NOTICE OF FILING

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Important Information

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No. VID 1023 of 2024

Federal Court of Australia

District Registry: Victoria

Division: General

MOIRA DEEMING V JOHN PESUTTO

APPLICANT'S WRITTEN OUTLINE IN SUPPORT OF INTERLOCUTORY APPLICATION TO SET-ASIDE RESPONDENT'S NOTICE TO PRODUCE

A. Introduction

1. By interlocutory application dated 27 August 2024, Mrs Deeming applies to set-aside a notice to produce which the respondent served on her on 21 August 2024 (the **Second NTP**). Mrs Deeming reads and relies upon the affidavit of her solicitor, Mr Jeremy Marel, in support of this application. Mrs Deeming tenders her List of Documents dated 28 June 2024, 8 August 2024 and 30 August 2024.

2. The trial in the matter is listed to commence on 16 September 2024 with a three week estimate. The parties have been ordered to complete various tasks including objections to affidavits and documents, preparation of the Court Book, and written opening submissions, in order to have the matter ready for trial.

3. On 2 February 2024, this Court ordered the parties to give standard discovery pursuant to r20.14. These orders were extended, and on 28 June 2024 Mrs Deeming filed and served her verified list of documents.

4. On 5 July 2024, the respondent raised objections to the adequacy of Mrs Deeming's discovery: JJM-1 p12ff. On 31 July 2024, Mrs Deeming responded to those objections (JJM-1 p19ff), and on 8 August 2024 filed and served a second verified list of documents. Almost immediately after being served with the second verified list of documents, the respondent served the first notice to produce: see JJM-1 p23ff. The respondent informed Mrs Deeming that he served the first notice to produce "[i]n order to avoid an ongoing dispute as to whether Mrs Deeming's communications with journalists are discoverable": JJM-1 p25. On 13 August 2024, Mrs Deeming notified the respondent of her objections to the first notice to produce: JJM-1 p29ff.

5. On 21 August 2024, the respondent withdrew the first notice to produce but served the Second NTP the subject of this application. On 27 August 2024, Mrs Deeming notified the respondent of her objections to the Second NTP, but stated "*Notwithstanding the above, our client is cognisant of her duty of ongoing discovery, and will obviously discover any additional*

documents she finds in the course of preparing for trial. We invite your client to withdraw the Second NTP".

6. On 30 August 2024, Mrs Deeming filed and served a further List of Documents.

Principles

7. The principles applicable to setting aside a notice to produce are well-established, and were summarised by Collier J in *Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd (No 3)* [2012] FCA 61 at [6] [authorities removed]:

(1)The party which has issued a Notice to Produce bears the onus of establishing that the documents the subject of the Notice are sufficiently relevant to justify production.

(2)Timing of the issue and service of a Notice to Produce is a relevant factor in respect of any application to set aside the Notice.

(3)A Notice to Produce cannot be used as an alternative to an application for discovery or for further and better discovery.

(4)It is necessary that the material sought has an apparent relevance to the issues in the principal proceedings. The test of apparent relevance in this context is whether the documents are reasonably likely to add, in the end, in some way or other, to the relevant evidence in the case.

(5)A Notice to Produce cannot be used for the purposes of 'fishing' or for the purpose of determining a preliminary question as to whether a party has a supportable case.

(6)A Notice to Produce may be set aside on the basis that it is unduly burdensome if the width of the categories requested is too broad or the categories are not described with adequate specificity.

See also *JKC Australia LNG Pty Ltd v AkzoNobel NV (No 7)* [2024] FCA 723 at [9] per Banks-Smith J.

8. An addition to these principles is that the Court's exercise of the power to set-aside a notice to produce must be exercised or carried out in a way that best promotes the overarching purpose in s37M of the *Federal Court Act 1976*.

9. Consistent with the over-arching purpose, principle six does not mean that a notice to produce must be set-aside in every circumstance just because there have been or could have been orders for discovery or orders for further and better discovery (see *McGrath v HNSW Pty Limited (No 2)* [2015] FCA 442; 232 FCR 532 at [23], [32]) but nonetheless the principle itself promotes the overarching purpose, as reflected in CPN-1 Part 10 Discovery, and often determinative, to this Court's determination of such an application as illustrated in the case summarised by Gleeson J in *McGrath* at [22]-[27]. In most cases, it will be contrary to the overarching purpose to permit a party to serve a notice to produce that requires a party to conduct searches over a lengthy time

period or in circumstances where discovery has occurred as opposed to seeking discrete or easily identifiable documents, e.g. *McGrath* at [29]-[31].

B. CONSIDERATION

10. The respondent must satisfy the Court that the documents are reasonably likely to add, in the end, in some way or other, to the relevant evidence in the case. The respondent bears the onus to establish, in light of the overarching purpose, that the documents sought are sufficiently relevant to justify production. In the circumstances of this case, given the discovery process, this may be difficult to satisfy and requires sufficient specificity in the description of the documents: see, for example, *Sportsbet Pty Ltd v State of New South Wales (No 9)* [2010] FCA 31 at [16], as to the effect of using broad words such as "referring" or "relating" used in the second NTP in particular circumstances: c.f. *Lucas Industries Ltd v Hewitt* (1978) 18 ALR 555 at 572-573: "[i]*t would seem that what is "sufficiently clear" in relation to any class must be determined by reference to all the circumstances concerning the demand for production*."

11. As to categories 1 and 2, they seek communications either directly or indirectly with journalists "relating or referring" to particular topics from 19 March 2023 to 21 August 2024, that is 521 days of records to be searched. Category 2 would require Mrs Deeming to consider every person she communicated with over that time. This is in effect a form of discovery by category, notwithstanding CPN-1 and the strictures, despite this Court's attitude to discovery, that would confine such categories. Although some of the topics are relevant events relevant to the pleadings and affidavits, categories h. and i. have no apparent relevance.

12. There is a lack of specificity in all the topics and they cover a broad range of subject matter, such that the request for communications 'relating or referring' to those topics could conceivably encompass not only communications about the subject matter of the proceeding but other communications. The producing party is left to make a judgment call of relevance similar to the discovery process. The breath of the language and general description of topics including the potential breadth of subject matter relating to the topics means that not only do the requests not satisfy the test of apparent relevance in the circumstances of this case, but the second NTP is a fishing expedition and otherwise oppressive. The circumstances and nature of the request also mean that, as to categories 1 and 2, it is a substitute for discovery.

13. The evidence relied upon in Mr Bartlett's affidavit does not justify the broad terms of the notice for categories 1 and 2 and reflects that the notice could have been targeted to particular communications and time periods referred to in the evidence or the particular publications

referred to in the affidavit. For each of the above reasons, categories 1 and 2 should be set-aside.

14. As to category 3, no evidentiary basis has been advanced to suggest that all documents producible under r20.14 have not been discovered. No reference is made to communications with Ms Keen prior to 18 March 2023 in the letter dated 8 August 2024 (c.f. JJM-1 p33). Given that it is admitted that documents within this class were discovered, this is in essence a fishing expedition to go behind and double check the affidavits of discovery and the ongoing obligation of discovery.

15. As to category 4, documents within this time period have also been discovered on the respondent's evidence. The respondent in his solicitor's letter and affidavit apparently question a claim for discovery over a message with Ms Keen – there is, however, no request or application for further particulars or challenge to the claim of privilege over that document. Better particulars of that document and a second communication found have nonetheless been provided in the List of Documents dated 30 August 2024. As to the claim that the Second NTP seeks documents that might be relevant to the respondent's defence of contextual truth – this again is speculative that such documents might exist and seeks to go behind the affidavit of discovery. Category 4 otherwise suffers from the same issues as categories 1 and 2 outlined in paragraphs 11 and 12 above. Categories 3 and 4 are liable to be set-aside.

C. **Orders**

16. The Second Notice to Produce should be set-aside and the respondent pay Mrs Deeming's costs. In the alternative, as this application is in essence a dispute about discovery, the parties' costs of the application should be their costs in the cause.

Dated: 30 August 2024

Sue Chrysanthou SC (02) 9132 5711 sue@chrysanthou.com.au

Barry Dean (02) 9151 5720 dean@153phillip.com.au

Counsel for the Applicant