

Lehrmann

v

Network Ten Pty Limited

NSD 103 of 2023

Outline of submissions for News Life Media Pty Ltd and the Australian Broadcasting Corporation

Orders sought

1. On 28 November 2023, Senior Counsel for the Second Respondent informed the Court of an intention to tender the Deed of Settlement and Release entered into by the Applicant, News Life Media Pty Limited and Samantha Maiden (together **News**), compromising proceedings NSD 104 of 2023.
2. Yesterday, Senior Counsel for the Second Respondent informed the parties and the Australian Broadcasting Corporation (the **ABC**) (by its Senior Counsel) of an intention to tender the Deed of Settlement and Release entered into by the Applicant and the ABC, compromising proceedings NSD 316 of 2023.
3. It is understood that those documents will be tendered in support of the Second Respondent's case on mitigation and causation, and that the Second Respondent intends to rely upon s 38 of the *Defamation Act*. News and the ABC make no submission in respect of the admissibility of the documents which is a matter for the parties.
4. In the event that there is a tender of those documents, News and the ABC seek the following orders:
 1. Those parts of the Deed of Settlement and Release entered into by the Applicant, News Life Media Pty Limited and Samantha Maiden, compromising proceedings NSD 104 of 2023, that have been redacted from the document attached to these submissions and marked "A" and any counterpart (the

“**Confidential Parts**”) be treated as confidential, within the meaning of Rule 2.32.

2. Pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), on the ground that the order is necessary to prevent prejudice to the proper administration of justice, until further order of the Court, there be no publication or disclosure of the Confidential Parts (as that term is defined in order 1) of the Deed of Settlement and Release entered into by the Applicant, News Life Media Pty Limited and Samantha Maiden, compromising proceedings NSD 104 of 2023, other than to or between the parties to proceedings NSD 103 of 2023 for the purpose of the conduct of that proceeding.
3. The Deed of Settlement and Release entered into by the Applicant and the ABC, compromising proceedings NSD 316 of 2023, be treated as confidential, within the meaning of Rule 2.32, save that this order will not prevent disclosure of:
 - (a) the fact of settlement of the said proceeding;
 - (b) the discontinuance of the said proceeding;
 - (c) the obligation of the ABC to publish a statement in the form set out in Schedule 2 to the deed or the terms of that statement; or
 - (d) the entitlement of either party to that deed to publish any of the following statements:
 - i. “The proceedings have settled on mutually acceptable, confidential terms, without admission of liability.”
 - ii. “As part of the settlement, the ABC paid an amount as contribution towards [Mr Lehmann’s] legal costs.”
 - iii. “No amount for damages or compensation was paid by the ABC as part of the settlement.”
4. Subject to order 3, pursuant to s 37AF of the Act, on the ground that the order is necessary to prevent prejudice to the proper administration of justice, until further order of the Court, there be no publication or disclosure of the Deed of Settlement and Release entered into by the Applicant and the ABC, compromising proceedings NSD 316 of 2023, other than to or between the parties to proceedings NSD 103 of 2023 for the purpose of the conduct of that proceeding.
5. Upon the making of those orders, News would not oppose inspection by any person of the document attached to these submissions and marked “A”.

6. News and the ABC acknowledge that it will be necessary for the Court (and the parties) to inspect unredacted versions of each of the deeds and respectfully request that those documents be treated as confidential, pending the determination of this application and the determination of any argument over the admissibility of those documents. Alternatively, an order should be made pursuant to s 37AI of the Act, pending determination of this application.

The News Deed

7. In May 2023, the Applicant and News compromised the Applicant's claim in proceedings NSD 104 of 2023. By clause 7 of that deed, the parties agreed to refrain from disclosure of certain information. Clause 7(a) has no continuing relevance, given the fact of discontinuance of the relevant proceeding. The mutual confidentiality obligation in clause 7(b) has continuing relevance.
8. Pursuant to clause 7(b), the Applicant and News agreed to refrain from disclosure of the quantum of the costs payment referred to in clause 3(b) of the deed, and to refrain from making any representations as to the scale of the quantum of the said costs payment. (It is clear that the reference to clause 3(b) was intended to be a reference to clause 2(b), which clause contains the relevant sum.) That restriction extended to third parties who may come or may have come into possession of the confidential information.
9. The proviso to that restriction permitted disclosure "if compelled by law, but then only to the extent required by law". In substance, the parties to the deed preserved their right to make this application.

The ABC Deed

10. Unlike the News deed, the ABC deed was expressed to be confidential, save for those matters identified in clause 10.1, subject to clause 10.2. Relevantly, the fact of settlement, the discontinuance of the proceeding, the statement in Schedule 2 to the deed, and the statements identified in clause 11.1 of the deed were not to be treated by the parties as confidential.

The foundation for the orders

11. There can be no doubt that each of News and the ABC is a person with a sufficient interest in maintaining the confidence of the terms on which each settled proceedings brought by the Applicant against each of them. In the context of the relief sought, each of News and the ABC is a person within the terms of s 37AH(1)(b) of the Act.

12. Whilst it is clear that a primary objective of the administration of justice is to safeguard the public interest in open justice, it is not the *only* primary objective: see *Porter v Australian Broadcasting Corporation* [2021] FCA 863 at [83]. As Jagot J observed, the objective contained within s 37M of the *Federal Court of Australia Act* to “facilitate the just resolution of disputes according to law and as quickly, inexpensively and efficiently as possible” is another primary objective to be taken into account. As ss 37AE- 37AL recognise, it is “sometimes necessary that information filed or given in a proceeding not be disclosed or published”: see *Porter* at [84]. Such information may include commercially confidential information: *Porter* at [84] – [85].
13. That primary objective includes the efficient use of judicial and administrative resources and the disposal of proceedings in a timely manner: see s 37M(2). S 37N requires parties to conduct proceedings, including negotiations for settlement, in a way that is consistent with that primary objective.
14. The principle of open justice is not absolute and has always yielded to contrary necessity: see *Porter* at [86] and [107]. It may be necessary to prevent prejudice to the proper administration of justice to make orders restricting access to a document, and the principle of open justice must yield: see *Porter* at [110].
15. In the context of an application for removal of a document from the Court file, Jagot J discerned no difference between the effect of making an order under s 37AF and the making of an order restricting public access to a document, and concluded that each raised the same considerations: see *Porter* at [88] - [91].
16. In *Porter* (at [55]), Jagot J referred with apparent approval to *McLaughlin v Glenn* [2020] FCA 679.
17. *McLaughlin* was a case where the parties had settled the proceeding and a suppression order was sought after settlement in respect of documents the subject of an access application by a non-party. The non-party had sought access to the originating application (which contained a complaint to the Australian Human Rights Commission and associated documents) and the statement of claim. The Court made orders prohibiting the publication of those documents, ordering that they be kept confidential and refusing third party access.
18. In *McLaughlin*, Abraham J recognised (at [26] – [28]) the “very significant public interest in the settlement of litigation” and noted that “the parties have achieved finality through agreement which may be undermined if a third party has access to and could report on matters which the parties seek to keep confidential”.

19. At [28], Abraham J referred, with apparent approval, to the following observations of Mortimer J (as the Chief Justice then was) in *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149 (2015) 241 FCR 397 at [30]:

“Second, the settlement of the proceeding strengthens the case to refuse access. In my opinion, and even in the absence of evidence about the precise terms of settlement of this proceeding, it would be inimical to the negotiation process which leads to the settlement of a proceeding in this Court, its discontinuance without judicial pronouncement of any kind, and the accompanying closing of the Court’s file with no further proceedings in open court, for a sensitive document such as the AHRC Complaint to be released over an applicant’s opposition. It would not be unusual for parties (not just applicants) in proceedings such as this to have as one of the motivations for settlement a desire to keep from the public gaze detailed factual allegations of the kind which are frequently set out in complaints made to the Commission. The Court should be mindful not to frustrate these consequences of settlement which may be in the contemplation of parties when they agree to resolve a proceeding by agreement.”

20. In each of *McLaughlin* and *Oldham*, the documents in respect of which orders were sought were documents which contained the allegations that had been made in the proceedings. An objective of the compromise was to keep from public access the allegations made in the proceeding.
21. In *Porter* (at [93]), Jagot J referred with approval to statements made by Mortimer J (as the Chief Justice then was) in *Valentine v Fremantlemedia Australia Pty Ltd* [2013] FCA 1293 at [13] – [16], including the observation that the maintenance of confidentiality around settlement is an important and often critical aspect of a successful resolution of proceedings. Jagot J said that the observation had application in defamation proceedings.
22. Whilst each of *Porter*, *McLaughlin* and *Oldham* concerned applications for the restriction of publication of and access to allegations made in the proceedings the subject of compromise, the observations of Jagot J in *Porter* extend further.
23. In *Porter*, Jagot J ultimately ordered that the unredacted defence and the unredacted reply filed in those proceedings be removed from the Court file.
24. At [99], her Honour noted that the function of the Court under s 37M was to facilitate the just resolution of disputes, and that that function included the facilitation of the settlement of disputes by parties on terms agreed between the parties, provided those terms are lawful and the rights or interests of third parties are not affected.
25. In the instant application, News and the ABC do not seek to restrict any party from using the information contained in the deeds for the legitimate purpose of the conduct of the

proceedings. Relevantly, News and the ABC do not contend that if the information in the deeds is considered by the Court to be relevant to the questions of causation and mitigation that a party to the proceedings should be prevented from using that evidence. The application is that the use of that information be moderated by the orders sought, ensuring that the confidentiality of certain information contained in the deeds is maintained.

26. In *Duma v Fairfax Media Publications Pty Limited (No 4)* [2023] FCA 159, the amount received from a previous settlement was kept confidential and received by the Court as an agreed fact: at [9], [56].
27. News and the ABC do not apprehend any submission that the settlements into which each entered was unlawful. As such, the lawful contractual bargain made by the Applicant with each of News and the ABC should be upheld, which bargain provided for confidentiality of certain terms of settlement. As Jagot J observed in *Porter* at [104] – [105], it may be necessary in the proper administration of justice to give effect to the contractual bargain of the parties and to avoid prejudice to the proper administration of justice by “potentially discouraging parties from settling all elements of their dispute”.
28. In the present application, it is clear that it was fundamental to the settlement of the two proceedings that certain information be kept confidential. In the case of News, that information was the quantum of the contribution made by News towards the Applicant’s costs of the relevant proceeding. For its own commercial reasons, News wished to keep that fact confidential, and the Applicant agreed to treat it as confidential. On the basis of that agreement, and consistent with the parties’ obligations under s 37N(1), the proceeding between them came to a conclusion without the need for determination by the Court.
29. In the case of the ABC, the information the subject of a confidentiality obligation included not only the quantum, but also other terms of the agreement made. The bargain reached by the Applicant and the ABC was that the mode and manner of settlement would be kept confidential, subject to the matters which were intended by the parties to that deed to be capable of public disclosure. It is not readily apparent why the disclosure of the mode and manner of settlement (subject to those carve-outs) would be relevant to an issue in the instant proceeding. What is clear from the fact that the ABC wished to keep its settlement deed confidential, and that the Applicant agreed to do so, is that there is a commercial interest of, at the very least, the ABC which should be preserved. Consistent

with their obligations under s 37N(1), the Applicant and the ABC also resolved their dispute and the basis upon which that dispute was resolved should be maintained.

30. Having regard to the obligation imposed upon parties under s 37N(1), it is necessary for the proper administration of justice to uphold the bargain of parties who comply with that obligation and settle disputes, on a confidential basis, and thereby assist in the efficient use of Court resources. The possibility that a concluded confidential settlement might be made public (save in the context of a proceeding to enforce that settlement) may operate as a disincentive to litigants wishing to compromise their disputes. For that reason, the proper administration of justice in this Court, more generally, is engaged.

Conclusion

31. News and the ABC respectfully request the Court to make orders in the terms referred to above, and reserve their right to respond to any submission made by any party.

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