Lexcray Pty Limited v Northern Territory of Australia (No 2)
[2015] NTSC 27

PARTIES:	LEXCRAY PTY LIMITED v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	33 of 1993 (9303729)
DELIVERED:	11 May 2015
HEARING DATES:	7 April 2015
JUDGMENT OF:	BARR J

CATCHWORDS:

PRACTICE AND PROCEDURE – Plaintiff's application to stay the defendant's summonses for taxation of costs – substantial delay by defendant in prosecuting costs recovery – affidavit evidence of defendant's solicitors explaining delay – plaintiff's application for discovery of specific categories of documents to explore alternative possible reasons for defendant's delay – plaintiff's discovery application speculative and an exercise in fishing – application for discovery refused.

Supreme Court Rules O 29.08

W A Pines Pty Ltd v Bannerman (1980) 41 FLR 169, *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, followed.

Bernd Matzat v The Gove Flying Club Inc and Ors, unreported judgment delivered 23 February 1996 (Mildren J.), *Mulley v Manifold* (1959) 103 CLR 341, *Rofe v Kevorkian* [1936] 2 All ER 1334, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	A Wyvill SC
Defendant:	A Young

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Lexcray Pty Limited v Northern Territory of Australia (No 2)
[2015] NTSC 27
No. 33 of 1993 (9303729)

BETWEEN:

LEXCRAY PTY LIMITED
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: BARR J

REASONS FOR JUDGMENT

(Delivered 11 May 2015)

Introduction

[1] The plaintiff has applied for discovery of specific categories of documents set out in the schedule to the summons filed 30 March 2015.

[2] The defendant is seeking to recover costs ordered by the Supreme Court in October 1999 and by the Court of Appeal in January 2001. Summonses for taxation and bills of costs for the costs of the trial and appeal proceedings were filed on 16 May 2002.

[3] The plaintiff's discovery application is made in the context of the plaintiff's application filed 17 November 2014 to stay ("strike out or dismiss") the

defendant's summonses for taxation of costs, on the ground that the plaintiff has been prejudiced by the defendant's great delay in prosecuting costs recovery.

[4] There are no pleadings to enable identification of the issues to be determined at the hearing of the stay application. However, Mr Wyvill, senior counsel for the plaintiff, has identified the issues as being: (1) the alleged prejudice suffered by the plaintiff and (2) the sufficiency of the defendant's explanation for its delay in proceeding with the taxations, with particular emphasis on the period from June 2008 to August 2012.

[5] Although the plaintiff's discovery application is contested, there is no issue between the parties that r 29.08 applies to all proceedings in the court, irrespective of whether there are pleadings. That rule would permit the court to make an order for particular discovery in the present case.[1]

[6] The facts set out in this decision are obtained from affidavit evidence before me on the hearing of the plaintiff's discovery application. Consistent with the usual practice in interlocutory matters, none of the deponents was cross-examined, nor was application made for any deponent to be cross-examined. For that reason in particular, my conclusions and findings herein are for the purpose of deciding the plaintiff's discovery application, and do not conclude any aspect of the plaintiff's stay application.

[1] *Bernd Matzat v The Gove Flying Club Inc and Ors*, unreported judgment delivered 23 February 1996 (Mildren J.)

[7] To the extent that it may be relevant, the Court has been informed that the taxations did not occur in the period May 2002 to May 2004 because the plaintiff requested that they not take place, pending the determination of appeal proceedings in the High Court and consequent further proceedings in the Court of Appeal.

[8] In the period from 2004 to 2006, the Northern Territory Cabinet considered representations made by or on behalf of the plaintiff to the effect that the Northern Territory should waive costs recovery. On 20 February 2006, Cabinet made a decision approving recovery of $800,000 for the Northern Territory's costs, in lieu of the amounts claimed in the bills of costs,[2] with terms of payment to be negotiated by the Solicitor for the Northern Territory, subject to the provision of appropriate security. That proposal is said to have significantly favoured the plaintiff,[3] but that is not a matter I have to determine.

[9] The Cabinet decision was communicated to the solicitors for the plaintiff on or about 3 March 2006.

[10] There followed further communications between Philip Timney, a senior lawyer in the Office of the Solicitor for the Northern Territory, and Mr Dunbar on behalf of the plaintiff. In early December 2006, Mr Dunbar sent a letter to Mr Timney dated 27 July 2006, as an attachment to an email

[2] The amount claimed was in excess of $1.5m, and did not include costs incurred in the second stage of proceedings in the Court of Appeal and in the High Court – see explanation of the proposed discount in the letter dated 3 March 2006 to the solicitors for the plaintiff, document 34 in Exhibit IM 1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[3] Affidavit David Lisson sworn 27 February 2015, par 8.

dated 2 December 2006. In that letter, Mr Dunbar confirmed the plaintiff's agreement to pay the $800,000 proposed by the Northern Territory, and stated his intention to negotiate in good faith about a repayment schedule and provision of some appropriate form of security.

[11] By letter dated 14 May 2008, and not having heard from Mr Dunbar since December 2006, Mr Timney made a proposal that the plaintiff pay $100,000 per annum for the next eight years, with interest to accrue at the 180-day "bank bill swap rate", and asking for Mr Dunbar's urgent response. In a very lengthy reply letter dated 29 June 2008 Mr Dunbar wrote:

> As I have had no communication from you since 2006, I had reached the conclusion that the Crown, in its Northern Territory form, had decided to release my family from having to pay the cost order which we think would be fair and just and equitable considering the circumstances of this matter.[4]

[12] Notwithstanding his claimed conclusion, Mr Dunbar went on to express concern that the Northern Territory intended to seek interest on its costs, and suggested that the terms of the proposed Deed not include interest on the $800,000 debt. He also suggested that the debt should be paid when and if the pastoral property known as Nutwood Downs were sold by the Dunbar family at some future date.

[13] On 30 June 2008 Mr Timney sent a letter by email to Mr Dunbar, relevantly as follows:

[4] Page 1, Document 52 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.

> I confirm receipt of your email and attachments, sent on 29 June 2008. I will seek instructions from my client and provide a response as soon as possible.

[14] There matters lay for some years. Mr Timney did not provide a timely response, or any response. Nor did any other legal practitioner within the Office of the Solicitor of the Northern Territory respond to Mr Dunbar, write to him or otherwise communicate with him until 16 August 2012.

[15] In his affidavit sworn 17 November 2014, Mr Dunbar referred to the absence of further correspondence to him from the Solicitor for the Northern Territory in the years 2008, 2009, 2010 and 2011 and deposed that "in these circumstances, by 2009", he had concluded that the Northern Territory had decided not to press the plaintiff for payment of any of its legal costs which might have been payable under the costs orders.[5]

Defendant's explanation for delay

[16] Explanation for the defendant's delay has been provided by Mr Timney, referred to above, and by David Lisson, senior solicitor, Director of the Litigation Division and, from July 2007, Executive Director of the Office of the Solicitor for the Northern Territory.

[17] Mr Timney was a senior lawyer within the Office of the Solicitor for the Northern Territory from 1999 until April 2010. He worked as a solicitor in the litigation between the plaintiff and the Northern Territory from in about May 1999 to the time of his departure in April 2010. Mr Timney had

[5] Affidavit Roderick Glen Macarthur Dunbar affirmed 17 November 2014, par 33 to par 37.

primary conduct of the matter from at least May 2006, save for a brief period, from August 2008 to February 2009, when he worked for the Northern Territory Licensing Commission. Mr Timney spoke with Mr Lisson about the plaintiff's proposal to pay the agreed $800,000 "when and if … Nutwood Downs is sold out of the Dunbar family at some future date", and was informed by Mr Lisson that he, Mr Lisson, did not consider the proposal to be reasonable or acceptable. However, for reasons which Mr Timney is now unable to explain, he did not take any further action after receipt of Mr Dunbar's letter to pursue costs recovery; in particular, he took no action from the date of his return to the Office of the Solicitor for the Northern Territory in February 2009 to the time of his final departure in April 2010.

[18] Mr Timney did not report to Cabinet in relation to the plaintiff's costs proposal contained in Mr Dunbar's letter of 29 June 2008. Although reports were provided to Cabinet[6] at regular intervals after receipt of Mr Dunbar's letter, they did not mention Mr Dunbar's proposal. Specifically, the reports did not provide advice or seek instructions in relation to the proposal. In December 2008, the 'current update' report stated that attempts to negotiate the terms of settlement had been unsuccessful to date. That statement was correct, although incomplete. In April 2009, it was reported that the Department of Justice was still awaiting a response from Mr Dunbar in relation to the request that he commit to repayment of the Territory's legal

[6] The reports were known as 'GERS reports' ('GERS' being an anagram used for 'Government Executive Reporting System', and were provided to the Department of the Attorney and Justice Secretariat to be sent to the Cabinet Office within the Department of the Chief Minister - see affidavit of Philip Timney sworn 27 February 2015, par 9.

costs, as discounted, and state his preferred means of securing payment. It was stated that "a final attempt to secure a settlement with Mr Dunbar through a charge over Nutwood Downs (payable on the sale of the property)" would be made. In August 2009, it was reported that the Department of Justice was still awaiting a response from Mr Dunbar requesting that he commit to repayment of the Territory's legal costs, as discounted, and state his preferred means of securing payment. Cabinet was similarly misinformed by reports in December 2009, April 2010, September 2010 and December 2010.

[19] Mr Timney has deposed as follows:

> In relation to the December 2008 entry I did not, as indicated there, make a further attempt at reaching settlement with Mr Dunbar and Lexcray or, as indicated in the April 2009 entry, make a final attempt to secure settlement through a charge over Nutwood Downs payable on the sale of the property. I cannot give an adequate explanation of my failure to carry out the matter further after that.[7]

[20] Notwithstanding his admitted failure to act to recover costs, Mr Timney deposed that Cabinet's instructions to seek recovery of the discounted amount of $800,000, with the terms of repayment to be negotiated on the basis of provision of appropriate security, remained Cabinet's instructions to the end of Mr Timney's involvement with the matter (that is, to April 2010, when Mr Timney left the Office of the Solicitor for the Northern Territory).[8]

[7] Affidavit of Philip Timney sworn 27 February 2015, par 12.
[8] Affidavit of Philip Timney sworn 27 February 2015, par 5.

[21] Mr Timney was at all relevant times under the "general supervision" of Mr Lisson.[9] Mr Lisson acknowledges the failure on the part of the Solicitor for the Northern Territory to "progress the implementation of Cabinet's decision appropriately" (both before and after the departure of Mr Timney) and accepts responsibility for that failure.[10] After Mr Timney's departure, Mr Lisson prepared reports for Cabinet in September 2010, December 2010, April 2011, September 2011 and April/May 2012. Those reports contained the same misinformation as that in the reports preceding Mr Timney's departure. The ongoing provision of incorrect or incomplete information might be explained (in part) by the fact that, in about April 2010, the "current part" of the file, which contained the correspondence between the plaintiff and Mr Timney, was lost or misplaced. It was not found prior to Mr Lisson leaving the Office of the Solicitor for the Northern Territory. Mr Lisson has deposed that, when preparing the reports for Cabinet from September 2010, he did have access to the correspondence and was not aware of the exact state of affairs on the file. This is consistent with what appears to have been a 'cutting and pasting' of the contents of the August 2009 report into seven subsequent reports.

[22] Mr Lisson has deposed that the instructions provided by the Cabinet decision made 20 February 2006 remained unchanged during the time he worked for the Solicitor for the Northern Territory.[11] Mr Lisson's

[9] Affidavit of David Stanley Lisson sworn 27 February 2015, par 9.
[10] Affidavit of David Stanley Lisson sworn 27 February 2015, par 13.
[11] Affidavit of David Stanley Lisson sworn 27 February 2015, par 13.

involvement effectively ended in or about June 2012, when he commenced an extended period of leave (until January 2013).[12]

[23] It is tolerably clear on the evidence that the reason for the defendant's delay was the egregious failure on the part of legal practitioners in the Office of the Solicitor for the Northern Territory to pursue costs recovery in the four-year period after 30 June 2008, the date of the email in which Mr Timney said he would obtain instructions in relation to the plaintiff's proposal, referred to in [13] above.

Reason for the discovery application

[24] The plaintiff's application for discovery seeks to explore or go behind the explanation given on behalf of the defendant by the legal practitioners employed in the Office of the Solicitor for the Northern Territory.

[25] Senior Counsel for the plaintiff contends that there has been no true explanation given for the delay on the part of the defendant in proceeding with recovery of its costs, and asserts, as a possibility, that there was a "conscious decision not to enforce rights" or a "decision made inconsistent with the intention to enforce rights".

[26] On the plaintiff's submission, such a decision may be inferred from the fact that the last active part of the files maintained by the Solicitor for the Northern Territory, the "current correspondence" file for file no. 30, was at some stage placed in archives.

[12] Affidavit of David Stanley Lisson sworn 27 February 2015, par 11.

[27] In my opinion, however, for reasons I will now explain, the suggested inference is not open on the evidence.

[28] As mentioned in [21] above, Mr Lisson deposed that sometime around April 2010, the most recent correspondence file was lost or misplaced.

[29] A review of intra-office email correspondence is helpful to understand what may have happened. Tracy Kapitula, an administrative co-ordinator in the Office of the Solicitor for the Northern Territory, sent an email to two other persons on 5 October 2010 in which she referred to having kept "the latest part of the Lexcray file" out of archives, and asked if the other two had seen it. It was not found at that time.[13] On 11 April 2011, Mr Lisson wrote to Ms Kapitula and asked her to "track down" the Lexcray file. He asked "Who has it? What is the current status?".[14] Mr Lisson's enquiry was, on its face, in relation to the requirement for a Cabinet report which was due on 9 May 2011. On 9 May 2011, Ms Kapitula wrote to Mr Timney (who was now a member of the Licensing Commission), referring to the fact that she (still) could not find "the latest correspondence part of the Lexcray file". Her email then read, in part, as follows:

> It's part number 30, and I had been hanging onto it for a while on my back-bench, and now I can't find it. I must admit though, it's missing for a little while now. You didn't take it with you on the off chance?? … .[15]

[13] Document 65 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[14] Document 67 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[15] Document 68 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.

[30] Before receiving any reply from Mr Timney, Ms Kapitula wrote to Mr Lisson and told him that she had been "searching high and low" for the latest part to the Lexcray file.[16] Mr Timney replied later in the day to state, in effect, that he had searched through all his documents and that he did not have any Lexcray files. He said that there were a couple of files in or on top the four-drawer filing cabinet in his former office.[17]

[31] It is apparent that the relevant part of the file remained misplaced. On 18 April 2012, Mr Lisson wrote to administrative officers in the Office of the Solicitor for the Northern Territory in the following terms:

> The ancient Lexcray matter has again reared its head with this GERS report. Quite some time ago we tried to find the file, without success. We must try again.
>
> It would be incredibly embarrassing to have to go to Cabinet to explain that we have lost our file and therefore cannot pursue this claim. This involves anywhere from $800,000 to $2m, so it is not an insignificant amount!
>
> Please move heaven and earth to find the file. Only the last (most vital) part is missing. Past players in this drama have been Phil Timney and Kathleen Chong-Fong."
>
> Storage areas, archives, offices et cetera must be searched thoroughly![18]

[32] A number of enquiries then followed. Ms Winteridge, an executive assistant, exchanged emails with the Records Management section, and in one such email, dated 24 April 2012, Ms Winteridge referred to Ms Kapitula having

[16] Document 69 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[17] Document 68 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[18] Document 77 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.

retrieved "the file (part 30), and said "… it was behind her desk but has now vanished into thin air".[19] There may have been some confusion on the part of Ms Winteridge as to whether Ms Kapitula had retrieved from archives the part file which then went missing, or whether she had retrieved "the previous part in the sequence", as suggested in an earlier email, as distinct from the part which later went missing. Ms Winteridge wrote to the Acting Legal Practice Manager on 4 May 2012 referring to file audits carried out by administrative staff, and concluded: "… the file is nowhere to be found and I don't think it will be found."[20]

[33] Ms Winteridge was proven to be wrong. The missing correspondence part of file 30 was found by a graduate clerk, Laura Stocky, on 23 June 2014. It was found in documents which had been retrieved from archives. The missing correspondence file was found by Ms Stocky in 'Box 0001', whereas it ought to have been in 'Box 0008'.[21] Although the precise circumstances in which the correspondence file went from 'active' to being archived in the wrong place remains unclear, the obvious inference is that the missing correspondence file was placed in the wrong filing box and continued to be in the wrong box until located by Ms Stocky.

[34] The documented history of the missing file (and its eventual recovery) is contrary to the conjecture of Mr Wyvill, senior counsel for the plaintiff that

[19] Document 82, page 994, in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[20] Document 83 in Exhibit IM1 to the affidavit of Ingrid Meier sworn 27 February 2015.
[21] Affidavit of Ingrid Meier sworn 27 February 2015, par 6; Affidavit of Laura Stocky sworn 24 April 2015, par 4. Ms Stocky's affidavit confirmed matters stated to the court by Mr Young of counsel at the hearing of the plaintiff's application.

the current file may have been deliberately archived in pursuance of a "conscious decision not to enforce rights" or a "decision made inconsistent with the intention to enforce rights" made by some person in authority. I accept Mr Young's submission that the evidence of Mr Timney and Mr Lisson, and the contents and timing of a significant number of emails between officers (both legal and administrative officers) of the Solicitor for the Northern Territory, demonstrate that the file was misplaced and that the authors of the emails were engaged in a genuine search for it, because it was thought to be essential to the defendant's costs recovery. In my view there is no basis in the evidence for an inference to be drawn that someone deliberately archived the relevant files or parts of files in pursuance of a conscious decision of the kind referred to by Mr Wyvill.

[35] There is no evidence to suggest that the defendant's failure to recover costs in a timely and effective manner was for any reason or reasons other than a lack of diligence on the part of legal practitioners employed by the Solicitor for the Northern Territory. I refer to [23] above. The lawyer having principal conduct of the costs recovery did not give the matter the proper attention it required, or any attention at all, from June 2008 to April 2010. He had given the matter scant attention in the two years prior to June 2008. His neglect of the matter was compounded by inadequate supervision over a period of many years.

[36] In relation to the period after April 2010, the history of the search for the missing file illustrates another unfortunate aspect of the defendant's

representation by the Solicitor for the Northern Territory. As far as I can tell, there was no item of correspondence or other document the absence of which prevented the defendant proceeding to recover costs. It is unclear why the Solicitor for the Northern Territory could not simply re-open or proceed with negotiations with Mr Dunbar on the basis of the instructions given by Cabinet to accept $800,000 on appropriate terms, including security. It did not really matter whether the correspondence file was to hand; it was not needed. In any event, to the extent that Mr Dunbar's agreement to accept the Territory's proposal was not a final and binding agreement, the Territory still had its remedy in pursuing taxations of the two bills of costs. The fact that the recent correspondence file was missing should not have been a reason for delay or further delay. Lawyers in the Office of the Solicitor for the Northern Territory appear to have been so caught up in the search for the missing file that they were distracted from asking themselves why the file was important, and whether it was really needed. The expressed concern that loss of the file meant that the defendant could not pursue its costs claim appears to have been unnecessary. Mr Young concedes that the archiving history of the missing file is only "an aspect of the defendant's explanation for delay rather than an explanation itself", and that such archiving history is "tangential and remote to the explanation".[22]

[37] The explanation given and the other facts deposed to do not bring great credit to those involved, but I have no reason to doubt the content of the

[22] Defendant's outline of argument, 1 April 2015, par 10.

affidavit material. The affidavit evidence is supported by the contemporaneous documents.

[38] In final reply, senior counsel for the plaintiffs argued that statements to the effect that 'my instructions remained the same' meant the solicitor did not receive any feedback or instructions from the Cabinet Secretariat. He argued that the reason may have been that Cabinet was happy to let the matter go, and hence the need to look at identified Cabinet documents.[23]

Fishing

[39] The defendant contends that the plaintiff's discovery application is speculative and fishing. I agree.

[40] In *W A Pines Pty Ltd v Bannerman*,[24] the plaintiff sought a declaration that a notice issued by the respondent Chairman of the Trade Practices Commission pursuant to s 155 *Trade Practices Act* was void. The plaintiff's pleading alleged that the notice was issued without the respondent having reason or any legally sufficient reason to believe any of the matters set out in s 155. The plaintiff did not provide particulars, and refused the respondent's request for particulars. The respondent in his defence denied the allegation. He also swore an affidavit that he did hold the relevant belief required by the section. In refusing the plaintiff's application for discovery, Toohey J said:[25]

[23] Items 6, 7 and 8 in the Schedule to the plaintiff's summons.
[24] (1980) 41 FLR 169.
[25] *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 169 at 174.

> I do not suggest that the reason for belief of the respondent is not a justiciable issue but I think that first there must be some basis for a contention that the respondent did not have reason to believe the matters referred to in a notice under s 155. .... It is not enough for an applicant merely to assert lack of reason to believe and then seek, as undoubtedly the applicant seeks in the present case, to find some support for that contention through the procedures of discovery and interrogatories... In the absence of some disclosed factual foundation for the allegation that the respondent did not have reason to believe any of the matters set out in s 155 when he issued the notice in question, neither discovery nor interrogatories is necessary for fairly disposing of the matters in issue. They are an attempt to make a case in a situation which can truly be described as fishing: *Rofe v Kevorkian*[26]."

[41] The decision of Toohey J at first instance was upheld by the Full Court.[27] Brennan J there noted that discovery had been sought before there was a "title of evidence" to suggest that the Chairman did not have the requisite cause to believe. His Honour continued:

> This is a case where a bare allegation is made by par 6 of the statement of claim and, the paragraph being denied, the applicant seeks to interrogate the Chairman and ransack his documents in the hope of making a case. That is mere fishing. ..."

[42] In a separate judgment, Lockhart J said:

> In the present case the appellant seeks discovery and leave to interrogate before there is any evidence that the respondent did not have the belief required by s 155(1). There are the barest allegations in paragraph 5 and 6 of the statement of claim. They are denied by the respondent in his defence who, in addition, sworn an affidavit that he held the relevant belief required by the section. ... "This is not merely clutching at a non-existent straw, but expecting to be carried by it": per Menzies J in *Mulley v Manifold*[28].

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[26] [1936] 2 All E.R. 1334, at 1337-1338.
[27] *W A Pines Pty Ltd v Bannerman* (1980) 41 FLR 175 at 181.
[28] (1959) 103 CLR 341 at 345.

> I have no doubt that the appellant is seeking to use the weapons of discovery and interrogatories to find out if it has a case of which it presently knows nothing. It is a fishing expedition to which this court will not lend its aid.

[43] The observations extracted in [40] to [42] are relevant. The present plaintiff, in an effort to make a case which it is presently unable to make, seeks discovery to explore the possibility that the reason for the defendant's delay might be otherwise than that deposed to in the affidavit evidence. The precise basis in law for the case sought to be made by the plaintiff is unclear, but, as mentioned in [25], the plaintiff seeks to attribute legal significance to a decision which the plaintiff suspects Cabinet might have made. The level of speculation is high.

[44] In my judgment, the application for discovery of the documents or categories of documents in the schedule to the summons is fishing. Accordingly, the application should be refused.

[45] The summons is dismissed.
