

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

APPLICANT'S CLOSING SUBMISSIONS

1. INTRODUCTION

1. The applicant relies on her outline of opening submissions for a summary of the relevant law and the applicant's position with respect to how the issues in this proceeding should be decided.
2. These closing submissions are narrowly focused on two issues: (a) the facts necessary to decide whether confidential was imparted to Ms Chrysanthou at the 20 November 2020 conference; and (b) the facts that would inform the Court's decision as to whether to exercise its inherent jurisdiction to protect the administration of justice and the appearance of justice by restraining Ms Chrysanthou from acting for Mr Porter in the ABC proceedings.

2. THE IMPARTING OF CONFIDENTIAL INFORMATION

3. There is an apparent conflict in the evidence as to what information was imparted to Ms Chrysanthou during the conference on 20 November 2020. The conflict arises because Ms Chrysanthou has given a version of the conference that differs markedly from that of Ms Dyer, Mr Hooke and Mr Bradley and Ms Chrysanthou's evidence was that "it's likely some other things were discussed but I think it's unlikely many other things were discussed".
4. The applicant relies on her evidence and that of Mr Hooke and Mr Bradley. The credibility and

reliability of each of those witnesses was not seriously challenged in cross-examination. There are some minor inconsistencies between their accounts, which is to be expected of independent accounts, but on the critical issue of whether the important critical and confidential topics were discussed, they are consistent.

5. In evidence-in-chief, Ms Dyer, Mr Hooke and Mr Bradley each deposed to the confidential information that they recalled having been disclosed to Ms Chrysanthou at the conference on 20 November 2020.¹ In Mr Hooke's reply affidavit, he further deposed to recalling the nature of some of the confidential information with a degree of precision.² It was not at any time put to Ms Dyer, Mr Hooke or Mr Bradley during cross-examination that their evidence-in-chief as to what was disclosed at the conference on 20 November 2020 should not be accepted.
6. Ms Chrysanthou deposes that she does not possess confidential information,³ but it is unclear from her evidence to what extent, if at all, she accepts that confidential information was imparted to her at the 20 November 2020 conference.⁴ Ms Chrysanthou's evidence as to what was discussed at the conference is not reliable. There are three principal reasons why her account of what occurred during the conference should not be accepted insofar as it is inconsistent with the evidence of Ms Dyer, Mr Hooke and Mr Bradley.

(a) Ms Chrysanthou does not recall one of the purposes of the 20 November 2020 conference

7. In cross-examination, Ms Chrysanthou repeatedly denied that one of the purposes of the conference on 20 November 2020 was to [REDACTED]
[REDACTED]
[REDACTED].⁵
8. This is one of the pieces of confidential information. It is glaringly improbable that it was not discussed.
9. As is apparent from the evidence, and from Ms Dyer's public statements, she and Mr Hooke wished to find a way to have AB's allegations of rape against Christian Porter made public.
10. Indeed, Mr Hooke⁶ and Ms Dyer⁷ were cross-examined to suggest that this was [REDACTED]

¹ Dyer [25], CB31; Hooke [15], CB44; Bradley [19], CB52.

² Hooke Reply [8]-22], CB476-481.

³ Chrysanthou [52], CB208.

⁴ See, for example, the ambiguity at TS 201/18-26.

⁵ TS 188/11 – 190/25.

⁶ TS 109/3- 110/4; 111/4-21.

⁷ TS 137/35-139/12.

11. In a text message exchange between [REDACTED], put into evidence by the second respondent during cross-examination, Ms Dyer said:⁸

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

12. Despite her denials, the advice that Ms Chrysanthou herself recalls having given during the conference is only consistent with her having been aware of this purpose and the question of whether it would be proper to [REDACTED].⁹ It is consistent with the specific evidence given by Mr Hooke in his second affidavit, on which he was not challenged.¹⁰

(b) The premise of Ms Chrysanthou's account of what occurred on 20 November 2020 was her account of a discussion she said she had with Mr Richardson on 19 November 2020

13. In her first affidavit, Ms Chrysanthou deposed that her "best recollection" was that she had first been approached by Mr Richardson to "look at an article for him and tell him whether [she] thought there might be a potential claim"¹¹ on 19 November 2020.¹² She deposed that on this occasion Mr Richardson showed her the article in *The Australian* and she "read it as [they] walked down the hall to [her] room".¹³ She gives her account of this walking discussion over eight paragraphs¹⁴ in direct speech. It is a critical premise of her account of what occurred during the conference on 20 November 2020 because the basis upon which she says that nobody else said much during the conference was that all of the relevant information had already been

⁸ Exhibit 6.

⁹ Chrysanthou [30], CB203-204.

¹⁰ Hooke Reply [21], CB480-481.

¹¹ TS 179/8-26.

¹² Chrysanthou [13], CB199.

¹³ Chrysanthou [14], CB199.

¹⁴ Chrysanthou [12]-[19], CB199-201.

explained to her by Mr Richardson whilst they were walking.¹⁵

14. However, Ms Chrysanthou affirmed that affidavit before Mr Richardson had made production of documents pursuant to a subpoena. He produced an email he had sent to her on 18 November 2020 with the subject line “Dyer”¹⁶.
15. The email reveals that Ms Chrysanthou’s account of what occurred before the conference on 20 November 2020 is unreliable.
16. Ms Chrysanthou accepted that there must in fact have been a phone discussion with Mr Richardson before his email of 18 November 2020 was sent to her.¹⁷ Ms Chrysanthou accepted that during that telephone conversation, there had been a discussion about the purpose of the conference and a discussion about Mr Hooke.¹⁸ Her evidence became in cross-examination that she had “combined” two discussions.¹⁹ She had not said this in her further affidavit which she affirmed after seeing the emails Mr Richardson had produced.
17. In her first affidavit, Ms Chrysanthou deposed that at the end of the walking conversation she “agreed to meet briefly with Ms Dyer and Matthew” and she did not “recall knowing who was to attend the conference [on 20 November 2020] apart from Mr Richardson and Ms Dyer”.²⁰ In cross-examination, Ms Chrysanthou accepted that she in fact knew that Mr Bradley would be attending the conference²¹ and that Mr Richardson had told her in his email of 19 November 2021 that Mr Hooke would also be in attendance at the conference.²²
18. In her first affidavit, Ms Chrysanthou deposed that she had not seen a draft of the Concerns Notice until Mr Richardson brought it with him to the 20 November conference.²³ In cross-examination, Ms Chrysanthou stated that she did not disagree that the attachment to Mr Richardson’s email to her on 18 November 2020 was a draft of the Concerns Notice.²⁴ That it is the draft Concerns Notice can be readily inferred from the subsequent email of 20 November 2020 that has the attachment.²⁵

(c) Ms Chrysanthou did not disclose in her affidavits all of the matters that she recalls being

¹⁵ TS181/21-45.

¹⁶ Chrysanthou 2, SC-3 at p 4; TS 178/33-4.

¹⁷ TS179/39-40; TS180/42-44.

¹⁸ TS180/46 - 181/2.

¹⁹ TS181/9-14.

²⁰ Chrysanthou [19]-[20], CB201.

²¹ TS179/28-32.

²² TS180/16-18.

²³ Chrysanthou [26], CB202.

²⁴ TS178/45 – TS 179/2.

²⁵ Bradley CB96-99.

discussed at the conference on 20 November 2020

19. Ms Chrysanthou confirmed in cross-examination that her first affidavit sought to give a full account of what she could remember as to what was said at the 20 November conference.²⁶ However, it is apparent that this was not correct or that Ms Chrysanthou's recollection of what occurred during the conference varied over time.
20. In her first affidavit, Ms Chrysanthou deposed at paragraph 17 that she had heard certain matters regarding the Four Corners episode from persons other than the attendees of the conference on 20 November 2020. She deposed that she had been told as part of her discussions with media lawyers and journalists that [REDACTED]
[REDACTED].²⁷ Ms Chrysanthou gave varying evidence as to whether this was discussed during the conference.²⁸
21. Ms Chrysanthou eventually said that the matters were "part of the discussions set out at paragraphs 28 and 29". When pressed as to where those matters appeared in paragraphs 28 and 29, Ms Chrysanthou agreed that nothing on the face of paragraph 28 revealed the matters that she had set out in paragraph 17.²⁹ After confirming that what she had said at the end of paragraph 17 was "the key issue"³⁰ discussed at the conference and "the whole point of [her] advice",³¹ she admitted that she did not expressly set it out anywhere in her affidavit as something that she recalled having been discussed at the conference.³²
22. In cross examination, Ms Chrysanthou was asked whether she recalled [REDACTED]
[REDACTED] during the 20 November conference.³³ Ms Chrysanthou responded that the discussion was only to the extent of the fact that she gave the broadcast interview.³⁴ She then said she had not included this as part of her account of the conference because it was something that Mr Richardson had already told her so she knew beforehand.³⁵ She then changed her explanation and said she left the discussion out of account of the conference because she could not recall Ms Dyer "saying anything *of substance* about [REDACTED]
[REDACTED] (emphasis added).³⁶

²⁶ TS175/16-17.

²⁷ Chrysanthou [17], CB200.

²⁸ TS181/35-37 to TS182/19-20.

²⁹ TS182/5-7.

³⁰ TS183/25, TS183/29.

³¹ TS183/31.

³² TS183/36-38.

³³ TS 190/41.

³⁴ TS 190/41-43.

³⁵ TS 190/45-47.

³⁶ TS 191/14-16.

3. THE ADMINISTRATION AND APPEARANCE OF JUSTICE

23. The applicant submits that the following additional factual matters are relevant be taken into account in the exercise of the Court's discretion to grant relief to protect the administration of justice, and the appearance of justice.

4.1 Failure to disclose to Mr Bradley that Mr Richardson believed there was a conflict

24. Ms Chrysanthou consulted at least two other senior counsel and Mr Richardson regarding the issues that are the subject matter of this proceeding.³⁷ However, Ms Chrysanthou accepts that the difference between Mr Richardson and everyone else she consulted was that everyone else was required to rely on what Ms Chrysanthou had told them she recalled about the circumstances relating to that conference whereas Mr Richardson had also been at the conference and therefore had his own independent recollection of those events.³⁸
25. Ms Chrysanthou spoke to Mr Richardson on 10 March 2021. There is a conflict between the evidence of Ms Chrysanthou and Mr Richardson's contemporaneous note as to what was said in that discussion.
26. Part of Ms Chrysanthou's account of that conversation is improbable. In her first affidavit, Ms Chrysanthou deposes that in her conversation with Mr Richardson on 10 March 2021, she asked him whether she had any confidential information from the conference.³⁹ In cross-examination, Ms Chrysanthou had said that she "had a recollection of what was disclosed to [her at the 20 November conference] and [she] checked that recollection with Matthew by asking him if he recalled anything that [she] didn't."⁴⁰ Ms Chrysanthou gave further evidence that in asking Mr Richardson this question she was asking Mr Richardson, at least in part, to tell her whether he remembered something that she had forgotten.⁴¹ Yet, Ms Chrysanthou admitted that she had not disclosed to Mr Richardson the things that she could remember in order to check whether Mr Richardson recalled anything that she did not.⁴²
27. Mr Richardson's contemporaneous note records him telling Ms Chrysanthou that accepting the brief from Mr Porter was a "bad idea" and that she may have a conflict if Ms Dyer or Mr Hooke

³⁷ TS 202/45-6

³⁸ TS 203/4-5.

³⁹ Chrysanthou [51], CB207.

⁴⁰ TS 201/32-34.

⁴¹ TS 203/24-5.

⁴² TS 201/36-39.

became witnesses in those proceedings.⁴³

28. In cross-examination, Ms Chrysanthou accepted that Mr Richardson had told her she had a conflict but did not believe it was in the conversation on 10 March 2021.⁴⁴
29. Ms Chrysanthou spoke to Mr Bradley on 15 March 2021 to inform him that she had taken the brief for Mr Porter. She spoke to him after the statement of claim had been filed. She told Mr Bradley during that conversation that Mr Richardson had agreed that Ms Chrysanthou did not have any confidential information.⁴⁵ She spoke to Mr Bradley again later that day and said that she had spoken to Mr Richardson and he did not recall anything confidential being discussed.⁴⁶ In correspondence with Ms Chrysanthou, Mr Richardson has disputed exactly what he said about confidential information. But that is not the relevant issue here. Rather, what is significant is that Ms Chrysanthou did not reveal to Mr Bradley that Mr Richardson had told her that she believed she had a conflict.

4.2 Delays in dealing with the issue of conflict

30. Mr Bradley initially sought to resolve the issue in a professional and non-confrontational way. He retained a senior counsel to provide advice and attempted to arrange for Ms Chrysanthou to speak to that senior counsel to explain the issue.⁴⁷
31. After Ms Chrysanthou retained solicitors at the end of March 2021, Mr Bradley responded promptly, and in detail, at the end of March and the beginning of April to requests for information from those solicitors.⁴⁸
32. There was then substantial delay on the part of Ms Chrysanthou.
33. On 13 April 2021, Mr Bradley sent an email to Mr Patrick George of Kennedys asking when he could expect to hear back from Mr George because Ms Dyer was concerned that it had been almost a month since the concern of conflict had first been raised with Ms Chrysanthou with no sign of a resolution.⁴⁹ On the same day, Mr George responded that he and Richard McHugh were working through Mr Bradley's letters and would provide a substantive response the

⁴³ Exhibit 10.

⁴⁴ TS 198/46-TS199/6.

⁴⁵ Bradley [26], CB54.

⁴⁶ Bradley Reply [8], CB452.

⁴⁷ Bradley Reply [9] and [11]-[12], CB453-454.

⁴⁸ See correspondence at CB154-CB177.

⁴⁹ Bradley MDB-3 at p42, CB90.

following week.⁵⁰

34. On 17 April 2021, Mr Bradley wrote to Mr George stating that Ms Dyer was prepared to wait until the end of Wednesday 21 April for a substantive response from Ms Chrysanthou but that following that date, if the matter was not resolved he might be instructed to take action without notice.⁵¹
35. On Wednesday 21 April 2021, Mr George wrote back to Mr Bradley stating that he would not be able to confirm Ms Chrysanthou's instructions that day, and requesting that Mr Bradley and Ms Dyer await the response before taking any further steps. He stated that he did not expect to be in a position to make the response before that Friday.⁵²
36. In cross-examination, Ms Chrysanthou confirmed that, although she did not know of these precise emails, she knew that there was an exchange of emails at this time.⁵³

4.3 Failing to engage or alter position after becoming aware of Richardson's refreshed memory from reviewing the list of material

37. On 31 March 2021, Mr Richardson emailed Ms Chrysanthou observing that Mr Bradley had called him earlier that day and advised that Ms Chrysanthou's solicitors had sent a letter to Mr Bradley in which they stated that Mr Richardson had conveyed the view that there was no confidential information imparted during the course of Ms Chrysanthou's retainer for Jo.⁵⁴ Mr Richardson then said that the letter did not sound as if it included "some of the other things I said to you including for instance my view that I did believe there was a conflict because James and Jo would probably be witnesses in the ABC case".⁵⁵
38. At some point, Ms Chrysanthou retained Mr Richard McHugh SC for assistance.⁵⁶ Ms Chrysanthou accepts that she was aware that Mr McHugh met with Mr Richardson and took him through the information that Marque Lawyers had prepared on instructions as to the alleged nature of the confidential information imparted at the 20 November 2020 conference.⁵⁷ Ms Chrysanthou also accepts that she knew that Mr Richardson's memory of what had been said at the conference had been refreshed by being taken through that letter.⁵⁸ Yet, despite having that

⁵⁰ Bradley MDB-3 at p41, CB89.

⁵¹ Bradley MDB-3 at p41, CB89.

⁵² Bradley MDB-3 at p41, CB89.

⁵³ TS 209/35-36.

⁵⁴ Chrysanthou, SC-2 at p 24; CB220.

⁵⁵ Chrysanthou, SC-2 at p 24; CB220.

⁵⁶ TS 205/25-29.

⁵⁷ TS 205/31-41.

⁵⁸ TS 207/34-39.

knowledge, Ms Chrysanthou never altered her position despite the entire premise of it being that she did not believe she had confidential information and believed she had checked this with Mr Richardson on 10 March 2021.

4.4. Media statement

39. On 12 May 2021, Company Giles published a media release on behalf of Mr Porter.⁵⁹ The media release reads:

It has been widely known for two months that Sue has been acting as my counsel in this well-publicised matter, yet the action has come shortly before court appearances on significant issues in the proceedings and over eight weeks after they were commenced. I'm therefore concerned about the timing of this application.

40. Ms Chrysanthou admits to being shown the media release before it was put out.⁶⁰ Ms Chrysanthou denies that the media release was misleading. However, the only fair reading of it was to suggest that the commencement of proceedings by Ms Dyer came as a surprise to Mr Porter and it was inexplicable that it had not been commenced earlier.

4.5. Assisting Mr Porter in this proceeding while ostensibly adopting a neutral position

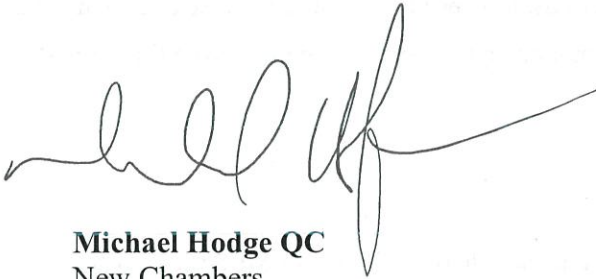
41. Since 12 May 2021, in the statements made on her behalf to the Court, Ms Chrysanthou has purportedly been taking a neutral position and would accept whatever decision the Court made.
42. In cross-examination, Ms Chrysanthou confirmed that her position in the proceeding “as a party” was that she was “neutral” and took “no position”.⁶¹ She gave evasive answers seeking to use the expression “as a party” to avoid acknowledging that she was not behaving neutrally. However, ultimately when asked whether through the conduct of this proceeding, she had been assisting Mr Porter in the preparation of his position, Ms Chrysanthou replied, “Yes”.⁶²

⁵⁹ Exhibit 11.

⁶⁰ TS 214/22-24.

⁶¹ TS 215/35, 215/38.

⁶² TS 216/16-18.



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