

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 19/05/2021 10:07:49 AM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Affidavit - Form 59 - Rule 29.02(1)
File Number:	NSD426/2021
File Title:	JOANNE ELIZABETH DYER v SUE CHRYSANTHOU & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Dated: 20/05/2021 11:56:01 AM AEST

Registrar

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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Form 59

Rule 29.02(1)

Affidavit

No. NSD426 of 2021

Federal Court of Australia

District Registry: Sydney

Division: General

Joanne Elizabeth Dyer

Applicant

Sue Chrysanthou SC

First Respondent

Charles Christian Porter

Second Respondent

Affidavit of: **Nathan Thomas Mattock**
 Address: Level 4, 343 George Street, Sydney, NSW 2000
 Occupation: Partner, Marque Lawyers
 Date: 19 May 2021

Contents

Document number	Details	Paragraph	Page
1	Affidavit of Nathan Thomas Mattock, sworn 19 May 2021.	[1] – [19]	1 - 5
2	Annexure "NTM-4", being a copy of the Second Respondent's proposed orders sent at 9:51pm on 17 May 2021.	[6]	6 - 8
3	Annexure "NTM-5", being a copy of the Second Respondent's proposed orders sent at 10:02am on 18 May 2021.	[7]	9 - 11

Filed on behalf of (name & role of party) Joanne Elizabeth Dyer, Applicant

Prepared by (name of person/lawyer) Nathan Mattock

Law firm (if applicable) Marque Lawyers

Tel (02) 8216 3000

Tel (02) 8216 3000

Email nathanm@marquelawyers.com.au

Address for service Level 4, 343 George Street, Sydney NSW 2000
 (include state and postcode)

Document number	Details	Paragraph	Page
4	Annexure "NTM-6", being a copy of Marque Lawyers' letter sent to the solicitors for the First and Second Respondent on 18 May 2021 enclosing the Applicant's proposed discovery orders.	[9]	12 - 15
5	Annexure "NTM-7", being a redacted copy of Marque Lawyers' letter sent to the solicitors for the First Respondent on 18 May 2021 proposing redactions to the First Respondent's Concise Response and the response from the First Respondent's solicitors dated 18 May 2021.	[11]	16 - 20
6	Annexure "NTM-8", being a copy of The Australian article "Christian Porter's defamation barrister Sue Chrysanthou faces legal action", dated 13 May 2021.	[13]	21 - 24
7	Annexure "NTM-9", being a copy of the transcript from the case management hearing in NSD206/2021 on 14 May 2021.	[19]	25 - 61

I say on oath:


1. I am a Partner at Marque Lawyers and the solicitor on record for the Applicant, Ms Joanne Dyer.
2. I previously swore an affidavit on behalf of the Applicant in these proceedings on 11 May 2021.
3. I am authorised to make this further affidavit on behalf of the Applicant in support of the Applicant's Interlocutory Application filed 19 May 2021 (**Application**) seeking:
 - a. orders for discovery by the First and Second Respondent of the categories set out in the Application; and
 - b. an interim non-publication order pursuant to section 37A1 of the *Federal Court Act 1976* (Cth) in respect of the First Respondent's Response to Concise Statement filed 17 May 2021.
4. This matter is listed for final hearing on 24 to 26 May 2021. Due to the limited time available before the final hearing, the Applicant also seeks dispensation from rule 20.13 of the *Federal Court Rules 2011* (Cth) with respect to the discovery application process.
5. Unless otherwise indicated, I make this affidavit from my own knowledge, information and belief based on my knowledge and experience as a solicitor. Where I depose to matters on information and belief, I believe those matters to be true.

Discovery

6. On 17 May 2021 at 9:51pm, I received an email from Ms Alanah Tannous (on behalf of Ms Giles, solicitor for the Second Respondent, Mr Porter) proposing categories of documents to be provided by the Applicant by way of discovery to "the Respondents." A copy of the proposed orders enclosed with Ms Tannous' email appear at **pages 6 to 8 of this affidavit and marked "Annexure NTM-4"**. I have annexed the Second Respondent's proposed orders to this affidavit as the version of the proposed orders that is annexed to the Affidavit of Ms Rebekah Giles sworn 18 May 2021 at pages 74 to 75 of RG-1 does not include the footer which was originally included in the proposed orders sent by Ms Tannous.
7. On 18 May 2021 at 10:02am, I received a further email from Ms Tannous, attaching further proposed discovery orders. A copy of the further proposed orders attached to Ms Tannous' email appears at **pages 9 to 11 of this affidavit and is marked "Annexure NTM-5" (Proposed Discovery Orders)**. I have annexed the Proposed Discovery Orders to this affidavit as the version of the proposed orders that is annexed to the Affidavit of Ms Rebekah Giles sworn 18 May 2021 at pages 78 to 79 of RG-1 does not include the footer which was originally included in the proposed orders sent by Ms Tannous.
8. On 18 May 2021 at 12:10pm, Ms Lauren Gasparini (working under my instructions) emailed a letter to the solicitors for the First Respondent and the Second Respondent outlining the Applicant's position with respect to the Proposed Discovery Orders. A copy of this letter appears at pages 81 to 82 of Annexure RG-1.
9. On 18 May 2021 at 1:20pm, Ms Gasparini emailed a second letter to solicitors for the First Respondent and the Second Respondent, enclosing the Applicant's proposed orders for discovery. A copy of this letter and the Applicant's proposed orders appears at **pages 12 to 15 of this affidavit and is marked "Annexure NTM-6"**.

Non-Publication Orders

10. On 18 May 2021:
 - (a) at 2:50pm, Ms Gasparini emailed a letter to Mr Patrick George, solicitor for the First Respondent, requesting redactions to the First Respondent's Concise Reply.
 - (b) At 7:17pm, Patrick George responded to the request for redactions
11. A copy of a redacted version of this letter outlining the Applicant's requested redactions, and Mr George's subsequent response, appears at **pages 16 to 20 of this affidavit and marked "Annexure NTM-7"**.
12. An unredacted version of the letter has not been annexed to this affidavit but can be provided to the Court if required.
13. On about 13 May 2021, *The Australian* published an article concerning this proceedings. A copy of the article appears at **pages 21 to 24 of this affidavit and marked "Annexure NTM-8"**.



Matters relevant to discovery sought from the First Respondent

14. At paragraph 2(e) of the First Respondent's Concise Response, the First Respondent states that she attended the conference on 20 November 2020 (**Conference**) as a favour to Mr Matthew Richardson.
15. At paragraph 2(i) of the First Respondent's Concise Response, the First Respondent states that she informed Mr Michael Bradley, Managing Partner of Marque Lawyers, on 15 March 2021 that she had accepted the brief to act for the Second Respondent in proceedings NSD 206/2021 in the Federal Court of Australia (**Porter Brief**).
16. I am informed by Mr Bradley, and verily believe, that the First Respondent advised Mr Bradley that she had made enquiries of Mr Bret Walker SC and two other senior counsel as to whether she should accept the Porter Brief. The conversation between the First Respondent and Mr Bradley is outlined at paragraph 26 of the Affidavit of Michael David Bradley affirmed 10 May 2021 in these proceedings. This conversation as deposed to by Mr Bradley forms the basis of my belief as to Ms Chrysanthou's enquiries.
17. At paragraph 2(g) of the First Respondent's Concise Response, the First Respondent confirms she has held the Porter Brief since 10 March 2021. The First Respondent corresponded with Marque Lawyers and the Applicant in respect of advice provided to the Applicant during the period 20 November 2020 to 4 March 2021. The relevant correspondence is privileged and has been annexed to the Affidavit of Michael David Bradley affirmed 10 May 2021 in these proceedings at pages 48 to 105 of Confidential Annexure MDB-5.

Matters relevant to discovery from the First and Second Respondent

18. At paragraph 23(a) of the Second Respondent's Concise Response, the Second Respondent states that "*Porter has given his informed consent for Chrysanthou to not inform him of any confidential matters that she learned by reason of her attendance at the 20 November 2020 conference and communications with representatives of Dyer thereafter*" (**Porter Informed Consent**).

Matters relevant to discovery from the Second Respondent

18. On 14 May 2021, Federal Court of Australia proceedings NSD 206 of 2021 were listed before her Honour Justice Jagot to attend on procedural matters (**ABC Case Management Hearing**).
19. My firm obtained a copy of the transcript of the ABC Case Management Hearing by email from Auscript at 7:51am on 19 May 2021. A copy of that email together with the attached transcript is at **pages 25 to 61 of this affidavit and is marked "Annexure NTM-9"**.

Sworn by the deponent

)

at Melbourne

)

in Victoria

)

on 19 May 2021

)

Before me:

)

Signature of deponent



Signature of witness

Emma Johnsen

Solicitor

Level 4, 343 George Street

Sydney NSW 2000

This affidavit was signed and witnessed in counterpart via audio visual link in accordance with section 12 of the Electronic Transactions Act 2000 (Vic).



Rule 29.02(8)

Certificate identifying annexure

No. NSD426 of 2021

Federal Court of Australia
District Registry: Sydney
Division: General

Joanne Elizabeth Dyer
Applicant

Sue Chrysanthou SC
First Respondent

Charles Christian Porter
Second Respondent

Annexure “NTM-4”

This is the annexure marked “NTM-4” to the affidavit of Nathan Thomas Mattock sworn before me on 19 May 2021.



.....
Signature of witness

ORDER

No. NSD 426 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: General

Joanne Elizabeth Dyer

Applicant

Sue Chrysanthou SC

First Respondent

Charles Christian Porter

Second Respondent

ORDER JUDGE: JUSTICE THAWLEY

DATE OF ORDER:

WHERE MADE: Sydney

The Court orders that the Applicant give discovery to the Respondents of the following categories of documents:

1. All documents recording or disclosing communications between the Applicant and any other person (natural person or corporation) in relation to the allegations made by AB against the Second Respondent from 23 June 2020 to date.
2. All documents recording or disclosing any communications between the Applicant and any other person (natural person or corporation) concerning the background to and nature of the Applicant's relationship with AB.
3. All communications between the Applicant and or any representative of the Applicant and any representative of the Australian Broadcasting Corporation recording or disclosing:

Filed on behalf of (name & role of party)	The Respondents		
Prepared by (name of person/lawyer)	Rebekah Giles		
Law firm (if applicable)	Company Giles		
Tel	1300 204 602	Fax	
Email	Rebekah@companygiles.com.au		
Address for service (include state and postcode)	111 Elizabeth Street Sydney NSW 2000		

[Form approved 01/08/2011]

- a. The contents of the Applicant's discussions with Louise Milligan or journalist employed by the ABC or any other representative of the ABC concerning the allegations made by AB against the second respondent; and
 - b. the terms upon which the Applicant agreed to be interviewed by Louise Milligan.
4. Any notes or records of any communications between the Applicant and First Respondent of the communications or discussions that took place between the Applicant and the First Respondent and Messrs Bradley, Hooke and Richardson on 20 November 2021.
5. Copies of all statements published or publicly disseminated by the Applicant from 23 June 2020 to date concerning the allegations made by AB against Mr Porter including but not limited to interviews given by the Applicant, statements made to by the Applicant the media, social media postings or statements made by the Applicant in closed social media groups.
6. Any document recording or evidencing the Applicant disclosing or discussing with any third party the information or any part thereof that the Applicant contends constitutes confidential information disclosed to the First Respondent at the meeting on 20 November 2020.

Rule 29.02(8)

Certificate identifying annexure

No. NSD426 of 2021

Federal Court of Australia
District Registry: Sydney
Division: General

Joanne Elizabeth Dyer

Applicant

Sue Chrysanthou SC

First Respondent

Charles Christian Porter

Second Respondent

Annexure "NTM-5"

This is the annexure marked "NTM-5" to the affidavit of Nathan Thomas Mattock sworn before me on 19 May 2021.



.....
Signature of witness

ORDER

No. NSD 426 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: General

Joanne Elizabeth Dyer

Applicant

Sue Chrysanthou SC

First Respondent

Charles Christian Porter

Second Respondent

ORDER JUDGE: JUSTICE THAWLEY

DATE OF ORDER:

WHERE MADE: Sydney

The Court orders that by 5 pm on 20 May 2021 the Applicant give verified discovery to the Second Respondent of the following categories of documents:

1. All documents recording or disclosing communications from 23 June 2020 to date between the Applicant and any other person (natural person or corporation) in relation to the allegations made by AB against the Second Respondent.
2. All documents recording or disclosing any communications between the Applicant and any other person (natural person or corporation) concerning the background to and nature of the Applicant's relationship with AB.
3. All communications between the Applicant and or any representative of the Applicant and any journalist employed by the Australian Broadcasting Corporation (**ABC**) or other representative of the ABC recording or disclosing:

Filed on behalf of (name & role of party)	The Respondents		
Prepared by (name of person/lawyer)	Rebekah Giles		
Law firm (if applicable)	Company Giles		
Tel	1300 204 602	Fax	
Email	Rebekah@companygiles.com.au		
Address for service (include state and postcode)	111 Elizabeth Street Sydney NSW 2000		

[Form approved 01/08/2011]

- a. The contents of the Applicant's discussions with Louise Milligan or any journalist employed by the ABC or any other representative of the ABC concerning the allegations made by AB against the Second Respondent;
 - b. the terms upon which the Applicant agreed to be interviewed by Louise Milligan; and or
 - c. communications relating or referring to the First Respondent.
- 4. Any notes or records of any communications between the Applicant and First Respondent of the communications or discussions that took place between the Applicant and the First Respondent and Messrs Bradley, Hooke and Richardson on 20 November 2021.
- 5. Copies of all statements published or publicly disseminated by the Applicant from 23 June 2020 to date concerning the allegations made by AB against the Second Respondent including but not limited to interviews given by the Applicant, statements made by the Applicant to the media, social media postings or statements made by the Applicant in closed social media groups.
- 6. Any document recording or evidencing the Applicant disclosing or discussing with any person who was not present at the 20 November 2020 conference with the First Respondent the information or any part thereof that the Applicant contends constitutes confidential information disclosed to the First Respondent at that meeting.

Rule 29.02(8)

Certificate identifying annexure

No. NSD426 of 2021

Federal Court of Australia
District Registry: Sydney
Division: General

Joanne Elizabeth Dyer
Applicant

Sue Chrysanthou SC
First Respondent

Charles Christian Porter
Second Respondent

Annexure “NTM-6”

This is the annexure marked “NTM-6” to the affidavit of Nathan Thomas Mattock sworn before me on 19 May 2021.



.....
Signature of witness

Our reference NM/13146
Phone +61 2 8216 3003
Email nathanm@marquelawyers.com.au

18 May 2021

Rebekah Giles
Company (Giles)
Level 13, 111 Elizabeth Street
Sydney NSW 2000

Patrick George
Senior Partner
Kennedys (Australasia) Pty Ltd
Level 22, 85 Castlereagh Street
Sydney NSW 2000

By email only: rebekah@companygiles.com.au
patrick.george@kennedyslaw.com

Dear Ms Giles and Mr George

**Joanne Elizabeth Dyer v Sue Chrysanthou SC & Anor (NSD426/2021) ("Proceedings") –
Applicant's proposed discovery orders**

1. We refer to our earlier letter of today's date confirming our client's response to the Second Respondent's proposed categories of discovery.
2. Please find enclosed our client's proposed discovery orders in respect of the First and Second Respondent (**Applicant's Proposed Orders**).
3. We would appreciate if the parties could please indicate by 3:00pm today whether:
 - (a) the Applicant's Proposed Orders are agreed; and
 - (b) your clients will be in a position to produce the documents by way of discovery by 5:00pm on Thursday, 20 May 2021.

Yours sincerely



Nathan Mattock
Partner

ORDERS

No. NSD426 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: General

Joanne Elizabeth Dyer

Applicant

Sue Chrysanthou SC

First Respondent

Charles Christian Porter

Second Respondent

THE COURT ORDERS THAT:

1. By 5:00pm on 20 May 2021, the First Respondent give verified discovery to the Applicant of the following documents:
 - a. Any documents recording or constituting communications between the First Respondent and another person in relation to:
 - (i) whether the First Respondent should accept the brief to act for the Second Respondent in Federal Court of Australia proceedings NSD206/2021 having regard to her position vis-à-vis the Applicant; and
 - (ii) information the First Respondent received during the course of her dealings with the Applicant.
 - b. Any documents recording or referring to communications that took place between the First Respondent and the Applicant, Mr Bradley, Mr Hooke and Mr Richardson on 20 November 2020.
2. By 5:00pm on 20 May 2021, the First Respondent and the Second Respondent give verified discovery to the Applicant of the following categories of documents:

Filed on behalf of (name & role of party)

Joanne Elizabeth Dyer, Applicant

Prepared by (name of person/lawyer)

Nathan Mattock

Law firm (if applicable)

Marque Lawyers

Tel 02 8216 3021

Fax

02 8216 3001

Email nathanm@marquelawyers.com.au ;

Address for service

Level 4, 343 George Street Sydney NSW 2000

(include state and postcode)

- a. Any documents recording or constituting communications between the First Respondent and the Second Respondent (or his solicitors) in relation to:
 - (i) any communications between the First Respondent and the Applicant; and
 - (ii) the informed consent alleged in paragraph 23(a) of the Concise Response of the Second Respondent.

Dated: 18 May 2021

Rule 29.02(8)

Certificate identifying annexure

No. NSD426 of 2021

Federal Court of Australia
District Registry: Sydney
Division: General

Joanne Elizabeth Dyer
Applicant

Sue Chrysanthou SC
First Respondent

Charles Christian Porter
Second Respondent

Annexure “NTM-7”

This is the annexure marked “NTM-7” to the affidavit of Nathan Thomas Mattock sworn before me on 19 May 2021.



.....
Signature of witness

Our reference NM/13146
Phone +61 2 8216 3003
Email nathanm@marquelawyers.com.au/laureng@marquelawyers.com.au

18 May 2021

Patrick George
Senior Partner
Kennedys (Australasia) Pty Ltd
Level 22, 85 Castlereagh Street
Sydney NSW 2000

By email only: Patrick.george@kennedyslaw.com

Dear Mr George

Joanne Elizabeth Dyer v Sue Chrysanthou SC & Anor

1. We refer to the unsealed copy of your client's Concise Response of the First Respondent served via email on 18 May 2021 (**Concise Response**).
2. The following paragraphs of the Concise Response contain either privileged or confidential information belonging to your client:



3. In accordance with your proposal set out in your letter dated 14 May 2021 (which outlined a process for disclosing your client's evidence), could you please confirm that:
 - (a) the paragraphs identified at paragraph 2 above are redacted prior to the Concise Response being filed with the Registry; and
 - (b) only the redacted version of the Concise Response is made available to Mr Porter and any solicitors or counsel acting for Mr Porter in Proceedings NSD 206 of 2021.

4. Our client intends to seek a non-publication order in respect of the unredacted version of the Concise Response tomorrow.
5. Please immediately confirm that you will refrain from making the unredacted copy of the Concise Response publicly available before then.

Yours sincerely



Nathan Mattock
Partner

Your ref

Our ref PTG/AUSC211-1032875 (PTG)

Kennedys

BY EMAIL: nathanm@marquellawyers.com.au

Mr Nathan Mattock
Partner
Marque Lawyers Pty Ltd
Level 4
343 George Street
SYDNEY NSW 2000

Kennedys (Australasia) Pty Ltd
Level 22
85 Castlereagh Street
Sydney NSW 2000
PO Box A65
Sydney South NSW 1235
Australia
ABN 31 119 302 742

t +61 2 8215 5999
f +61 2 8215 5988
DX 239 Sydney

kennedyslaw.com

Direct Dial+61 2 8215 5901

Patrick.George@kennedyslaw.com

18 May 2021

Dear Mr Mattock

JOANNE ELIZABETH DYER V SUE CHRYSANTHOU SC & ANOR

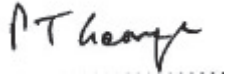
- 1 We refer to your letter dated 18 May 2021, in relation to your request for redactions to our client's Concise Response to the Concise Statement.
- 2 Our client makes no claim for privilege or confidentiality in respect of the paragraphs of her Concise Response cited by you, which you assert belongs to her. Nor do we consider those paragraphs disclose the content of any confidential information or privileged communication belonging to your client.
- 3 Our proposal in relation to any confidential information in our client's proposed affidavit did not relate to the Concise Response.
- 4 As you know from the email of Nathan Buck sent at 5:45pm yesterday, the unsealed Concise Response was already lodged with the Court Registry at that time and served on all parties to the proceeding, including Mr Porter's solicitor in Proceedings NSD 206 of 2021. As foreshadowed in that email, we now **enclose**, by way of service, the sealed version of our client's Concise Response.
- 5 Our client will not consent nor oppose any application by your client to have redactions made to the sealed version of the Concise Response. Nor will our client consent or oppose any application by your client for a non-publication order in respect of the unredacted version of the Concise Response.
- 6 We and our client undertake not to make the unredacted copy of the Concise Response public pending a ruling on the foreshadowed non-publication orders.

Kennedys offices, associations and cooperations: Argentina, Australia, Belgium, Bermuda, Brazil, Canada, Chile, China, Colombia, Denmark, Dominican Republic, England and Wales, France, Guatemala, Hong Kong, India, Ireland, Israel, Italy, Mexico, New Zealand, Northern Ireland, Norway, Oman, Pakistan, Panama, Peru, Poland, Portugal, Puerto Rico, Russian Federation, Scotland, Singapore, Spain, Sweden, Thailand, United Arab Emirates, United States of America.

Mr Nathan Mattock
Marque Lawyers Pty Ltd

Kennedys

Yours sincerely

A handwritten signature in black ink, appearing to read 'P T George', written over a horizontal dotted line.

Patrick George
Senior Partner
for Kennedys

Rule 29.02(8)

Certificate identifying annexure

No. NSD426 of 2021

Federal Court of Australia
District Registry: Sydney
Division: General

Joanne Elizabeth Dyer

Applicant

Sue Chrysanthou SC

First Respondent

Charles Christian Porter

Second Respondent

Annexure “NTM-8”

This is the annexure marked “NTM-8” to the affidavit of Nathan Thomas Mattock sworn before me on 19 May 2021.



.....
Signature of witness

THE AUSTRALIAN

Christian Porter's defamation barrister Sue Chrysanthou faces legal action

By **NICOLA BERKOVIC**, LEGAL AFFAIRS CORRESPONDENT

6:20AM MAY 13, 2021

Christian Porter's high-profile defamation barrister is facing legal action to stop her representing the former attorney-general in his case against the ABC.

Jo Dyer, director of the Adelaide Writers Week, is seeking orders to stop Sue Chrysanthou SC from representing Mr Porter.

Ms Chrysanthou, who has previously represented actor Geoffrey Rush and Greens senator Sarah Hanson-Young, has been accused of having access to confidential information related to Mr Porter's case against the ABC provided to her by Ms Dyer.

Ms Dyer was a friend of a woman, known as Kate, who alleged she had been raped by Mr Porter in 1988 when she was 16 and Mr Porter was 17. She committed suicide in June last year.

Mr Porter, now Industry Minister, is suing the ABC and journalist Louise Milligan over an online article published on February 26, which reported that an unnamed cabinet minister was facing historical rape allegations.

Mr Porter, 50, outed himself as the unnamed minister five days later and launched the defamation action on March 15.

In a statement on Wednesday, he said it had been "widely known for two months" that Ms Chrysanthou was acting for him in the case and he was concerned about the timing of Ms Dyer's action, ahead of a key hearing in his defamation case against the ABC.

Barrister Michael Hodge SC, representing Ms Dyer in her bid to oust Ms Chrysanthou from the defamation case, told the Federal Court on Wednesday that Ms Chrysanthou had confidential information that was relevant to the dispute provided to her in the course of a "lawyer-client relationship" with Ms Dyer.

Ms Chrysanthou had reviewed a legal letter sent on November 26 to The Australian, on Ms Dyer's behalf, claiming an opinion piece written by columnist Janet Albrechtsen had defamed her.

The column criticised an ABC Four Corners program about sexism in parliament, broadcast earlier that month, as "a poorly executed political hatchet job".

Ms Dyer was quoted in the program criticising Mr Porter for his conduct as a young man and describing him as having "an assuredness that's perhaps born of privilege".

The program did not air any rape allegation against Mr Porter.

The legal letter said Kate had disclosed to Ms Dyer "an extremely serious allegation against Christian Porter regarding events that she alleged had taken place in January 1988" and Ms Dyer had agreed to be interviewed for the Four Corners program because she believed she had a responsibility to her late friend.

The letter — well before Milligan reported the rape claims — said Kate had told many people of the allegations and this "must have come to the attention of The Australian". "It does not seem plausible that information concerning (Kate)'s allegations had not reached senior editorial staff at the Australian," it read.

The criticism of Ms Dyer's appearance should not have been published because The Australian should have been aware the interview was for the purpose of sharing Kate's story, the letter read.

While the ABC argues that the publication of the allegations in February did not defame Mr Porter because the broadcaster did not name him, he will only need to show at least one person who had read it reasonably understood it referred to him to show that he had been identified.

Mr Hodge, dubbed the "baby-faced assassin" during the banking royal commission, told Federal Court judge Thomas Thawley there were two possible grounds for preventing Ms Chrysanthou from acting for Mr Porter — "misuse of confidential information" and "apprehension of an interference with the administration of justice".

Ms Dyer's court application, filed on Monday, seeks an order that Ms Chrysanthou be restrained from acting for Mr Porter "on the grounds that the order is necessary to prevent prejudice to the proper administration of justice and to preserve confidentiality and legal professional privilege".

Ms Chrysanthou, one of the nation's leading defamation lawyers, has not yet been restrained from acting for Mr Porter.

Justice Thawley agreed to join Mr Porter as a party to the proceedings. Mr Porter is being represented by Bret Walker SC and Nicholas Olson in relation to Ms Dyer's legal action.

Mr Olson told the court it was a "bit rich" that Ms Dyer was bringing the action now when she'd known of Ms Chrysanthou's engagement for months. Ms Chrysanthou is scheduled to appear at a hearing relating to the defamation matter on June 1.

Ms Chrysanthou's barrister, Noel Hutley SC, told the court that Ms Chrysanthou had "no substantive recollection" of any confidential information provided to her by Ms Dyer.

"My client's position is ... she will do anything which the court thinks she ought do," he said.

More stories on this topic

- [Fiery email tussle between Porter's and ABC lawyers](#)
- [Last Post, May 18](#)
- [ABC's attack on Wran 'not fair'](#)

Topics

[Abc](#)

Rule 29.02(8)

Certificate identifying annexure

No. NSD426 of 2021

Federal Court of Australia
District Registry: Sydney
Division: General

Joanne Elizabeth Dyer
Applicant

Sue Chrysanthou SC
First Respondent

Charles Christian Porter
Second Respondent

Annexure “NTM-9”

This is the annexure marked “NTM-9” to the affidavit of Nathan Thomas Mattock sworn before me on 19 May 2021.



.....
Signature of witness



AUSCRIPT AUSTRALASIA PTY LIMITED

ACN 110 028 825

T: 1800 AUSCRIPT (1800 287 274)

E: clientservices@auscript.com.au

W: www.auscript.com.au

Ordered by: Nelli Martin

For: Marque Lawyers

Email: laureng@marquelawyers.com.au

TRANSCRIPT OF PROCEEDINGS

O/N H-1477317

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

JAGOT J

No. NSD 206 of 2021

CHARLES CHRISTIAN PORTER

and

AUSTRALIAN BROADCASTING CORPORATION and ANOTHER

SYDNEY

9.30 AM, FRIDAY, 14 MAY 2021

**MS S. CHRYSANTHOU SC and MR B. WALKER AO SC appear for the applicant
MR J. GLEESON SC appears with MS R. ENBOM QC for the respondents**

Copyright in Transcript is owned by the Commonwealth of Australia. Apart from any use permitted under the Copyright Act 1968 you are not permitted to reproduce, adapt, re-transmit or distribute the Transcript material in any form or by any means without seeking prior written approval from the Federal Court of Australia.

HER HONOUR: I will just take appearances first, then I would like to say something. Yes.

5 MS S. CHRYSANTHOU SC: May it please the court, your Honour, I appear for Mr Porter.

MR J. GLEESON SC: May it please the court, I appear with MS ENBOM of Queen's Counsel for the respondents in these proceedings.

10 HER HONOUR: Yes. Thank you. So what I would like to say is – and I will hear everybody, one way or another, about this, but basically, as is obvious, all of the lawyers, including me, are responsible for the integrity of these proceedings in terms of the proper administration of justice. There is an outstanding application that Ms Chrysanthou, it's said, cannot appear in these proceedings consistently with that
15 requirement. That application, as I understand it, is listed for hearing on 24 May. It seems to me – and as I say, I will hear people about this. This is a current inclination or view without having heard anyone, that I have two options.

Option one is to stay this proceeding until that issue is determined one or another,
20 and if Ms Chrysanthou can appear consistent with the need for the proper administration of justice, so be it. If she can't, so be it. Option two is less extreme, and it recognises that the only person the subject of any allegation that she can't appear is Ms Chrysanthou, which would mean that if Ms Chrysanthou would give an undertaking that she would effectively have no involvement in these proceedings
25 until – unless and until the other proceeding is determined in her favour, then this proceeding could continue with Ms Chrysanthou effectively isolated from this proceeding unless and until there's a resolution of the other proceeding.

So at the moment, that's how I see it. At the moment, obviously, I would be
30 prepared to hear either Ms Chrysanthou or someone else, either on Mr Porter's or in a sense, on Ms Chrysanthou's behalf, whatever it be, as to whether you can be heard in this matter at all at this point in time. If the – and I have to hear the ABC, obviously, on the issue of whether the option 2, the quarantining option, is sufficient. As matters presently stand, I think it is, but I will hear them. Now, if that requires,
35 practically speaking, this matter to be stood down so someone else can appear for the applicant, some other counsel, either to address whether Ms Chrysanthou can be heard or not heard or whether Ms Chrysanthou wants to stand that down so she can get some instructions, I'm prepared to do that.

40 Basically, I'm free throughout that day. I can hear this matter at any time throughout the day. So what would people like me to do at this stage?

MS CHRYSANTHOU: Well, to start with, I should say that the first issue is that there's no interlocutory relief sought against me and none made.

45 HER HONOUR: That doesn't really matter.

MS CHRYSANTHOU: Yes. The second issue is, your Honour, that we would like to know, relevant to whether your Honour proceeds with option A or option B, how long the ABC have known about this issue.

5 MR GLEESON: Your Honour, I should say, we object to the matter being substantively addressed by Ms Chrysanthou.

HER HONOUR: Yes. Yes.

10 MR GLEESON: We would urge your Honour's invitation to have it - - -

HER HONOUR: I'm only going to hear you on whether you can be heard.

MR GLEESON: - - - a short adjournment.

15 MS CHRYSANTHOU: Right. I understand.

HER HONOUR: Yes. Yes.

20 MR GLEESON: I would apply - - -

HER HONOUR: Or I would be prepared to hear someone else on that same issue for - - -

25 MS CHRYSANTHOU: Yes.

HER HONOUR: - - - which purpose I would be happy to stand this down, so some – and that can be stood down at any time today. So unless you persuade me that my approach is wrong, I guess, that you can be heard while the other application remains
30 outstanding, then in a sense, well, you – then there will have to be other representation for the application.

MS CHRYSANTHOU: Well, we can – we understand that Mr Walker can attend today.

35 HER HONOUR: Right.

MS CHRYSANTHOU: He's back having been in the High Court all week, and we understand he's in chambers this morning. So we don't have an issue with him
40 addressing your Honour on these matters.

HER HONOUR: Yes. Okay. Well, let me hear from – which – what time would you say I should adjourn this to this morning? I know the other matter, I think, might be listed at 12, but I'm guessing that can all be - - -
45

MS CHRYSANTHOU: I think the other matter is just listed at 12 to confirm the hearing date and whether that was an available date, because on the last occasion, Thawley J wasn't quite sure if that was the date.

5 HER HONOUR: Right.

MS CHRYSANTHOU: So we just need to made inquiries of Mr Walker as to precisely what time he can attend.

10 HER HONOUR: Okay.

MS CHRYSANTHOU: If you can give us two minutes, your Honour, we can - - -

15 HER HONOUR: Well, let me hear what Mr Gleeson says in the meantime.

MR GLEESON: Your Honour, I would just suggest your Honour adjourn the court briefly to allow those inquires to be made, and then we can indicate a suitable time for - - -

20 HER HONOUR: Yes. So why don't I adjourn for five minutes, and then we will see what's happening in the meantime. Okay.

25 MS CHRYSANTHOU: Yes, your Honour. We will – can we tell your Honour's Associate once we've made contact with Mr Walker?

HER HONOUR: Sure. Yes. You can – I will – look, I will wait downstairs, so it won't take too long so we can clean it up, see what time he can get here.

30 MS CHRYSANTHOU: Thank you, your Honour.

HER HONOUR: Okay. Thank you.

35 **ADJOURNED** **[9.36 am]**

RESUMED **[10.30 am]**

40 MR B. WALKER AO SC: I appear for the applicant. May it please, your Honour.

MR GLEESON: Yes. And I appear, again, with Ms Enbom of Queen's Counsel, your Honour.

45 HER HONOUR: Well, as I indicated this morning, Mr Walker, it seemed to me that there were two options, but I will hear people as to whether there's another option. The first option was for this matter to proceed in circumstances where there's an

outstanding application about Ms Chrysanthou's capacity or ability to continue to appear. Ms Chrysanthou could give an undertaking that until that matter's determined, she won't have anything to do with this proceeding, in which event, then this – subject to hearing what Mr Gleeson says, this proceeding could continue.

5 Secondly, I could stay this proceeding until that matter has resolved, one way or another.

MR WALKER: Both of those are wrong in principle.

10 HER HONOUR: Yes. Okay.

MR WALKER: And seriously so.

HER HONOUR: Yes.

15

MR WALKER: You do not have before you an application to restrain Ms Chrysanthou on the – at the - - -

HER HONOUR: True.

20

MR WALKER: - - - behest of Ms Dyer.

HER HONOUR: No. No, I'm not acting on that basis.

25 MR WALKER: But - - -

HER HONOUR: I'm acting on my own motion to protect the integrity of this proceeding.

30 MR WALKER: And your Honour has no information whatever, except for the existence of that undetermined application - - -

HER HONOUR: Yes.

35 MR WALKER: - - - which could probably – possibly be dealt with by you, on your own motion

HER HONOUR: Yes. I know there's an application. Isn't that all I need to know?

40 MR WALKER: Absolutely not. What you know is that there is an application which is marked by the absence of any interlocutory injunction being sought. That's the first thing.

HER HONOUR: Yes.

45

MR WALKER: That's of little significance in relation to appearance and litigation where dispatch is the order of the day.

HER HONOUR: Yes.

MR WALKER: Second, you have no information whatever about the merit of that application, prima facie or otherwise - - -

5

HER HONOUR: Accepted.

MR WALKER: - - - and your Honour, of course, would rigorously - - -

10 HER HONOUR: Absolutely.

MR WALKER: - - - observe what flows from that state of affairs.

HER HONOUR: No, no. No, I accept that.

15

MR WALKER: Which means that this is a case where, for all you know, that is, the court, considering acting today of its own motion, for all the court would know, there is an unjustified plan to interfere with my client's choice of counsel and that counsel's duty to appear as briefed. Or there may be justification. It is not known one way or the other.

20

HER HONOUR: True.

MR WALKER: It is unthinkable that, in case it was unjustified, there would be irreparable – and it would be irreparable in terms of the delay; you can never recover the time. Irreparable harm to my client from a temporary cessation of his capacity to attain and receive the benefit of Ms Chrysanthou's appearance. That can never be recovered.

25

30 HER HONOUR: Well, it's - - -

MR WALKER: We know already there's a stay, in effect, sought.

HER HONOUR: I know. And I'm saying that I think there's a stay of the whole – I haven't heard Mr Gleeson, but at the – in the moment, my inclination is a stay of this proceeding isn't justified. It could proceed if, in the interim, depending the resolution of the other application, Ms Chrysanthou gave an undertaking not to be involved in this proceeding. Now, I know you say that's wrong in principle.

35

40 MR WALKER: It's profoundly wrong, but, of course, it is the effect of an interlocutory injunction, overtly so.

HER HONOUR: Yes, it is. Yes, so I don't have any problem with that.

45 MR WALKER: Without any of the requirements for an interlocutory injunction having been made out, and indeed, without the matter being before you.

HER HONOUR: It doesn't need to be before me. I can – in terms of a formal application, I'm responsible, along with everybody else who is a lawyer in this matter, for ensuring that the integrity of this proceeding is maintained. If – I mean, if Thawley J could have heard the application before him immediately, then we would
5 know one way or another. The simple fact is that that's not practicable, so in order to preserve the integrity of this proceeding, you're right. I know nothing about the merits. But you - - -

10 MR WALKER: The status quo is that Ms Chrysanthou is briefed. That's the status quo.

HER HONOUR: The status quo is she's briefed, but in order to preserve the integrity of this proceeding, which is a value which trumps everything else, then I just don't understand how Ms Chrysanthou, under that application, can continue to
15 act, frankly, in this proceeding.

MR WALKER: So that means - - -

20 HER HONOUR: For this period. That's all.

MR WALKER: This period is a period which is likely to be very important in the progress of litigation towards a relatively early hearing.

25 HER HONOUR: True, but there are other counsel, and I think there are other counsel on the team who are not subject to this issue.

MR WALKER: What that amounts to is this, that this court, under the rubric of protecting the integrity of the proceedings, to which I will come back - - -

30 HER HONOUR: Yes.

MR WALKER: - - - under that rubric is providing the disadvantage or detriment to be visited on my client now, which in form would come from an interlocutory injunction in those other proceedings not sought. So that's the functional outcome
35 for which your Honour is suggesting.

HER HONOUR: In one sense, yes, if I can accept that being represented by one counsel as opposed to a myriad of other counsel who would be equally available - - -

40 MR WALKER: We are not fungibles, your Honour, and that should not be entertained as an idea.

HER HONOUR: There's always alternative representation available.

45 MR WALKER: Of course. People can die and get sick. But we're not fungibles. In other words, choice of counsel is not a lottery. People choose counsel for reasons, which, in the integrity of the administration of justice, is a respected liberty.

HER HONOUR: Of course. But it's - - -

MR WALKER: Judges do not impose counsel on parties.

5 HER HONOUR: No, no. But it's always subject – always subject – to that counsel being able to discharge their duty - - -

MR WALKER: Quite.

10 HER HONOUR: - - - consistent with the administration of justice.

MR WALKER: Quite so. And it is not true – and it would be the most dreadful precedent for your Honour to set. It is not true that upon an allegation being made which is resisted, one loses or has suffered the slightest detraction from one's fitness
15 to appear. I have myriad secrets from myriad people. The notion that any one of them could come out and say, "I don't want you to appear in a case in which I am not a party because you have my secrets," is self-evidently absurd.

HER HONOUR: Well, Justice – if I'm wrong, in principle, Thawley J, nevertheless,
20 would have the power of his own motion, on the basis of the prima facie material he has, to do exactly what I'm doing, wouldn't he?

MR WALKER: May I suggest, with great respect, that in a civil suit such as Thawley J has before him, there is no motion to grant an interlocutory – no own
25 motion power to grant an interlocutory injunction. Section 23 has its limits. This is an adversarial jurisdiction. There's party autonomy as to whether an injunction is sought, and judges don't enter the arena by deciding to grant relief against a party which is not sought.

30 HER HONOUR: Well, I'm not - - -

MR WALKER: Your Honour, with respect, is expanding an own motion power with respect to the administration of justice into an alien field in relation to Thawley J, which is a civil suit - - -
35

HER HONOUR: Yes.

MR WALKER: - - - between parties.

40 HER HONOUR: Yes.

MR WALKER: And so, no, Thawley J does not have an own motion power to grant the effect of an interlocutory injunction.

45 HER HONOUR: Okay. All right.

MR WALKER: There would need to be an application. That's a chapter 3 point, with respect, and so, section 78B now tolls.

5 HER HONOUR: So if I allow Ms Chrysanthou to continue her involvement in this proceeding, pending resolution of the other application, and the other application is determined adversely to Ms Chrysanthou, what about the impact that that has had on this proceeding?

10 MR WALKER: That remains to be seen. At the moment, nothing is identified – nothing is identified in relation to the case management directions and orders which are sought today.

HER HONOUR: Yes.

15 MR WALKER: Nothing is indicated as to how they could be in the slightest degree affected by whatever it is provides the supposed equity which, on the hypothesis you've asked me to address, would be vindicated before Thawley J.

20 HER HONOUR: Yes.

MR WALKER: No connection whatever between – if it's confidential information, - - -

25 HER HONOUR: Yes.

MR WALKER: - - - and I don't know things, obviously, - - -

HER HONOUR: No, no.

30 MR WALKER: - - - any more than your Honour does.

HER HONOUR: No, no, I don't.

35 MR WALKER: If it's confidential information there is no suggestion that these case management directions and orders that we seek are affected in any way by Ms Chrysanthou's supposed possession of that information or any, for more abundant caution, quia timet ruling with respect to her conduct. And one can be fairly secure about that, because the one person who was not your Honour or Thawley J, the one person who has the autonomy to decide whether Ms Chrysanthou should not appear
40 this morning is the applicant before Thawley J, who can seek an interlocutory injunction, and didn't and hasn't. And has, remarkably, in our submission, delayed, both in the commencement of proceedings and in their prosecution. Now, Mr Gleeson's client - - -

45 HER HONOUR: Yes.

MR WALKER: - - - can add nothing to that that I've just spoken about, your Honour's ignorance and my ignorance, about how any information said to be the subject of the confidentiality suit before Thawley J could possibly affect Ms Chrysanthou's capacity to seek case management directions of this kind. There's
5 just no possible way in which, apart from completely inadmissible speculation, no better than mine, that he could do that either. That means that as between the parties before you there is nothing to indicate that Ms Chrysanthou is in the slightest degree embarrassed, in the technical sense, by some prior dealing with a person who is not a party to these proceedings.

10 HER HONOUR: True, true.

MR WALKER: And your Honour should not speculate about anything which is now fully within the grasp of Thawley J in those proceedings.

15 HER HONOUR: No, I accept that. I – there's no issue about that, it's the exist - - -

MR WALKER: In other words, there's nothing to protect in relation to the integrity of the administration of justice because no one here is in a position to explain how it could possibly be that unknown information – and Ms Dyer doesn't get any benefit
20 in her – in a phantom appearance in – this morning before your Honour from the fact that we don't know what the information is. You don't make assumptions that it might be really important.

25 HER HONOUR: No, no, I'm not assuming anything.

MR WALKER: In which case - - -

HER HONOUR: I am not – I'm assuming – all I'm – well, I'm not assuming, I
30 know, as does everyone, that there is an application - - -

MR WALKER: And that's it.

HER HONOUR: - - - which remains undetermined.
35

MR WALKER: And that's it.

HER HONOUR: But if that – and just on the case management issue, I mean, if there is validity in that – if there is validity in that application I will – just say,
40 ultimately, that application succeeds, and I don't know one way or another if there is or isn't, but if it succeeds, then - - -

MR WALKER: It's not going to undo your Honour's orders here.

45 HER HONOUR: Sorry?

MR WALKER: It can't possibly undo your Honour's orders here.

HER HONOUR: No, no, I'm suggesting it would undo my orders.

MR WALKER: And in which case they should be made, because they are salutary orders for the progress of these proceedings.

5

HER HONOUR: But would not it have been inappropriate, then, for Ms Chrysanthou in that intervening period to have acted?

10 MR WALKER: No, that doesn't follow at all, your Honour. That doesn't follow at all.

HER HONOUR: But it – well, the effect of it would be, if Thawley J is persuaded by the application, that Ms Chrysanthou should never have been involved - - -

15 MR WALKER: Well - - -

HER HONOUR: - - - in this proceeding, is it not?

20 MR WALKER: Your Honour, then, let me progress a bit further. It doesn't follow that there will be an equity that can be vindicated only by preventing Ms Chrysanthou appearing at all; that's the first thing. The second thing is whether that is so depends upon matters of which you have no knowledge, of which I have no knowledge.

25 HER HONOUR: Yes, yes, I accept that.

MR WALKER: And there should not be speculation unfavourable to Mr Porter in his choice of Ms Chrysanthou about whether or not Ms Dyer will make out such a swingeing case, that is, that information has been imparted which means she cannot possibly appear for Mr Porter against the ABC. It's not against Ms Dyer.

30

HER HONOUR: No, no, I understand that.

35 MR WALKER: Well, with respect, it is a remarkable state of affairs that cautions all the more particularly against your Honour proceeding on the basis that there is something here worthy of the equivalent of an interlocutory injunction in other proceedings where there is no such application at all, and your Honour should not, with respect, proceed on the basis that for all you know, it may turn out that Ms Chrysanthou was in a position vis-à-vis Ms Dyer, not the ABC, vis-à-vis Ms Dyer, so that Mr Porter should be deprived of her services today.

40

That, with respect, is moot in the sense that there is no controversy between the parties as to whether she can appear today. There's no interlocutory injunction. They don't - - -

45

HER HONOUR: No, no. I understand that.

MR WALKER: - - - seek remedies except prospectively. They couldn't seek remedies that have any retrospective effect. It's not like the award of damages, where it has a retrospective effect by reason of the way in which they are measured. This is a prospective injunction sought, not including today, and that is why, with
5 respect, there is no sound juristic basis upon which you can say that there may come a time in the future when it can be said retrospectively there should have been no appearance today. That's not true. And it's for those reasons – and no one is in a position to add anything except baseless speculation concerning that.

10 And it's for those reasons, in our submission, that in terms of the integrity of the administration of justice, the threat to it is any qualification or compromise of Mr Porter's right, and I do stress right, to have his counsel of choice appear subject only to disciplinary, abuse of process, and related considerations, and it's difficult to name
15 what the related considerations are other than the remarkable injunction sought without an interlocutory application by Ms Dyer. So those are the only possibilities.

HER HONOUR: No. No. It's the latter. Yes.

MR WALKER: And it is part of the integrity of the administration of justice that
20 judges don't dictate to parties who will appear for them. Courts don't have favourite counsel. They don't have disfavoured counsel.

HER HONOUR: No. It's nothing to do with that, as we all know.

25 MR WALKER: In which case – in which case, the court should be very cautious about doing anything which conveys the flavour of some thumb in the scales whereby there will be a disadvantage, permanent, never able to be erased, a disadvantage visited on a person on a speculative basis that the court disavows any capacity to say anything about it. That's not the stuff of the exercise of judicial
30 power. In our submission, that is beyond your Honour's power. You do not have a general power to say, "I will hear you and I won't hear you." You have to have reasons, soundly based and anchored in fact, to do any such remarkable thing, and you don't have it in this case.

35 HER HONOUR: No. No. I – but I mean, there should be - - -

MR WALKER: And so there should not be a stay because a stay – a stay is operating in parallel to the same effect, because the ground for the stay simply is Ms Chrysanthou, retained by Mr Porter, is the subject of other proceedings.
40

HER HONOUR: Yes. No. I understand the stay and the proposed quarantining of Ms Chrysanthou are two sides of the same coin, and I mean, it probably goes without saying that nothing to do with the court's view as to choice of counsel has any relevance to this matter whatsoever. It's completely irrelevant. The only basis upon
45 which I raise this issue is the existence of an undetermined application, and that's it. It's nothing to do with the court - - -

MR WALKER: And for the reasons I have put, it would be - - -

HER HONOUR: No, no. I understand that. But - - -

5 MR WALKER: It would be - - -

HER HONOUR: - - - I'm clarifying that obviously - - -

MR WALKER: It would be grossly unsound in principle to proceed - - -

10 HER HONOUR: No. I understand you say that it's contrary.

MR WALKER: - - - to use that as a foundation for anything.

15 HER HONOUR: Yes. No. I understand you say that's contrary to principle, but I mean, as – I want it to be absolutely clear, this has – that this has nothing to do with my view in any way, shape, or form, about counsel. It's – that's completely irrelevant. It's the fact of the application alone.

20 MR WALKER: Your Honour, with great respect, that last statement by your Honour can't avail for this reason. If my client is deprived of his rights to have Ms Chrysanthou appear this morning, then on any view of it, your Honour's ruling to that effect, that is, refusing to hear her, is a statement normative that she should not appear for him today.

25 HER HONOUR: No, no. I accept that. No, no. No, no. We're not - - -

MR WALKER: All right. And - - -

30 HER HONOUR: - - - we're not at cross-purposes on that. I'm just making it clear that - - -

MR WALKER: And that is wrong. That – what I'm suggesting is that - - -

35 HER HONOUR: No, no. I understand you - - -

MR WALKER: - - - shouldn't - - -

40 HER HONOUR: - - - say that's wrong in principle. I mean, the reality is that right of a person to have their counsel of choice is not untrammelled, because if that counsel is unable to appear because they do have – I accept that I don't have any evidence about this, but it's not an untrammelled right. It's subject to other rights, as in, the – of course it is.

45 MR WALKER: No rights are untrammelled.

HER HONOUR: No.

MR WALKER: It's regulated by law.

HER HONOUR: Of course.

5 MR WALKER: Which law includes that which binds us professionally.

HER HONOUR: Correct.

10 MR WALKER: Which this court is not in a position to say anything about in this case.

HER HONOUR: Accepted.

15 MR WALKER: Now, your Honour, can I return to where I started. This is all that we – and I literally mean you and I – know about the case before Thawley J - - -

HER HONOUR: Is its existence.

20 MR WALKER: - - - is that it may have a basis and it – or it may not have a basis, and you can't pick between the two.

HER HONOUR: Absolutely.

25 MR WALKER: It means that if you were to act upon the pendency, that is, the undetermined nature of that, you would be knowingly acting on the basis that it could well be equally possible – for all you know, it could well be that it has no justification.

30 HER HONOUR: Correct.

35 MR WALKER: That means that any of us at the bar table can be prevented from appearing temporarily, tactically – can be prevented from appearing by someone, a stranger to proceedings, saying, "He or she has information. I'm not going to tell you what in the substance of the proceedings in question. I'm going to do that in another case, where I'm studiously not going to seek an early denouement by an interlocutory application. And until that is determined, I insist, on the precedent of Jagot J, in Porter v The ABC, I insist that they cannot appear because there is a detraction from the integrity of the administration of justice." If you throw in the word "appearance", it does get better, it gets worse.

40

HER HONOUR: Sorry, Mr - - -

45 MR WALKER: If you throw in the notion of the appearance of the integrity of the administration of justice, it gets even worse, because it becomes even more remote from something which a party is entitled to have determined by a proper exercise of judicial power. And that is not occurring, as we speak – as I speak now. Your Honour has no facts. There is no legal principle which says that a person against

whom an allegation is made, being counsel, must stop acting as counsel until the allegation is sorted out.

HER HONOUR: No, I understand that.

5

MR WALKER: There is a disciplinary process set out - - -

HER HONOUR: No. No, this is – no. You don’t have to persuade – all this is about is the fact of an application, the fact that it’s undetermined, and the fact that as we’re sitting here, it could be determined one way, or it could be determined the other.

10

MR WALKER: So that, for all the court knows, it would be taking a step against the interests of my client without there being any foundation for it, unless there were – as your Honour has asked me to consider by raising the notion of a notional power, unless there were some legal principle that said upon an allegation being made about which nothing more is known except that there’s an allegation – we don’t even know what the allegation is, but upon an allegation being made, and the fact of an allegation being made, the court has a power – without knowing whether it’s good, bad, or indifferent, has a power to say everything must stop.

15

20

Now, your Honour raises the fear that if you don’t do that, and things turn out badly for Ms Chrysanthou in the other proceedings, what, about the matter, which is within your Honour’s full grasp, including relevant own motion powers, the case management of these proceedings, to which my answer is, as your Honour knows, that there is nothing to indicate how that could possibly relate back retrospectively, given that, for example, Ms Dyer has not asked the court ever to order that Ms Chrysanthou can’t appear on case management hearings.

25

How could a person who is a stranger to these proceedings, even if she might be considered perhaps – if I say “prospective witness”, that’s probably going much further than the facts presently permit, but at most, perhaps, how could that possibly cast retrospectively any light on the integrity – not to say, with great respect, the correctness of your Honour’s determination, after argument heard from Ms Chrysanthou on these directions. And it’s for those reasons – and Mr Gleeson can’t add anything.

30

35

HER HONOUR: I still hear him.

40

MR GLEESON: Well, that’s the third time you’ve said that.

MR WALKER: Except by way of inadmissible speculation on that.

MR GLEESON: That’s the fourth time you’ve said that.

45

HER HONOUR: He will still be heard.

MR WALKER: I will no doubt get to say it again if my friend, contrary to my prediction, were to suggest that speculation would be a proper basis for your Honour to proceed.

5 HER HONOUR: No, I understand the point.

MR WALKER: Now, the ABC, with respect, is not in a position to be, by proxy or otherwise, funnelling any claim by Ms Dyer to restrain Ms Chrysanthou.

10 HER HONOUR: No, no, I accept - - -

MR WALKER: That's also a marker which I may also repeat. Because it is central to the integrity of the administration of justice in this case that there is no inappropriate intervention by the court in relation to retainers and there is no, of
15 course, officious meddling by an opposing party. We have challenges to retainer - - -

HER HONOUR: In the other - - -

MR WALKER: - - - to deal with such matters, which don't apply in this case and
20 you've - no one has mentioned - has suggested there's any challenge to a retainer in that traditional sense. And, otherwise, opposing parties don't get to intermeddle with the representation on the other side.

HER HONOUR: So can I just - I've been making sure - there's no issue with me
25 seeing the application in the other proceedings, is there? I haven't actually looked at the application in the other proceeding. You say it's a prospective - do you have the application in the other proceeding?

MR WALKER: No, I don't, but - - -

30 HER HONOUR: You don't, no. I don't either. You're saying it's a prospective - I don't know what - I mean, I don't know what it is. I assume it's to - - -

MR WALKER: So it seeks an injunction - - -

35 HER HONOUR: Yes.

MR WALKER: Right.

40 HER HONOUR: To restrain Ms Chrysanthou - - -

MR WALKER: Yes.

HER HONOUR: - - - from appearing?

45 MR WALKER: Which order, - - -

HER HONOUR: Yes, would operate prospectively.

MR WALKER: - - - if I may say so, can only ever be prospective.

5 HER HONOUR: Yes, yes, I understand that.

MR WALKER: You don't expose somebody to a criminal sanction for contempt
- - -

10 HER HONOUR: No, no, no, I - - -

MR WALKER: - - - from last Monday.

HER HONOUR: I accept that.

15 MR WALKER: Yes.

HER HONOUR: All right. Okay.

20 MR WALKER: That's - - -

HER HONOUR: Well, I don't need to - - -

MR WALKER: Well, so that's what I mean by prospective.

25 HER HONOUR: I don't need anything more than that, that's what I assumed it was.

MR WALKER: That's – that would be our position, your Honour.

30 HER HONOUR: Okay. Well, I understand that. I do still propose to hear from Mr Gleeson.

MR WALKER: I'm not suggesting – no one could ever suggest that there's
nothing that Mr Gleeson could say. I'm just trying to poison the ground. Six times.

35 HER HONOUR: Very effectively. Okay.

MR GLEESON: Thank you, your Honour. Your Honour, could I identify, first, the
evidence that we rely upon - - -

40 HER HONOUR: Sure.

MR GLEESON: - - - so it's formally on the record.

45 HER HONOUR: Yes, let me just get my right glasses.

MR GLEESON: Firstly, it's the affidavit of Grant Michael McElvaney affirmed 13 May 2021. I read that affidavit and, to the extent necessary, I tender the annexures.

5 HER HONOUR: Yes, I have seen that affidavit. Let me just make sure I've got the hard copy of it. So – that's one of 14 May. files of 13 May. Sorry, I'm getting there. I've got them all electronically. So 13 May I've got.

MR GLEESON: Thank you, your Honour.

10 HER HONOUR: So any objection to that affidavit and the - - -

MR WALKER: No, your Honour.

15 HER HONOUR: Yes, thanks.

MR GLEESON: And your Honour will see from annexure GM1, pages 4 to 5, - - -

HER HONOUR: Yes.

20 MR GLEESON: - - - that the order that we were proposing for today were, firstly, an order in the nature of an adjournment of this case management hearing - - -

HER HONOUR: Sure.

25 MR GLEESON: - - - to the first available date after the determination of the proceedings before Thawley J. And then we were seeing the vacation of certain extant - - -

30 HER HONOUR: Yes, well, they're the substantive orders.

MR GLEESON: - - - orders.

35 HER HONOUR: No, well, that's – they're, sort of, the equivalent of option 2. It's, effectively, freezing these proceedings until it's resolved.

MR GLEESON: It could be viewed that way. I think option 1 – yes, nothing further to happen until, - - -

40 HER HONOUR: Yes, until it's resolved.

MR GLEESON: - - - say, 25 May, assuming the matter has been resolved by then.

HER HONOUR: Yes.

45 MR GLEESON: That's what we seek.

HER HONOUR: Yes.

MR GLEESON: I observe that Mr Walker has made clear that the other option your Honour proposed for consideration, namely, an undertaking, - - -

HER HONOUR: Yes.

5

MR GLEESON: - - - from Ms Chrysanthou, is not being taken up on their part.

HER HONOUR: Yes, yes.

10 MR GLEESON: So the battleground is whether - - -

HER HONOUR: Obviously not.

MR GLEESON: Whether we should be entitled to these orders on page 5.

15

HER HONOUR: Yes, yes.

MR GLEESON: In terms of power, we source those orders to your Honour's case management power. The court has ample power to determine when case management hearings should be heard. There has to be a principle basis for it, but there's ample power to do that. Mr Walker mentioned briefly that – well, perhaps it was one of his more passionate submissions in an otherwise passionate submission – that the orders, along the lines of page 5, would offend chapter III of the Constitution and raise a section 78 issue, and if that was a rhetorical flourish I can ignore it. If Mr Walker is seriously saying that there is a section 78B issue as to whether your Honour can make those orders, on that basis, relying upon the Judiciary Act, we ask your Honour to adjourn the entirety of this proceeding today in order that those notices can be issued by Mr Walker, because if that's part of his argument, then it is clear the Judiciary Act says the attorneys must have the opportunity to be heard on it. If it's rhetorical, your Honour can dismiss it.

20

25

30

Next in the affidavit, you will see from the letter at pages 8 to 9 what has been publicly reported - - -

35 HER HONOUR: Yes. I see that.

MR GLEESON: - - - about the nature of the proceedings involving Ms Dyer and Ms Chrysanthou and the fact that paragraph 7, Mr Porter has been or will be joined to the proceeding issued by Ms Dyer. I won't read out the press. Your Honour has that there. It would appear from page 12, if that is an accurate report, that Mr Hutley appearing for Ms Chrysanthou indicated what her defence will be, and then that she will do anything the court thinks she will do, and she regards it as a contest between Ms Dyer and Mr Porter. So it appears that Mr Porter is to be the active opponent to Ms Dyer in those proceedings, and Ms Chrysanthou says she will take effectively a neutral position.

40

45

At page 14 in the press at about point 6, there's discussion of a matter Mr Walker raised this morning, perhaps only briefly, that he was suggesting there was some delay on Ms Dyer's part. That's not – obviously not an issue before your Honour, and your Honour can see the parties had competing views as to why it took some
5 time for the matter to get to court.

HER HONOUR: Yes.

MR GLEESON: The response to that letter is at page 18. The letters that are at
10 pages 21 through to 24 do not concern your Honour this morning because that issue, for the moment at least, has been temporarily resolved. We don't make any point of that. So that's the first piece of evidence, your Honour. Secondly, formally in terms of what is occurring before Thawley J, we understand it's common ground that it's before his Honour at 12 noon today, and it is likely that 24 May will be set for the
15 final hearing of the application. We also understand it's common ground that on 13 May, his Honour made a series of orders designed to have the matter ready for final hearing on that date.

In terms of Mr Walker saying, "Well, why didn't Ms Dyer seek an interlocutory
20 injunction," matter for her, matter for those proceedings. But fairly obviously, the court is accommodating that application by giving it grade 1 expedition for an early final hearing. Now, next, your Honour, in terms of the balance of the evidence that we rely upon, there will be certain matters I will need to take your Honour to from the pleadings. I don't wish to be overly formal and tender the pleadings. I will just it
25 take it that they're before the court on the application, particularly noting that your Honour has an interim suppression order in respect to certain parts of those pleadings.

HER HONOUR: Yes.

30 MR GLEESON: Could I ask your Honour to go to the statement of claim.

HER HONOUR: Yes.

35 MR GLEESON: Identify that there are a number of allegations in the pleadings which Ms Chrysanthou prepared, that appears on page 11, which, it would seem likely involve Ms Dyer and communications between Ms Dyer and either Ms Milligan of the ABC or the woman referred to as AB in the pleading and referred to by us as Kate. Now, if I could take your Honour to show that. In the particulars of
40 identification which commence at the bottom of page 3 - - -

HER HONOUR: Hang on.

45 MR GLEESON: - - - there are a series of particulars, first of all F, about the November 2020 Four Corners program in which things were said.

HER HONOUR: Sorry. Am I looking at 5F?

MR GLEESON: Five F. Sorry, five – particulars of identification put at page 3 and over the page - - -

HER HONOUR: Sorry.

5

MR WALKER: - - - then F.

HER HONOUR: Yes.

10 MR WALKER: So F.

HER HONOUR: On or about 9 November?

15 MR WALKER: Yes. And then H, J, L, the reference to AB's friends. M, Ms Milligan is speaking to various persons, and then particularly AG, a reference to the friends, and AI. And then in the claim for aggravated damages, which is at paragraph 8, one of the claims of malice, paragraph J, is that Ms Milligan did not disclose, in her reporting her close friendship with a friend or friends of AB, including persons named in the 1 March article and/or the November Four Corners.
20 It's a fair inference that Ms Dyer is one of the people that is referred to as "the friends", being a person in those articles or programs, and so, she has - - -

HER HONOUR: Where do I get that from? Do I know who any of these people friends or who are?
25

MR GLEESON: I will be taking your Honour, next, to the interrogatories, which will fill the gap.

HER HONOUR: Okay.
30

MR GLEESON: Thank you.

HER HONOUR: So it's not apparent on the face of this statement of claim.

35 MR GLEESON: Not directly apparent on the face of it, but I will come to - - -

HER HONOUR: No. Okay.

40 MR GLEESON: Anyway. So that's the statement of claim. In the defence – and I will be careful here, because I'm taking your Honour to one hopefully uncontroversial paragraph of schedule 1, which is the subject of the interim suppression order.

HER HONOUR: Yes. So just tell me the paragraph number.
45

MR GLEESON: So it's page 16. It's paragraph (vi), at the top.

HER HONOUR: Yes.

MR GLEESON: Which, from the preface on the previous page, is about steps taken to obtain relevant information.

5

HER HONOUR: Yes.

MR GLEESON: And you will see there that's one of the parts that fills the gap that your Honour raised with me, that she was one of the people interviewed. Interview was broadcast as part of a Four Corners program. That's one of the gaps filled. So that is what we know from the pleadings. The next – the position between the parties is that the ABC has currently sought particulars of the identity of the friends, and to date, the applicant has refused to answer that question. Your Honour, the next piece of evidence is that the two sets of submissions which the court has recently received on the motions - - -

15

HER HONOUR: These are for the 1, 2 June argument, are they?

MR GLEESON: Yes. The first is for the 1, 2 June. It's a document outline of submissions 13 May. It's authored by Ms Chrysanthou.

20

HER HONOUR: Hang on a sec. Yes, I've got that. I haven't - - -

MR GLEESON: No.

25

HER HONOUR: I haven't read this.

MR GLEESON: No. All your Honour needs to know for our purposes today is that Ms Chrysanthou has authored those submissions, and that at paragraph 112 and 113, she has made submissions about seeking to strike out the paragraph from the defence that I took you to, which involves Ms Dyer. So what I seek to establish from this is on the material in this court, the applicant's case places some reliance on Ms Dyer and on various communications of Ms Dyer. The strikeout motion seeks to strike out those paragraphs.

35

There is at least a relation – that's all I'm putting the submission as. There's a clear relation between the issues in this proceeding and the matters to be heard by Thawley J. Your Honour, the next piece of evidence – I think this can just be done as common ground, hopefully, that your Honour has short submissions on the proposed interrogatories filed on 10 May. They're signed by Ms Chrysanthou.

40

HER HONOUR: On the interrogatories. Let me see if I've got those. I've got – maybe these are – yes, no, I have got them. The short ones.

MR GLEESON: They're just – that's just to establish Ms Chrysanthou has authored those submissions, and if your Honour has the proposed interrogatories - - -

45

HER HONOUR: Now, they're on the back of an affidavit from Ms Giles, aren't they?

MR GLEESON: Yes.

5

HER HONOUR: Let me – I will have to grab that.

MR GLEESON: And one of the case management issues is – when they're reached is we oppose interrogatories being administered, certainly the pleadings being
10 settled.

HER HONOUR: Yes. No. Let me just see if I can find Ms Giles's affidavit. So Ms Giles of 13 May. It's 11 May, isn't it? It's Ms Giles's 11 May affidavit. I've got it online anyway, so – hang on. I can't find the hard copy, but I will open it
15 online. There it is. I don't know what I just did. I think I just unplugged that computer. I did. It's gone black. That's gone – that's died. Sorry. I have to open it up on another computer, because it has literally just – it won't open up on that computer. Do you have a copy of Ms Giles's affidavit of 11 May? I just can't put my hands on it.

20

MR WALKER: Can we hand up - - -

HER HONOUR: Thanks. Okay. So the interrogatories are on the back of here?

25 MR GLEESON: Yes, and if your Honour could go to page 7.

HER HONOUR: Hang on a minute.

MR GLEESON: Proposed interrogatories 44 and 45.

30

HER HONOUR: Hang on. So when you say page 7, is that - - -

MR GLEESON: Of the proposed interrogatories.

35 HER HONOUR: Interrogatories to first respondent start at page 5 on this, so do I go to – I must have different page numbering. So 44 and 45.

MR GLEESON: Yes.

40 HER HONOUR: On my page 11. Yes.

MR GLEESON: Yes. So the interrogatories assert that quotes were included from JO Dyer in the 1 March article, and then questions are asked on that premise. Forty-six asks why Ms Dyer was included in the 1 March article, and then similar
45 interrogatories for 49 and 50 concern Ms Dyer's inclusion in the 7:30 story. So this is the second part of plugging the gap, that the friends that Mr Porter appears to be relying upon in his pleading include Ms Dyer in her role in the article in the Four

Corners program and communications and so on. Now, what that means is it also confirms that the role of Ms Dyer in these proceedings, including communications either with Kate or Ms Milligan, are an important part of the issues.

5 Your Honour, that's the – sorry. That – and the final piece of evidence, just formally, is that the orders sought by Ms Chrysanthou today on behalf of - - -

HER HONOUR: Yes. I've got those somewhere.

10 MR GLEESON: - - - Mr Porter should be before your Honour. There are - - -

HER HONOUR: I do. They are. So just bear with me.

MR GLEESON: A lengthy series of orders.

15

HER HONOUR: Yes.

MR GLEESON: That include seeking orders to answer interrogatories in advance of the pleadings even being settled. They include what looks like standard or general
20 discovery at an extraordinarily early date. They include certain other matters. They then seek a separate question in paragraph 8, which we are opposing, and they ask your Honour to do that on 31 May.

HER HONOUR: To actually the separate - - -
25

MR GLEESON: To actually hear. It's a bizarre application that your Honour would, in advance of even considering strikeout motions, would somehow separate out part of the issue in the statement of claim for a final hearing on 31 May and that apparently, orders 9 and 10 and 11 that in the midst of everything else happening in
30 this matter that the parties are meant to put on final submissions on - - -

HER HONOUR: Yes. I understand that.

MR GLEESON: - - - that. And then - - -
35

HER HONOUR: Also, I thought that we had agreed last time that whether or not there would be separation would be argued on 1 and 2 June, but I might - - -

MR GLEESON: That is what we understood your Honour had reached, and so, this document is seeking something quite contrary to that. And then, it's seeking orders for the final hearing when the matter is still a long way away from being ready.
40 Now, your Honour, that's the material. Could I then put our submissions on the matters which your Honour can properly find before you today.

45 HER HONOUR: Yes.

MR GLEESON: The first is that there is an application that has been filed in the court. It's before Thawley J. It's to be given extreme expedition for a final hearing, probably 24 May. And the application is to restrain Ms Chrysanthou from acting in this proceeding. So that's the first matter, the fact of that - - -

5

HER HONOUR: Yes.

MR GLEESON: - - - proceeding. The related matter is it being fixed for an extremely expedited hearing, so that there is a good prospect of a decision on that matter very, very soon. The second fact is that Ms Chrysanthou has prepared the statement of claim in the proceedings. She has prepared the reply. She has prepared the submissions to strike out the defence. She has prepared the submissions on interrogatories. And one may infer that the orders which are being sought today have also been prepared or settled by her.

15

The third fact is that the statement of claim prepared by Ms Chrysanthou involves allegations which appear, through the material I've taken your Honour to, to concern Ms Dyer, her other client, and communications between Ms Dyer and Kate or Ms Milligan. And therefore, there is a relationship, at least, between the issues and the allegations in these proceedings and what is said to be in suit in the other proceeding.

20

The fourth matter is that at a level of possibility – and I put it no higher than that – the other proceedings may lead to an injunction restraining Ms Chrysanthou from acting in these proceedings. I put it no higher than possibility. They may also lead to findings and evidence which bear upon the role that Ms Chrysanthou has had in these proceedings, and continues to have in these proceedings.

25

And the fifth matter, as a matter of possibility only, is that depending upon the nature of those orders and findings and evidence, the ABC may – may – be in a position where, after proper advice, it seeks to amend its defence in these proceedings and/or to bring other applications in these proceedings. Those matters cannot be known until two weeks time.

30

HER HONOUR: Right. So – well, what kind? Just theoretically. I know that you don't – can't say you would or you wouldn't, but what kind of application did you have in mind?

35

MR GLEESON: Your Honour, if the case were one where a client disclosed confidential information to their lawyer, number 1, and if, number 2, that lawyer decided to act for a different party who had an interest adverse to that client, and did so without the consent of that client, that lawyer would, absent any special qualification of the second retainer, be bound to use all information at their disposal for the benefit of that second client in preparing and litigating for that client. If – and I put nothing higher than the level of possibility - - -

45

HER HONOUR: No, no, this is all ifs. This is - - -

MR GLEESON: This is “if”.

HER HONOUR: These were the ifs that I’ve got in mind.

5 MR GLEESON: Yes. The “if” is that if a lawyer has taken on that conflicting retainer and, consciously or otherwise, remembered or otherwise, used information from that first client in the drawing of the pleading in the second matter and/or in the prosecution of that matter, - - -

10 HER HONOUR: Yes.

MR GLEESON: - - - such as in the way the submissions are framed, such as in the way the interrogatories are framed, - - -

15 HER HONOUR: Yes.

MR GLEESON: - - - then, depending upon those findings, it may be open to consider that there has been an infection of the material presented to the court in the second matter. Now, infection in the sense that there is material which has gone to
20 the heart of the construction of the case and the prosecution of the case which ought never to have been there.

HER HONOUR: But what do a – Mr – and this is the point Mr Walker was making, that that application is prospective and there’s no – he says there’s no possible
25 connection with what would happen – what has – well, the seeking of, at least, case management orders today by Ms Chrysanthou. So what are you saying is a possibility? And I realise we’re all talk – we have no idea, - - -

MR GLEESON: Right.
30

HER HONOUR: - - - none of us, that’s fine, but we do know there’s an application. So - - -

MR GLEESON: Right. So the first point is Mr Walker says the injunction is
35 prospective only. We, our team, - - -

HER HONOUR: Yes, you may - - -

MR GLEESON: - - - do not have that. We do not have that pleading.
40

HER HONOUR: No.

MR GLEESON: Mr Walker’s client, it would seem, has the pleading. But the point is not simply the form of the injunction.
45

HER HONOUR: Yes.

MR GLEESON: The basis upon which it is being put is that, having undertaken, as we understand it, that obligation to Ms Dyer - - -

HER HONOUR: Yes.

5

MR GLEESON: - - - it was wrong, it was wrong to accept the conflicting retainer from Mr Porter.

HER HONOUR: Clearly, that's the argument in the other case.

10

MR GLEESON: That's the argument. And so a possible outcome of the case is that Thawley J says, "When I've considered the evidence" - - -

HER HONOUR: Yes.

15

MR GLEESON: - - - "I find that the wrong, to use that term, occurred no later than the very preparation of the statement of claim in these proceedings". Now - - -

HER HONOUR: Or whatever it be, yes.

20

MR GLEESON: Or whatever it be, or whichever document.

HER HONOUR: Yes.

25 MR GLEESON: Now, the relief that can be given will be tailored to the equity of the case. But the finding may be that it was information which was confidential to Ms Dyer and the moment the legal representative is approached by someone like Mr Porter and the interest is seen to be adverse to the interest of Ms Dyer the ordinary approach of equity and of duty is that one must - - -

30

HER HONOUR: Sorry about that. That might be something to do with the public streaming that's happening of this.

35 MR GLEESON: Yes. One would obtain a fully informed consent from the first client, and if one was unable to obtain that consent because you couldn't disclose to the first client the fact the second client was trying to brief you, then, you would simply say, "For reasons I can't explain I can't take on the retainer".

HER HONOUR: Yes.

40

MR GLEESON: Now, that's - that would equity's ordinary approach to this type of situation. So it is possible, at least, that, depending on the evidence, depending on the findings, Thawley J finds it was wrong - - -

45 HER HONOUR: Can we stop that? Can we get that not to - yes, okay.

MR GLEESON: That it was wrong to accept the retainer from Mr Porter at the outset and it was wrong to continue to prosecute the proceeding. Now, if that is the underlying finding and if the evidence bears that out we would then be in a position where there would be at least an argument - - -

5

HER HONOUR: Yes.

MR GLEESON: - - - that that wrong has infected the pleading and there may be an application to rely upon that under the rubric of abuse of process, strikeout, stay, or any of those matters.

10

HER HONOUR: Yes.

MR GLEESON: Now, our pleadings are not closed. We've put on the best pleading we can, but in the light of that knowledge, that in two weeks time we may well know those additional matters, there would then be a duty on the ABC to act with extreme expedition to say to your Honour, "There's nothing we do about that" or "There is something we do about that". Now, so that's one aspect of the answer to Mr Walker. The other aspect is the argument that the only person who's suffering a harm here is Mr Porter, because his right, as he calls it, to have his counsel is interfered with, and that's a permanent harm that can never be unwound.

15

20

HER HONOUR: Or, alternatively, on your approach, his right to have this matter progressed would be interfered with - - -

25

MR GLEESON: Well - - -

HER HONOUR: - - - because your approach is to say, "Well, we will just stop this proceeding until we find out what happens in the other proceeding", - - -

30

MR GLEESON: We will have a - - -

HER HONOUR: - - - on the same basis - - -

35

MR GLEESON: We will have a temporary pause.

HER HONOUR: Yes.

MR GLEESON: And, again, it's quite incomplete to describe it as a right to have the matter progressed at any particular pace.

40

HER HONOUR: Sure. I understand.

MR GLEESON: Your Honour has given this matter extreme expedition at the request of Mr Porter. In some senses, the matter has moved and is moving far too quickly for there to be proper, orderly presentation. I mean, the suggestion that, in

45

the midst of everything else your Honour has programmed, we would have to answer 291 interrogatories - - -

HER HONOUR: Well, we can come to that.

5

MR GLEESON: - - - and give general discovery, that - - -

HER HONOUR: No orders have been made for any of that to happen.

10 MR GLEESON: No. But that's to be there. But your Honour has ample power, we would submit, on a case-management basis, to decide what is the appropriate timing of what is a two-week period. That's what we're talking about, a two-week period. But I want to deal with one other aspect. Mr Walker said - - -

15 HER HONOUR: But I would be doing it, make no mistake about it, on the basis of the existence of the other proceeding.

MR GLEESON: Yes.

20 HER HONOUR: So exactly the same as - - -

MR GLEESON: Yes.

25 HER HONOUR: - - - what else, otherwise, I was proposing. And the mere possibility that those other proceedings might yield some outcome.

30 MR GLEESON: A and B and C. The harm that Mr Walker doesn't recognise, because he says the injunction is only prospective, but if the findings are that Ms Chrysanthou ought not to have been in this matter from the first place, every continued involvement she has in the matter in her presentation to the court is a further - - -

HER HONOUR: Risk.

35 MR GLEESON: - - - repetition of - is a risk.

HER HONOUR: Yes.

40 MR GLEESON: It's a risk. Now, that is a risk - Mr Walker just doesn't factor that in at all. That is a risk to the administration of justice, and that is the primary reason why your Honour would be entitled to make these orders if you were so minded to, because that harm, from - at the level of risk, from an officer of the court, who has that fundamental conflict hanging over them, that harm is continuing and being repeated by every step that is going on in the matter. And it's a harm that's
45 identifiable, but very difficult to unwind after the event.

Now, for the same reason – it’s not directly analogous, but your Honour, at Mr Porter’s request, made interim suppression orders, I think, over our opposition. Your Honour did that because your Honour wished to protect the administration of justice against an identifiable threat at a time when there was not yet the occasion to have
5 full argument about whether those orders were necessary. That’s a classic example. The sort of thing Mr Walker says is beyond judicial power the constitution.

That’s a classic example of an identifiable threat where the court takes an interim protective measure, and then – and why does the court do it? Because the court says,
10 “Well, if it should turn out down the track those schedules should never have been pleaded, the harm done by overzealous publicity of them may be very difficult to unwind and compensate Mr Porter for, so we take a protective measure.” With respect, we’re in the same regime. In this two-week period, is this an appropriate protective measure, having regard to the overall interests of the administration of
15 justice? May it please your Honour.

HER HONOUR: Mr Walker, anything you want to - - -

MR WALKER: The issue is pretty well joined. Can I simply make it clear, my
20 chapter 3 comment concerns, in effect, an interlocutory injunction being granted against Ms Chrysanthou appearing or Mr Porter retaining Ms Chrysanthou without there being any such application by the only person claiming standing deceit, namely, Ms Dyer, not the ABC.

25 HER HONOUR: Yes.

MR WALKER: And my friend has properly observed that distinction.

30 HER HONOUR: Yes.

MR WALKER: It says nothing about the entire propriety of what my learned friend last mentioned; namely, an application by us for an interim suppression on the grounds he correctly identifies, which are in the heartland of an exercise of chapter 3, power of a self-protective claim. Totally different.
35

HER HONOUR: Well, I think, based on what has emerged, the only real issue is whether I should be making their orders, which are not any kind of – saying this can proceed if Ms Chrysanthou doesn’t have involvement. That was - - -

40 MR WALKER: It framed as an adjournment.

HER HONOUR: This is framed as an adjournment.

MR WALKER: And let me make it clear: I am not attempting the heroic
45 assimilation of the adjournment application to the interlocutory injunction which your Honour should not, in effect, be granting against Ms Chrysanthou.

HER HONOUR: No, no. No, and I'm - - -

MR WALKER: So let me make it clear I'm not going that far.

5 HER HONOUR: I'm persuaded – yes. Look, it's not what - - -

MR WALKER: Of course, you have got a power to adjourn - - -

HER HONOUR: Yes.

10

MR WALKER: - - - for a plethora of reasons, which would be impossible to describe in advance, they are so various.

15 HER HONOUR: Well, but this is an – it would be on precisely the same basis, namely, the application that's hanging – has been brought and is undetermined against Ms Chrysanthou.

MR WALKER: I don't want to repeat - - -

20 HER HONOUR: No.

MR WALKER: - - - what I've said in chief, but your Honour understands that as a matter of discretion, not power, discretion in relation to an adjournment, you should, in our submission, rigorously resist providing the functional equivalent of what
25 would be otherwise unthinkable, namely an interlocutory injunction without an application for one by a person in a position to claim one, being a party in these proceedings, and it has to be said, apart from the – apart from the incidental remarks by my friend about how hard the lawyers for ABC are at work at the moment, which he did not advance as a reason for the adjournment - - -

30

HER HONOUR: No, no.

MR WALKER: - - - the only reason for the adjournment is - - -

35 HER HONOUR: To enable this - - -

MR WALKER: - - - we should be not doing something which will involve the court hearing Ms Chrysanthou until the court has determined in other proceedings whether that can or should happen - - -

40

HER HONOUR: That's right.

MR WALKER: - - - and as I say, that leads it back to you should not be making an adjournment which is based, therefore, on this proxy notion of an interlocutory
45 injunction. That is what, in our submission, lies outside a known power. Now, all of that has to be seen by your Honour in the context of the power to adjourn. It is an extremely broad power, but it's still an exercise of judicial power, and you would be

very wary, with respect, against dispensing with the usual constitution of a justiciable controversy by having parties to it with adversarial opportunities, and this is not ex parte, and if it were ex parte, it's only in the sense it was dire. The proper moving party for an interlocutory injunction is not here and the court doesn't have power,
5 with respect, ex parte to grant relief to a person who has not sought it.

HER HONOUR: Yes.

10 MR WALKER: That's my point.

HER HONOUR: No, no. I understand that, and I accept – to that extent, I accept the submission. So option 1 or 2 or whatever it was is off the table. It's only - - -

15 MR WALKER: And may I say this about section 78B of the Judiciary Act. That argument by me with respect to resisting an adjournment is a classic example of the exception to 78B which provides that which has to be done urgently being done urgently. But with respect, we don't need to - - -

20 HER HONOUR: Go there.

MR WALKER: - - - to go to section 78B. I am entitled to put an argument that the matters that are raised in support of an adjournment are nothing other than an interlocutory injunction for something that is not sought.

25 HER HONOUR: Yes. No. I understand that. I - - -

MR WALKER: If it please the court.

30 HER HONOUR: I understand that. Look, I accept that to some extent, the eggs are already scrambled, I guess. What my – my view is that the risk which was on my mind when I came into court, which is the same risk that Mr Gleeson has identified, that is, that we shouldn't be adding more eggs to the bowl pending the urgent resolution of the other proceeding which I am aware is happening on an expedited basis, I find that compelling in terms of protecting the integrity of this proceeding so
35 that there should be no greater risk to the integrity of this proceeding than there already arguably or unarguably, I don't know which way, is.

So I am minded to accede, at least to order 1, of the respondents' orders. Now, that – we should actually fix a date. I'm going to assume that Thawley J will be able to
40 determine the application urgently, so maybe I will just give you a date after 24 May and if we need to vacate it because he's reserved, we can vacate it. I'm not going to vacate the dates of 1 and 2 June. I'm going to leave them on foot because almost inevitably, something will be able to usefully be done on those dates anyway in this matter, because there's lots of other arguments that can be had, and no doubt will be
45 had. So where are we? So he's hearing you on the Monday.

MR GLEESON: Would the Wednesday be possible, your Honour?

HER HONOUR: Yes. I was just going to say, I'm quite happy to put this in at 9.30, I think, on the Wednesday. I will just double-check if we've got anything else. If it's pointless, because he has reserved or whatever, we can vacate it, that's fine. Wednesday the 26th. That's all right, I'm going to list it for So what I will do,
5 order 1 will be – it's not really the first case management hearing - - -

MR GLEESON: No.

HER HONOUR: - - - because we've already had two, so I will just delete "first".
10 So I will just say:

(1) The case management hearing be adjourned to –
don't need all the rest –

9.30 am on 26 May 2021.

Two – now, let me see what I'm vacating. Let me find my orders. Would I leave 8
15 on? Because I've still got the dates of 1, 2 June and this is only requiring you to do something.

MR GLEESON: It is, your Honour, but for that affidavit and those submissions, they are simply responsive to the documents I've taken you to this morning - - -
20

HER HONOUR: Yes.

MR GLEESON: - - - where there may be the problem. So, your Honour, one possibility would be if your Honour – it's not quite what we had sought, but if your
25 Honour moved our date back to 5 pm on 26 May.

HER HONOUR: Yes.

MR GLEESON: And then we're before your Honour in the morning. If – we will
30 keep working on those documents. If we submit by that morning we have a good reason to be relieved of that obligation we would make that application in the morning.

HER HONOUR: Yes, that seems reasonable to me.
35

MR GLEESON: Yes, your Honour.

HER HONOUR: So I won't vacate 8, 9. I won't vacate 10. Now, that's happening at 5 pm on 28 May. If people want to move that back a bit I will, but - - -
40

MR WALKER: We don't change.

HER HONOUR: No, okay. And then you're asking me to vacate 12. Well, I think I will leave 12 for now, because all sorts of things can happen. I won't vacate the hearing of the interlocutory application at this stage; that seems to me to be unnecessary.

5

MR WALKER: As you please, your Honour.

MR GLEESON: And then on the morning of the 26th we can - - -

10 HER HONOUR: Well, you can tell me all about it - - -

MR GLEESON: - - - make any application that's appropriate at that point.

HER HONOUR: That's fine. So, then - - -

15

MR WALKER: We do understand that, your Honour, I accept what my friend has said about that possibility.

20 HER HONOUR: Yes, yes. Yes, no, that's fine, I get that too. So, then, so I won't make order 2; so that's out. Then, order 3, well, that's costs. Well, does that not – does this all depend? I mean, shouldn't I be reserving costs?

MR GLEESON: They should be reserved, your Honour.

25 HER HONOUR: Yes, okay. So costs be reserved. Liberty to – so that will be order 2. Order 4 will become order 3, liberty to restore. And that's it, is it not?

MR GLEESON: And then your Honour has amended the date in order 8 and 9 of the previous orders to 26 May.

30

HER HONOUR: Yes, so maybe I should make an order for – order 8 and 9, is it?

MR GLEESON: Yes.

35 HER HONOUR: Orders 8 and 9 of the orders dated whatever they are, 11 May 2021, be varied. So the relevant date is 26 May.

MR GLEESON: May it please the court.

40 HER HONOUR: Yes? 2021.

MR GLEESON: Yes.

45 HER HONOUR: Okay. Now, there's one other thing I need to notify the parties of. I don't know whether they've noticed it yet. There has been another interlocutory application filed in this matter. So – and I think I indicated it could be given a return date next Wednesday. I can't quite remember. Anyway, it's the first return date. So

it's an interlocutory application by Mr Shane Dowling. He seeks leave to intervene in relation to the argument about the continuation of the suppression orders on 1 and 2 June. So I'm just letting parties know that.

5 It should be filed on the – it should be available on the court's electronic system. I understand that it might be – have been allocated a first return date of 9:30 next Wednesday, the – what's that – 19th. It has been allocated 10:15, has it? Well, that's a bit odd. I see, it has been allocated 10:15 as a first return date. Anyway, I will let the parties know that. I don't know whether you've been served with that application
10 or not. Okay. You have been. All right. Obviously, if that date's inconvenient, the parties – people can all confer and let me know another potential date. Okay. Is there anything else?

MR WALKER: Yes. Your Honour, as your Honour knows, we are earnestly
15 seeking the earliest trial date possible.

HER HONOUR: I have preserved provisional dates - - -

MR WALKER: And that's what I just wanted to raise.
20

HER HONOUR: Yes.

MR WALKER: We would not wish by any silence today - - -

25 HER HONOUR: No, no.

MR WALKER: - - - to give rise to the possibility of that being reversed, that reservation. We're very keen to - - -

30 HER HONOUR: No. The reservation isn't reversed. I can see in your proposed orders that you've got it running from 27 September. I think I could indicate - - -

MR WALKER: Moving from a reservation to an actual listing, a bit like being at an airport, I guess, we would very much like to book our seat.
35

HER HONOUR: Yes, absolutely. I understand that.

MR WALKER: I've said what I need to say about it.

40 HER HONOUR: Yes. I think, on the 1 and 2 June, we can sort out – I think – look, my inclination is that it would help everybody, given representation, at least, to know a hearing date.

MR WALKER: Exactly.
45

HER HONOUR: Even if, ultimately – if it's the fact you don't make that date, for reasons, I still think it would be in everybody's interests to reserve a date now, even if it's premature in one way.

5 MR WALKER: Emphatically so. Thank you, your Honour.

HER HONOUR: Yes. So people need to take that into account, what those dates are. At the moment, it's sometime between, at the earliest, 27 September. Preferably for me, for other reasons, probably from 5 October and December. So preferably not
10 November because of Full Courts, but I would have to get permission to list it if that's what people wanted, but that would probably be granted. All right. Thank you.

MR GLEESON: May it please the court.
15

HER HONOUR: I will adjourn. Thank you.

MATTER ADJOURNED at 11.42 am UNTIL WEDNESDAY, 26 MAY 2021