

Preliminary Discovery of Documents from a Prospective Defendant - r 5.3 *Uniform Civil Procedure Rules 2005*

by Gary Doherty

Preliminary discovery is dealt with in rules 5.1-5.8 of the *Uniform Civil Procedure Rules 2005* (UCPR), which in summary provide:

- Rule 5.1 Definitions for the purposes of Pt 5 UCPR
- Rule 5.2 Discovery to ascertain the identity or whereabouts of a prospective defendant
- Rule 5.3 Discovery of a document or thing from a prospective defendant that would assist the applicant in determining whether or not to commence proceedings against the prospective defendant
- Rule 5.4 Discovery from a person who is not an intended party to the proceedings, but in respect of whom it appears to the court may be able to give discovery of a document or thing relating to any question in the proceedings
- Rule 5.5 Provides that procedural aspects of Div 1 of Pt 21 UCPR apply to preliminary discovery
- Rule 5.6 Provides that an order for preliminary discovery may be made subject to a condition requiring the applicant to give security for costs
- Rule 5.7 Provides that a claim for privilege may be made in respect of preliminary discovery
- Rule 5.8 Deals with costs concerning applications for preliminary discovery

Scope of paper

This paper is concerned with an application under r 5.3 UCPR for an order for preliminary discovery from a prospective defendant or cross-defendant, in circumstances where it appears to the court that the applicant having made reasonable inquiries is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective

defendant and that discovery of a document or thing would assist the applicant in deciding whether or not to commence proceedings.

Uniform Civil Procedure Rules – r 5.3

5.1 Definitions

(cf Federal Court Rules, Order 15A, rule 1)

In this Part:

applicant means an applicant for an order under this Part.

identity or whereabouts includes the name and (as applicable) the place of residence, registered office, place of business or other whereabouts, and the occupation and sex, of the person against whom the applicant desires to bring proceedings, and also whether that person is an individual or a corporation.

5.3 Discovery of documents from prospective defendant

(cf Federal Court Rules, Order 15A, rules 6, 7 and 9)

If it appears to the court that:

- (a) the applicant may be entitled to make a claim for relief from the court against a person (**the prospective defendant**) but, having made reasonable inquiries, is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant, and
- (b) the prospective defendant may have or have had possession of a document or thing that can assist in determining whether or not the applicant is entitled to make such a claim for relief, and
- (c) inspection of such a document would assist the applicant to make the decision concerned,

the court may order that the prospective defendant must give discovery to the applicant of all documents that are or have been in the person's possession and that relate to the question of whether or not the applicant is entitled to make a claim for relief.

(2) An order under this rule with respect to any document held by a corporation may be addressed to any officer or former officer of the corporation.

(3) Unless the court orders otherwise, an application for an order under this rule:

- (a) must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of documents in respect of which the order is sought, and
- (b) must, together with a copy of the supporting affidavit, be served personally on the person to whom it is addressed.

(4) This rule applies, with any necessary modification, where the applicant, being a party to proceedings, wishes to decide whether or not to claim or cross-claim against a person who is not a party to the proceedings.

Preliminary discovery of documents from a prospective defendant for the purposes of deciding whether or not to commence proceedings was first introduced to the Supreme Court with the commencement of the *Uniform Civil Procedure Rules 2005*. Previously, it was only possible to obtain preliminary discovery to ascertain a prospective defendant's identity or whereabouts.

The power is conferred in r 5.3(1)(a) if it appears to the court the applicant “*may be entitled to make a claim against the prospective defendant*” and after having made reasonable inquiries it appears the plaintiff is unable “*to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant*”.

The counterpart of r 5.3 UCPR is O 15A r 6 of the *Federal Court Rules*, which has been in existence for many years. The decisions on the Federal Court rule, except where there is divergence in the substance between the two rules, are of guidance in the interpretation of r 5.3.¹ Comparison of the two rules shows that r 5.3 is in wider terms than O 15A r 6 and is more generous in its application.

Federal Court Rules – O 15A r 6

Interpretation

In this Order, unless the context or subject-matter otherwise requires:

applicant means applicant for an order under this Order.

description includes the name, and (as applicable) the place of residence, registered office, place of business, occupation and sex of the person against whom the applicant desires to bring a proceeding, and also whether that person is an individual or a corporation.

possession means possession, custody or power.

6 Where:

- (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description has been ascertained;
- (b) after making all reasonable inquiries, the applicant has not sufficient information to enable a decision to be made whether to commence a proceeding in the Court to obtain that relief; and
- (c) there is reasonable cause to believe that that person has had or is likely to have had possession of any document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist in making the decision;

the Court may order that that person shall make discovery to the applicant of any document of the kind described in paragraph (c).

The Federal Court authorities suggest that the Federal Court rule is to be given the fullest scope that the language will reasonably allow and that it should be construed beneficially.² In

¹ *Papaconstuntinos v Holmes A Court and Anor* [2006] NSWSC 945 SCNSW, Simpson J at [13]

² *Paxus Services Ltd v People Bank Pty Ltd* (1990) 99 ALR 728 at 733

*Panasonic Australia Pty Ltd v Ngage Pty Ltd*³ Young CJ in Eq considered the construction and application of r 5.3 UCPR. His Honour stated:

“It would seem that the rule-making authority has deliberately intended to incorporate into NSW court procedure at the very least the power of the Federal Court and that despite any conservative philosophy a judge might hold about the extent of the law of discovery, courts must proceed on the basis that there has been a deliberate policy decision made to extend the rights of potential plaintiffs against potential defendants and to extend them in the way that the Federal Court set out in cases like *Hooper v Kirella*.”⁴

The Table provides a comparison of the provisions of r 5.3(1) UCPR and O 15A r 6.

R 5.3(1) UCPR	O 15A r 6 FCR
If it appears to the court that the applicant may be entitled to make a claim for relief from the court: (1)(a)	Where there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the court: (a)
If it appears to the court that ... having made reasonable inquiries, the applicant is unable to obtain sufficient information to decide whether or not to commence proceedings: (1)(a)	Where after making all reasonable inquiries, the applicant has not sufficient information to enable a decision to be made whether to commence a proceeding in the court: (b)
If it appears to the court that discovery from the prospective defendant may have or have had possession of a document or thing that can assist in determining whether or not the applicant is entitled to make a claim for relief: (1)(b)	Where there is reasonable cause to believe that the prospective defendant has had or is likely to have had possession of any document relating to the question whether the applicant has the right to obtain the relief ... : (c)
If it appears to the court that inspection of a document would assist the applicant to decide whether or not to commence proceedings, the court may order discovery of documents that relate to the question of whether or not the applicant is entitled to make a claim for relief: (1)	Where there is reasonable cause to believe ... that inspection of the document by the applicant would assist in deciding whether or not to commence proceedings the court may order discovery of documents relating to the question of whether the applicant has the right to obtain the relief: 6

What is the purpose of preliminary discovery under r 5.3?

The purpose of preliminary discovery is not to produce material which will strengthen or enhance a decision to commence proceedings, but rather to provide what is reasonably necessary to enable the decision to be made.⁵ It follows that an applicant is not entitled “to fish” for the purpose of ascertaining whether he or she has a case against the prospective defendant.

³ [2006] NSWSC 399 SCNSW, Equity Division, reported (2006) 69 IPR 595

⁴ at [22] See footnote 9 (below) for the context in which his Honour referred to *Hooper v Kirella*

⁵ *Matrix Film Investment One Pty Ltd v Alameda Films LLC* [2006] FCA 591 FCA, Tamberlin J at [19]

What must an applicant establish to obtain an order under r 5.3?

Analysis of r 5.3 UCPR shows that an order may not be made unless the court is satisfied of the following five separate matters:

1. That the applicant may be entitled to make a claim against the prospective defendant;
2. That the applicant has made reasonable enquiries;
3. That notwithstanding that the applicant has made reasonable enquiries, the applicant is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant;
4. That the prospective defendant may have, or may have had, possession of a document or thing that could assist in determining whether or not the applicant is entitled to make such a claim for relief; and
5. That inspection of that document or thing would assist the applicant to make a decision whether or not to commence proceedings.

Even if the applicant establishes these five matters the power to make an order remains discretionary.⁶

The applicant may be entitled to make a claim

In the cases which have discussed what an applicant must prove to satisfy a court that he or she “may be entitled to make a claim”, there has been a difference of opinion as to the test to be applied.

In *Cairns v Unicomb and Ors*⁷ Palmer J indicated that an applicant is required to establish that evidence adduced in support of the application demonstrated, to a prima facie level at least, that there are arguable causes of action against the defendant.⁸

Young CJ in Eq adopted a less onerous test in *Panasonic Australia Pty Ltd v Ngage Pty Ltd*⁹ finding that it will be sufficient if there is reasonable cause to believe that the applicant may have a right of action against the prospective defendant on some recognised legal ground. His Honour stated:

“However, as counsel submit, for the purposes of the present proceedings, all that the plaintiff need show is that the contemplated proceedings are likely to rest on some recognised legal ground and does not necessarily have to show a prima facie or pleadable case so long as there is reasonable cause to believe that the applicant may have a right to obtain relief in the court,

⁶ *Papaconstuntinos v Holmes A Court and Anor*, *supra*, at [18] & *Panasonic Australia Pty Ltd v Ngage Pty Ltd*, *supra*, at [38]

⁷ [2005] NSWSC 1279, Equity Division, Palmer J, 1 December 2005

⁸ at [19]

⁹ (*supra*) [2006] NSWSC 399 SCNSW, Equity Division

its mere assertion that there is such a case being insufficient. The authority for that proposition is *Hooper v Kirella Pty Ltd* (1999) 96 FCR 1 at 11-12, a decision on comparable rules in the Federal Court.”¹⁰

...

“Although there is some suggestion in the judgment of Palmer J in *Cairns v Unicomb* [2005] NSWSC 1279 that a prima facie case has to be shown, it seems to me that the general flow of decision in the Federal Court, see *Paxus Services Ltd v People Bank Pty Ltd* (1990) 99 ALR 728 and *Aitken v Neville Jeffress Pidler Pty Ltd* (1991) 33 FCR 418, is that what one looks for is to see if there is reasonable cause to believe that the applicant may have a right of action against the respondent.”¹¹

When determining whether an applicant has established that he or she “may be entitled to make a claim”, relevant considerations are the position of the applicant and the applicant’s requisite knowledge from that position. In *Cairns v Unicomb and Ors* the applicant was an executrix seeking information about transactions of which she had no direct knowledge and of which she had not been informed by the deceased. Young CJ in Eq considered that in those circumstances, more latitude must be afforded by the court to an application for preliminary discovery than would be the case if the applicant were a direct participant in the relevant transaction with direct knowledge.¹²

In *Morton v Nylex Ltd*¹³ White J applied the test preferred by Young CJ, he stated:

“... In order for it to “appear” to the Court that the applicant “may be entitled” to make a claim for relief, it is not necessary for the applicant to show a prima facie or pleadable case. On the other hand, the mere assertion of a case is insufficient. It will be sufficient if there is reasonable cause to believe that the applicant may have a right of action against the respondent resting on some recognised legal ground: *Panasonic Australia Pty Ltd v Ngage Pty Ltd* ...”

The applicant has made reasonable inquiries

The requirement to make “reasonable inquiries” suggests that the applicant must establish that he or she has made a reasonable attempt to identify, consider and explore alternate sources of information, and if one source fails other potential sources should be explored.

The inquiries are not limited to inquiries made of the prospective defendant. However, in order for an applicant to establish that she has made reasonable inquiries to obtain sufficient information to decide whether or not to commence proceedings, the applicant should usually make inquiries of the prospective defendant concerning matters of liability. This will usually lead to the prospective defendant providing explanations. Young CJ considered that an applicant is not obliged to accept at face value the explanations which may have been given,

¹⁰ at [20]

¹¹ at [27]

¹² at [10]

¹³ [2007] NSWSC 562 at [25]

but is entitled to test whether the explanations given are fully exculpatory or, on the contrary, are insufficient and the documents reveal sufficient cause to prosecute causes of action.¹⁴

The relevant time for having made reasonable inquiries is the time the court is considering the application. If reasonable inquiries have not been made prior to the filing of the application, but are made prior to hearing, an order may nevertheless be made.¹⁵

In *Sinopharm Jiangsu Co Pty Ltd v Bank of China*¹⁶ McDougall J dismissed an application for preliminary discovery under r 5.3 for a failure by the applicant to discharge its onus of showing that it has made reasonable inquiries. The plaintiff was a company incorporated in the People's Republic of China who entered into contracts with a company incorporated in Australia ("the supplier") for the supply of crude iodine for delivery to the plaintiff in China. The payment mechanism for the contracts required the plaintiff to establish a letter of credit in favour of the supplier to be delivered to the defendant (Bank of China) before each shipment of iodine. The plaintiff kept its account at the defendant's Jiangsu branch in China. The letters of credit were issued and delivered to the defendant at its NSW Chinatown branch. The supplier also operated a bank account at that branch and as a result, the defendant received documents in its capacity as the supplier's banker. The supplier failed to deliver any crude iodine to the plaintiff. Nonetheless, the defendant on three occasions debited the plaintiff's account and remitted those funds to the supplier's bank account. The supplier then took the money and disappeared.

Concerning the question of reasonable inquiries his Honour stated¹⁷:

"What is reasonable cannot be determined in some a priori fashion. The determination must take into account the facts of the particular case including, so far as those facts demonstrate it, the relationship (if any) between the applicant and the prospective defendant. If there were no such preexisting relationship, then I would incline to the view that enquiries of the bank in this jurisdiction through its Chinatown branch would amount to "reasonable enquiries".

However, in circumstances where, as I have said, the whole of the relevant relationship, both general and particular, appears to have been conducted in the city of Jiangsu, and between representatives of Sinopharm and the bank in that city, I am not so satisfied.

To my mind, when a customer in a foreign country complains that its banker in a foreign country has wrongfully debited its account held in that foreign country, the starting point for the enquiries is that foreign country; specifically the place in the foreign country where the relevant transactions occurred. That is not in my view displaced by the consideration that some underlying or collateral action may have occurred in this country.

In this case, I think, the starting point for Sinopharm was to make enquiries of the bank in Jiangsu. It may have done so and received no satisfaction; and if that were the case, it might be a material consideration. But there is no evidence whatsoever that it has made any such

¹⁴ *Cairns v Unicomb and Or, supra* at [12]. This is also relevant to matter 3 (i.e. whether sufficient information is available)

¹⁵ *Papaconstantinos v Holmes A Court and Anor, supra* at [27]

¹⁶ [2007] NSWSC 484

¹⁷ at [32]-[35]

enquiries. Thus, in my view, Sinopharm has failed to discharge the onus on it of showing that it has made those reasonable enquiries.”

Where relevant information may be obtained through an FOI application, it is prudent to make an application or at least properly consider the merits of an application, as FOI is a useful investigative procedure that will assist in establishing that “reasonable inquiries” have been undertaken. In *Roads & Traffic Authority of NSW v Australian National Car Parks Pty Ltd*¹⁸ the NSW Court of Appeal refused leave to appeal a decision of Malpass AsJ dismissing an application under r 5.2(1)(a) UCPR by the defendant/applicant seeking from the RTA details of the registered owners of 294 vehicles. The information was required by the applicant for the purposes of commencing private prosecutions for debts of less than \$100 against the owners of the vehicles for failing to pay for parking.

The RTA contended that the application should be refused because the applicant was side-stepping the procedures applicable under FOI. The applicant’s case was that in the circumstances, the FOI route did not constitute “reasonable inquiries”. The evidence was that the RTA received hundreds of FOI applications from persons seeking private registration details each year. It processed them upon payment of a fee and in doing so consulted the person whose personal details were sought to provide them with an opportunity to object to their details being released. The combined cost of the individual applications was expensive in proportion to the unpaid parking fees and the overall process was slow.

In dismissing the application for leave to appeal the Court of Appeal recognised that the applicant had alternative rights and, if it could bring itself within the scope of preliminary discovery and obtain a favourable exercise of the judicial discretion, then it could escape the toils and delays of the FOI regime.

Having made reasonable enquiries the plaintiff is unable to obtain sufficient information to decide whether or not to commence proceedings

The prospective defendant may have, or may have had, possession of a document or thing that could assist in determining whether or not the plaintiff is entitled to make a claim for relief

In *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd*¹⁹, Lindgen J refused an application for preliminary discovery under the Federal Court rule on the basis that the applicant had sufficient information to decide whether or not to commence proceedings. His Honour held that the applicant’s subjective opinion that it did not have enough information to decide whether or not to commence proceedings was insufficient. His Honour stated:

“The fact that a particular applicant genuinely feels unable, because of a lack of information, to decide to commence a proceeding does not, without more, satisfy para 6 (b); the objective aspect of the paragraph requires it to be shown as an objective fact that

¹⁸ [2007] NSWCA 114, Mason P, McColl JA and Bell J

¹⁹ [1996] (unreported, No NG 351 of 1996)

the applicant lacks ‘sufficient information to enable a decision to be made whether to commence a proceeding’.”²⁰

...

“Having regard to the extensive scientific research which has been carried out by or on behalf of Alphapharm and its strong prima facie case, it is difficult to avoid the conclusion that in seeking pre-action discovery, it is seeking to eliminate a possibility, rather than to obtain key information without which it is not able to commence a proceeding. No doubt inspection of the documents referred to in Alphapharm’s application would assist it in taking that decision, but I am of the view that it already has reasonably sufficient information to enable it to decide. Another way of expressing the matter is to say that Alphapharm has not, after making all reasonable inquiries, come up against an obstacle consisting of the lack of key information which it reasonably needs to enable it to decide whether to commence a proceeding; rather, it hopes to be comforted in taking the decision which it already has sufficient information to enable it to take.” (Emphasis added)²¹

In *Glencore International AG v Selwyn Mines Ltd*²² Lindgren J indicated that the measure of preliminary discovery is the extent of information that is necessary, but no more than that which is reasonably necessary, in order to overcome the insufficiency of information already possessed by the plaintiff after it has made “all reasonable inquiries” to enable it to make a decision as to whether to commence proceedings.

Young CJ in *Eq* has suggested that r 5.3 UCPR not only covers information as to the evidence required to prove a cause of action, but also covers material as to the possible worth of the prospective defendant.²³ This is because a significant consideration for most people when deciding to litigate is whether the defendant will have sufficient assets to satisfy a judgment in favour of the plaintiff.

In *Morton v Nylex Ltd*²⁴ White J dismissed an application for preliminary discovery under r 5.3 UCPR for failure of the plaintiff to prove the negative requirement that they are unable to obtain sufficient information to decide whether or not to commence proceedings. His Honour stated²⁵:

“[33] The onus is on the plaintiffs to make it appear to the Court that, having made reasonable inquiries, they are unable to obtain sufficient information to decide whether or not to commence proceedings against Nylex. The third requirement of r 5.3(1)(a) requires an objective assessment of the information already possessed by the plaintiffs to determine whether that information is sufficient for such a decision to be made. The question is whether the applicant has insufficient information to be able to decide whether to institute proceedings; not merely to establish a cause of action. Hence, an applicant may be entitled to preliminary discovery of documents relevant to available defences, or the extent of

²⁰ at [41]

²¹ at [50]

²² (2005) FCA 801

²³ *Panasonic Australia Pty Ltd v Ngage Pty Ltd* [2006] NSWSC 399 SCNSW per Young CJ at [35]

²⁴ [2007] NSWSC 562 at [25]

²⁵ at [32]-[40]

apprehended breaches, or the likely quantum of damages, as well as of documents which may establish whether there is a cause of action. However, unless the applicant is lacking something reasonably necessary to make a decision whether to institute proceedings, he or she is not entitled to preliminary discovery. An applicant must disclose what information he or she already has relevant to making such a decision, and identify what information is lacking. Preliminary discovery cannot be used to build up a case which an applicant has already decided, or could decide, to bring (*Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd* (Lindgren J, Federal Court of Australia, 24 May 1996; *St George Bank Ltd v Rabo Australia Ltd Glencore International AG v Selwyn Mines Ltd (recs and mgrs apptd)* (2005) 223 ALR 238 at 241 [15]; *Matrix Film Investment One Pty Ltd v Alameda Films LLC* [2006] FCA 591 at [15]-[19], [25]).”

Concerning the deficiencies in the evidence his Honour stated:

“[34] There is no issue that the plaintiffs have made reasonable inquiries. They have made persistent inquiries over a number of years. However, there is little evidence before me of what information they have obtained as a result of those inquiries. None of the documents they have obtained from HRL was produced. No attempt was made to summarise the contents of such documents. No explanation was given as to what the plaintiffs have learned as a result of their inquiries, or in what particular respects their information is deficient so that they are unable to decide whether or not to commence proceedings against Nylex. There is only a broad assertion by Mr Morton in para 17 of his affidavit that *"until I can obtain further documents I do not know whether the other plaintiffs and myself have rights to pursue Nylex, HWR (HRL), the directors of both or one only of them or possibly the financial institutions or advisors of Nylex and HWR."* Mr Morton does not explain why that is so.

[35] This paragraph of Mr Morton's affidavit was not objected to, presumably because Nylex wished to rely on it to show an absence of a reasonable cause to believe that a cause of action against Nylex exists. Had it been objected to, it would have been inadmissible. ... I do not consider that it carries any weight on the question of whether it appears that the plaintiffs do not have sufficient information to decide whether or not to commence proceedings against Nylex. That question is to be determined objectively. Its answer does not depend on Mr Morton's subjective beliefs. In any event, there is no evidence of what Mr Morton believes he will need in order to make such a decision. There is no evidence that Mr Morton is legally qualified. There must be many cases in which a plaintiff would not know whether the information available to him or her were a sufficient basis to justify the bringing of proceedings. That is one reason prospective plaintiffs usually consult lawyers. There is no evidence from the plaintiff's solicitors or counsel that they do not consider that the information presently available to the plaintiffs is insufficient to make a decision as to whether or not proceedings should be commenced against Nylex and, if so, why that is.

[40] Nylex has not produced any evidence that the plaintiffs have sufficient information to enable them to make the decision. However, the onus does not lie on Nylex. The onus lies on the plaintiffs to establish the negative requirement in r 5.3(1)(a) that they are unable to obtain sufficient information to decide whether or not to commence proceedings. The assertion by Mr Morton that, until documents are produced, he does not know whether or not the plaintiffs are entitled to make a claim against Nylex does not cast an evidentiary onus on the defendants. That is not just because Mr Morton does not give any reason for his opinion. It is also because the plaintiffs may have sufficient information to decide whether or not to

commence proceedings, even if Mr Morton does not know it. The plaintiffs' evidence did not reach a point where an evidentiary onus was cast upon Nylex to show that the plaintiffs had sufficient information to make a decision whether or not to commence proceedings.”

Security for Costs & Costs

Security for Costs

(cf Federal Court Rules, Order 15A, rule 11)

5.6 An order under this part may be made subject to a condition requiring the applicant to give security for the costs of the person in against whom the order is made.

Costs and other expenses

(cf SCR Part 52A, rule 26; DCR Part 39A, rule 5; Federal Court Rules, Order 15A, rules 4 and 11)

5.8 (1) On the application for an order under this Part, the court may make orders for the costs of the applicant, the person against whom the order is made or sought and of any other party to the proceedings.

(2) The costs in respect of which such an order may be made include:

- (a) payment of conduct money, and
- (b) payments made on account of any expense or loss in relation to the proceedings, and
- (c) the costs of making and serving any list of documents, and
- (d) the costs of producing any documents for inspection, and
- (e) the costs of otherwise complying with the requirements of any order under Division 1 of Part 21, as applying to the discovery and inspection of documents the subject of an order for discovery under this Part.

When dealing with applications for costs, the defendant should be in a position to inform the court of a sum of money which it reasonably requires for marshalling documents, preparing the list of documents and supervising inspection. If security is ordered, it will usually be provided in an amount that will offer a complete indemnity for the costs of compliance with the order.

The general order for costs in a contested application is that costs follow the event. However, where a party seeks a special costs order and the other side does not appear to contest the application, the plaintiff will more likely be ordered to bear his/her own costs. In a borderline case where the plaintiff receives an advantage, the likely order for costs is that the costs of the application be the plaintiff's costs in any proceedings that are commenced as a result of the discovery – the formal order being that costs be reserved with an order to be made encapsulating the costs if proceedings are commenced.

Tips for making an application under r 5.3 UCPR

If instructed to act for an applicant on an application for preliminary discovery of documents the following steps will assist in preparation:

1. Identify the prospective defendant and the potential causes of action.
2. Comprehensively investigate the factual matters concerning liability and consider any potential defences.
3. Make inquiries of the potential defendant being mindful of the requirement to discharge the onus of having made reasonable inquiries. Consider the following:
 - Information available in the public domain, such as policies, standard procedures, media releases, annual reports etc.
 - FOI application – where the prospective defendant is a government department or relevant information is available about the potential defendant through FOI.
 - If proceedings are on foot and the application is in respect of a potential cross-defendant consider issuing subpoenas. Ensure any subpoena has sufficient specificity or it risks being set aside as an abuse of process for fishing.
 - Request specific classes of documents going to issues of liability, defences, damages, quantum etc.
4. Make inquiries of the prospective defendant with a view to gaining an understanding of the nature of the information held by the defendant, be mindful of the need to prove the defendant may have, or may have had possession of documents that could assist in determining whether or not the plaintiff is entitled to make a claim for relief.
5. Analyse the marshalled information and evaluate it against the elements of the potential causes of action and defences.
6. If there has been an FOI application, consider any objections to the release of information or masking of information that would otherwise be discovered and inspected under an order for preliminary discovery.
7. Identify key deficiencies in the information.
8. Demonstrate how the deficiency renders the information insufficient to enable a decision to be made whether or not to commence proceedings, preferably by pointing to a material fact to which the deficiency is concerned.

9. Provided there is no risk of evidence being destroyed by the prospective defendant, consider making further specific requests for information identified in the analysis in the preceding paragraph.
10. If there is a risk of evidence being destroyed consider making an urgent application for an interim preservation order under r 25.3 UCPR.
11. Draft categories of documents for discovery addressing the objective deficiencies in the available information – do not simply draft categories of documents that would be discoverable if substantive proceedings were on foot.
12. Give the prospective defendant reasonable notice of the intended application.
13. Prepare an affidavit in support of the application addressing the five matters, which must be established to obtain an order under r 5.3.
14. Make the application by filing a Notice of Motion in existing proceedings (i.e. cross-defendant) or by way of Summons if there are no proceedings on foot.
15. Serve the application personally on each prospective defendant.
16. Consider the possible need to raise money for security of costs.

Tips for defending an application under r 5.3 UCPR

If instructed to act for a defendant in opposition an application for preliminary discovery of documents the following steps will assist in preparation:

1. When approached by a potential applicant for preliminary discovery making inquiries:
 - Ascertain if there is any obligation to provide the requested information, e.g. trustee, contractual obligation, legislation etc.
 - Carefully review material documents and consider if there is any strategic advantage to be gained by providing all or part of the requested documents with the intention of controlling the provision of documents so as to weaken any application. Take care when providing documents that refer to other documents, as if not all documents are provided it may strengthen the application.
2. At all times be mindful of ethical obligations when communicating with the applicant. Do not mislead the applicant, e.g. by stating that there are no documents on a given issue or that all documents concerning the issue have been provided – unless you have clear and firm instructions to do so.

3. Identify the documents that have been produced to applicant.
4. Identify material documents that have not been produced to the applicant and the reasons why they have not been produced.
5. Consider what inquiries the applicant has made and whether there are other reasonable inquiries that ought to have been made.
6. Consider the potential causes of action and, if possible, objectively demonstrate from the documents provided to the applicant that there is sufficient information available to enable a decision to be made whether or not to commence proceedings.
7. Assess the amount of work/resources/time required to conduct reasonable inquiries, marshal documents within the proposed categories, and provide a verified list of documents.
8. Consider any draft categories of documents proposed by the applicant. Be mindful that entering into discussions with the applicant about proposed classes of documents before an order is made for preliminary discovery could materially assist the applicant.
9. Assess the approximate cost of complying with an order for preliminary discovery if made in the terms of the proposed categories in the application: see rules 5.6 & 5.8 UCPR.
10. Prepare an affidavit opposing the application addressing the five matters, which the applicant must establish and any other relevant matters arising from the above points. The evidence should also provide a summary of the information informally provided to the applicant.

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21 February 2008