

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMON LAW DIVISION  
EMPLOYMENT AND INDUSTRIAL LIST

Not Restricted

S CI 2016 02269

VOLUNTEER FIRE BRIGADES  
VICTORIA INC

Plaintiff

v

COUNTRY FIRE AUTHORITY

Defendant

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JUDGE: Ierodionou AsJ  
WHERE HELD: Melbourne  
DATE OF HEARING: 6 October 2016  
DATE OF RULING: 10 October 2016  
CASE MAY BE CITED AS: Volunteer Fire Brigades Vic Inc v CFA (No. 2)  
MEDIUM NEUTRAL CITATION: [2016] VSC 613 First Revision 12 October 2016

**PRACTICE AND PROCEDURE:** Discovery of documents – Production for inspection – *Civil Procedure Act 2010* (Vic) s 55 – Overarching purpose – Real issues in dispute – Power of Court to limit inspection – Discretion of Court – Cost of discovery and inspection – Applicability of previous judicial finding

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J Davis QC with Mr S Freire	Robinson Gill Lawyers
For the Defendant	Mr C O'Grady QC with Ms R Zambelli	Lander & Rogers

HER HONOUR:

1 Certain documents have been discovered by the defendant in this litigation. This ruling concerns whether or not the defendant is required to produce these documents for inspection by the plaintiff.

2 By orders of Justice McDonald made on 3 October 2016, the parties were to file an agreed list of questions for determination in respect of whether documents were subject to legal professional privilege, public interest immunity or without prejudice privilege. These questions were to be heard on 6 and 10 October 2016. The parties could not agree on these questions and each subsequently filed separate questions for determination by the Court. The defendant included a question in its list that was beyond the scope of the questions referred to in Justice McDonald's orders. The question is as follows:

Should this Honourable Court make an order under s 55(1) of the *Civil Procedure Act 2010* that the Plaintiff is not entitled to inspect documents falling within discovery categories 1(d) and 3(d), on the basis that those documents relate only to the 'cost' of the implementation of the Proposed Agreement?

3 The Proposed Agreement referred to in the question is a reference to the proposed enterprise agreement between the defendant and the United Firefighters Union of Australia. The dispute regarding it is at the heart of this proceeding.

4 Both parties were in agreement that the Court should hear the question on the afternoon of 6 October 2016. Given the potential bearing of this question on other questions for determination, and the impending trial date of 2 November 2016, the Court decided it expedient to hear and determine it on that date.

### **Background**

5 The defendant discovered documents prior to a ruling given by Justice J Forrest on 29 September 2016: *Volunteer Fire Brigades Victoria v CFA (Discovery Ruling)* ('the Discovery Ruling').<sup>1</sup> The Discovery Ruling concerned various categories of documents including a sub-category 2(d): 'The cost or possible cost of the Proposed Agreement'. Sub-categories

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<sup>1</sup> [2016] VSC 573.

1(d) and 3(d) referred to in the question for determination in this hearing are the same as sub-category 2(d) in the Discovery Ruling.

6 In the Discovery Ruling, the Court declined to order discovery in respect of category 2(d). It made no ruling in respect of sub-categories 1(d) and 3(d) as they were not in dispute. Discovery had already been made in respect of those sub-categories. At paragraph [48] of the Discovery Ruling, and in respect of category 2(d), Justice J Forrest held:

I will not permit discovery of documents relating to the ‘cost’ of the implementation of the proposed EBA [enterprise agreement]. This does not go to the question of inconsistency and, in any event, is moot given the letter of comfort provided by the Minister. At best, it is a peripheral issue.

### **Submissions**

7 Both parties made oral submissions, and the defendant also made written submissions.

8 The defendant submits that the effect of the Discovery Ruling is that the plaintiff is not entitled to discovery of documents concerning the cost of the proposed agreement. It seeks an order that the plaintiff is not entitled to inspect such documents. It says that there is no relevant distinction between the documents which the plaintiff sought in respect of category 2(d) and the documents in categories 1(d) and 3(d). Although the defendant has discovered documents falling within categories 1(d) and 3(d) in its affidavits of documents, it should not be required to permit the plaintiff to inspect those documents. The Court should proceed on the basis that the documents are either not relevant, or of only peripheral relevance, to the issues in the proceeding. Further, or in the alternative, the issue to which they are relevant has been rendered moot by the Minister’s letter of comfort (as referred to in the Discovery Ruling).

9 The defendant relies on s 55(1) of the *Civil Procedure Act 2010* (Vic) (‘CPA’). It says that s 55 gives the Court wide powers to control discovery. Those powers are ample to support an order that inspection not be permitted of documents that have been discovered in these circumstances.

- 10 The defendant refers to the unnecessary costs that will be incurred regarding numerous public interest immunity claims with respect to documents that have peripheral relevance to the case. It says that there will be unnecessary court time expended on ruling on such claims.
- 11 The defendant refers to the Discovery Ruling, and says that it was obtained after the parties had expended considerable time and resources. Given that the Discovery Ruling has now been made, further court time and resources of the parties would be expended in litigating documents falling within categories 1(d) and 3(d), and this would be inconsistent with the overarching purpose of the CPA. Section 7 of the CPA refers to the overarching purpose of that Act ‘to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute’.
- 12 The defendant refers to High Court authority on the need to avoid ‘[u]nduly technical and costly disputes about non-essential issues’: *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd*.<sup>2</sup> It says that the Court should be proactive to avoid such disputes. The defendant submits that the Court should exercise its powers under s 55 in order to avoid the parties incurring further costs in relation to documents already held to be of little or no relevance to the essential issues to be resolved in this litigation.
- 13 The plaintiff submits that the Court should not relieve the defendant of its obligation to provide inspection. The defendant has discovered the documents and the right of inspection should follow as a matter of law.
- 14 The plaintiff submits that the Discovery Ruling is on category 2(d) not categories 1(d) and 3(d). It concedes that the latter two categories were not in dispute before the Court at the time of the Discovery Ruling. The plaintiff also concedes that there is great similarity, at the very least, between these sub-categories.
- 15 The plaintiff refers to paragraphs 26–28 of the amended statement of claim and submits that the documents are relevant. It says that no application has been made to strike out these paragraphs. The plaintiff says that the defendant has not deposed that it discovered the

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<sup>2</sup> (2013) 250 CLR 303 at 323 [56]–[57].

documents in error.

16 The plaintiff submits that there is no evidence to support the defendant's application. There is no evidence as to which documents, if any, fall within categories 1(d) and 3(d). There is no evidence as to whether some documents fall wholly or partly within those categories. The plaintiff says that there is no visibility as to the identity of the documents and that the plaintiff would therefore be prejudiced by the order sought.

17 The plaintiff says that this is a novel use of the CPA. It says that the CPA will apply to relieve a party of its legal obligations only if there is some undue burden cast upon that party in performing those obligations. It queries the extent of the additional cost burden involved in photocopying documents for inspection. It says that it cannot seriously be contended that this cost would trigger a basis to avoid production under the CPA. It points to the lack of evidence on the volume of documents and cost of inspection.

18 Neither party could point to any authority concerning s 55 which was directly on point.

### **Applicable Principles**

19 Section 7(1) of the CPA provides that '[t]he overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.'

20 Section 8(1) states:

A court must seek to give effect to the overarching purpose in the exercise of any of its powers, or in the interpretation of those powers, whether those powers—

(a) in the case of the Supreme Court, are part of the Court's inherent jurisdiction, implied jurisdiction or statutory jurisdiction; or

...

(c) arise from or are derived from the common law or any procedural rules or practices of the court.

21 Section 9 provides:

(1) In making any order or giving any direction in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects—

- (a) the just determination of the civil proceeding;
  - (b) the public interest in the early settlement of disputes by agreement between parties;
  - (c) the efficient conduct of the business of the court;
  - (d) the efficient use of judicial and administrative resources;
  - (e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for—
    - (i) the fair and just determination of the real issues in dispute; and
    - (ii) the preparation of the case for trial;
  - (f) the timely determination of the civil proceeding;
  - (g) dealing with a civil proceeding in a manner proportionate to—
    - (i) the complexity or importance of the issues in dispute; and
    - (ii) the amount in dispute.
- (2) For the purposes of subsection (1), the court may have regard to the following matters—
- (a) the extent to which the parties have complied with any mandatory or voluntary pre-litigation processes;
  - (b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;
  - (c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the proceeding;
  - (d) the degree to which any lack of promptness by a party in undertaking the proceeding has arisen from circumstances beyond the control of that party;
  - (e) the degree to which each person to whom the overarching obligations apply has complied with the overarching obligations in relation to the proceeding;
  - (f) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the court;
  - (g) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;
  - (h) the extent to which the parties have had the benefit of legal advice and representation.
- (3) This section does not—

- (a) limit any other power of a court to make orders or give directions; or
- (b) preclude the court from considering any other matters when making any order or giving any direction.

22 Section 55 of the CPA is as follows.

- (1) A court may make any order or give any directions in relation to discovery that it considers necessary or appropriate.
- (2) Without limiting subsection (1), a court may make any order or give any directions—
  - (a) requiring a party to make discovery to another party of—
    - (i) any documents within a class or classes specified in the order; or
    - (ii) one or more samples of documents within a class or classes, selected in any manner which the court specifies in the order;
  - (b) relieving a party from the obligation to provide discovery;
  - (c) limiting the obligation of discovery to—
    - (i) a class or classes of documents specified in the order; or
    - (ii) documents relating to one or more specified facts or issues in dispute; or
    - (iii) some or all of the issues set out in a statement of issues filed in the proceeding;
  - (d) that discovery occur in separate stages;
  - (e) requiring discovery of specified classes of documents prior to the close of pleadings;
  - (f) expanding a party's obligation to provide discovery;
  - (g) requiring a list of documents be indexed or arranged in a particular way;
  - (h) requiring discovery or inspection of documents to be provided by a specific time;
  - (i) as to which parties are to be provided with inspection of documents by another party;
  - (j) relieving a party of the obligation to provide an affidavit of documents;
  - (k) modifying or regulating discovery of documents in any other way the court thinks fit.
- (3) A court may make any order or give any directions requiring a party discovering documents to—

- (a) provide facilities for the inspection and copying of the documents, including copying and computerised facilities;
  - (b) make available a person who is able to—
    - (i) explain the way the documents are arranged; and
    - (ii) help locate and identify particular documents or classes of documents.
- (4) A court may order or direct a party to pay to another party an amount specified or determined by, or in accordance with, the order or direction in relation to the costs of discovery in any manner considered appropriate by the court, including, but not limited to, payment in advance of an amount to the other party for some or all of the estimated costs of discovery.
- (5) Without limiting any other power of a court to make costs orders, a court may order or direct that costs payable under an order or a direction under subsection (4) are recoverable as costs in the proceeding.

23 Rule 29.09(2) of the *Supreme Court (General Civil Procedure) Rules 2015* ('the Rules') provides that if a party who has made an affidavit of documents is served with a notice to produce, it shall provide for inspection of such documents within seven days of service of the notice. Rule 29.09(1) provides that the notice may require production of the documents referred to in the affidavit of documents, other than those documents over which the party has made an objection to inspection.

24 Rule 2.04 provides that the Court may dispense with compliance with the Rules at any time.

25 Relevant principles on discovery are outlined in the Discovery Ruling at paragraphs [28]–[36], and need not be reiterated here.

26 It was not in dispute that the Court has powers to make the orders sought by the defendant. That is, the plaintiff did not submit that it was beyond the Court's powers to make orders to the effect that the defendant was not obliged to produce documents for inspection. Indeed, such a submission would have been contrary to authority; see, for instance: *Theodore v Australian Postal Commission*;<sup>3</sup> *Tabcorp Holdings Ltd v State of Victoria (No 2)*.<sup>4</sup>

### **Consideration**

27 The Discovery Ruling concerns sub-category 2(d), which is the same as sub-categories 1(d)

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<sup>3</sup> [1988] VR 272 at 275.

<sup>4</sup> [2013] VSC 541 at [25], [28].



and 3(d). The Discovery Ruling is relevant to sub-categories 1(d) and 3(d), given that they are the same as sub-category 2(d). The effect of the Discovery Ruling is that category 2(d) need not be discovered. It follows that sub-categories 1(d) and 3(d) now need not be discovered. There is no utility in discovering them. However, having been discovered, they cannot be un-discovered. The appropriate order will be to relieve the defendant of the obligation to produce such documents for inspection.

28 As to the plaintiff's submissions on paragraphs 26–28 of the amended statement of claim, it is noted that these paragraphs were before the Court at the time of the Discovery Ruling. These, apparently, had no impact on the Discovery Ruling and are therefore of no weight here. It is therefore immaterial that the defendant has not made a strike out application in respect of paragraphs 26–28 of the amended statement of claim. Given that fact, and the fact that the sub-categories in issue here are the same as sub-category 2(d) in the Discovery Ruling, there is no utility, and nor would it be appropriate, to revisit the issues again.

29 As to the plaintiff's submissions about the lack of evidence concerning the identification of the particular documents within sub-categories 1(d) and 3(d), that can be met by an order that the defendant file an affidavit identifying those documents. The defendant has indicated that it has no objection to doing so. The Court does not consider the current lack of such an affidavit to be fatal to the defendant's application. This matter did not come on by summons, but rather came on urgently in the wake of Justice McDonald's orders.

30 The Court does not accept the plaintiff's submission that the CPA requires the defendant to prove that there is an undue burden in providing inspection. It matters not whether there is one or 100 documents that fall within sub-categories 1(d) and 3(d). Applying the Discovery Ruling, there is no utility in ordering inspection of documents that concern an issue which is, at best, peripheral to the proceeding.

31 For completeness, the Court does not accept the defendant's submissions as to the time or cost of inspection or disputes regarding public interest immunity for certain documents in sub-categories 1(d) and 3(d). There is no evidence before the Court on the identity or volume of such documents.

- 32 The plaintiff made submissions concerning documents which may fall partly within sub-categories 1(d) and 3(d), and partly within other categories of discovery. Such documents will need to be discovered and produced for inspection. Consistently with the question posed by the defendant, this ruling relates to documents which fall only within sub-categories 1(d) and 3(d).
- 33 The power under s 55 of the CPA is a broad one. It should be read and applied in light of sections 7 to 9 of the CPA, which require Court powers be applied for the overarching purpose; that is, to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute. The Court is satisfied that s 55(1) gives it the power to relieve the defendant of the obligation to produce sub-categories 1(d) and 3(d) for inspection. Alternatively, the Court has a general discretion to do so.
- 34 The Court will make orders that the defendant is to depose as to the documents in sub-categories 1(d) and 3(d). As discussed above, these must be documents which fall wholly within those categories. The Court will make orders that the defendant is not obliged to produce such documents for inspection.