FEDERAL COURT OF AUSTRALIA

Ashby v Slipper (No 2) [2016] FCA 550

File number:	NSD 580 of 2012
Judge:	**FLICK J**
Date of judgment:	19 May 2016
Catchwords:	**PRACTICE AND PROCEDURE** – release from implied undertaking – jurisdiction of Court after proceeding concluded – considerations to be taken into account – the facilitation of a criminal investigation **PRACTICE AND PROCEDURE** – power to make supplemental orders after conclusion of proceedings – application made by a former party
Legislation:	*Fair Work Act 2009* (Cth)
Cases cited:	*Ashby v Commonwealth (No 4)* [2012] FCA 1411, (2012) 209 FCR 65 *Ashby v Slipper* [2014] FCA 973 *Ashby v Slipper* [2014] FCAFC 15, (2014) 219 FCR 322 *Ashby v Slipper* [2016] FCAFC 63 *Ashby v Slipper (No 2)* [2014] FCAFC 67, (2014) 194 ALD 10 *Australian Trade Commission v McMahon* (1997) 73 FCR 211 *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476 *Caboolture Park Shopping Centre Pty Ltd v White Industries (Qld) Pty Ltd (in liq)* (1993) 45 FCR 224 *Camp Curlewis Resorts Pty Ltd v Hamersley Iron Pty Ltd* (Unreported, Federal Court of Australia, Branson J, 20 December 1994) *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 *Hearne v Street* [2008] HCA 36, (2008) 235 CLR 125 *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576 *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3, (2005) 218 ALR 283 *Plate Glass Holdings Pty Ltd v Fraser Gordon Investments Pty Ltd* [2012] FCA 1487

	Websyte Corporation Pty Ltd v Alexander [2012] FCA 69, (2012) 95 IPR 344
Date of hearing:	12 May 2016
Registry:	New South Wales
Division:	Fair Work Division
National Practice Area:	Employment & Industrial Relations
Category:	Catchwords
Number of paragraphs:	16
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Solicitor for the Applicant in the Interlocutory Proceeding:	Australian Government Solicitor for the Commonwealth of Australia

ORDERS

NSD 580 of 2012

BETWEEN:	**JAMES HUNTER ASHBY** Applicant
AND:	**PETER SLIPPER** Respondent

JUDGE: **FLICK J**

DATE OF ORDER: **19 MAY 2016**

THE COURT ORDERS THAT:

1. The Commonwealth of Australia has leave to use Exhibit RDM-2 and Exhibit RDM-3 to the Affidavit of Mr Rodney David McKemmish dated 24 April 2012 by providing them to the Commissioner of the Australian Federal Police (the "AFP") to be used for the following purposes:
   (i) the conduct of investigations by the AFP as to whether offences have occurred against the laws of the Commonwealth;
   (ii) to obtain advice in relation to whether any offences have occurred against the laws of the Commonwealth; and
   (iii) in evidence in relation to any prosecution for an offence against a law of the Commonwealth.
2. No order as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

1 It is unnecessary for present purposes to re-canvass the background facts giving rise to the present dispute other than to note that in April 2012 Mr James Ashby filed in this Court an *Originating Application* essentially making two claims for relief, namely:

- a claim under the *Fair Work Act 2009* (Cth); and
- a claim for damages for breach by the Commonwealth of Mr Ashby's contract of employment.

The Respondents to that *Originating Application* were named as the Commonwealth of Australia and a former Speaker of the House of Representatives, Mr Peter Slipper. The claims against the Commonwealth were resolved and the proceeding against the Commonwealth was accordingly discontinued by consent in October 2012.

2 The balance of the proceeding against Mr Slipper was not so easily or quickly resolved. Mr Slipper maintained that the proceeding was an abuse of process and another Judge of this Court agreed: *Ashby v Commonwealth (No 4)* [2012] FCA 1411, (2012) 209 FCR 65. But this decision was set aside on appeal: *Ashby v Slipper* [2014] FCAFC 15, (2014) 219 FCR 322. See also: *Ashby v Slipper (No 2)* [2014] FCAFC 67, (2014) 194 ALD 10. The matter was remitted for hearing. The hearing did not take place. In June 2014 the Court granted leave to Mr Ashby to discontinue the proceeding against Mr Slipper. Left outstanding was the fate of an application made by Mr Slipper in which he sought to set aside an indemnity costs order that had previously been made. The Court as presently constituted set aside that indemnity costs order in September 2014: *Ashby v Slipper* [2014] FCA 973. There was a challenge to that decision. In April 2016 a Full Court granted leave to appeal but then dismissed the appeal: *Ashby v Slipper* [2016] FCAFC 63. Hopefully there will be no application for special leave to appeal to the High Court of Australia.

3 Subject to that contingency, it otherwise may have been hoped that the April 2016 Full Court decision was the last involvement of this Court arising out of the original dispute between Messrs Ashby and Slipper. But any such hope was shattered when in April 2016 the Commonwealth filed an *Interlocutory Application.*

4 The *Originating Application* as first filed in April 2012 contained the following statement:

> The allegations contained in the Application are supported by sworn/affirmed evidence and, in the case of text messages, by forensic Information Technology assessment and report.

The reference to "*text messages*" was a reference to materials which had been downloaded from Mr Ashby's mobile phone. The downloaded material was recorded on two discs which were exhibited to an affidavit filed on behalf of Mr Ashby by Mr Rodney McKemmish, an expert in computer forensics. Those two discs had not been tendered in the proceeding.

5 It was clearly arguable that there nevertheless remained an "*implied undertaking*" that the discs could only be used for the purpose of resolving the dispute between Messrs Ashby and Slipper. Although the expression "*implied undertaking*" is frequently employed, it should be recalled that when the undertaking attaches to evidence or other materials there is nothing voluntary about it; the constraint upon the use of the evidence or other materials is a substantive obligation: *Hearne v Street* [2008] HCA 36 at [96] and [106] to [107], (2008) 235 CLR 125 at 154 to 155, and 158 to 159 per Hayne, Heydon and Crennan JJ.

6 The Commonwealth's *Interlocutory Application* seeks an order that it be released from any constraint on the use of the two discs such that it can provide both of them to the Australian Federal Police. The police have for some time been investigating an allegation that Mr Slipper's official Speaker's diary may have been disclosed without lawful authority to a person or persons not entitled to receive it.

7 Mr Ashby and Mr Slipper both consent to the form of orders sought by the Commonwealth.

8 It is concluded that those orders should be made.

9 Notwithstanding the fact that the substantive proceeding between Messrs Ashby and Slipper has concluded, the Court nevertheless retains jurisdiction to make the orders sought: *Camp Curlewis Resorts Pty Ltd v Hamersley Iron Pty Ltd* (Unreported, Federal Court of Australia, Branson J, 20 December 1994). Even after a judgment has been passed and entered, the Court retains a power to make what are sometimes referred to as "*supplemental orders*" which do not vary or alter orders previously made: *Caboolture Park Shopping Centre Pty Ltd v White Industries (Qld) Pty Ltd (in liq)* (1993) 45 FCR 224 at 234 to 235 per Lee, Hill and Cooper JJ. And it is appropriate to make the application for such an order in the proceeding in which the evidence or other material was first filed: *Holpitt Pty Ltd v Varimu Pty Ltd* (1991) 29 FCR 576 at 577. Given the existence of the power, there is no reason to confine it to making an order at the request of an entity that remained a party at the time the proceeding was ultimately concluded, as opposed to a former party against whom claims for relief have been resolved and the proceeding discontinued.

10 When exercising the jurisdiction to release a party from the "*implied undertaking*", it has been said that a Court may do so only where "*special circumstances*" exist. The dispensing power "*is not freely exercised*": *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10 at 37 per Brennan J. The need for "*special circumstances*" recognises the balance between reasons for imposing the constraint on material secured for use in proceedings and the reasons why a party may seek to free itself from that constraint. There must be a reason to release a party from the constraint initially imposed which seeks to balance – or at least take into account – the reasons for imposing the constraint in the first place. Reasons for initially imposing the constraint include a recognition that the Court's compulsory processes of obtaining information may have been employed to secure that information – in some cases from third parties – in order to facilitate the administration of justice between the parties to litigation. Reasons for relaxing the constraint frequently involve considerations going beyond the immediate interests of the parties to particular litigation (and those whose otherwise confidential materials have been subpoenaed) and involve the wider public interest, including the public interest in the administration of justice and the administration of the law more generally. In the present case, these considerations include the enforcement or administration of the criminal law.

11 More recently, in *Liberty Funding Pty Ltd v Phoenix Capital Ltd* [2005] FCAFC 3, (2005) 218 ALR 283 at 289 to 290 Branson, Sundberg and Allsop JJ expressed the principles to be applied as follows:

> [31] In order to be released from the implied undertaking it has been said that a party in the position of the appellants must show "special circumstances": see, for example, *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217. It is unnecessary to examine the authorities in this area in any detail. The parties were not in disagreement as to the legal principles. The notion of "special circumstances" does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes. The discretion is a broad one and all the circumstances of the case must be examined. In *Springfield Nominees*, Wilcox J identified a number of considerations which may, depending upon the circumstances, be relevant to the exercise of the discretion. These were:
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> - the nature of the document;
> - the circumstances under which the document came into existence;
> - the attitude of the author of the document and any prejudice the author may sustain;
> - whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
> - the nature of the information in the document (in particular whether it contains

personal data or commercially sensitive information);

- the circumstances in which the document came in to the hands of the applicant; and
- most importantly of all, the likely contribution of the document to achieving justice in the other proceeding.

This list of "*considerations*" is, obviously enough, not exhaustive: *Plate Glass Holdings Pty Ltd v Fraser Gordon Investments Pty Ltd* [2012] FCA 1487 at [27] per Flick J.

12 In the present case, one important consideration is that the Commonwealth seeks to disclose the two discs to the Australian Federal Police to assist in the investigation of a possible criminal offence. The mere fact that a release from the undertaking may facilitate the administration of the criminal law is nevertheless not necessarily determinative. In the context of considering an implied undertaking given in respect to discovered documents, Lee J of the Queensland Supreme Court in *Bailey v Australian Broadcasting Corporation* [1995] 1 Qd R 476, at 486 to 487, has thus observed:

> Does it then follow that a party who, through discovery, has come into possession of documents which disclose the commission of a criminal offence may, as of right, disclose them to the criminal authorities? In my opinion, it does not. To so conclude one would have to be able to say that in every case where the criminal law is infringed, the public interest in pursuing a prosecution in respect of that infringement outweighs the public interest in ensuring the integrity of the discovery process. However, the law is not so black and white. Indeed the plaintiff conceded that it will not be in every case where the criminal law is infringed that the Court will grant the leave sought ... The infringement may be of a trivial or inconsequential nature or the application for leave might be brought, not for the purpose of promoting the public interest, but rather out of malice or spite on the part of the applicant ... Moreover, the disclosure may have been brought about by circumstances in which the respondent was unable to claim a privilege otherwise open to him ... and that is a factor which may render it unfair or unjust for the Court to grant the leave sought. All of the circumstances must be looked to in order to determine the nature and extent of the countervailing public interest raised.
>
> ... [I]n my opinion, the general weight of authority supports the proposition that leave of the Court is required before discovered documents can be used for any extraneous purpose, even when that purpose is to further a criminal prosecution ...

Justice Lee concluded that there were "*sound reasons*" for granting leave. There have, however, been various expressions of the reason for the release from an undertaking being the facilitation of the criminal processes. Thus, for example, in *Websyte Corporation Pty Ltd v Alexander* [2012] FCA 69, (2012) 95 IPR 344 a release from an implied undertaking was sought in order to disclose documents to the Victorian police. Although the Court refused to release a party from the undertaking, Jessup J observed:

> ... On one view, there would be an irony if it were a court of justice which stood in the way of such enforcement by precluding the injured party concerned from providing to the police all the material upon which it could legitimately lay its hands.

And in *Australian Trade Commission v McMahon* (1997) 73 FCR 211 at 217 Lehane J observed:

> .... Where an authority or person charged with the investigation of possible criminal conduct is a party to a proceeding and obtains, through for example documents discovered in the proceeding, information suggesting that criminal conduct, of a kind which the authority or person is charged to investigate, the public interest seems to me to require, in most cases at least, that permission be given to use the information for that purpose ...

13 On the facts of the present case it has been concluded that the Commonwealth should be permitted to release the two discs to the Australian Federal Police for the purposes identified in the proposed orders, because:

- both Mr Ashby and Mr Slipper consent to the orders sought;
- there is a legitimate public interest in permitting the Australian Federal Police access to materials that may assist its investigation into the alleged unlawful disclosure of the official diary of a former Speaker of the House of Representatives;
- from the limited available information relating to the contents of the two discs, there is a legitimate basis to conclude that the text messages Mr Ashby sent (and those he received) could lead to the disclosure of further information relevant to the police investigation;
- the original mobile phone from which Mr McKemmish downloaded the information is no longer available, meaning that the police cannot simply seek access to that phone and undertake their own forensic analysis; and
- the execution of a further search warrant in November 2015 failed to disclose the information in question.

Although there may be no necessity to do so, it would appear that steps have been pursued in the present case with a view to obtaining further information of relevance to the criminal investigation now being pursued before making the present application.

CONCLUSIONS

14 The orders which the Commonwealth seeks should be made.

15 The Commonwealth should be released from the "*implied undertaking*" in respect to the two discs to the extent identified in the orders sought and in the form to which Messrs Ashby and Slipper consent.

16 It was agreed that there should be no order as to costs.

THE ORDERS OF THE COURT ARE:

1. The Commonwealth of Australia has leave to use Exhibit RDM-2 and Exhibit RDM-3 to the Affidavit of Mr Rodney David McKemmish dated 24 April 2012 by providing them to the Commissioner of the Australian Federal Police (the "AFP") to be used for the following purposes:

   (i) the conduct of investigations by the AFP as to whether offences have occurred against the laws of the Commonwealth;

   (ii) to obtain advice in relation to whether any offences have occurred against the laws of the Commonwealth; and

   (iii) in evidence in relation to any prosecution for an offence against a law of the Commonwealth.

2. No order as to costs.

I certify that the preceding sixteen (16) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Flick.

Associate:

Dated: 19 May 2016