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### Details of Filing

Document Lodged:	Outline of Submissions
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 that reads 'Sia Lagos'.

Dated: 24/05/2021 10:33:30 AM AEST

Registrar

### Important Information

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No. NSD426/2021

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

## **APPLICANT'S OUTLINE OF SUBMISSIONS**

### **1. INTRODUCTION**

#### **1.1 The applicant's case**

1. The first respondent, Ms Chrysanthou, is a barrister and senior counsel. She advised the applicant, Ms Dyer in late 2020 and early 2021. Ms Chrysanthou has accepted a brief for the second respondent, Mr Porter, in his defamation proceedings against the Australian Broadcasting Corporation and a journalist, Ms Louise Milligan. The applicant seeks to restrain Ms Chrysanthou from continuing to act for Mr Porter. The applicant's case is that Ms Chrysanthou should be restrained because there is a real and obvious risk that she may misuse information that is subject to a duty of confidentiality owed by her to Ms Dyer, or because her continued representation of Mr Porter, in the circumstances, may adversely affect the appearance of the administration of justice in this Court and the integrity of the judicial process, or both.
2. Issues arising in the ABC proceedings intersect with the content of confidential communications made to Ms Chrysanthou during the course of her lawyer-client relationship with Ms Dyer.

3. Ms Chrysanthou has not of her own volition ceased to act for Mr Porter in the ABC proceedings. It is therefore necessary and appropriate for this Court to permanently restrain her from doing so.

## 1.2 Issues for determination by this Court

4. There are two alternative grounds on which the Court might restrain a legal practitioner in the circumstances arising in this proceeding:
- (a) *first*, if a reasonable person, informed of the relevant facts, might reasonably anticipate a danger of misuse of confidential communications made to Ms Chrysanthou in the context of the lawyer-client relationship between her and Ms Dyer, and there is a real and sensible possibility that the interests of Ms Chrysanthou in advancing Mr Porter’s case might conflict with her duty to keep the information confidential and refrain from using that information to Ms Dyer’s detriment;<sup>1</sup> or
  - (b) *secondly*, where the proper administration of justice requires the Court to prevent the lawyer from acting, to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice.<sup>2</sup>
5. In relation to the first ground, the following issues arise for determination:<sup>3</sup>
- (a) Was there was a lawyer-client relationship between Ms Chrysanthou and Ms Dyer?
  - (b) What was the relevant information imparted in the context of that relationship?
  - (c) Is the relevant information confidential?
  - (d) Is Ms Chrysanthou in possession of the relevant information?
  - (e) Is Ms Chrysanthou acting “against” Ms Dyer in the ABC proceedings in the requisite sense?
  - (f) Is there a real risk that the confidential information will be relevant to the ABC proceedings?
  - (g) Is there no risk of misuse of the confidential information?
6. In relation to the second ground, the Court must determine whether to exercise its supervisory jurisdiction to restrain Ms Chrysanthou even if it has not been established that there is a

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<sup>1</sup> *Nash v Timbercorp Finance Pty Ltd (in liq)* [2019] FCA 957 (*Timbercorp*) at [62] (Anderson J).

<sup>2</sup> *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065 (*Dealer*) at [4] (Beach J).

<sup>3</sup> *Timbercorp* at [64].

sufficient risk of misuse of Ms Dyer’s confidential information.<sup>4</sup>

## **1.2 How the issues for determination should be decided**

7. From at least 20 November 2020, Ms Chrysanthou was in a client-lawyer relationship with Ms Dyer from which a duty of confidentiality arose in respect of confidential information communicated to Ms Chrysanthou within the confines of that relationship.
8. The relevant information imparted in the context of the client-lawyer relationship between Ms Chrysanthou and Ms Dyer fell within two broad categories: (a) specific items of information communicated to Ms Chrysanthou in confidence; and (b) Ms Chrysanthou’s impressions of Ms Dyer and her personality, character, honesty, strengths, weaknesses and attitudes to litigation.
9. The relevant information was passed to Ms Chrysanthou within the confines of a client-lawyer relationship and therefore by its nature attracted the duty of confidentiality at the time that it was imparted. The information was not already notorious at the time of its communication. It remains confidential information that has not entered the public domain.
10. The relevant information was imparted to Ms Chrysanthou in conference and is otherwise based on Ms Chrysanthou’s understanding of Ms Dyer formed from that same conference. Ms Chrysanthou is therefore relevantly “in possession” of that information, even if she cannot presently recall it.
11. Ms Dyer is likely to be called as a witness for the respondents in the ABC proceedings.
12. There is an obviously discernible intersection between matters alleged in the ABC proceedings and the issues that have become the subject of interrogatories issued by Mr Porter in those proceedings and the confidential information imparted on Ms Chrysanthou in the course of her client-lawyer relationship.
13. There is, therefore, a significant risk that Ms Chrysanthou may misuse, in the relevant sense, Ms Dyer’s confidential information to prosecute Mr Porter’s case.
14. Even if it cannot be established that there is a risk of misuse of Ms Dyer’s confidential information by Ms Chrysanthou, the Court should nonetheless exercise its supervisory jurisdiction and restrain Ms Chrysanthou from continuing to act for Mr Porter to protect the integrity of the judicial process and the due administration of justice, including the appearance of justice.

## **2. THE LAWYER-CLIENT RELATIONSHIP**

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<sup>4</sup> *Dealer* at [93]-[96].

## 2.1 The identification of the lawyer-client relationship

15. A well-recognised category of fiduciary relationship exists between legal practitioner and client.<sup>5</sup> The fiduciary character of the relationship is emphasised because there is a public element to the work of a legal practitioner which is integral to the administration of justice, and the existence of legal professional privilege and the policy considerations underlying it are “inconsistent with a rule that would too readily allow a [legal practitioner], who has received confidential information from one client, to later act for another client against the old client’s interests”.<sup>6</sup>
16. The duty of confidentiality is not an incident of the fiduciary relationship between a lawyer and a client, but rather a contractual or (as in this case) equitable duty owed by the lawyer to preserve the client’s confidential information.<sup>7</sup> It therefore survives the termination of the fiduciary relationship.<sup>8</sup> Nonetheless, the identification of the fiduciary relationship of lawyer-client between two persons assists in identifying whether the duty of confidentiality attaches to communications that pass between them.
17. A legal practitioner may take up the role of a fiduciary by a less than formal arrangement than contract.<sup>9</sup> The existence and scope of the duty may derive from a course of dealing.<sup>10</sup> As Mason J observed in *Hospital Products Ltd v United States Surgical Corporation*,<sup>11</sup> a fiduciary relationship may be identified where a person “undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or practical sense”.<sup>12</sup> His Honour noted that the fiduciary has, in such circumstances “a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position”.<sup>13</sup>

## 2.2 Ms Chrysanthou’s course of dealing with Ms Dyer

18. Ms Chrysanthou’s course of dealing with Ms Dyer indicates that from at least 20 November

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<sup>5</sup> *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 (***Hospital Products***) at 96-7 (Mason CJ); *Sent v John Fairfax Publications Pty Ltd* [2002] VSC 429 at [33], [105]-[106] (Nettle J); *Timbercorp* at [63].

<sup>6</sup> *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 311 (Drummond J).

<sup>7</sup> *Dealer* at [35].

<sup>8</sup> *Dealer* at [35].

<sup>9</sup> *Beach Petroleum NL v Abbott Tout Russell Kennedy & Ors* [1999] NSWCA 408; (1999) 48 NSWLR 1 (***Beach***) at [192].

<sup>10</sup> *Beach* at [194].

<sup>11</sup> (1984) 156 CLR 41.

<sup>12</sup> *Hospital Products* at 96-7 (Mason CJ).

<sup>13</sup> *Hospital Products* at 96-7 (Mason CJ).

2020, she had agreed to act in the interests of Ms Dyer in a manner which would affect Ms Dyer's interests in a legal and practical sense.

19. On or around 17 November 2020, Ms Dyer formed the view that [REDACTED]. [REDACTED] She instructed Mr Michael Bradley of Marque Lawyers, a firm of solicitors, to act for her.<sup>16</sup> Ms Dyer also sought advice from Mr Matthew Richardson, of counsel,<sup>17</sup> and for that purpose she, and her friend Mr James Hooke, met with Mr Richardson.<sup>18</sup> Mr Richardson suggested that Ms Chrysanthou might also be able to assist, and that he would ask her.<sup>19</sup> Mr Richardson asked Ms Chrysanthou to attend a conference with Ms Dyer on 20 November 2020, and she agreed.<sup>20</sup> Prior to the conference, [REDACTED]. [REDACTED].
20. On 20 November 2020, Ms Dyer, Mr Hooke, Mr Bradley and Mr Richardson attended a conference in Ms Chrysanthou's chambers [REDACTED]. [REDACTED]<sup>22</sup> During the course of the conference, Ms Chrysanthou received confidential information and advised [REDACTED].<sup>3</sup> She also [REDACTED].<sup>4</sup> Ms Chrysanthou indicated that she would not charge for the advice given at the conference or for [REDACTED]. [REDACTED].
21. Between 20 November and 23 November 2020, Ms Chrysanthou was copied on emails in which Mr Richardson provided advice in relation to [REDACTED]. [REDACTED].<sup>5</sup>
22. On two separate occasions on 23 November 2020, Ms Chrysanthou provided her own advice in relation to [REDACTED]. On the first occasion, the advice was communicated to Mr

<sup>14</sup> Dyer, JED-1, pp 9-13 (CB35).

<sup>15</sup> Dyer [15]-[17] (CB30).

<sup>16</sup> Bradley [5] (CB50); Dyer [18] (CB30).

<sup>17</sup> Dyer [19]-[20] (CB31).

<sup>18</sup> Hooke [8] (CB43); Dyer [20] (CB31).

<sup>19</sup> Hooke [8] (CB43).

<sup>20</sup> Chrysanthou [19]-[20] (CB201).

<sup>21</sup> Chrysanthou [21] (CB201).

<sup>22</sup> Hooke [10] (CB44); Dyer [21] (CB31); Bradley (CB51)

<sup>23</sup> Chrysanthou [28] (CB203).

<sup>24</sup> Chrysanthou [18] (CB200).

<sup>25</sup> Bradley [10] (CB51).

<sup>26</sup> Bradley, MDB-5 pp 48-59 (CB96-107).

Richardson who emailed the advice to Mr Bradley and copied Ms Chrysanthou into the email.<sup>27</sup> The second occasion arose in a conference call between Mr Bradley, Ms Chrysanthou and Mr Richardson at approximately 4.30pm that day.<sup>28</sup>

23. On 25 November 2020, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>30</sup> [REDACTED]  
[REDACTED]<sup>31</sup>
24. On 13 January 2021, Mr Bradley emailed Ms Dyer, Ms Chrysanthou and Mr Richardson, copying Mr Hooke, that [REDACTED]  
[REDACTED]<sup>32</sup>  
Mr Bradley indicated that he was available the following week to discuss. On 27 January 2021, Ms Chrysanthou responded to the email asking Mr Bradley to let her know when he wanted to discuss.<sup>33</sup> A conference was arranged for 4.30pm on 28 January 2021.<sup>34</sup> It took place on Microsoft Teams between Ms Chrysanthou, Ms Dyer, Mr Hooke, Mr Richardson and Mr Bradley.<sup>35</sup>
25. On 29 January 2021, Ms Chrysanthou emailed Mr Hooke, copying Ms Dyer, Mr Bradley and Mr Richardson.<sup>36</sup> Ms Chrysanthou addressed the email to the “Team” and indicated that [REDACTED]  
[REDACTED]  
[REDACTED] Ms Chrysanthou made clear that [REDACTED]  
[REDACTED] Ms Chrysanthou also made reference to a discussion that had been had between herself and other recipients of her email earlier that day.
26. On 10 February 2021, Mr Hooke emailed Ms Chrysanthou [REDACTED]

<sup>27</sup> Bradley, MDB-5, p 60 (CB108).

<sup>28</sup> Bradley, MDB-5, pp 61-70 (CB109-118)

<sup>29</sup> Bradley, MDB-5, p 72 (CB120).

<sup>30</sup> Bradley, MDB-5, p 73 (CB121).

<sup>31</sup> Bradley, MDB-5, p 74 (CB122).

<sup>32</sup> Bradley, MDB-5, p 95 (CB143).

<sup>33</sup> Bradley, MDB-5, p 99 (CB147).

<sup>34</sup> Bradley, MDB-5, pp 100-103 (CB148-151).

<sup>35</sup> Bradley Reply, MDB-6, pp 6-9 (CB455-458); Hooke Reply, JH-1, p 12 (CB485).

<sup>36</sup> Bradley, MDB-5, p 104 (CB152).

[REDACTED] On the same day, Ms Chrysanthou responded to sa [REDACTED] On 12 February 2021, Mr Hooke received a further email from Ms Chrysanthou [REDACTED]

27. On 4 March 2021, Mr Richardson emailed Ms Dyer and Mr Hooke copying Ms Chrysanthou.<sup>40</sup> The email indicated that [REDACTED]

28. On 30 March 2020, Patrick George of Kennedy’s, a firm of lawyers representing Ms Chrysanthou, wrote to Mr Bradley stating that Mr George had “taken detailed instructions from Ms Chrysanthou”<sup>41</sup>. Mr George’s letter contained the following assertions:

(a) “I am instructed that you act for Ms Jo Dyer *for whom our client has previously acted in*

[REDACTED]<sup>42</sup>

(b) “Prior to accepting the brief for Mr Porter, [Ms Chrysanthou] spoke to Matthew Richardson, junior counsel for Ms Dyer, who arranged the conference and was present, and asked him whether to his recollection she had any confidential information *as a result of her instructions from Ms Dyer.*”<sup>43</sup>

29. It is plain from the matters described above that from at least 20 November 2020 until 4 March 2021, Ms Chrysanthou had partaken in a course of dealing involving Ms Dyer in which Ms Chrysanthou had: (a) advised Ms Dyer in relation to [REDACTED]

[REDACTED] (b) [REDACTED] and (c) [REDACTED]

Accordingly, Ms Chrysanthou agreed to act for Ms Dyer, and did so act, in the exercise of her powers and discretions as counsel and in a manner which affected Ms Dyer’s interests in both a legal and practical sense. Ms Chrysanthou was, by this course of dealing, in possession of the special opportunity to exercise her powers and discretions to Ms Dyer’s detriment. Accordingly, there existed a fiduciary relationship between Ms Chrysanthou and Ms Dyer, and that the nature

<sup>37</sup> Hooke Reply, JH-3, p 16 (CB489).

<sup>38</sup> Hooke Reply, JH-4, p 18 (CB491).

<sup>39</sup> Hooke Reply, JH-5, p 20 (CB493).

<sup>40</sup> Bradley, MDB-5, p 105 (CB153).

<sup>41</sup> Bradley, MDB-5, p 106 (CB154).

<sup>42</sup> Bradley, MDB-5, p 106 (emphasis added) (CB154).

<sup>43</sup> Bradley, MDB-5, p 106 (emphasis added) (CB154).



of that relationship was one of lawyer and client.

### 3. THE RELEVANT INFORMATION

#### 3.1 Categories of relevant information

30. Two broad categories of information may become the subject of a duty of confidentiality between a lawyer and a client. The first category relates to the disclosure of specific items of information that may, depending on the facts of the case, be identified with relative precision.<sup>44</sup>

31. The second category of information consists of the revelations that are made by the client, including subconsciously, through the course of their interaction with their lawyer, and the impression that is consequently formed by the lawyer of the client.<sup>45</sup> That impression may relate to the client's personality, character, honesty, strengths, weaknesses and attitudes to litigation,<sup>46</sup> and may be formed by the lawyer over the course of an interaction with a client that lasts no longer than a couple of hours.<sup>47</sup> It may also be inferred from the nature of the work undertaken by the lawyer for the client.<sup>48</sup> There is no need for an applicant to particularise this category of information.<sup>49</sup>

32. Both types of information arise on the facts in this proceeding.

#### 3.2 Background to disclosure of relevant information

33. On 9 November 2020, the ABC broadcast an episode of the program "Four Corners" entitled "Inside the Canberra Bubble". In preparing that episode, [REDACTED]

[REDACTED] 0 [REDACTED]  
[REDACTED]  
[REDACTED] 51

34. At the 20 November 2020 conference, in the course of seeking advice in relation to [REDACTED]  
[REDACTED] Ms Dyer and Mr Hooke disclosed to Ms Chrysanthou a broad range of information [REDACTED]

<sup>44</sup> *Timbercorp* at [66].

<sup>45</sup> *Sent and Primelife Corporation Ltd v John Fairfax Publication Pty Ltd* [2002] VSC 429 (*Sent*) at [67].

<sup>46</sup> *Yunghanns v Elfic Ltd (formerly known as Elders Finance & Investment Co Ltd)* (unreported, Supreme Court of Victoria, Gillard J, 3 July 1998) at 10-11, as cited in *Sent* at [67]; *Timbercorp* at [68].

<sup>47</sup> *Sent* at [68]-[70].

<sup>48</sup> *Sent* at [69]-[70].

<sup>49</sup> *Timbercorp* at [72].

<sup>50</sup> Dyer [13] (CB30).

<sup>51</sup> Bradley, MDB-1, pp 10-11 (CB58-59).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>52</sup> Those disclosures form the basis for

the relevant information in this case.

**3.3 First category of information: specific items of disclosure to Ms Chrysanthou**

35. **Information A:** Ms Dyer disclosed [REDACTED]  
[REDACTED]<sup>53</sup>

36. **Information B:** Mr Hooke disclosed [REDACTED]  
[REDACTED]<sup>54</sup>

37. **Information C:** Ms Dyer and Mr Hooke discussed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>55</sup>

38. **Information D:** Mr Hooke disclosed that [REDACTED]  
[REDACTED]

39. **Information E:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>56</sup>

<sup>52</sup> Chrysanthou, SC-2, p 24 (CB220).

<sup>53</sup> Dyer [25(b)] (CB32).

<sup>54</sup> Hooke [15(b)] (CB44); Dyer [25(b)] (CB32); Hooke Reply [18] (CB479).

<sup>55</sup> Dyer [25(e)] (CB32), Hooke [15(f)] (CB45)

<sup>56</sup> Hooke Reply [19] (CB480).

<sup>57</sup> Hooke Reply [19] (CB480).

<sup>58</sup> Dyer [25(e)] (CB32); Bradley [13] (CB51).

<sup>59</sup> Hooke Reply [19] (CB480).

<sup>60</sup> Dyer [25(g)] (CB32), [25(h)] (CB32); Bradley [20(e)] (CB52); Hooke [15(i)] (CB45)

<sup>61</sup> Hooke Reply [16(a)] (CB478).

<sup>62</sup> Hooke Reply [16(b)] (CB478), [16(c)] (CB479).

<sup>63</sup> Hooke Reply [16(d)] (CB479).

40. **Information F:** Ms Dyer and Mr Hooke disclosed the [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>66</sup>

41. **Information G:** Ms Dyer disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]<sup>68</sup>

42. **Information H:** Ms Dyer disclosed [REDACTED]  
[REDACTED]<sup>69</sup>

43. **Information I:** Mr Hooke disclosed that [REDACTED]  
[REDACTED]  
[REDACTED]

44. **Information J:** Ms Dyer's disclosed [REDACTED]  
[REDACTED]<sup>71</sup>

45. **Information K:** Ms Dyer disclosed [REDACTED]  
[REDACTED]<sup>72</sup>

46. **Information L:** Ms Dyer disclose [REDACTED]

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<sup>64</sup> Dyer [25(g)] (CB32), [25(h)]; Bradley [20(e)]; Hooke [15(i)] (CB45), Hooke Reply [11] (CB477), [14] (CB478).  
<sup>65</sup> Hooke Reply [11] (CB477), [14] (CB478).  
<sup>66</sup> Hooke Reply [14] (CB478).  
<sup>67</sup> Bradley [20(f)]; Hooke [15(j)] (CB45), Hooke Reply [9] (CB476).  
<sup>68</sup> Hooke Reply [9] (CB476).  
<sup>69</sup> Dyer [25(g)] (CB32), [25(h)]; Bradley [20(e)] (CB52); Hooke [15(i)] (CB45)  
<sup>70</sup> Hooke Reply [19] (CB480).  
<sup>71</sup> Dyer [25(c)] (CB32).  
<sup>72</sup> Dyer [25(d)] (CB32).

47. **Information M:** Ms Dyer disclosed [REDACTED]

48. **Information N:** Ms Dyer disclosed [REDACTED]  
[REDACTED]<sup>75</sup>

### 3.4 Second category of information: Ms Chrysanthou's impressions of Ms Dyer

49. The disclosure of the relevant information set out above was made in a conference with Ms Chrysanthou which lasted for 1 hour to 2 hours. The disclosures were made within the confines of a lawyer-client relationship, in which Ms Dyer and Mr Hooke were unguarded about the information being revealed. The disclosures and the context in which they were made placed Ms Chrysanthou in a position to observe and form an impression as to Ms Dyer's strengths, weaknesses, honesty, knowledge and beliefs, and that impression is relevant information for the purposes of this proceeding.

## 4. THE RELEVANT INFORMATION IS CONFIDENTIAL

### 4.1 The presumption of confidentiality

50. There is no precise formulation for determining whether information is confidential, however, it has been observed that "given the relationship of lawyer and client and the ambit of professional confidence of which professional privilege is a manifestation, the Court should...not be slow to accept the existence of confidential information".<sup>76</sup> Consistently with this principle, all communications by a client to a lawyer are *prima facie* confidential<sup>77</sup> since the very passing of information from client to lawyer within the confines of that relationship will attract to that information a confidential character.<sup>78</sup> That presumption also applies to information that has not come from directly from the client, but was nonetheless imparted within the confines of the lawyer-client relationship.<sup>79</sup>

51. The presumption of confidentiality applies with even greater force to the impression formed by a lawyer of a client, the incidents of which are sometimes described as "getting to know you

<sup>73</sup> Dyer [25(f)] (CB32); [25(p)] (CB33).

<sup>74</sup> Dyer [25(j)] (CB32).

<sup>75</sup> Dyer [25(o)] (CB33).

<sup>76</sup> *Village Roadshow v Blake Dawson Waldron* [2004] Aust Tort Reports at ¶81-726, 65 338; *Timbercorp* at [74].

<sup>77</sup> *Minter (Pauper) v Priest* [1930] AC 558 at 581 (Lord Atkin); *Timbercorp* at [75]; *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 453 at [83].

<sup>78</sup> *Timbercorp* at [76].

<sup>79</sup> *Timbercorp* at [76].

factors”,<sup>80</sup> over the course of their interaction. The confidentiality of that information may be inferred “from the nature and extent of work undertaken by the legal practitioner for the client”.<sup>81</sup> As Nettle J observed in *Sent*, such information is on any analysis considered “highly confidential”.<sup>82</sup>

52. The presumption of confidentiality applies unless and until it can be shown that the information is already notorious or has entered the public domain.<sup>83</sup>

#### **4.2 The presumption of confidentiality has not been displaced**

53. Having regard to the context of their disclosure within a lawyer-client relationship, the categories of information identified in the preceding section must be presumed to be confidential for the purposes of the duty of confidentiality. The presumption will continue to apply unless and until that information can be shown to be already notorious or within the public domain.

### **5. POSSESSION OF THE RELEVANT INFORMATION**

#### **5.1 Recollection of relevant information is irrelevant**

54. The duty of confidentiality attaches to information disclosed to a lawyer within the confines of a lawyer-client relationship even where the lawyer cannot consciously recall the content of that information. It has been observed that the lawyer could, in such circumstances, subconsciously avail him or herself of the relevant information, and that the risk of subconscious misuse is sufficient to restrain a lawyer from acting against a former client.<sup>84</sup>

#### **5.2 Ms Chrysanthou possesses the relevant information**

55. Ms Chrysanthou alleges that she cannot recall some or all of the relevant information.<sup>85</sup> She also alleges that she has not retained emails that she was copied into, and that she does not recall receiving or reading those emails.<sup>86</sup>
56. Even if Ms Chrysanthou has no conscious memory of the relevant information and no

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<sup>80</sup> *Sent* at [70].

<sup>81</sup> *Timbercorp* at [79].

<sup>82</sup> *Sent* at [70]; *Timbercorp* at [79].

<sup>83</sup> *Timbercorp* at [76]-[77], citing Dal Pont, *Law of Confidentiality* (LexisNexis Butterworths, 2015) at 170 and Dal Pont, *Lawyers’ Professional Responsibility* (6<sup>th</sup> ed, Thomson Reuters, 2017) at 345.

<sup>84</sup> *Gillies v Dibbets* [2001] QSC 459.

<sup>85</sup> Chrysanthou [34] (**CB204**).

<sup>86</sup> Chrysanthou [37]-[38] (**CB207**).

continuing record of related communications, the relevant information was communicated to Ms Chrysanthou within the context of an in-person conference which she admits attending.<sup>87</sup> She is therefore relevantly in possession of that information.

## 6. ACTING “AGAINST” MS DYER

### 6.1 The position of a witness

57. In *Timbercorp*, a former client who sought to restrain certain legal practitioners from acting in a proceeding was not a party to that proceeding. The proceeding was a public examination in which the former client was a potential examinee. After considering the nature of a public examination, Anderson J concluded that the former client in was in a position analogous to a witness in a court proceeding.<sup>88</sup> His Honour observed that while possible misuse of information may occur where a legal practitioner’s new client acts against a former client, the doctrine extends further and the “touchstone of restraint of a [legal practitioner] is not direct opposition to the former client per se, but rather *conflict* with the legal practitioner’s duty of confidentiality to client”.<sup>89</sup> His Honour considered that such conflict would disadvantage or operate to the detriment of a former client,<sup>90</sup> and could arise on the existence of a conflict in the confidentiality owed to a former client who is a witness in the new proceeding.<sup>91</sup>

### 6.2 Ms Dyer is likely to be a witness in the ABC proceeding

58. [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] it is likely that Ms Dyer will be called as a witness for the respondents in that proceeding in order to establish that information was sought from her, and the nature of that information.

<sup>87</sup> Concise Response (First Respondent) [2(d)] (CB13)

<sup>88</sup> *Timbercorp* at [96], albeit that Anderson J acknowledged that an examinee does not have all the protections afforded to a witness in adversarial litigation at [97].

<sup>89</sup> *Timbercorp* at [98]; *Sent* at [33].

<sup>90</sup> *Timbercorp* at [98].

<sup>91</sup> *Timbercorp* at [99].

<sup>92</sup> Defence filed on behalf of the respondents in the ABC Proceedings (ABC Defence) [11].

<sup>93</sup> ABC Defence, Schedule 1, 5(x)(vi).

59. Ms Chrysanthou is a barrister subject to the *Legal Profession Uniform Conduct (Barristers) Rules 2015*. Accordingly, she has standing professional obligations towards Mr Porter as a current client to “promote and protect fearlessly and by all proper and lawful means [Mr Porter’s] best interests to the best of [Ms Chrysanthou’s] skill and diligence, and do so without regard to... any other person”.<sup>94</sup> There is a real risk that Ms Chrysanthou will be required to fulfill that obligation to the disadvantage and detriment of Ms Dyer as a witness in those proceedings.
60. Ms Chrysanthou maintains that she has given an undertaking not to cross-examine Ms Dyer if she becomes a witness in the ABC proceedings,<sup>95</sup> and that Ms Dyer is not disadvantaged or likely to suffer detriment as a witness in that proceeding by the fact that Ms Chrysanthou acts for Mr Porter.<sup>96</sup> Having regard to the fact that Ms Chrysanthou maintains that she cannot recall some or all of the relevant information, however, Ms Chrysanthou is not in a position to satisfy the Court that no misuse of the relevant information will occur subconsciously. Moreover, Ms Chrysanthou’s undertaking not to cross-examine Ms Dyer is of only limited utility since it will not prevent Ms Chrysanthou’s active participation in other parts of the proceeding, such as the drafting of critical preparatory documents and conferral with co-counsel and solicitors. If left unrestrained, such ongoing participation, which may manifest in numerous and unpredictable ways, could indirectly disadvantage or cause detriment to Ms Dyer’s interests as a witness in the proceeding.

## 7. RELEVANCE TO ABC PROCEEDINGS

61. There is an obviously discernible intersection between the relevant information and the issues arising in the ABC proceedings. The nexus may be established by reference to the matters pleaded in the Statement of Claim filed on behalf of Mr Porter in those proceedings on 15 March 2021 (the **Porter Statement of Claim**) and the interrogatories issued by Mr Porter to each of the respondents in those proceedings. Ms Chrysanthou admits that she drafted the Porter Statement of Claim,<sup>97</sup> and Ms Giles deposes that Ms Chrysanthou also drafted the interrogatories.<sup>98</sup> [REDACTED]
- [REDACTED]
- [REDACTED]

<sup>94</sup> *Legal Profession Uniform Conduct (Barristers) Rules 2015*, rule 35.

<sup>95</sup> Concise Response (First Respondent) [18(d)] (**CB19**).

<sup>96</sup> Concise Response (First Respondent) [18(e)] (**CB19**).

<sup>97</sup> Chrysanthou [58] (**CB209**).

<sup>98</sup> Giles [47] (**CB233**).

**7.1 Porter Statement of Claim**

62. The Porter Statement of Claim alleges: “*Shortly prior to her death in June 2020, AB had informed persons, including Malcolm Turnbull, Senator Penny Wong, Daniel Mulino MP, her friends, and others unknown to Porter, that she had allegations to make about Porter’s conduct in 1988, even though the details of her allegations were not specified to each of those persons.*”<sup>99</sup>

63. The following confidential information is relevant to the above particular:

- (a) **Information A:** Ms Dyer disclosed [REDACTED]  
[REDACTED]
- (b) **Information B:** Mr Hooke disclosed [REDACTED]  
[REDACTED]
- (c) **Information E:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

64. The Porter Statement of Claim alleges: “*For the purposes of preparing the November 4Corners and the two articles referred to in the preceding particulars, Milligan conducted interviews with many persons who knew Porter during which she asked a range of personal questions about him including his sexual preferences and whether he forced a former partner to perform sexual acts against her will*”.<sup>100</sup>

65. The following confidential information is relevant to the above particular:

**Information F:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>99</sup> Porter Statement of Claim [5], particular (l) – emphasis added (CB67).

<sup>100</sup> Porter Statement of Claim [5] particular (j) (CB67).



[REDACTED]

66. The Porter Statement of Claim alleges: *“By the time the November 4Corners was aired, a number of persons including employees of the ABC, persons to whom Milligan had spoken about Porter, persons to whom AB had communicated, and other persons unknown to Porter, were aware that some sort of sexual misconduct allegation had been made about Porter in relation to his conduct when he was about 17.”*<sup>101</sup>

67. The following confidential information is relevant to this particular:

(a) **Information E:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(b) **Information F:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED].

68. It is alleged in the Porter Statement of Claim that: *“The ABC and Milligan...were aware of AB’s allegations for many months prior to the publication of the Article [on 26 February 2021]”*.<sup>102</sup>

69. The following confidential information is relevant to the above particular.

(a) **Information E:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]

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<sup>101</sup> Porter Statement of Claim [5], particular (m) (CB67).

<sup>102</sup> Porter Statement of Claim [8], particular (f) (CB72)

[REDACTED]

(b) **Information H:** Ms Dyer disclosed [REDACTED]  
[REDACTED]

70. The Porter Statement of Claim alleges: *“Milligan intended to include, as part of the November 4Corners, allegations by a woman who claimed that Porter had raped her in 1988 at a debating competition when she was 16 and he was 17, being a person who committed suicide in about June 2000 (AB)”*.<sup>103</sup>

71. The following confidential information is relevant to the above particular.

(a) **Information G:** Ms Dyer disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

(b) **Information H:** Ms Dyer disclosed [REDACTED]  
[REDACTED]

72. The Porter Statement of Claim alleges: *“The ABC and Milligan were frustrated that they were unable to broadcast AB’s allegations in the November 4Corners as they intended...”*.<sup>104</sup>

73. The following confidential information is relevant to the above particular.

**Information G:** Ms Dyer disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**7.2 Interrogatories issued to the First Respondent**

<sup>103</sup> Porter Statement of Claim [5], particular (k) (CB67)

<sup>104</sup> Porter Statement of Claim [8], particular (f) (CB72).

74. The interrogatories issued to the First Respondent in the ABC proceedings ask:

*44. In including quotes from Jo Dyer in the 1 March article, did the First Respondent consider that readers might make the connection between the cabinet minister the subject of the Article and the November 4Corners, given Ms Dyer also appeared in that, and in which she made adverse comments about Mr Porter?*

*45. If the answer to the preceding interrogatory is in the affirmative:*

*(a) what consideration was given;*

*(b) why was Ms Dyer included in the 1 March article?*

...

*49. In including parts of an interview with Jo Dyer in the 7:30 story, did the First Respondent consider that viewers might make the connection between the cabinet minister the subject of the Article and the November 4Corners, given Ms Dyer also appeared in that, and in which she made adverse comments about Mr Porter?*

*50. If the answer to the preceding interrogatory is in the affirmative:*

*(a) what consideration was given;*

*(b) why was Ms Dyer included in the 7.30 story?*

...

*65. After the publication of the Article and before 3pm on 3 March 2021, the did the First Respondent receive any enquiries about whether the Article was connected to the November 4Corners?*

75. The following confidential information is relevant to the above interrogatories.

**Information G:** Ms Dyer disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

76. The interrogatories issued to the First Respondent ask:

*76. When did the First Respondent first become aware that AB had made an allegation of rape against Mr Porter?*

*77. How did the First Respondent first become aware that AB had made an allegation of rape against Mr Porter?*

77. The following confidential information is relevant to the above interrogatories.

**Information E:** Ms Dyer and Mr Hooke disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

78. The interrogatories issued to the First Respondent ask:

*78. Was the First Respondent given a 2 page statement said to have been written by AB about Mr Porter?*

79. The following confidential information is relevant to the above interrogatory.

**Information C:** Ms Dyer and Mr Hooke discussed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

80. The interrogatories issued to the First Respondent ask:

*98. Did any member of AB's family give the First Respondent any statement which included her allegations against Mr Porter?*

81. The following confidential information is relevant to the above interrogatory.

**Information D:** Mr Hooke disclosed [REDACTED]  
[REDACTED]

82. The interrogatories issued to the First Respondent ask:

*112. Did AB's parents, at any point in time, inform the First Respondent that they opposed the publication of any information, material or otherwise concerning AB?*

*113. If the answer to the preceding interrogatory is in the affirmative please state:*

*(a) the date of the communication;*

*(b) the substance of the communication.*

*114. Did the First Respondent at any time communicate with AB's parents?*

*115. If the answer to the preceding interrogatory is in the affirmative please state:*

*(a) the date(s) of the communication(s);*

*(b) the name of the employee or agent who communicated'*

*(c) the substance of the communication.*

83. The following confidential information is relevant to the above interrogatories.

**Information I:** Mr Hooke disclosed [REDACTED]

[REDACTED]

[REDACTED]

84. The interrogatories issued to the First Respondent ask:

*135. Did the First Respondent intend, at some time prior to 9 November 2020 to include the rape allegation against Mr Porter in the November 4Corners?*

136. *If the answer to the preceding interrogatory is in the affirmative, please state:*

*(a) the date from which it was intended that the rape allegation be included;*

*(b) the date when it was decided to exclude it;*

*(c) who decided that it not be included;*

*(d) why that decision was made.*

137. *Why did the First Respondent publish the rape allegation against Mr Porter in the Article, having not published it in November 2020?*

...

140. *Was it ever intended by the First Respondent to include the allegation by AB against Mr Porter in the November 4Corners?*

141. *If the answer to the preceding interrogatory is in the affirmative, please state the time period that such an intention existed?*

142. *Why was the allegation by AB against Mr Porter not included in the November 4Corners?*

143. *When was it decided that the allegation by AB against Mr Porter would not be included in the November 4Corners?*

144. *Which employee or agent of the First Respondent made the decision not to include the allegation by AB against Mr Porter in the November 4Corners?*

85. The following confidential information is relevant to the above interrogatories.

**Information G:** Ms Dyer disclosed [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

**8. RISK OF MISUSE OF INFORMATION**

86. It is the respondents' burden to establish that there is no risk of misuse of information by Ms

Chrysanthou.<sup>105</sup> In this context, misuse has been described as “to make any use of it or to cause any use to be made of it by others otherwise than for [the client’s] benefit”.<sup>106</sup> The risk of misuse of confidential communications particularly arises “from the acceptance of instructions to act for another client with an adverse interest in a matter to which the information is or may be relevant”.<sup>107</sup> Preference is to be given to the interests of the first client in preserving the confidentiality of its information over the rights of a second client to choose its own lawyer.<sup>108</sup>

87. For the reasons given above, there is a significant and obvious risk that Ms Chrysanthou may misuse, in the relevant sense, Ms Dyer’s relevant information.

## 9. ADMINISTRATION OF JUSTICE

88. As part of its supervisory jurisdiction, the Court possesses an inherent jurisdiction to ensure the due administration of justice, to protect the integrity of the judicial process and to restrain legal practitioners from acting a particular case. The test to be applied is whether “a fair-minded reasonably informed member of the public would conclude that the proper administration of justice required that the [lawyer] be so prevented from acting, at all times giving due weight to the public interest that a litigant should not be deprived of his or her choice of [lawyer] without good cause.”<sup>109</sup> Although there is a public interest in a lawyer having access to his or her counsel of choice, that public interest may be overridden with due cause.<sup>110</sup>
89. The restraint of a lawyer on the basis of protecting the due administration of justice and the appearance of justice has broader scope than the duty of confidentiality. The ground may be established even where there is no risk of misuse of confidential information.<sup>111</sup>
90. In the circumstances of this case, where the parties are prolific public figures and the Court’s processes are being duly scrutinised, it would be appropriate for the Court to exercise its supervisory jurisdiction to restrain Ms Chrysanthou even if, on a strict reading, it cannot be established that all the incidents of risk of misuse of confidential information have been satisfied. In such a case, maintaining the appearance of due administration of justice nonetheless weighs in favour of granting relief.

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<sup>105</sup> *Timbercorp* at [65].

<sup>106</sup> *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 (**Prince Jefri**) at 235 (Lord Millett).

<sup>107</sup> *Prince Jefri* at 235-6 (Lord Millett).

<sup>108</sup> *British American Tobacco Australia Services Ltd v Blanch* [2004] NSWSC 70 at [143] (Young CJ in Eq).

<sup>109</sup> *Dealer* at [36].

<sup>110</sup> *Dealer* at [95].

<sup>111</sup> *Dealer* at [96].

**10. RELIEF**

91. Ms Dyer seeks to restrain Ms Chrysanthou from continuing to act for Mr Porter in the ABC proceeding, and also seeks permanent non-publication orders to protect her confidentiality in respect of the information disclosed to Ms Chrysanthou.



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