Preliminary Discovery of Documents from a Prospective Defendant –

r 5.3 *Uniform Civil Procedure Rules* 2005

by Gary Doherty (assisted by Tessa Dudfield[1]) - March 2015

Preliminary discovery and inspection is dealt with in Part 5 of the *Uniform Civil Procedure Rules* 2005 **(UCPR)** (rules 5.1 – 5.8), which provide:

- Rule 5.1 Definitions of "applicant" and "identity or whereabouts" for the purposes of Pt 5
- 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 a party to existing 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 for discovery Div 1 of Pt 21 UCPR apply to an order for discovery under Pt 5
- 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 a privileged document that is the subject of an order for preliminary discovery
- Rule 5.8 Deals with costs and other expenses 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

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1 **Tessa Dudfield** is a student of law at the University of Sydney (undertaking studies in Bachelor of Laws and Bachelor of Arts - Chinese studies 2012-2016).

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, Division 7.3, rule 7.21)

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, Division 7.3, rules 7.23, 7.24, 7.25)

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 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 Rule 7.23 of the *Federal Court Rules*, which replaced O 15A r 6 in 2011. However, the general statements of principle did not change.[2] The decisions concerning 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.[3] Comparison of the two rules shows that r 5.3 is in wider terms than r 7.23 and, is more generous in its application.

Federal Court Rules – Rule 7.23

Definitions for Division 7.3

In this Division:

"prospective applicant" means a person who reasonably believes that there may be a right for the person to obtain relief against another person who is not presently a party to a proceeding in the Court.

"prospective respondent" means a person, not presently a party to a proceedings in the Court, against whom a prospective applicant reasonably believes the prospective applicant may have a right to obtain relief.

Discovery from prospective respondent

(1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:

(a) reasonably believes that he or she may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained; and

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2 *Ebos Group Pty Ltd v Team Medical Supplies Pty Ltd* [2011] FCA 862; *Higgins v Hancock* (2011) 199 FCR 393 [55]-[59] (Jacobson J)

3 *Papaconstuntinos v Holmes A Court and Anor* [2006] NSWSC 945 SCNSW [13] (Simpson J)

(b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and

(c) reasonably believes that:

(i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and

(ii) inspection of the documents by the prospective applicant would assist in making the decision.

(2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1) (c) (i).

Federal Court authorities state that the Federal Court rule is to be beneficially construed, "given the fullest scope that its language will reasonably allow, with proper brake on any excesses lying in the discretion of the Court, exercised in the particular circumstances of each case."[4] In *Panasonic Australia Pty Ltd v Ngage Pty Ltd*[5] 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*."[6]

The Table provides a comparison of the provisions of r 5.3(1) UCPR and R 7.23 FCR

R 5.3(1) UCPR	**R 7.23 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 the prospective applicant reasonably believes that he or she may have the right to obtain relief in the court from a prospective respondent whose description has been ascertained; (1)(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	Where after making reasonable inquiries, the prospective applicant does not have sufficient information to decide whether to start a proceeding in the court to obtain

4 *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWCA 69 [52] (McColl JA)

5 [2006] NSWSC 399 SCNSW, Equity Division (reported (2006) 69 IPR 595)

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

commence proceedings: (1)(a)	that relief; (1)(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)	… reasonably believes that the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain relief; (1)(c)(i)
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)	… reasonably believes that inspection of the documents by the prospective applicant would assist in making the decision: (1)(c)(ii) If the court is satisfied of matters mentioned in subrule (1), the court may order the prospective respondent discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i)

What is the purpose of preliminary discovery under r 5.3 UCPR?

The purpose of preliminary discovery is not to produce material that will strengthen or enhance a decision to commence proceedings, but rather to provide what is reasonably necessary to enable the decision to be made.[7] It follows that an applicant is not entitled "to fish" for the purposes of ascertaining whether he or she has a case against the prospective defendant.

What are the elements of r 5.3 UCPR?

Rule 5.3 UCPR essentially consists of the following five elements:

1. That the applicant may be entitled to make a claim against the prospective defendant (noting that it is not necessary for the applicant to show a prima facie or pleadable case);
2. That the applicant has made reasonable enquiries in an attempt to ascertain the necessary information;
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

[7] *Matrix Film Investment One Pty Ltd v Alameda Films LLC* [2006] FCA 591 [19] (Tamberlin J)

5. 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 each element, the power to make an order remains discretionary.[8]

Application of the elements of r 5.3 UCPR

The requirement under r 5.3 is that it 'appear' to the Court that the applicant "may be entitled to make a claim," in contrast to the Federal Court Rule 7.23 requiring an objective reasonable belief.[9] Under r 5.3, an applicant must show more than the mere possibility of a claim.[10]

The initial difference of opinion in the cases that surrounded r 5.3 regarding what an applicant must prove to satisfy a Court that he or she "may be entitled to make a claim", was settled by the NSWCA (McColl JA; Young JA; Sackville AJA) in *Hatfield v TCN Channel Nine.*[11] The case involved a former rather unfortunate policewoman who was portrayed in the Channel Nine television show *Underbelly - The Golden Mile*. The former officer sought preliminary discovery to determine if she had a claim in defamation and whether she was entitled to injunctive relief. McColl JA summarised the general and established principles relevant to an application for primary discovery.[12] Approving the test preferred by Young CJ in *Cairns v Unicomb and Ors* and that of White J in *Morton v Nylex Ltd,*[13] her Honour stated:

> "First, [i]n 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."

The use of the word "may" provides the court with a degree of latitude, indicating it need not have to reach "a firm view that there is a right to relief."[14]

> "Secondly, while ''the mere assertion of a case is insufficient…[i]t 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.'"

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

9 *Reeve v Aqualast* Pty Ltd [2012] FCA 679 [31] (Yates J)

10 *Quanta Software International Pty Ltd v Computer Management Services Pty Ltd* (2000) 175 ALR 536 (FCA) [24]; *Airservices Australia v Transfield Pty Ltd* (1999) 164 ALR 330 [5]; *Hooperv Kirella Pty Ltd (1999) 96 FCR 1 at [39]. Although these cases were decided under the Federal Court Rules, they appear to be relevant to applications decided under UCPR r 5.3.*

11 [2010] NSWCA 69

12 *Hatfield v TCN Channel Nine Pty Ltd* [2010] NSWCA 69 [47]-[50]

13 Approved in *Athena Investment Holdings LLC v AJ Lucas Group Ltd* [2013] NSWSC 1837

14 *Ibid, see also Telstra Corp Ltd v Minister for Broadband, Communications and the Digital Economy* [2008] FCAFC 7*;* (2008) 166 FCR 64 [58]

Belief requires more than mere assertion and more than suspicion or conjecture. It is an inclination of the mind towards assenting to, rather than rejecting a proposition. Thus, it is not sufficient to point to a mere possibility. In *Hatfield,* McColl JA stated that[15]:

> "[It] is an inclination of the mind towards assenting to, rather than rejecting a proposition. Thus it is not sufficient to point to a mere possibility. The evidence must incline the mind towards the matter or fact in question. If there is no reasonable cause to believe that one of the necessary elements of a potential cause of action exists, that would dispose of the application insofar as it is based on that cause of action"

In *Hatfield,* McColl JA stated that, "whilst uncertainty as to only one element of a cause of action might be compatible with 'reasonable cause to believe'…uncertainty as to a *number* of such elements may be sufficient to undermine the reasonableness of the cause to believe."[16] This view was affirmed in *Athena Investment Holdings LLC v AJ Lucas Group Ltd*[17], which concerned an application for preliminary discovery on the basis that Lucas had engaged in misleading or deceptive conduct and had breached a loan agreement. Lucas argued that the application should be dismissed, as there was no reasonable cause to believe that all the necessary elements of each potential cause of action existed. Robb J rejected the argument, and in doing so cited McColl JA's statements in *Hatfield*.

The position of the applicant and the applicant's particular knowledge arising from that position, are relevant factors to consider when determining whether an applicant has established that he or she may be entitled to make a claim. By way of illustration, 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. Palmer J in Eq considered that in those circumstances the Court must afford more latitude to an applicant for preliminary discovery than would be the case if the applicant were a direct participant in the relevant transaction with direct knowledge.[18]

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. This is a question of fact to be considered in all the circumstances, including the relationship between the parties, and the relationship between the party making the application and any other source of information.[19]

The inquiries should not whenever possible, be 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 to commence proceedings, the applicant should usually make inquiries of the

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15 *Hatfield* at [49] approving Hely J in *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 [26](d)

16 Hatfield at [50], approving Hely J in *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 [26](e)

17 [2013] NSWSC 1837 [65]

18 *Cairns v Unicomb & Ors* [2005] NSWSC 1279 [10] (Palmer J)

19 *Hatfield* [85]; *Steffen v ANZ Banking Group* [2009] NSWSC 666 [15]

prospective defendant concerning matters of liability. This will usually lead to the prospective defendant providing explanations.

In *Cairns,* Palmer J considered that an applicant is not obliged to accept at face value the explanations which may have been given, 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.[20]

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.[21]

In *Sinopharm Jiangsu Co Pty Ltd v Bank of China*[22] 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 had 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 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 enquiries, his Honour stated[23]:

> "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 pre-existing 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".
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> 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.
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> 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.
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> 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;

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20 *Cairns v Unicomb and Anor, supra [12].*

21 *Papaconstuntinos v Holmes A Court and Anor, supra* [27]

22 [2007] NSWSC 484

23 *Ibid* [32]-[35]

> and if that were the case, it might be a material consideration. But there is no evidence whatsoever that it has made any such 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 might 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*[24] the NSW Court of Appeal refused leave to appeal, dismissing an application under r 5.2(1)(a) UCPR seeking from the RTA details of the registered owners of 294 vehicles. The information was required 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 sidestepping 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.

The Court of Appeal, in dismissing the application for leave to 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.

In *Hatfield,* McColl JA explained the particular wording of r 5.3 in relation to the information that a plaintiff must obtain, stating:

> "…[T]he question posed by [r 5.3(1)(a)] … is <u>not</u> whether the applicant has sufficient information to decide if a cause of action is available against the prospective respondent [but]… <u>whether the applicant has sufficient information to make a decision whether to commence proceedings in the Court. Accordingly, an applicant for preliminary discovery may be entitled to discovery in order to determine what defences are available to the respondent and the possible strength of those defences.</u> Thus application of the rule will not be precluded by the fact that the applicant already has available evidence establishing a prima facie case for the granting of relief, as there might be matters of defence which could defeat a prima facie case."[25] (Emphasis added)

In *Alphapharm Pty Ltd v Eli Lilly Australia Pty Ltd*[26], 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 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:

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24 [2007] NSWCA 114 (Mason P, McColl JA and Bell J)

25 at [51]

26 [1996] (unreported, No NG 351 of 1996)

> "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 the applicant lacks 'sufficient information to enable a decision to be made whether to commence a proceeding'."[27]
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> …
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> "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." [28] (Emphasis added)

In *Morton v Nylex Ltd* [29] White J dismissed an application for preliminary discovery under r 5.3 UCPR for failure of the plaintiff to prove the negative requirement that the plaintiff was unable to obtain sufficient information to decide whether or not to commence proceedings. His Honour stated[30]:

> "[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 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*

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27 *Ibid* [41]

28 *Ibid* [50]

29 [2007] NSWSC 562 [25]

30 *Ibid* [32]-[40]

(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 that was relied upon by the plaintiff, 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.
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> [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.
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> [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."

In *Brydon v Australian Track Corporation* Campbell J suggested that to the extent that the plaintiff has been unable to obtain information to make a decision whether or not to bring the proceedings, r 5.3 is not available to a plaintiff who has filed but not served a Statement of Claim. This is because, for the purposes of preliminary discovery, the proceedings have already commenced.[31]

The document need not provide direct proof that the applicant is entitled to make a claim, however it must assist in the decision making process.[32]

In *Glencore International AG v Selwyn Mines Ltd* [33] Lindgren J indicated that the measure of preliminary discovery extends to information that is necessary, but no more than that which is reasonably necessary, to overcome the insufficiency of information already possessed by the plaintiff after the plaintiff has made "all reasonable inquiries," to enable it to make a decision as to whether to commence proceedings.

If the requested documents are of a confidential nature, the court may adopt a procedure whereby the document is produced to the Court as a "Confidential Exhibit". In considering whether to grant access to the document, the applicant must first demonstrate a legitimate forensic purpose for seeking access at this stage of the proceedings. It is at the Court's discretion whether a document should be made available to the parties.[34]

The courts have emphasised that preliminary discovery applications are *interlocutory* applications where it is inappropriate for parties to litigate contested issues of fact. Such applications should also be submitted with regard to the objectives in s56 *Civil Procedure Rules.*[35]

It should be noted again that the grant of an application for preliminary discovery is discretionary. In *Hatfield,* although the evidence available satisfied the requirements of r 5.3(1)(a), the Underbelly television show was based on events already well known to the public domain. Accordingly, the application was dismissed.

Consider the purpose of PN SC Eq 11 - *Disclosure in Equity Division*

Practice Note SC Eq 11 *Disclosure in Equity Division* was introduced by his Honour Bathurst CJ in 2012 for the guidance of practitioners in preparing cases for hearing in the Equity Division and was enacted with the purpose of achieving the just, quick and cheap resolution of the real issues in dispute.

Although the Practice Note does not apply to the making of an order for preliminary discovery, it is important to have a thorough understanding of the Court's procedures with respect to discovery generally and to the need to minimise costs incurred through discovery.

The Practice Note provides that the Court will not make an order for disclosure of documents until the parties to the proceedings have served their evidence, unless

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31 *Brydon v Australian Rail Track Corporation Ltd* [2014] NSWSC 1560 [9]-[18] (Campbell J)

32 *RinRim Pty Limited v Deutsche Australia Limited* (2013) NSWSC 1762 [44] (Hallen J); *Maser v Edmonson* [2009] NSWSC 966 [29] (Macready AsJ)

33 (2005) FCA 801

34 *National Employers Mutual General Insurance Assn Ltd v Waind* [1978] 1 NSLR 372

35 *The Age Company Ltd & Ors v Liu* [2013] NSWCA 26 [102]-[105] (Barwick J)

there are exceptional circumstances necessitating disclosure. This is consistent with the notion that discovery should never be used as a fishing exercise, as the requirement to present evidence early on in proceedings will ensure that the parties are focused on the substantive issues.[36] Her Honour Bergin CJ in Eq described the 'new' regime in *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analyst Group Pty Ltd* as follows:[37]

> "Under the new regime, the plaintiffs would serve their evidence, including documents upon which they rely, in relation to their cases in chief. The defendants would then serve their evidence, including documents upon which they rely, in their respective cases. If at that time it appears necessary for disclosure of particular documents additional to those that had been relied upon by any of the parties, a consensual regime might be put in place or an application for disclosure of particular documents, or categories of documents, might be made.
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> The ambit of that disclosure is confined to the real issues between the parties as defined by not only the pleadings, but also the evidence. This process will require the proofing of witnesses at a very early stage of the litigation with the need for forensic judgments to be made as to the existence of admissible evidence in support of the respective claims. This will of course require the client and/or witnesses to provide the relevant documents to the lawyers in support of the particular claims in their evidence. However it is envisaged that the process will engender a far more disciplined analysis of the need for disclosure by reference to those real issues, compared to the carte blanche gathering in of every document the respective clients have generated in their lengthy relationship for "review" by teams of lawyers and students in the absence of any knowledge of the proposed evidence.

A successful application under the Practice Note for early discovery (before the service of evidence) will need to demonstrate "exceptional circumstances," meaning that the applicant must show it is necessary to obtain certain documents to fairly prepare their case for trial, or that they are unable to serve their evidence without the documents in question.[38]

Such circumstances may include; where the information necessary for a party's case is solely within the knowledge of the party against whom disclosure is sought,[39] when disclosure of the documents is needed to fairly prepare a case for trial,[40] and where quicker disclosure is deemed consistent with the just, quick and cheap resolution of the disputed issues.[41]

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36 Justice P A Bergin, (Speech delivered at The Commercial Law Association of Australia Ltd June Judges, 'The New Regime of Practice In The Equity Division of the Supreme Court of New South Wales', NSW State Library, 21 June 2013)

37 *Armstrong Strategic Management and Marketing Pty Ltd v Expense Reduction Analysts Group Pty Ltd* [2012] NSWCCA 393 [65]-[66]

38 *Danihel v Manning* [2012] NSWSC 566 [16]

39 *Naiman Clarke Pty Ltd v Tuccia* [2012] NSWCCA 314 [26]; *Leda Manorstead Pty Ltd v Chief Commissioner of State Revenue (No 2)* [2013] NSWSC 89

40 *Danihel v Manning* [2012] NSWSC 556

41 *RSA (Moorvale Station) Pty Ltd v VDM CCE Pty Ltd* [2013] NSWSC 534, *In the Matter of Mempoll Pty Ltd; Anakin Pty Limited and Gold Kinds (Australia) Pty Limited* [2012] NSWSC 1057

Although not specifically applying to other subpoenas and notices to produce, the court has adopted a broad interpretation of the Practice Note to ensure its purpose and requirements are not circumvented. In *North Coast Transit* [2013] NSWSC 1912, the applicants unsuccessfully sought to use the Practice Note to have a subpoena set aside on the grounds it was an abuse of process in contravention of the practice note. It was recognised that the Practice Note did not apply to subpoenas, as a subpoena does not seek an order for "disclosure of documents." [42] However, it was also recognised that a subpoena could be set aside if it involved an attempt to subvert the operation of the Practice Note – whereby what the subpoena sought was, in substance, disclosure within the scope of the Practice Note. Black J was of the view that a subpoena issued to a third party that required the production of identified documents would not ordinarily be inconsistent with the objectives of the Practice Note.[43] In *New Price Retail Services Pty Ltd v Hanna*,[44] McDougall J's stated that the considerations underlying the Practice Note also apply to the issuing of subpoenas – this view has been cited with approval.[45]

Practice Note SC Eq 11 does not apply to Notices to Produce but notices should not be used to circumvent the purpose or requirements of the Practice Note.[46]

Security for costs - UCPR r 5.6

If an order under r 5.8 is made, r 5.6 provides that the court may make the order subject to a condition requiring the applicant to give security for the costs of the person against whom the order is made. 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.

Costs and other expenses - UCPR r 5.8

When dealing with an application for costs under r 5.8, the defendant should ideally 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.[47]

The general order for costs in a contested application for preliminary discovery is that costs follow the event.[48] 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.

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42 *North Coast Transit* [2013] NSWSC 1912 [55] (Black J)

43 *Ibid*

44 [2012] NSWSC 422 [19]

45 *North Coast Transit* [56]

46 *Mempoll Pty Ltd, Anakin Pty Limited and Gold Kinds (Australia) Pty Limited* [2012] NSWSC 1057

47 *Panasonic Australia Pty Ltd v Ngage Pty Ltd (No2)* [2006] NSWSC [40] (Young J)

48 *Steffen v ANZ Banking Corp. Limited* [2009] NSWSC 883 [31]-[33] (McDougall J)

In *RinRim Pty Ltd v Deutsche Australia Limited*, the applicant was ordered to pay 80% of the defendant's costs due to the urgency of the preliminary discovery application and because it imposed an overtly onerous burden on the defendant, and it was found the defendants did not act unreasonably in response.[49] His Honour Hallen J surmised that the jurisdiction to order preliminary discovery is an extraordinary one, since such an order involves an invasion of the prospective respondent's private affairs in order to determine whether or not a case can properly be brought against them.[50]

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 should 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 requirement 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.

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49 *RinRim Pty Limited v Deutsche Australia Limited* [2013] NSWSC 1762 [82]-[83]

50 *Ibid* [85] (Hallen J)

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 preliminary 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 the opportunity to consider the proposed categories for preliminary discovery.

13. Give the proposed defendant reasonable notice of the intended application for preliminary discovery.

14. Consider serving a *Calderbank letter* on the prospective defendant in an attempt to secure an indemnity costs order if the application is successful.

15. Prepare an affidavit in support of the application addressing each element of r 5.3, which must be established to obtain an order for preliminary discovery.

16. Make the application by filing a Notice of Motion in existing proceedings or by way of Summons if no proceedings are on foot.

17. Serve the application personally on each prospective defendant.

18. Consider the need to raise money for security of costs.

TIPS FOR DEFENDING AN APPLICATION UNDER R 5.3 UCPR

If instructed to act for a potential 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 in that regard.

3. Identify the documents that have been produced to the 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.

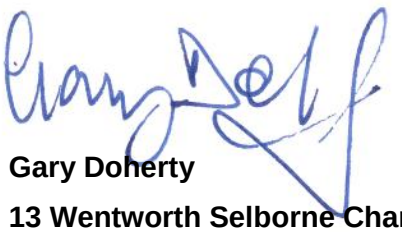
7. If some or all of the documents are privileged, consider informing the applicant of the claim for privilege and the grounds relied upon, so that the applicant can consider abandoning the proposed application or particular categories, in the event that the material documents are accepted as being privileged.

8. 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.

9. 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, but could provide effective cost protection.

10. 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.

11. Prepare an affidavit opposing the application addressing the elements of r 5.3, 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.



Gary Doherty

13 Wentworth Selborne Chambers

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