannot be certain that she and her team have been able to gather all such statements because they do not know the times, locations or circumstances in which such statements were made. It is possible that not all public statements made by the Applicant in different fora have been reproduced on the Internet.[13]

22. *Fourthly*, beyond a mere assertion in correspondence[14], there is no evidence that the Applicant cannot comply with the orders sought by the Interlocutory Application in time for the hearing. The Applicant has asserted that requiring the Applicant to produce the documents sought "would impose an oppressive burden" on her.[15] This contention is somewhat surprising in circumstances where if the information disclosed in the 20 November 2020 conference was truly confidential it would be expected that it has not been widely disclosed to persons beyond those who attended the conference. It suggests that there is a body of documents, perhaps a large body of documents, that respond to the proposed categories. That in and of itself undermines any submission this is a fishing exercise. But more to the point, the Applicant has not adduced evidence as to the volume of the material or to demonstrate the degree of burden it would impose upon her. In any event, in circumstances where the Applicant has invoked the Court's supervisory jurisdiction and sought final relief on an

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11 Letter from Marque Lawyers to Company (Giles) dated 18 May 2021. Giles [27] Ex RG-1 pages 81-82.

12 Letter from Marque Lawyers to Company (Giles) dated 18 May 2021. Giles [27] Ex RG-1 pages 81-82.

13 Giles [28].

14 Letter from Marque Lawyers to Company (Giles) dated 18 May 2021. Giles [27] Ex RG-1 pages 81-82.

15 Letter from Marque Lawyers to Company (Giles) dated 18 May 2021 at [7]. Giles [27] Ex RG-1 pages 81-82.

expedited basis, which relief only may be exercised in exceptional circumstances[16], justice dictates that she be required to give discovery in the categories identified in the Interlocutory Application.

F. CONCLUSION

23. For the above reasons, the Second Respondent submits that Court ought to make the orders sought in the Interlocutory Application. The Interlocutory Application seeks that discovery be given by 5pm on 20 May 2021, although the Second Respondent is content to receive any documents ordered to be discovered be received in tranches, so long as verification occurs before the commencement of the hearing on 24 May 2021.

19 May 2021

CH Withers E Bathurst

Counsel for the Second Respondent

16 *Kallinicos v Hunt* (2005) 64 NSWLR 561 at [64] (Brereton J).