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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

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Registrar

Important Information

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DYER V CHRYSANTHOU AND ANOTHER – NSD 426 OF 2021

SECOND RESPONDENT'S OPENING SUBMISSIONS

REDACTED FOR CONFIDENTIALITY

A. INTRODUCTION

1. The issue in these proceedings is whether the First Respondent, Sue Chrysanthou SC, ought to be restrained from acting for the Second Respondent, Charles Christian Porter, in proceedings brought by him in this Court against the ABC Corporation (**ABC**) and journalist Louise Milligan in which he alleges he has been defamed (**Porter Proceedings**).

2. The Applicant seeks an order pursuant to s 23 of the *Federal Court of Australia Act 1976* (Cth) that, until further order, Ms Chrysanthou be restrained from acting for Mr Porter in the Porter Proceedings. The Applicant, Joanne Dyer, advances two bases on which her claim to injunctive relief rests. *First*, the protection of confidential information. *Secondly*, the Court's inherent jurisdiction.

3. For the reasons outlined below, and which will be developed in closing submissions, the Court would not exercise its jurisdiction to restrain Ms Chrysanthou from acting for Mr Porter in the Porter Proceedings. The jurisdiction invoked by Ms Dyer is an exceptional one. It must be exercised with caution and due weight must be given to the public interest in a litigant not being deprived on the counsel of his choice without due or good cause.

B. FACTUAL BACKGROUND

4. The material facts may be summarised as follows.

[redacted]Ms Dyer appeared on the Four Corners' episode "Inside the Canberra Bubble" which aired on ABC TV on 14 November 2020. [redacted] In that episode, some extracts from the interview were

broadcast.[1]

Following the airing of that Four Corners' episode, an article was published in The Australian by Janet Albrechtsten entitled "Vested interests cornered by ABC hatchet job" (**Australian Article**).[2] [3] On 17 November 2018, both Ms Dyer and Mr Hooke met with Michael Bradley, Managing Partner of Marque Lawyers,

Ms Dyer and Mr Hooke met with Mr Richardson on 18 November 2020

9. A conference was arranged in Ms Chrysanthou's chambers on 20 November 2020 at 10am. Ms Dyer, Mr Hooke, Mr Bradley and Mr Richardson attended (although Mr Richardson was some minutes late). This conference, and what was said to be disclosed by Ms Dyer at the

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1 Affidavit of Rebekah Ruth Giles sworn 20 May 2021 (**Giles**), Exhibit RG-2 pages 26 and 36 (CB 248 and 258).

2 Giles Exhibit RG-2 pages 45-49 (CB 267-271).

3 Affidavit of Joanne Elizabeth Dyer affirmed 10 May 2021 (**Dyer**) [15]-[17] (CB 30); affidavit of James Royce Murray Hooke sworn 10 May 2021 (**Hooke**) [5] (CB 43).

4 Dyer [18] (CB 30); Hooke [6] (CB 43); affidavit of Michael David Bradley affirmed 10 May 2021 (**Bradley**) [7] (CB 50).

5 Hooke [9] (CB 44).

6 Affidavit of Theognosia (Sue) Chrysanthou affirmed 19 May 2021 (**Chrysanthou**) [12]-[16] (CB 199-200).

conference, is central to the present proceedings. It lasted for about an hour. These submissions return to the topics of information discussed at the conference further below.

[redacted]

[redacted]

[redacted]

[redacted]

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7 Chrysanthou [27] (CB 202).

8 Chrysanthou [28] (CB 203).

9 Chrysanthou [31] (CB 204).

10 Confidential Annexure MDB-5, pages 68-69 (CB 116 and 117).

11 Confidential Annexure MDB-5, page 67 (CB 115).

12 Chrysanthou [29] (CB 203).

13 Bradley [20] (CB 53), Confidential Annexure MDB-5 pages 48 to 59 (CB 96-107).

14 Chrysanthou [30] (CB 203).

[redacted]

[15] Chrysanthou [33] (CB 204).

[16] Bradley [20] (CB 53), Confidential Annexure MDB-5 pages 48 to 59 (CB 96-107).

[17] Bradley [20] (CB 53), Confidential Annexure MDB-5 page 60 (CB 108).

[18] Bradley [20] (CB 53), Confidential Annexure MDB-5 page 66 (CB 114).

[19] Bradley [20] (CB 53), Confidential Annexure MBD-5 page 67 (CB 115).

[20] Bradley [20] (CB 53), Confidential Annexure MDB-5 page 72 (CB 120).

[21] Bradley [20] (CB 53), Confidential Annexure MDB-5 page 73 (CB 121).

[22] Bradley [20] (CB 53), Confidential Annexure MDB-5 page 74 (CB 122).

[23] Bradley [20] (CB 53), Confidential Annexure MDB-1 pages 9-12 (CB 10-12).

[24] Dyer [28] (CB 33); Bradley [20] (CB 53), Confidential Annexure MDB-5 page 76 (CB 124).

[redacted]

[redacted]

[redacted]

25 Dyer [29] (CB 33), Bradley [21] (CB 53), Confidential Annexure MDB-5 pages 78-89 (CB 126-137).

26 Bradley [21] (CB 53), Confidential Annexure MDB-5 pages 84-90 (CB 132-138).

27 Confidential Annexure MDB-5 page 93 (CB 141).

28 Confidential Annexure MDB-5 page 94 (CB 142).

29 Dyer [30] (CB 33); Chrysanthou [41]; Confidential Annexure MDB-5 page 95 (CB 143).

30 Dyer [31] (CB 33); Confidential Annexure MDB-5 page 99 (CB 147).

31 Chrysanthou [42] (CB 206); Bradley [22] (CB 53); affidavit of Michael David Bradley affirmed 21 May 2021 (**Bradley #2**) at [3] (CB 451).

32 Chrysanthou [43] (CB 206).

33 Dyer [34] (CB 34); Chrysanthou [43] (CB 206); Confidential Annexure MDB-5 page 104 (CB 152).

34 Affidavit of James Hooke, dated 21 May 2021 (**Hooke #2**) at [31] (CB 493).

21. On 26 February 2020, an article was published on the ABC website by the ABC and Ms Milligan entitled "Scott Morrison, senators and AFP told of historical rape allegation against Cabinet Minister" (**ABC Article**).[35] The ABC Article is the subject of the Porter Proceedings. Mr Porter identified himself as the person against whom the historical rape allegation had been made on 3 March 2021.[36]

[redacted]

23. On 8 March 2021, the Four Corners episode "Bursting the Canberra Bubble" was aired on ABC. Ms Dyer appeared in the episode.[40]

24. On 10 March 2021, Mr Porter called Ms Giles to seek her advice in relation to damage to his reputation. Ms Giles recommended instructing Ms Chrysanthou to advise and appear in any defamation proceedings to be brought by Mr Porter. Later that day, Ms Giles, Mr Porter and Ms Chrysanthou had a conference during which Chrysanthou says that she "will need to check that I have no conflict because of a conference last year". Ms Chrysanthou telephoned Mr Richardson that day. One of the things she asked him was whether she had any confidential information from the conference. Mr Richardson said words to the effect of "I don't think so, not given all of the public statements that have been made now." She spoke to some other senior counsel. She did not consider that she had a proper basis to refuse the brief for Mr Porter. Later that day, Ms Chrysanthou and Ms Giles spoke, and Ms Chrysanthou said to Giles words to the effect "I've checked – I don't have any confidential information, there is no

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35 Giles [32] (CB 230); Chrysanthou [44] (CB 206).

36 Chrysanthou [46] (CB 207).

37 Chrysanthou [47] (CB 207).

38 Chrysanthou [47] (CB 207).

39 Confidential Annexure MDB-5 page 105 (CB 153).

40 Giles [34] (CB 230).

conflict, I can accept the brief", to which Giles says "Great. You are now briefed in this matter".[41]

25. During the period, Ms Giles and Ms Chrysanthou worked long hours to advise Mr Porter as to an appropriate cause of action and to prepare pleadings for the anticipated Porter Proceedings[42] which were commenced on 15 March 2021.[43] Ms Chrysanthou participated in the drafting of the statement of claim.[44]

26. That same day, 15 March 2021, Ms Chrysanthou had a conversation with Mr Bradley in which Ms Chrysanthou informed Mr Bradley that she had considered whether she had a conflict to act in the Porter Proceedings and had determined that she did not. Mr Bradley said he would speak to Ms Dyer about it.[45] [redacted] Ms Chrysanthou expressed her view that she did not consider she had a basis to return the brief in the Porter Proceedings.[46]

27. Ms Chrysanthou informed Ms Giles of the position being taken by Ms Dyer.[47] They had a conversation with Mr Porter shortly thereafter where Ms Chrysanthou said, "If I have confidential information which I do not think I do, I cannot use it for your benefit in any way." Mr Porter said, "I understand and accept the position."[48]

[redacted] From that time until 24 March 2021, Ms Chrysanthou continued to work on the Porter Proceedings.[49] On the afternoon of 24 March 2021, Mr Bradley telephoned Ms Chrysanthou [redacted]

41 Giles [12]; Chrysanthou [48]-[53] (CB 207-208).
42 Giles [14]; Chrysanthou [54] (CB 208).
43 Dyer [35] (CB 34); Bradley [25] (CB 54); Giles [16] (CB 225), [34] (CB 230); Chrysanthou [57] (CB 208).
44 Chrysanthou [58] (CB 209).
45 Bradley [26] (CB 54); Bradley #2 [4]-[6] (CB 451-452); Chrysanthou [57]-[58] (CB 208-209).
46 Chrysanthou [58] (CB 209); Bradley #2 [7]-[8] (CB 209).
47 Giles [17]-[18] (CB 226).
48 Giles [17]-[18] (CB 226); Chrysanthou [59] (CB 210).
49 Giles [19] (CB 226); Chrysanthou [60] (CB 210).
50 Chrysanthou [61] (CB 210); Bradley #2 [9] (CB 454).

[redacted]

29. From 30 March 2021, Ms Chrysanthou engaged Patrick George (of Kennedys) to represent her. There was correspondence between Marque Lawyers and Kennedys in respect of the issue over the period 30 March 2021 to 30 April 2021.[52] On 30 April 2021, Marque Lawyers provided to Kennedys draft documents (including affidavits of Ms Dyer, Mr Hooke and Mr Bradley) in respect of proposed proceedings in the Supreme Court of NSW seeking to restrain Ms Chrysanthou from acting in the Porter Proceedings.[53] The letter also stated:

> the identity of the deponents in these proceedings (in particular Mr Hooke) and the fact of his attendance at the conference with Ms Chrysanthou is among the confidential matters our client is entitled to protect. We ask that, consistent with your earlier practice, you keep those facts confidential, unless and until they are otherwise made public.

[redacted] Ultimately, these proceedings were commenced on 10 May 2021. The Concise Statement is redacted [redacted]

31. In the period between 15 March 2021 and the commencement of these proceedings, as detailed further below, Ms Chrysanthou worked long hours on the Porter Proceedings, including particularly from 4 May 2021 when the defence in the Porter Proceedings was filed.

C. ISSUES FOR DETERMINATION

32. As noted at the outset, Ms Dyer advances two bases on which her claim to injunctive relief rests. *First*, the protection of confidential information. *Secondly*, the Court's inherent jurisdiction.

33. Within those two bases, a number of issues arise for determination. At a very high level, they are summarised in Ms Dyer's opening submissions at [5]-[6]. The relevant principles with respect to those issues are set out below.

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51 Chrysanthou [63]-[65] (CB 212); Bradley #2 [10]-[12] (CB 454).

52 Bradley [27]-[35] (CB 55-56), Confidential Annexure MDB-5 pages 106-130 (CB154-178).

53 Affidavit of Nathan Thomas Mattock sworn 10 May 2021 (**Mattock**) at [3] (CB 181), Annexure NTM-1 page 4 (CB 183).

34. It should be noted at this point that Ms Dyer's case is based on nine core foundations: *first*, the existence of a lawyer-client relationship between Ms Dyer and Ms Chrysanthou[54]; *second,* that Ms Chrysanthou's duties in relation to the confidential information are owed to Ms Dyer and not anyone else; *third*, that it was her confidential information that was passed to Ms Chrysanthou during the conference and it is that information that she seeks to protect through these proceedings (not anyone else's); *fourth*, the information disclosed *by Ms Dyer* in conference may be relevant to Ms Chrysanthou's carriage of the Porter Proceedings[55]; *fifth*, Ms Dyer's views about that information and when she knew it may be relevant to Ms Chrysanthou's carriage of the Porter Proceedings[56]; *sixth,* "Ms Dyer will be called by the ABC as a witness in Mr Porter's defamation proceedings" and "is therefore likely to be subject to cross-examination by counsel for Mr Porter"[57]; *seventh*, the 20 November 2020 conference has put Ms Chrysanthou "in a position to form an overall opinion as to Ms Dyer's strengths, weaknesses, honesty, knowledge and beliefs" and that is also confidential information;[58] *eighth*, that Ms Chrysanthou would be required by her duty to Mr Porter to disclose him Ms Dyer's confidential information[59] and *ninth*, that "[t]he Applicant is at a real risk of being at a disadvantage or suffering detriment as a witness in that proceeding if Ms Chrysanthou continues to act for Mr Porter."[60]

35. It may be seen that the heart of Ms Dyer's case concerns the potential for misuse of her confidential information, with the principal risk arising out of Ms Dyer's allegation that she will be called as a witness by the ABC in the proceedings.

36. Two further points should be noted. *First,* the case as described at paragraph 34 is the case that Mr Porter has come to meet and in a case like this, brought on with expedition, the Applicant must be held to the pleading. *Secondly,* there is no allegation that Ms Chrysanthou has used any of the alleged confidential information in her carriage of the Porter Proceedings thus far. Thus, in examining the pleadings and draft interrogatories in that case, the starting point is that everything that is alleged has been alleged on the basis of information obtained independently from anything said at the 20 November 2020 conference. The case is brought on the basis of

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54 Concise Statement at [1] (CB 6).

55 Concise Statement at [25] (CB 9).

56 Concise Statement at [25] (CB 9).

57 Concise Statement at [30] (emphasis added) (CB 10).

58 Concise Statement at [23] (CB 9).

59 Concise Statement at [26] (CB 10).

60 Concise Statement at [30] (CB 10).

prospective potential misuse of the information, if Ms Dyer becomes a witness in the proceedings.

D. RELEVANT PRINCIPLES

Lawyer-client relationship

37. Ms Dyer does not advance as a separate basis for the injunctive relief she seeks any fiduciary duty of loyalty said to be owed by Ms Chrysanthou to Ms Dyer by reason of an ongoing lawyer-client relationship.[61] While an issue as to the scope of any lawyer-client relationship between Ms Chrysanthou and Ms Dyer is an issue in the proceedings – as it informs the question of whether confidential information was imparted to Ms Chrysanthou by Ms Dyer – Ms Dyer does not contend that there is any *ongoing* lawyer-client relationship between the two. If there was a lawyer client relationship, it came to an end by 29 January 2021 when Ms Chrysanthou spoke to Mr Quill about a possible resolution of the case and he never came back to her.

38. It is also noted that it is not advanced in this case that there was ever any lawyer-client relationship between Mr Hooke and Ms Chrysanthou. This is relevant for reasons explained at paragraph 95 below.

39. It is trite that a well-recognised category of fiduciary relationship exists between a legal practitioner and a client. However, as the NSW Court of Appeal emphasised in *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 [188]-[189], even in the case of a lawyer-client relationship, the duty is not derived from the status. As in all such cases, the duty is derived from what the lawyer undertakes, or is deemed to have undertaken to do, in the particular circumstances. Not every aspect of the lawyer client relationship is fiduciary. Conduct which may fall within the fiduciary component of the relationship of a lawyer and client in one case, may not fall within the fiduciary component of another. Likewise, not every communication made to the lawyer may fall within the scope of the retainer.

40. In the present case, [redacted] However, Ms Dyer submits that a relationship of counsel and client was established by Ms Chrysanthou and Ms Dyer with respect to their course of dealing in the one conference on

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61 *Cf*, for example, *Técnicas Reeunidas SA v Andrew* [2018] NSWCA 192 (***Técnicas Reeunidas***).

20 November 2020 and subsequent email correspondence [redacted] until early March 2021.

41. Neither Respondent admits (by their Concise Responses) that a fiduciary relationship was established in the present case. And while the Second Respondent does not dispute that a lawyer-client relationship arose on 20 November 2020 conference [redacted], the submission he makes is that even if the Court is satisfied that there was such a relationship, that in and of itself is not determinative of the relief sought by Ms Dyer in these proceedings. In particular, and as detailed further below, it does not reduce Ms Dyer's burden of identifying with precision the information imparted to Ms Chrysanthou during the course of those dealings, nor her burden of establishing that information was confidential, nor or burden of establishing its relevance to the Porter Proceedings and the risk of misuse.

Protection of confidential information

42. The Court will restrain a legal practitioner continuing to act for a party to litigation if a reasonable person informed of the facts might reasonably anticipate a danger of misuse of confidential information of a former client and that there is a real and sensible possibility that the interest of the practitioner in advancing the case in litigation might conflict with the practitioner's duty to keep the information confidential, and to refrain from using that information to the detriment of the former client.[62]

43. The test for restraining a legal practitioner on the basis of possible misuse or the risk of misuse of confidential information requires the Court to consider and determine the following sequence of questions[63]:

    a. What is the relevant information?

    b. Is that information confidential?

    c. Does the legal practitioner have possession of that information?

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62 *Mallesons Stephen & Jaques v KPMG Peat Marwick* (1990) 4 WAR 357 at 362-3 (Ipp J); *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1 at 5 (Hayne J); *Sent v John Fairfax Publication Pty Ltd* [2002] VSC 429 (***Sent***) at [35] (Nettle J).

63 *Nash v Timbercorp Finance Pty Ltd (in liq), in the matter of the bankrupt estate of Nash* (2019) 137 ACSR 189 (***Re Timbercorp***) at [64] (Anderson J).

d. Is the legal practitioner proposing to act "against" the former client in the requisite sense?

e. Is there a real risk that the confidential information will be relevant?

f. Is there no real risk of misuse of the confidential information?

44. Ms Dyer bears the onus of answering question (a) with sufficient particularity and also satisfying the Court of affirmative answers to questions (b) to (e).[64] The Respondents bear the burden of establishing question (f).

45. The relevant authorities with respect to each of the above questions may be summarised as follows.

What is the relevant information?

46. In answering the first of the above questions, the first and most fundamental principle established by the authorities, on countless occasions, is that Ms Dyer must identify with precision the confidential information alleged to have been imparted to the legal practitioner. As Drummond J explained in *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307 at 314 (emphasis added):

> It is a basic requirement that before material will be recognised as having the character of confidential information, the information in question must be identified with precision and not merely in global terms: *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 443 and cf *O'Brien v Komesaroff* (1982) 150 CLR 310 at 327. The requirement is insisted upon even though it may necessitate disclosing to the court the very information the confidentiality of which it is sought to preserve by the action. This requirement has its foundation in the need for the court to be able to frame a clear injunction, should relief against misuse of confidential information be granted. There are procedures available that will minimise the risk that confidentiality will be lost by the litigation process, although the applicant did not seek to invoke them here. Cf R Dean, Law of Trade Secrets, p 122 and s 50 of the *Federal Court of Australia Act 1976* (Cth). But the requirement goes to a matter more fundamental than that: "The more general the description of the information which a plaintiff seeks to protect, the more difficult it is for the court to satisfy itself that information so described was imparted or received or retained by a defendant in circumstances which give rise to an obligation of confidence": *Independent Management Resources Pty Ltd v Brown* [1987] VR 605 at 609 (emphasis added).

47. More recently, in *Re Timbercorp*, Anderson J summarised the requirement that information be identified with sufficient particularity at [66] as follows (emphasis added):

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[64] *Re Timbercorp* at [64] (Anderson J). This test was cited with approval in *Mumbin v Northern Territory of Australia (No 1)* [2020] FCA 475 at [38]-[39] (Griffiths J).

> For material to possess the character of confidential information, the information in question must be identified with precision: *In re A Firm of Solicitors* at 10; *Carindale* at 314, citing *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* [1987] FCA 266; (1987) 14 FCR 434 at 443; *O'Brien v Komesaroff* [1982] HCA 33; (1982) 150 CLR 310 at 327; *Durban Roodepoort Deep, Limited v Mark David Reilly and Glenn Robert Featherby As Administrators of the Deed of Company Arrangement of Laverton Gold NL (Subject to Deed of Company Arrangement) & Ors* [2004] WASC 269 (Durban) at [69]-[80]. As explained by Le Miere J in *Durban* at [80], the precise identification of the information is also central to the subsequent characterisation of its potential misuse:
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> > Before a court will grant an injunction to protect a client's confidential information by restraining his former solicitor from acting against him, the former client must establish that the solicitor possesses confidential information and must identify the confidential information with precision and not merely in global terms. The client must identify the confidential information with some particularity. The degree of particularity required must depend upon the facts of the particular case. The confidential information must be identified with sufficient particularity to enable the court to determine whether the information is truly confidential, whether the confidential information which once existed, if it did, continues to be confidential and whether the confidential information is relevant to any issue in the current proceedings and might be used in those proceedings.

48. That requirement – to identify the relevant information with sufficient particularity – is critical. Otherwise, the Court cannot determine whether there could be any risk or danger that it may be sued to the detriment of Ms Dyer in these proceedings, or to the advantage of Mr Porter in the Porter Proceedings.[65] As Pagone J observed in *Slaveski v State of Victoria & Ors* [2009] VSC 540 (***Slaveski***) at [13], it is not enough that the information alleged to have been given to a legal practitioner relates generally to the proceedings:

> [I]t is the detail and particularity of the confidential information that matters. The detail matters because it is by reference to the detail that a court is able to evaluate both the need to maintain confidentiality and the degree of apprehension for potential misuse. The degree of particularity that may be given may vary with the circumstances, and the court may fashion appropriate means for the reception of evidence to ensure proper evaluation without inappropriate disclosure; but the evidence here is only of a short and most general discussion which is not shown to impact in any concrete way on the proceedings.

49. There is good reason why it is necessary to identify the confidential information with specificity. As Pagone J observed in *Slaveski* at [6], "[t]he ease with which such allegations can be made, and the potential damage which they may cause if accepted, required more precision of detail than supplied by Mr Slaveski, and requires greater confidence in the accuracy of the facts asserted than I can have on the evidence and submissions put by Mr Slaveski." In that case, it was not that the subject matter of the information imparted to the barrister had no relevance to the proceedings, but it was that the information was "described so

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[65] *Bahonko v Nurses Board of Victoria (No 3)* [2007] FCA 491 at [8] (Middleton J).

broadly as to be incapable of maintaining a claim for a conflict or a possible misuse of confidential information": at [7]. That same may be said in the present case for reasons articulated below.

50. It is acknowledged that that the requirement to identify the requisite information with sufficient particularity needs to be applied with a degree of flexibility. In *Sent* at [65]-[71], while his Honour approached the question of precision of information in accordance with the principles articulated in *Carindale Country Club* set out above, his Honour quoted from the decision of Gillard J in *Yunghanns v Elfic Pty Ltd* (1998) Butterworth Cases 9803497 at page 10 as follows:

> The degree of particularity of the confidential information must depend upon all the circumstances. Often, it cannot be identified for fear of disclosure. In considering this factor it must be borne in mind that a solicitor makes notes, forms views and opinions of clients and observes things that the client may have forgotten or overlooked.
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> In some cases, the circumstances of the retainer and the nature of the legal work will be sufficient to establish the nature of the confidential information. In this regard, the relationship between solicitor and client may be such the solicitor learns a great deal about his client, his strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics. These are factors which I would call the getting to know you factors. The overall opinion formed by a solicitor of his client as a result of his contact may in the circumstances amount to confidential information that should not be disclosed or used against the client.

51. While it may be accepted that less precision is required insofar as the alleged relevant information comprises what Gillard J described as "getting to know you factors", his Honour's observations do not extend to permitting an applicant seeking to restrain the legal practitioner from acting to elide, or dilute, his or her evidentiary burden of identifying the alleged confidential information disclosed with precision. Nor are those "getting to know you factors" relevant to the "first category of information" or "specific items of disclosure" said to be made to Ms Chrysanthou in the present case. They are only relevant to the "second category of information" alleged to be disclosed i.e. "Ms Chrysanthou' s impressions of Ms Dyer." These submissions return to that distinction further below.

52. To the extent that reliance is placed on "getting to know you factors", it is still incumbent on the applicant for injunctive relief to provide evidence of the information imparted that is said to have enabled the practitioner to form a view about the client's "strengths, his weaknesses, his honesty or lack thereof, his reaction to crisis, pressure or tension, his attitude to litigation and settling cases and his tactics."[66]

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[66] See above at paragraph 50.

Is that information confidential?

53. In her opening submissions at [50]-[52], Ms Dyer emphasises that it is not necessary to demonstrate some particular quality of confidentiality in relation to the material and that any information received by a legal practitioner in relation to a client's affairs is *prima facie* confidential.[67]

54. One must be careful, however, not to apply that principle in a vacuum. For one thing, it is to overstate the principle as a "presumption" of confidentiality; indeed, in *Bolkiah Prince Jefri v KPMG* [1999] 2 AC 222 at 236-237 (***Prince Jefri***), Lord Millett considered it unnecessary to "introduce any presumptions, rebuttable or otherwise" in relation to this matter. For another thing, one should not divorce that statement of principle from the unusual circumstances of the present case. A client could tell the practitioner something obvious not confidential, for example, that the sky is blue. That of course would not be confidential and there could be no expectation that the practitioner would keep that information confidential. That of course is an extreme example but it shows that there are lot of facts so widely and public known as to be non-confidential.

55. As such, there is little utility in applying a presumption, as the Applicant does, that everything that is said in a discussion between lawyer and client is confidential and such an assumption should not be applied. *First,* it would involve applying a legal assumption that in many cases will be against the facts. *Second,* the application of that kind of presumption visits an unfairness on the practitioner or in this case the practitioner's client (Mr Porter), because it is being deployed to try to shift a legal burden to Mr Porter to disprove the presumption, i.e. to prove what was discussed was not confidential and to prove that there is no risk of misuse of confidential information. The unfairness arises because neither Mr Chrysanthou nor Mr Porter can be told the information that is said to be confidential.

56. It follows that the ordinary standards of proof should be applied and there is a burden on the Applicant to prove that the information was and remains confidential with admissible evidence and no legal presumption should arise either way. There is no suggestion in this case that the

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[67] *Re Timbercorp* at [73]-[77] (Anderson J) referring to Professor Dal Pont's quotation of a Canadian decision which expresses that "any information received by a lawyer in his professional capacity concerning his client's affairs is prima facie confidential unless it is already notorious or was received for the purposes of being used publicly or otherwise disclosed in the conduct of the client's affairs"; *Mumbin* at [38(c)] (Griffiths J).

Applicant would be incapable of supplying admissible evidence of the kind necessary to prove the confidentiality of the information, properly particularised.

57. As elaborated below and will be explored in more detail in closing submissions, the evidence will establish that much of the information said to have been disclosed to Ms Chrysanthou in the 20 November 2020 conference (to the extent it has been particularised or proven by admissible evidence) is information which had already entered the public domain or, subsequent to the 20 November 2020 conference and before Ms Chrysanthou was retained in the Porter Proceedings, became publicly available thereby losing any confidential character it might have had. The evidence will establish that Ms Dyer herself was motivated that the topics of information said to be disclosed at the 20 November 2020 conference become publicly known. While these proceedings are not the forum to criticise Ms Dyer's motivations (and the Second Respondent does not in any way seek to do so), those motivations mean that the Court, in the circumstances of the present case, cannot "readily infer" that what was disclosed in the 20 November 2020 conference was information that was confidential or information that remains confidential to date.

58. Indeed, the duty of confidentiality lasts only as long as the information in question remains outside of the public domain. And once confidential information is characterised as having been released into the "public domain" it forever loses its character as confidential.[68] Whether information has been released into the public domain is a question of fact and degree. As Ward J (as the Chief Judge in Eq. then was) explained in *Brand v Monks* [2009] NSWSC 1454 at [180] and [184] (by reference to authority):

> [180] Whether information has entered the public domain to such an extent as to permit its disclosure in the face of a contractual prohibition against disclosure is a question of fact and degree, taking into account the circumstances and the extent of any existing publication of the information. If only limited publication has occurred, and if relative secrecy remains, then the information may well retain its confidential character.
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> ...
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> [184] Whether something has entered the public domain is a question of fact and will often be a matter of degree. I am not aware of a definitive test as to when it may be said that information is sufficiently accessible or so widely known as to be regarded as being in the public domain. If relative secrecy remains, notwithstanding a limited publication of the information, then it seems likely that the information in question

[68] *Re Timbercorp* at [77] (Anderson J).

> will not have lost the necessary quality of confidence in order to preclude a duty of confidence arising in equity.

59. Another way of putting the point, as Sackville J did in *Seven Network Limited v News Limited* [2007] FCA 1062 at [2955], is that it is very difficult to regard information as being confidential, or having been communicated to the recipient in circumstances importing an obligation of confidence, if the information is very similar in character to that which the communicator has previously chosen for its own purposes to place in the public domain.

Is the legal practitioner in possession of the confidential information?

60. The legal practitioner must be "in possession of" the confidential information in the relevant sense. For physical and electronic documents, this is ordinarily simple to determine.[69] In a case where much of the confidential information is said to be what was orally disclosed to Ms Chrysanthou in the 20 November 2020 conference, the task may be more complex. In that sense, this aspect of the test is inextricably intertwined with the requirement that the Applicant identify the alleged confidential information with sufficient precision. Because if it is not so precisely identified, the Court cannot determine the question of whether the legal practitioner is in fact in possession of it.

Is the legal practitioner proposing to act "against" the applicant in the requisite sense?

61. As Anderson J observed in *Re Timbercorp* at [89], most applications to restrain a legal practitioner from acting against a former client are made in the context of adversarial litigation. However, as Ms Dyer points out in her opening submissions at [57], Anderson J went on to find that a former client of the legal practitioner who was a potential examinee in a liquidator's examination was acting "against" the applicant in the requisite sense. His Honour considered that in those circumstances there was a conflict with the legal practitioner's duty of confidentiality owed to the applicant. As his Honour observed at [98] (emphasis added):

> Various authorities and commentary contain observations to the effect that a legal practitioner may be enjoined on the basis of a possible misuse of confidential information where the legal practitioner's new client is to "act against" the former client. That is undoubtedly true but the doctrine extends further. The touchstone of the restraint of a solicitor is not direct opposition to the former client per se, but rather conflict with the legal practitioner's duty of confidentiality to the client (see *Mallesons* at 362-3; Sent at [33]), and that such conflict would disadvantage, or operate to the detriment of, the former client (see *Carindale* at 312-313) (emphasis added).

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[69] *Re Timbercorp* at [86] (Anderson J).

62. The facts were that Nash was a bankrupt, on his own petition, who was served with a summons for examination and orders for the production of books and records. The summons was issued by the liquidators. Thus there was no real dispute that Nash was going to be examined and could evidence in the examinations that was relevant to whatever the liquidators were examining. Mills Oakley (who were acting for the liquidators) had acted for Nash and a related company in contentious and non-contentious years in the period 2001 to 2009 (and the relevant period for the examination was from 1 July 2006) – hence the risk of use of misuse of confidential information Mills Oakley had obtained from Nash throughout that period. Further, his Honour went on to hold that Mills Oakley was acting "against" the bankrupt examinee in that case, in particular because "the examination 'is inquisitorial and investigatory by nature and is designed to lead to further action against the bankrupt should this be seen to be warranted by his answers[70]'".

63. The evidence does not allow the Court to draw the same conclusion as to the likelihood of Ms Dyer being a witness, for reasons explained in paragraphs 109 to 116 below, and her interaction with Ms Chrysanthou lasted about an hour, not eight years, as in *Re Timbercorp*.

Is there a real risk that the confidential information will be relevant?

64. In the present case, the questions which arise in respect of the question referred to immediately above, overlap with the next question – namely whether there is a real risk that the confidential information will be relevant. As Anderson J summarised in *Re Timbercorp* at [102]:

> For a legal practitioner to be restrained from acting against a former client on the basis of possible misuse of confidential information, the 'possible misuse' must be sufficiently characterised. There must be a sufficient nexus between the confidential information of the former client and the manner in which it is to be misused by the legal practitioner.

65. For the reasons outlined below, Ms Dyer will not satisfy the Court that there is a real risk that any information imparted to Ms Chrysanthou at the 20 November 2020 conference will be relevant in the requisite sense.

Risk of misuse?

66. Only if the Ms Dyer satisfies the above requirements, does the onus shift to the Respondents to establish that there is no real risk of misuse of confidential information.[71] It must be shown

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[70] *Re Timbercorp* at [100] (Anderson J), citing *R v Zion* [1986] VR 609 at 614 (Murphy J).

[71] *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd & Ors* [2015] VSC 453 at [66], [70(b)] (Riordan J); *Prince Jefri* at 237 (Lord Millett).

that there is no risk (in the sense of no real risk, as opposed to a risk that is merely fanciful or theoretical) of disclosure. Whether or not this is a heavy burden depends upon the particulars of the confidential information said to have been disclosed, i.e. how confidential it is, whether it is likely to become confidential and whether certain steps can be taken to reduce the risk of misuse.

67. The Second Respondent submits that the Court likely will not need reach this question. And if it does, then the Court will be satisfied that the Respondents have met their onus for the reasons set out in paragraphs 125 to 126 below.

Inherent jurisdiction

68. The Court also has an inherent jurisdiction to restrain a legal practitioner from acting in a particular case, as an incident of its supervisory jurisdiction over its officers and to control its processes in aid of the administration of justice.[72] The test to be applied in this inherent jurisdiction is whether a fair minded reasonably informed member of the public would conclude that the proper administration of justice required that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.[73] That inherent jurisdiction is exceptional and is to be exercised with caution.[74] In determining whether the jurisdiction ought to be exercised, the Court must take into account the public interest in a litigant not being deprived of the counsel of his or her choice without due cause, the timing of the application, in that the cost, inconvenience or impracticality of requiring the barrister to cease to act may provide a reason for refusing to grant the relief.[75]

69. The jurisprudence with respect to the Court's inherent jurisdiction to restrain a legal practitioner from acting were extensively reviewed by Brereton J (as his Honour then was) in *Kallinicos*. At [76] his Honour reduced those authorities to the following convenient collation of the relevant principles:

- During the subsistence of a retainer, where the court's intervention to restrain a solicitor from acting for another is sought by an existing client of the solicitor, the foundation of the court's jurisdiction is the fiduciary obligation of a solicitor, and the

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72 *Kallinicos v Hunt* (2005) 64 NSWLR 561(***Kallinicos***) at [76] (Brereton J).

73 *Kallinicos* at [76] (Brereton J).

74 *Kallinicos* at [76] (Brereton J).

75 *Kallinicos* at [76] (Brereton J).

inescapable conflict of duty which is inherent in the situation of acting for clients with competing interests [*Prince Jefri*].

- Once the retainer is at an end, however, the court's jurisdiction is not based on any conflict of duty or interest, but on the protection of the confidences of the former client (unless there is no real risk of disclosure) [*Prince Jefri*].

- After termination of the retainer, there is no continuing (equitable or contractual) duty of loyalty to provide a basis for the court's intervention, such duty having come to an end with the retainer [*Prince Jefri; Belan v Casey; Photocure; British American Tobacco; Asia Pacific Telecommunications; contra Spincode; McVeigh; Sent*].

- However, the court always has inherent jurisdiction to restrain solicitors from acting in a particular case, as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice [*Everingham v Ontario; Black v Taylor; Grimwade v Meagher; Newman v Phillips Fox; Mitchell v Pattern Holdings; Spincode; Holborow; Williamson v Nilant; Bowen v Stott; Law Society v Holt*]. *Prince Jefri* does not address this jurisdiction at all. *Belan v Casey* and *British American Tobacco* are not to be read as supposing that *Prince Jefri* excludes it. Asia Pacific Telecommunications appears to acknowledge its continued existence.

- The test to be applied in this inherent jurisdiction is whether a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that a legal practitioner should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice [*Everingham v Ontario; Black v Taylor; Grimwade v Meagher; Holborow; Bowen v Stott; Asia Pacific Telecommunications*].

- The jurisdiction is to be regarded as exceptional and is to be exercised with caution [*Black v Taylor; Grimwade v Meagher; Bowen v Stott*].

- Due weight should be given to the public interest in a litigant not being deprived of the lawyer of his or her choice without due cause [*Black v Taylor; Grimwade v Meagher; Williamson v Nilant; Bowen v Stott*].

- The timing of the application may be relevant, in that the cost, inconvenience or impracticality of requiring lawyers to cease to act may provide a reason for refusing to grant relief [*Black v Taylor; Bowen v Stott*].

70. In *Kallinicos* itself, Brereton J found that in proceedings where it was likely that the solicitor for certain of the defendants would be a material witness on controversial issues of substance, and his evidence and the propriety of his conduct would come under scrutiny, such that he would be in a position in which client's interest, his own interest, and his obligation to the court might well be in conflict, fair-minded reasonably informed members of the public would conclude that the proper administration of justice required that the solicitor not act for those defendants in the proceedings. That facts of that case are far removed from the circumstances of the present, as outlined further below.

71. More recently in this Court, in *Mumbin* at [39], Griffiths J summarised the relevant principles which guide the exercise of the Court's separate discretion as follows (emphasis in original):

(a) The Court has 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 in a particular case as part of its supervisory jurisdiction (see, for example, *Grimwade v Meagher* [1995] VicRp 28; [1995] 1 VR 446 at 452 per Mandie J and *Dealer Support Services Pty Ltd v Motor Trades Association of Australia Ltd* [2014] FCA 1065; 228 FCR 252 at [37] per Beach J).

(b) The test to be applied is whether a fair-minded, reasonably informed member of the public might conclude that the proper administration of justice requires that a solicitor be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice (I prefer this formulation of the principle, as opposed to the use of the term "would": see *Timbercorp* at [62] per Anderson J and the cases cited therein, as opposed to the different formulation adopted by Beach J in *Dealer Support Services* at [94], upon which the Jawoyn Claim applicant relied, but I would regard even that higher standard to have been met in the circumstances here).

(c) Due weight must be given to the public interest in a client not being deprived of the legal practitioner of its choice, however, this important value can be over-ridden in an appropriate case (*Dealer Support Services* at [95] per Beach J).

(d) This basis for disqualification is not discharged by it simply being demonstrated that there is no risk of the misuse of confidential information (*Dealer Support Services* at [96] per Beach J).

(e) This basis for disqualification is an "exceptional one" and is "to be exercised with appropriate caution" (*Geelong School Supplies Pty Ltd v Dean* [2006] FCA 1404; 237 ALR 612 at [35] per Young J).

(f) A legal practitioner may be restrained from acting in a matter not only where the practitioner has a conflict of interest viz a viz a former client, but also viz a viz a person who is "as good as" a client (*Macquarie Bank Ltd v Myer* [1994] VicRp 22; [1994] VR 350 at 359 per J D Phillips J).

72. The Second Respondent submits that the above is an accurate summary of the relevant principles save for, respectfully, his Honour's adoption of the formulation of the test – namely whether a fair-minded, reasonably informed member of the public *might* conclude that the proper administration of justice requires that a legal practitioner be prevented from acting in the interests of the protection of the integrity of the judicial process and the appearance of justice. The weight of authority, including in this Court, requires that the fair-minded,

reasonably informed member of the public *would* so conclude.[76] In any event, Ms Dyer does not appear to dispute that this is the appropriate test (see her opening submissions at [88]).

73. The "exceptional" or "extraordinary" circumstances of the exercise of the Court's jurisdiction should not be understated.[77] As Young CJ in Eq observed in *Bhaghat v Global Custodians Ltd (No 1)* [2001] NSWSC 720 at [7] (unreported, 17 August 2001) (and cited with approval in *Slaveski* at [4]), the principles set out above cannot be applied in a mechanicalistic or strict manner, because otherwise it would disqualify lawyers who knew anything about a case "by a simple device". Similarly, in *Bahonko* at [3], Middleton J observed (emphasis added):

> The Court must be careful not to intervene unless it is absolutely required in the circumstances of the case. Further, the Court should be mindful that sometimes applications for restraining legal practitioners may be misused or quite inappropriately pursued by a party to proceedings. In *Freeman v Chicago Musical Instrument Co* 689 F2d 715 (1982), the Court observed at 722:
>
> > We do not mean to infer that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment.

74. That caution is pertinent in the present case for the reasons to which these submissions will return.

75. The relevant factors that weigh in the balance include:

    a. the applicant's (here Ms Dyer's) right to ensure that confidential information given by him or her to the legal practitioner is not used against him or her;

    b. the defendant's (here Mr Porter's) *prima facie* right to be represented by their counsel of choice. In that regard, counsel are required, subject to quite limited exceptions in

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[76] *Kallinicos* at [76] (Brereton J); *Sent* at [113] (Nettle J) *Geelong School Supplies Pty Ltd v Dean* (2006) 237 ALR 612 at [35] (Young J); *R v MG* (2007) 69 NSWLR 20 at [71]-[73]; [95] (McClelland CJ at CL, Bell, Hoeben JJ); *Li v Wu* [2012] FCA 164 at [7] (Jagot J); *Dealer Support Services Pty Ltd* at [94] (Beach J); *Hutchins v Cap Coast Telecoms Pty Ltd (in liq), in the matter of Cap Coast Telecoms Pty Ltd (in liq) ACN 128 716 030 (No 2)* [2015] FCA 946 at [25] (Gleeson J); *Smirke on behalf of the Jurruru People v State of Western Australia* [2017] FCA 825 at [3] (Barker J); *Young v Roads and Maritime Services (No 2)* [2018] NSWCA 91 at [12] (Beazley P); *Huang v Wong* [2018] NSWCA 94 at [30] (Beazley P; Meagher JA; Simpson AJA); *Técnicas Reeunidas* at [71] (Leeming JA).

[77] *R v Kahzaal* (2006) 167 A Crim R 565; *Main Road Property Group Pty Ltd v Pelligra & Sons Pty Ltd* [2007] VSC 43 (unreported, Bell J, 1 March 2007); *Bahonko* at [2] (Middleton J); *Commonwealth Bank of Australia v Kyriackou* [2008] VSC 146; *Slaveski* at [4] (Pagone J); *Kallinicos* at [76] (Brereton J); *Dealer Support Services* at [97] (Beach J); *Sacca v El Saafin* [2021] FCA 383 (***Sacca***) at [33] (Anastassiou J).

the Bar Rules, to accept briefs to appear. The cab rank rule is fundamental aspect of professional practice at the Bar[78];

c. that conflicts of interest are not too readily imagined where none exist and, relatedly, the Court's role to avoid manufacturing conflicts of interest by a litigant retaining counsel on some minor, or unrelated, aspect of a matter to prevent a barrister from acting against the party in the future by the possibility or suggestion of conflicts without substance[79];

d. the timeliness of the application to restrain the legal practitioner, and any delay in that process is a significant matter which tends against an order restraining the legal practitioner from continuing the act.[80] It has been observed that "this is an area in which a litigant should act promptly"[81] and that a party "must take the point at the earliest opportunity"[82]; and

e. the cost, inconvenience, impracticality and possible tactical disadvantage of requiring a legal practitioner to cease acting.[83]

76. As Pagone J observed in *Slaveski* at [5] (emphasis added):

> The public has an interest in maintaining [the right to ensure that confidential information given to a legal practitioner is not misused] so as to ensure the continued confidence in the administration of justice. The defendants have a countervailing right to be represented by counsel of their choice, although that right may have to give way to the plaintiff's right to ensure that confidential information is not misused. The public also has an interest that conflicts of interest re not too readily imagined where none exist. An independent bar is fundamental to the administration of justice. An aspect of that independence is a litigant's right to access skilled practitioners of their choice. The law must guard against insufficiently founded assertions of conflicts of interest in part because it could otherwise deny litigants access to the best representation for their disputes and in part because it could encourage immeritorious assertions and contentions. This could, in turn, deny to the courts the proper assistance that they need to achieve the correct outcome as between disputing parties. In extreme cases it could encourage

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78 *Zamattia v Zamattia* [2019] NSWSC 1769 at [29] (Leeming JA).

79 *Slaveski* at [5] (Pagone J).

80 *Sacca* (Anastassiou J) at [34] citing *Colonial Portfolio Services Ltd v Nissen* (2000) 35 ACSR 673 at [174] (Rolfe J); *Re IPM Group* at [63]-[66] (Black J) and *Turner v Turner* [2018] NSWSC 1140 at [91] (Sackar J).

81 *H Stanke & Sons Pty Ltd v Von Stanke* (2006) 95 SASR 425 at [81] (White J), cited with approval in *Sacca* at [34] (Anastassiou J).

82 *Frigger v Kitay (No 10)* [2016] WASC 63 at [31] (Le Miere J), cited with approval in *Sacca* at [34] (Anastassiou J).

83 *Sacca* at [33] (Anastassiou J) citing *Re IPM Group Pty Ltd* [2015] NSWSC 240 (***Re IPM Group***) at [51] (Black J).

> the wholly undesirable practice of manufacturing conflicts by a litigant retaining counsel on some minor, or unrelated, aspect of a matter to prevent a barrister from acting against that party in the future by the possibility or suggestion of conflicts without substance. The administration of justice must be more robust than that. A conflict is not made out by mere assertion or merely by having previously acted for someone. To have received a retainer by a client is not to disqualify counsel from ever accepting a brief against the former client in the future.

E. APPLICATION OF PRINCIPLES

Protection of confidential information

What is the relevant information?

77. Ms Dyer has taken the position in these proceedings that she would only provide evidence about what was said at the 20 November 2020 conference by way of topics. Her evidence is presented in that way[84] as is Mr Bradley's evidence.[85] The same approach is taken in Mr Hooke's first affidavit at [15].

78. The reason for that approach being taken is explained in Dyer [24] in which she deposes:

> As explained at paragraph 5 above, I do not intend to waive the legal professional privilege attached to my communications with my legal advisors on 20 November 2020. To preserve the privileged nature of those discussions, I explain only the topics that were discussed and not the content of those discussions.

79. There was, of course, never any risk that Ms Dyer would waive privilege by disclosing detailed particulars of the confidential information in her evidence to the solicitors and counsel for the First Respondent and counsel for the Second Respondent and to the Court. Disclosure for that limited purpose would not give rise to a privilege waiver and the Second Respondent has never contended otherwise. Ms Dyer has permitted the Second Respondent's counsel to see the unredacted affidavit of Ms Chrysanthou which discloses the advice given to Ms Dyer and what Ms Chrysanthou says was discussed at the conference. Ms Dyer has permitted the Second Respondent's counsel to see all of the privileged communications exhibited to the affidavit of her solicitor, Mr Bradley. Ms Dyer has permitted the Second Respondent's counsel to see the privileged communications produced by Mr Richardson on subpoena. All of that evidence is the subject of suppression orders made pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) such that only counsel for Mr Porter in these proceedings and counsel and solicitors for Ms Chrysanthou in these proceedings can see that evidence.

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[84] Dyer [25] (CB 31-32).

[85] Bradley [19] (CB 52).

80. These are the kinds of mechanisms that Drummond J was referring to in *Carindale* (see above at paragraph 46) as being available to ensure that the confidentiality of the information is not lost in the litigation process. In short, as the Applicant's legal advisors would have been aware, from their review of the authorities, including *Sent* in which this point is made at [66], quoting *Carindale,* disclosure of full details of the confidential information in affidavits from the attendees at the conference to the Second Respondent's counsel and to the Court could never have waived privilege over any advice given or undermined the confidential nature of the information.

81. Nevertheless, Ms Dyer and her legal team have self-evidently made a forensic decision to present the evidence by topic. So much was confirmed by Senior Counsel for Ms Dyer at the case management hearing on 19 May 2021[86]. The Court raised a question about the adequacy of Ms Dyer's evidence and the level of generality at which it is expressed. Ms Dyer and her legal team have evidently had a change of heart, which has culminated in the "reply" affidavit of Mr Hooke, served on the Second Respondent's Senior Counsel at 8.30am on Saturday morning and which seeks to provide "more detail" around what was discussed and to "explain the further involvement that I had with Ms Chrysanthou in relation to [redacted]"[87] He seeks to give evidence in direct speech, particularising what was said at the conference.

82. The evidence is not reply evidence at all. It is evidence in chief and the Second Respondent objects to it being admitted.

83. The other witnesses, Ms Dyer and Mr Bradley have not changed their evidence to provide further particulars, it is still presented by way of topics.

84. It follows that for the purposes of the Court determining these proceedings, Ms Dyer cannot invoke legal professional privilege to justify the generality of her evidence of the topics discussed at the 20 November 2020 conference, and avoid her burden of establishing the alleged information disclosed admissibly, and with sufficient particularity, especially where she has selectively allowed so much evidence of the privileged communications to be disclosed to counsel for the Second Respondent and solicitors and counsel for the First Respondent.

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86 T19.7 to 20.31

87 Hooke #2 [3] (CB 475).

85. The Second Respondent does not dispute that any legal advice given by Ms Chrysanthou at the 20 November 2020 conference or thereafter [redacted] is privileged.

86. The Second Respondent does not, however, accept that the following matters are privileged or confidential:

[redacted]

87. As to (a) and (b) above, those are matters that would ordinarily need to be disclosed in order to make out a claim for privilege. The basic circumstances surrounding the disclosure of confidential communications given for the dominant purpose of obtaining legal advice always have to be disclosed to sustain a claim for privilege, including the purpose for which the lawyer was retained.[88] As to (c)-(d) above, the assertion of a claim by one party against another could never be privileged and there is uncontested evidence from Ms Chrysanthou that [redacted].[89] As to (e), that fact could not be in dispute, nor could it seriously be contended that it is confidential.

<u>The first category of information: items of disclosure to Ms Chrysanthou</u>

88. Turning then to the alleged categories of information disclosed to Ms Chrysanthou, to the extent that evidence going to the "topics" discussed at the 20 November 2020 conference is within the scope of the pleading and is admitted into evidence, the Second Respondent will submit that Ms Dyer has not met her burden of establishing the critical requirement of identifying with

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88 See *Hancock v Rinehart (Privilege)* [2016] NSWSC 12 at [32]-[34] and *Rinehart v Rinehart* [2016] NSWCA 58 at [31].

89 Chrysanthou at [30] (CB 203-204).

specificity the information disclosed to Ms Chrysanthou at the conference on 20 November 2020. In circumstances where the topics of discussion are described only at the most general level, there is no way in which the Court could properly evaluate both the need to maintain confidentiality and the degree of apprehension for potential misuse.[90]

89. Take for example, the topic identified in Dyer [25(b)] (categorised as "Information A" in [35] of Ms Dyer's opening submissions) – [redacted] (a matter which will be developed in greater detail in closing submissions). Moreover, how could the Court assess whether that information was relevant to the Porter Proceedings and whether there was a risk of misuse of it by Ms Chrysanthou in the Porter Proceedings? The answer is that, based on the evidence in Dyer [25(b)], the Court could not properly answer those questions without engaging in speculation.

90. And where, as here, the Applicant says the Second Respondent has the burden of proving no risk of the misuse of confidential information, it is essential that the particulars of the information are disclosed, so that the Second Respondent can endeavour, though his counsel, to meet that burden.

[redacted] The same may be said for the topic identified in Dyer [25(g)] (categorised as "Information E" and "Information F" in [39] of Ms Dyer's opening submissions) – [redacted]

[90] *Slaveski* at [13] (Pagone J).

92. Because of the generality of the pleading and this evidence, the Court cannot assess its confidentiality or the risk associated with it being disclosed to Ms Chrysanthou. Because the Court does not have the benefit of specifics of the conversation, it cannot answer these questions. [redacted] One just does not know the content of this disclosure from the general evidence she gives in her affidavit at [25(g)]. And unless one knows that content, it is impossible to assess whether it possesses the requisite quality of confidence and its relevance to the Porter Proceedings in terms of the risk of misuse in those proceedings. It is likewise impossible to assess it against the ABC's defence, [redacted].

93. The same point may be repeated for the other topics of information identified in Ms Dyer's evidence in chief. Detailed submissions as to the inadequacy of the particularisation of those other topics will be made in closing submissions. In that sense, the first basis on which Ms Dyer invokes the Court's jurisdiction to injunct Ms Chrysanthou (protection of alleged confidential information disclosed in the course of a lawyer-client relationship) fails *in limine*.

94. As outlined in paragraphs 81 to 83 above, the Applicant's attempt to fix this inadequacy of her case by Hooke #2 – [redacted] – should not be permitted. Order 6 of the Court's orders of 12 May 2021 only permitted evidence in reply and Ms Dyer needs leave to adduce this evidence and to amend her pleading to make it relevant. The Court would not grant leave for her to do that for the reasons to be developed more fulsomely at the commencement of the hearing on 24 May 2021, but it is at least the following reasons:

    a. *First,* the particulars of the confidential information set out in Hooke #2 simply are not the subject of the pleading. That can be contrasted with the significant reliance placed on Hooke #2 in Ms Dyer's opening submissions in her categorisation of the specific information at [35]-[48] (there are 17 references to Hooke #2 in those submissions);

    b. *Second,* it cannot be said that Hooke #2 is evidence in reply. It is not expressed as such (see at [2]) and the labelling of it as "Hooke Reply" in Ms Dyer's opening submissions and in the Court Book does not change its character is truly evidence in chief;

c. *Thirdly*, and relatedly, it cannot be the case that the additional information deposed by Mr Hooke about the 20 November 2020 conference in Hooke #2 was only recently revealed. Mr Hooke was at the conference on 20 November 2020 and was always a witness in these proceedings. He had prepared an affidavit in the proceedings by 30 April 2021 when Ms Dyer was threatening to commence these proceedings in the Supreme Court of NSW.[91] Moreover, the other deponents in the case, and the solicitor on the record in these proceedings – Mr Bradley – were present at the 20 November 2020 conference. They have not given evidence in chief, or in purported reply for that matter, of the matters referred to in Hooke #2.

d. *Fourthly*, it is a significant departure from the manner in which the evidence of the 20 November 2020 conference was described in Ms Dyer's, Mr Bradley's and Mr Hooke's evidence in chief – namely by topic. As explained above, that was a forensic decision made by Ms Dyer and her advisers when she commenced these proceedings, with a view to protecting privilege in those discussions. The Second Respondent's counsel have made decisions on how best to conduct this case in the Second Respondent's interests based on the evidence in chief filed on 10 May 2021. Different investigations would have been conducted had the evidence been supplied at that time. Different categories of discovery would have been sought at the interlocutory hearing on 19 May 2021. Leave to issue further subpoenas would have been sought. Additional witnesses may have been called, by subpoena or otherwise. It is impossible at this late stage to revisit those forensic decisions.

e. *Fifthly*, when evidence such as that in Hooke #2 is adduced two days before the commencement of the expedited hearing and in circumstances where counsel for the Second Respondent cannot seek instructions about it from their client, their solicitors, or Ms Chrysanthou (all of whom are prohibited from seeing the unredacted version), it is highly prejudicial to the Second Respondent to admit the evidence.

f. *Sixthly*, no reason or explanation has been put forward by the Applicant as to why this detail is only emerging now. Ms Dyer (who has been well-advised on the issues the subject of these proceedings since the Porter Proceedings commenced) must have known that it is well established in the authorities that a critical component of her case for injunctive relief based on the risk of misuse of confidential information required

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[91] Mattock [3] (CB 181), Annexure NTM-1 page 4 (CB 183).

her to identify *with precision* the alleged confidential information disclosed to Ms Chrysanthou in the 20 November 2020 conference. For the reasons explained above, her legal representatives must have known that they could have done so without waiving privilege. She ought not be entitled to seek to remedy this gap in her evidence and unwind the consequences of her forensic decision not to adduce evidence with sufficient particularity at this late stage.

95. Each of those reasons means the evidence, if contrary to the submission above, is relevant to a fact in issue in the proceedings, ought to be excluded on the basis of s 135 of the *Evidence Act 1995* (Cth).

96. There is another difficulty with Ms Dyer's reliance on Hooke #2 (for the purposes of the s 135 objection and also to the extent the Court admits the evidence). That is that these proceedings are concerned with whether Ms Chrysanthou ought to be restrained from acting for Mr Porter in the Porter Proceedings on the basis of the disclosure by Ms Dyer of *her* confidential information to Ms Chrysanthou in the context of the lawyer-client relationship between them. There is no suggestion that Mr Hooke and Ms Chrysanthou (or Mr Hooke and Mr Bradley or Mr Richardson for that matter) were engaged in a lawyer-client relationship at that time. Thus, while Ms Dyer is *prima facie* entitled to seek protection of *her* confidential information, her standing does not extend to seeking to restrain Ms Chrysanthou from acting for Mr Porter in the Porter Proceedings by reason of Mr Hooke's choice to disclose to Ms Chrysanthou (and the others present at the 20 November 2020 conference) *his* confidential information, particularly in circumstances where there is no suggestion he was ever a client of Ms Chrysanthou.[92] In the collation and categorisation of the relevant information in [35]-[48] of her written opening submissions, Ms Dyer does not make this distinction.[93] It is an important one which will be developed at trial.

97. But the question of who the confidential information actually belongs to has simply not been explored in the preparation of this trial because [redacted] His "reply affidavit" is referred to seventeen times in the

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92 See the discussion of standing in *Re Timbercorp* at [46]-[60].

93 Rather, references to Ms Dyer's, Mr Bradley's and Mr Hooke's affidavit evidence are variously combined in an effort to satisfy the requirement to identify the relevant information with sufficient particularity.

Applicant's opening submissions and it is apparent from those submissions that the affidavit has been served to backfill a gap in the Applicant's case two days before the trial starts. It should not be permitted.

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

98. In her opening submissions at [49], Ms Dyer invokes the "getting to know you factors" of which Nettle J spoke in *Sent* at [65] as the second category of information disclosed to Ms Chrysanthou in the 20 November 2020 conference.

99. The Court would not exercise is exceptional jurisdiction to restrain Ms Chrysanthou from acting in the Porter Proceedings merely because she observed Ms Dyer for around an hour in a conference. Ms Chrysanthou's evidence is that she [redacted] Further, and while it is accepted to be a different context, Ms Dyer appeared on both the Four Corners programs, in November 2020 and March 2021. Any member of the Australian public can observe her demeanour by watching those programs which are freely available online. The evidence also establishes Ms Dyer utilises social media quite prolifically, including providing public comment on the matters the subject of the Porter Proceedings. Moreover, Ms Chrysanthou has given an undertaking (to which Mr Porter has consented) not to cross-examine Ms Dyer in the Porter Proceedings to the extent she is called to give evidence[95] (which as detailed further below, is unlikely on the evidence before this Court).

Is the information confidential?

100. Ms Dyer accepts in her opening submissions at [53] that the confidentiality of any information imparted by Ms Dyer to Ms Chrysanthou will be lost to the extent that information has entered the public domain. As noted at paragraph 54 above, the evidence will establish that much of the information said to be disclosed to Ms Chrysanthou in the 20 November 2020 conference (to the extent it has been particularised or proven by admissible evidence) is information which had already entered the public domain or, subsequent to the 20 November 2020 conference, became publicly available thereby losing any confidential character it might have had. The evidence will establish that Ms Dyer herself was motivated that the topics of information said

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94 Chrysanthou [34] (CB 204).

95 Giles [64] (CB 235).

to be disclosed at the 20 November 2020 conference become publicly known. [redacted]

101. In closing submissions, the Second Respondent will provide to the Court an *aide memoire* of the relevant categories or topics of information said to be disclosed to Ms Chrysanthou (as categorised in Ms Dyer's opening submissions at [35]-[48]) and where there is publicly available information relating to the same topic or where it is disclosed in the ABC's defence.[96] That evidence reveals that Ms Dyer has commented [redacted] extensively in public forums. And the Court may infer that Ms Dyer has also commented on these matters in circumstances which she considers to be expressly or implicitly confidential.

102. That inference may be drawn in circumstances where: on the one hand, when faced with a proposed discovery category that called for all documents recording or evidencing Ms Dyer disclosing or discussing with any person who was not present at the 20 November 2020 conference the information that Ms Dyer contends constitutes confidential information disclosed at the conference, her lawyers asserted in correspondence that compliance with that category would impose of her an "oppressive burden"[97]; and, on the other hand, when ordered to give verified discovery of such documents limited to circumstances which were not expressly or implicitly confidential, her List of Documents asserts that she has nothing to produce.[98] Having regard to the publicly available information exhibited to Ms Giles' affidavit, that List of Documents is somewhat questionable. Or alternatively, it is illustrative of deficiencies in the "topics" approach to the 20 November 2020 conference that Ms Dyer and the other witnesses adopted in their evidence in chief.

103. As to the information contained in the [redacted], the claim for confidentiality and privilege over it is weak, including for the reasons outlined at paragraph 84 above. [redacted] Similarly, as Ms Giles deposes, the Concerns Notice (sent under s 14 of the *Defamation Act 2005*) is open correspondence and not sent on a

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96 Most of that information collated in Giles Exhibit RGM-2 pages 26-219 (CB 248-441). However, further information may be tendered.

97 See letter from Marque Lawyers dated 18 May 2021 which was at pages 81-82 of Exhibit RG-1 to the affidavit of Rebekah Ruth Giles sworn 18 May 2021 in support of the Second Respondent's Interlocutory Application dated 18 May 2021.

98 Applicant's List of Documents served 20 May 2021.

99 Chrysanthou [32] (CB 204).

without prejudice basis. She [redacted] routinely advises her clients that there is no expectation of confidentiality in relation to such notices, especially sent to media organisations.[100] In any event, the subject matter of the Concerns Notice here has been disclosed in press reports (by the Notice's recipient) about these proceedings.[101]

Is Ms Chrysanthou in possession of the relevant information?

104. Turning then to Ms Chrysanthou's recollection of what information was disclosed to her, Ms Chrysanthou has sworn [redacted] She has also deleted her emails which followed the conference, as is her usual practice.[104]

105. In those circumstances, and as Nettle J observed in *Sent*, "it may seem to follow that there could not be a real and sensibility possibility of the misuse" by her or Mr Porter in the Porter Proceedings of anything disclosed. It may be accepted, as Ms Dyer points out in her opening submissions at [54]-[56], that that is not the end of the matter and, as Nettle J went on to observe at [88]-[89], recollections are liable to be revived. And while Ms Chrysanthou's recollection may be irrelevant to the question of whether she is in "possession" of the relevant information, it is not irrelevant when one comes to the question of whether there is a risk of misuse of the alleged confidential information. These submissions return to this point at paragraph 126 below.

Relevance of the ABC's Defence

106. There is a further critical matter that the Applicant does not address in her submissions.

107. The inquiry in this case is not limited to whether information is confidential, in the sense of whether it is in the public domain or not. The real question is whether the information is confidential and known only to the attendees at the conference. If the information said to be known by Ms Chrysanthou is known to all parties to the Porter Proceedings, then there can be no risk of confidential information being misused by Ms Chrysanthou in her carriage of the

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100 Giles [88]-[89] (CB 239-240).

101 Giles [80(o)] (CB 238), Exhibit RG-2, pages 20-24 (CB 242-246).

102 Chrysanthou [28]-[33] (CB 203-204).

103 Chrysanthou [34] (CB 204).

104 Chrysanthou [38] (CB 205).

Porter Proceedings. The Court will see that the ABC has filed an extensive defence [redacted] This will be developed in the Second Respondent's closing submissions; it is sufficient to note at the outset that the Applicant cannot restrain Ms Chrysanthou acting based on information that she told Ms Chrysanthou [redacted].

Acting "against" Ms Dyer

108. As Anderson J observed in *Re Timbercorp* at [89], most applications to restrain a legal practitioner from acting against a former client are made in the context of adversarial litigation. The current circumstances are different. Ms Dyer is not a party to the Porter Proceedings. In those circumstances, it is necessary to obtain an appreciation of the subject-matter of the forum in which the alleged confidential information may possibly be used by Ms Chrysanthou. In this case, the relevant forum is the Porter Proceedings. And in the context of the Porter Proceedings, it is necessary for the Court to assess on the evidence before it the likelihood of Ms Dyer being a witness in those proceedings.

109. In the present case, the Court will not conclude that Ms Dyer is likely to be a witness in the Porter Proceedings or that the alleged confidential information that she disclosed to Ms Chrysanthou during the 20 November 2020 conference will be relevant in the Porter Proceedings.[105] That is so for the following reasons (which will be developed more fulsomely in closing submissions).

[redacted] *First*, Ms Dyer is not identified in the statement of claim in the Porter [redacted]

[105] *Cf* Ms Dyer's opening submissions at [59]-[60].

[redacted]

111. [redacted] does not give rise to a likelihood that Ms Dyer herself will be called as a witness in the Porter Proceedings. As Ms Giles deposes, to the extent the qualified privilege defence requires proof of reasonableness, in Ms Giles' experience that burden is met by the respondents to a defamation action leading evidence from "journalists and sometimes the person responsible for making the decision to publish".[106] There is no evidence, documentary or otherwise, which suggests the respondents to the Porter Proceedings are considering calling Ms Dyer as a witness.

112. Ms Dyer's argument in her opening submissions at [58] – [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" – is unpersuasive. It is, of course, a step back from the contention in the Concise Statement that she "will" be a witness in the case (at [30]) and in her solicitor's correspondence that she was likely to be a "central" witness in the case.[107] In any event, it can hardly be controversial that information was sought from by Ms Milligan from Ms Dyer – she appeared in the Four Corners' programs. Presumably, Ms Milligan can and will give evidence about the information she obtained from Ms Dyer and the records of the interviews will be discoverable.

[redacted] *Secondly*, it is not apparent that the evidence of Ms Dyer is relevant to the [redacted]

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106 Giles [40]-[41] (CB 206). See also *Echo Publications Pty Ltd v Tucker (No 3)* [2007] NSWCA 320 at [24]-[25] (Hodgson JA, with whom Mason P and McColl JA agreed)

107 CB 176.

That allegation (some particulars of which are is the subject of a strike out motion[108]) [redacted]

114. *Thirdly*, to the extent Mr Porter contends in the Porter Proceedings that the ABC Article was published maliciously[110], it is not apparent why the ABC or Ms Milligan will rely on direct evidence from Ms Dyer to defend this allegation. As Ms Giles deposes in her affidavit at [42], it is her understanding "that this allegation is wholly dependent on what was in the mind of Ms Milligan and any other relevant employee of the ABC at the time of the publication. Given the state of mind of Ms Dyer is irrelevant", Ms Giles does not see how evidence from her could assist the Court.

115. *Fourthly*, by reason of the above matters, and in circumstances where there is no evidence of any present intention of the respondents to the Porter Proceedings calling Ms Dyer as a witness, it would be a "matter of mere conjecture", as opposed to permissible inference, for the Court to conclude in these proceedings that it is likely Ms Dyer will be called as a witness in the Porter Proceedings.[111] To the extent one engages in conjecture, the only conclusion that can be reached is that she is unlikely to be a witness.

[redacted] *Fifthly*, even if Ms Dyer's evidence ([redacted]) is relevant to the plea of malice or any other issue in the Porter Proceedings, it is difficult to see how anything Ms Dyer disclosed to Ms Chrysanthou in the 20 November 2020 conference could be used to her disadvantage in the Porter Proceedings if she was ever cross-examined. [redacted]

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108 Giles [39] (CB 232).

109 Giles [44] (CB 232).

110 See *Sent* at [75]-[76] where Nettle J concluded (in a very different context) that there was a significant probability of matters going to the truth of the alleged defamatory meanings being investigated at trial in light of the plea of malice.

111 As to the distinction between conjecture and inference, see *DIF III âe" Global Co-Investment Fund L.P v DIF Capital Partners Limited* [2020] NSWCA 124 at [145]-[147] (Bell P).

[redacted]

Relevance of the information to the Porter Proceedings

117. The matters outlined above with respect to the likelihood of Ms Dyer being called as a witness in the Porter Proceedings are also relevant in the Court's assessment of the relevance of the alleged confidential information disclosed to Ms Chrysanthou in the Porter Proceedings.

118. The detail of the pleadings in the Porter Proceedings and their relationship (if any) to the topics of information said to have been disclosed in the 20 November 2020 conference will be analysed in detail in closing submissions, but for the purposes of opening the following submissions are made.

119. *First*, to the extent the information comprises [redacted]

120. *Secondly*, to the extent the information comprises [redacted]

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[112] Bradley, Annexure MDB-1 page 11 (marked confidential) (CB 59).

[113] Hooke #2 [19] (CB 480).

121. *Thirdly*, as to Information Categories E and F ([redacted] The same may be said of those categories of information which relate to [redacted], and also bearing in mind that the 14 November 2020 Four Corners' episode is not the subject of the defamation suit.

122. The point is illustrated by draft interrogatories 44, 45, 49, 50 for which Mr Porter has applied for leave to administer. These interrogatories refer to Ms Dyer. They are set out in Ms Dyer's submissions at [74]. [redacted] As those interrogatories are a form of discovery[114], if leave is granted to administer them, the respondents to the Porter Proceedings themselves have a duty to make all reasonable inquiries which are likely to, or may, reveal what is known to the respondents relevant to the interrogatories and verify the truth of the answers provided.[115] Even so, it is difficult to see how such reasonable inquiries would even involve consulting Ms Dyer, [redacted]

123. *Fourthly*, and perhaps most importantly, establishing mere symmetry of the information to snippets of pleadings in the Porter Proceedings is insufficient. The notion of "relevance" in this context is tied to the risk of misuse. As Anderson J described it in *Re Timbercorp* at [102], the information is only relevant to the Porter Proceedings if there is a sufficient nexus between the confidential information of the former client and the manner in which it is to be misused by the legal practitioner. Beyond lining up the categories of information identified in her opening submissions with allegations made in the Statement of Claim and allegations made in the Defence, Ms Dyer's opening submissions do not identify how in fact those categories of information are relevant in the sense they are liable to be misused *to the disadvantage of Ms Dyer* if she is ever called as witness in the proceedings. In those circumstances, the risk of advantage to Mr Porter (by Ms Chrysanthou knowing, consciously or subconsciously, what

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[114] *Austal Ships Pty Ltd v Incat Australia Pty Ltd (No 3)* (2010) 272 ALR 177 at [7] (McKerracher J).

[115] *Stanfield Properties Ltd v National Westminster Bank plc (London and County Securities Ltd, third party)* (1983) 2 All ER 249 (Sir Robert Megarry V-C); *Sharpe v Smail & Anor* (1975) 49 ALJR 130 at 132 (Gibbs J).

was disclosed to her at the 20 November 2020 conference), cannot sensibly be, let-alone precisely, articulated. That is because the risk is more theoretical than real.

124. If anything, the exercise of lining up the pleadings with the categories of information said to be disclosed to Ms Chrysanthou illustrates that there will more likely than not be discovery and interrogatories in respect of many of the topics of information said to have been disclosed to Ms Chrysanthou in the 20 November 2020 conference, in particular those relating to the ABC's and Ms Milligan's states of mind in publishing the ABC Article.[116] Indeed, because of the allegation of malice, [redacted] the question of those respondents' states of mind is directly relevant to the case. And the Court here would infer that there will be discovery sought of, and required to be given, by the respondents on these issues. That discovery likely would mean that all communications between Ms Dyer, Mr Hooke, Ms Milligan and any other person at the ABC will be produced. Indeed, in defamation proceedings, where a person's state of mind is in issue then "everything relating to the subject in question which came to the notice of the person whose state of mind is relevant becomes admissible to establish that state of mind".[117] In those circumstances, it is difficult to see what advantage Ms Chrysanthou is in by apparently being in possession of information about the ABC's sources and strategies (to the extent those matters were known by Ms Dyer). Or more relevantly, it is difficult to see how Ms Chrysanthou's participation in the Porter Proceedings (when documents concerning those issues will be available to her as counsel for Mr Porter) would disadvantage Ms Dyer (if she were ever called as a witness).

Risk of misuse

125. The point made immediately above is also relevant to the question of whether there is no real risk of misuse of the confidential information. If the disclosures made to Ms Chrysanthou in the 20 November 2020 conference cannot be characterised as information that could be used to Ms Dyer's disadvantage or for Mr Porter's advantage in the Porter Proceedings, then what is the real and sensible risk of misuse of it by Ms Chrysanthou if she continues to act for Mr Porter? One cannot readily point to one. There is no evidence to suggest, for example, that what Ms Dyer disclosed to Ms Chrysanthou in conference was any different to what she disclosed to Ms Milligan when she was interviewed.

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[116] It is Ms Giles' expectation that the discovery and interrogatories will include all materials going to the state of mind of the ABC and Ms Milligan (Giles [41] (CB 232)).

[117] *Seidler v John Fairfax & Sons Ltd* [1983] 2 NSWLR 390 at 393F-394B (Hunt J).

126. In any event, to avoid the any risk of misuse of any "getting to know your factors" that Ms Chrysanthou is said to have picked up in the 20 November 2020 conference, Ms Chrysanthou has undertaken not to cross-examine Ms Dyer if she is called as a witness.[118] She is also no longer in possession of the emails about the content of the Concerns Notice sent to the Australian.[119] And she has deliberately only been shown the redacted versions of the affidavit evidence filed and served by Ms Dyer in these proceedings so as to avoid any contamination by reason of these proceedings.

127. Further, Mr Porter has given his consent to Ms Chrysanthou and Ms Giles that Ms Chrysanthou will not disclose to him or use in any way to his advantage in the Porter Proceedings any confidential information from the interaction with Ms Dyer if she ever recalls it.[120] In those circumstances, the submission made at [59] of Ms Dyer's opening submissions – that there is a real risk of Ms Chrysanthou acting contrary to rule 35 of the *Legal Profession Uniform Conduct (Barristers) Rules 2015*, loses any real force because Ms Chrysanthou is not, contrary to [26] of the Concise Statement, required to disclose that information to Mr Porter.

128. In those circumstances, the Second Respondent will submit that he has satisfied his burden (to the extent he has one) of establishing that there is no real risk of misuse of the confidential information said to have been disclosed to Ms Chrysanthou by Ms Dyer.

Inherent jurisdiction

129. The interests of justice do not weigh in favour of the exercise of the Court's inherent jurisdiction – a jurisdiction which the authorities are at pains to emphasise ought to be exercised with restraint only in exceptional circumstances. That is so for the following reasons.

130. *First*, while Ms Dyer has a right to ensure that confidential information given by her to Ms Chrysanthou is not used against her, for the reasons explained above, that case as to risk of misuse of confidential information has not been made out. Thus, that right does not in the circumstances of this case does not weigh particularly heavy in the balance. That is particularly because if the Court is required to have recourse to whether to exercise its inherent jurisdiction, it must necessarily have rejected the first basis on which Ms Dyer seeks injunctive relief in

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[118] Giles [64] (CB 235).

[119] Chrysanthou [38] (CB 205).

[120] Chrysanthou [59] (CB 210); Giles [18] (CB 226).

these proceedings. That illustrates why the circumstances must be exceptional for the Court to exercise its jurisdiction.

131. *Secondly*, that is to be contrasted by Mr Porter's *prima facie* right to be represented by his counsel of choice in the Porter Proceedings. The seriousness of the allegations made in the Porter Proceedings, and the defences raised by the respondents in those proceedings, need not be stated. Ms Giles gives evidence of the detrimental effect of the ABC Article, based on communications and documents, on Mr Porter. For these reasons, he has given instructions to his lawyers to seek an expedited determination of his case.[121] The Court has adhered to that request, with Jagot J tentatively setting the matter down for hearing later this year.[122] If he were to lose the senior counsel he instructed from early March this year[123], this may well jeopardise the expedited hearing that has been put in place; it is not a simple matter of wasted costs or inconvenience.

132. *Thirdly*, and relatedly, the Porter Proceedings are not a matter where another senior counsel can seamlessly fill Ms Chrysanthou's role should she be restrained by these proceedings. Ms Giles gives evidence of the intensity of the Porter Proceedings and the willingness of Ms Chrysanthou to work long and arduous hours on the case to expedite it in accordance with Mr Porter's instructions.[124] Ms Chrysanthou has confirmed in her affidavit the many number of hours she has worked on the case.[125] Her technical expertise in defamation law is highly valued by her instructing solicitor, Ms Giles[126], both of which are necessary in a case as the Porter Proceedings. It is also a technical expertise which is uncommon, there being not a significant number of defamation specialist senior counsel at the NSW bar.[127] The Porter Proceedings are technically complex, factually dense and vigorously contested.[128] The Court would infer as much from a review of the pleadings, the fact that it has been set down for a six-week hearing and the calibre of the counsel team engaged by the parties to the proceedings.

133. *Fourthly*, the time it took for Ms Dyer to bring these proceedings does not weigh in her favour. Ms Dyer knew from 15 March 2021 (the day the Porter Proceedings were commenced) that Ms

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121 Giles [56] (CB 234).

122 Giles [56] (CB 234).

123 While Mr Walker is briefed, Ms Chrysanthou (a specialist defamation barrister) has primary carriage of the matter (Giles [15] (CB 225)).

124 Giles [20]-[21] (CB 226-227); [48]-[55] (CB 233-234).

125 Chrysanthou [69] (CB 212); [71] (CB 213); [78] (CB 214).

126 Giles [23]-[28] (CB 227-228).

127 Giles [29]-[31] (CB 229-231).

128 Giles [28] (CB 228).

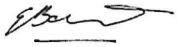
Chrysanthou was briefed by Mr Porter. Ms Dyer and her advisers must have known that Ms Chrysanthou was working on the brief. Yet it took until 10 May 2021 for these proceedings to be commenced. Whilst at first blush it is not a significant delay, in the context of the Porter Proceedings, it was. The pleadings have closed; the Court has listed a two-day strike out motion commencing on 1 June 2021, and significant interrogatories have been prepared, all with Ms Chrysanthou's detailed input. As noted above, it has been observed that "this is an area in which a litigant should act promptly"[129] and that a party "must take the point at the earliest opportunity".[130] That requirement is even more important in the context of defamation proceedings because a principal purpose of defamation proceedings is public vindication. The longer that vindication is delayed, the greater the risk that the purpose of the proceedings may be undermined.[131]

134. *Finally*, the submission made in Ms Dyer's opening submissions at [90] – which is to the effect that the Court would more readily exercise its jurisdiction in the present case because the "parties are prolific public figures" – is somewhat unsettling. To the contrary, the public interest in the Porter Proceedings means that the Court in these proceedings would be especially conscious of the extraordinary jurisdiction invoked by Ms Dyer and the need to protect against the invocation of conflicts of interest where none properly exist.

F. CONCLUSION

135. For the above reasons, the Court would decline to restrain Ms Chrysanthou from continuing to act for Mr Porter in the Porter Proceedings. The Second Respondent also seeks to be heard on the scope of the non-publication orders sought by Ms Dyer.

23 May 2021



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[129] *H Stanke & Sons Pty Ltd v Von Stanke* (2006) 95 SASR 425 at [81] (White J), cited with approval in *Sacca* at [34] (Anastassiou J).

[130] *Frigger v Kitay (No 10)* [2016] WASC 63 at [31] (Le Miere J), cited with approval in *Sacca* at [34] (Anastassiou J).

[131] *Rush v Nationwide News Pty Ltd (No 6)* [2018] FCA 1851 at [115] (Wigney J), citing *Channel Seven Adelaide Pty Ltd v Manock* (2010) 273 LSJS 70 at [60] (Bleby J (with whom White J agreed)).