

02/11; [2011] VSC 56

SUPREME COURT OF VICTORIA

MESSADE v BAIREs CONTRACTING PTY LTD

J Forrest J

28 February 2011

PRACTICE AND PROCEDURE – NOTICE TO PRODUCE – PRINCIPLES APPLICABLE TO A NOTICE TO PRODUCE – WHETHER LEGITIMATE FORENSIC PURPOSE DEMONSTRATED – WHETHER ON THE CARDS THAT THE RELEVANT DOCUMENTS WOULD MATERIALLY ASSIST THE DEFENCE CASE – WHETHER NOTICE TO PRODUCE CONSTITUTED IMPERMISSIBLE ATTEMPT TO SEEK GENERAL DISCOVERY – WHETHER NOTICE TO PRODUCE CONSTITUTES “FISHING EXPEDITION”.

At the commencement of a common law trial involving the assessment of M's damages claim, his former employer, B. Pty Ltd sought production of documents pursuant to a notice to produce. The purpose was to corroborate M's account to doctors of what activities he undertook and his general physical condition in the course of three overseas trips and his apparent failure to tell the doctors that he had travelled to Sudan.

HELD: Notice to produce dismissed.

1. The principles relevant to determining whether a party is required to produce documents under subpoena are:

(a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;

(b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;

(c) the applicant for the witness summons must also satisfy the court that it is “on the cards”, or that there is a “reasonable possibility”, that the documents sought under the subpoena “will materially assist the defence”.

(d) a “fishing expedition” is not a legitimate forensic purpose and will not be permitted;

(e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.

(f) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.

Commissioner of Australian Federal Police v Magistrates' Court of Victoria & Ors [2011] VSC 3; MC01/2011, applied.

2. The notice to produce failed at the first hurdle – its purpose was neither legitimate nor forensically specific. It was far too wide. To endeavour to attack histories given to particular doctors would only be a legitimate forensic exercise if BP/L identified precisely in what way M.'s account to the doctors was inconsistent with the photographic evidence – assuming it existed. The submission did not descend to this detail – it was general, not limited to specific assertions made by M. to the doctors (such as what he was and was not capable of doing on the trip, or as another example, whether he was or was not working whilst away). The authorities demonstrate that the forensic purpose must be identified with precision. It has not been in the present case.

3. Also, there was no evidence to suggest (a) that such photographs existed; or (b) that it was 'on the cards' that such photographs (if they existed) would in some way impugn M.'s account to doctors, or contradict his evidence. This was the casting of a line with the hope that something may be caught in a very large pond. It was impermissible.

J FORREST J:

Introduction

1. At the commencement of the common law trial involving the assessment of Mr Messade's

damages claim, the defendant Baires Contracting Pty Ltd^[1] (his former employer), sought production of documents pursuant to a notice to produce given on 31 January 2011.

2. The notice to produce sought production by the plaintiff of “all photographs of the plaintiff in hard copy and electronic form relating to overseas travel and taken by the plaintiff from 1 August 2003 to the date of hearing”.

3. In the course of submissions in the absence of the jury, a further application was made by counsel for Baires, namely:

(a) to amend the notice to include all photographs held on any computer in the possession of the plaintiff;^[2]

(b) to order that the plaintiff not tamper or alter any computer generated image of himself.^[3]

4. For reasons which I will now set out, I concluded that the terms of the notice were too wide and constituted “fishing”, consequently I determined that Mr Messade is not required to produce any such photographs – if they, indeed, exist.

Applicable principles

5. The principles applicable to a notice to produce;

... are similar to those imposed by a subpoena and that the considerations which apply to the setting-aside of a subpoena are equally applicable to a notice to produce. Just as a “fishing” subpoena will be set aside, so will a fishing notice to produce.^[4]

6. Recently in the *Commissioner of Australian Federal Police v Magistrates’ Court of Victoria & Ors*,^[5] I set out the principles relevant to determining whether a party is required to produce documents under subpoena. I repeat those relevant to this case:-

(a) it is necessary for the party at whose request the witness summons was issued to identify expressly and precisely the legitimate forensic purpose for which access to the documents is sought;

(b) the identification of such a legitimate forensic purpose is to be considered by the court without inspecting the documents sought to be produced;

(c) the applicant for the witness summons must also satisfy the court that it is “on the cards”, or that there is a “reasonable possibility”, that the documents sought under the subpoena “will materially assist the defence”.

(d) a “fishing expedition” is not a legitimate forensic purpose and will not be permitted;

(e) the relevance of a document to the proceeding alone will not substantiate an assertion of legitimate forensic purpose. There is no legitimate forensic purpose if the party is seeking to obtain documents to see whether they may be of relevance or of assistance in his or her defence.

... ..

(h) where a party fails to demonstrate a legitimate forensic purpose, the court should refuse access to the documents and set aside the witness summons.

Application of the principles in this case

7. The objection, taken belatedly, that the notice to produce is no more than a fishing expedition, required Baires to demonstrate:

(a) precisely, the legitimate forensic purpose for which access to the photographs is sought; and

(b) that it is “on the cards” or that there is a reasonable possibility that the photographs sought will materially assist the defendant’s case; and

(c) that it is not a mere exercise to see whether there is material which might assist the defence – i.e. in other words a fishing expedition (a corollary of (b)).

8. Ms Hartley SC, who appeared with Ms Cefai-Talbot for Baires, submitted that the forensic purpose was to corroborate, or otherwise, the plaintiff’s account to doctors of what activities he

was undertaking and his general condition in the course of three overseas trips between 2006 and 2009, and his apparent failure to tell the doctors that he had travelled to the Sudan.^[6] As Ms Hartley put it:-

It's simply an exercise to determine what he was and was not doing.^[7]

9. In my view, this notice fails at the first hurdle – its purpose is neither legitimate nor forensically specific. It is far too wide. To endeavour to attack histories given to particular doctors would only be a legitimate forensic exercise if Baires identified precisely in what way Mr Messade's account to such doctors was inconsistent with the photographic evidence – assuming it exists. Baires' submission did not descend to this detail – it was general, not limited to specific assertions made by Mr Messade to the doctors (such as what he was and was not capable of doing on the trip, or as another example, whether he was or was not working whilst away). The authorities demonstrate that the forensic purpose must be identified with precision. It has not been.

10. If I am, however, wrong on the first issue, then had Baires reached the second and third hurdles it would also have failed. There is not a skerrick of evidence to suggest:

(a) that such photographs exist; or

(b) that it is on the cards that such photographs (if they exist) will in some way impugn Mr Messade's account to doctors, or contradict his evidence in this Court. This is the casting of a line with the hope that something may be caught in a very large pond. It is impermissible.

11. Perhaps, if discovery of the photographs had been pursued by Baires, the position would be different – but it was not and there is no evidentiary foundation to suggest such photographs, if they exist, will assist its case.

12. Finally, I should say something about Baires seeking an order that Mr Messade be restrained from tampering with any photographs. This application should not have been made. It carried the clear innuendo, without any substantiation, that there was a risk Mr Messade may in some way alter the photographs. When I asked counsel upon what basis the application was made, I was told that Mr Messade was proficient in using Photoshop.^[8] So are hundreds of thousands of persons aged between 12 and 82.

13. Such an order could only have been made if there was a real risk or danger on "solid evidence",^[9] of potential tampering or alteration by Mr Messade of the photographs.^[10] There was not an iota of evidence to support this application.

14. For the above reasons, I determined that the plaintiff should not be required to produce the photographs, the subject of the notice to produce.

[1] Referred to as "Baires"

[2] T 35

[3] T 40

[4] *Crown Joinery Pty Ltd v Lyleho Pty Ltd* [2007] VSC 214 [31] per Maxwell P

[5] [2011] VSC 3 [28]

[6] T 36-37

[7] T 37

[8] T 40-41

[9] *Mr Gloss Pty Ltd v Mischel* [2011] VSC 40 [4]

[10] An appropriate analogy is the test in an application for a freezing order. See *Patterson v BTR Engineering* (1989) 18 NSWLR 319, *Pearce v Waterhouse* [1986] VicRp 57; [1986] VR 603, *Victoria University of Technology v Wilson* [2003] VSC 299 [38].

APPEARANCES: For the plaintiff Messade: Mr J Richards SC with Ms T Riddell, counsel. Clark Toop & Taylor, solicitors. For the defendant Baires Contracting Pty Ltd: Ms M Hartley SC and Ms P Cefai-Talbot, counsel. Hall & Wilcox, solicitors.