CITATION:	*Martynova v Brozalevskaia (No 2)* [2023] NTSC 45
PARTIES:	MARTYNOVA, Marina Efimovna v BROZALEVSKAIA, Raisa
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	2022-02203-SC
DELIVERED:	31 May 2023
HEARING DATE:	29 March 2023
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Application for order for preliminary discovery against a prospective Defendant – Prerequisites for the making of an order – Requirement to establish a reasonable cause to believe that a right of relief may be available – Elements of the putative cause of action proposed by the Plaintiff – Extent that Plaintiff must satisfy the Court in respect of proof of the proposed cause of action – Requirement to have made all reasonable inquiries to obtain the necessary documents – Requirement to establish that the applicant requires the documents to determine whether to commence proceedings – Order for preliminary discovery is discretionary – Factors relevant to the exercise of the discretion.

Application for stay of proceedings – Permanent stay applied for based on like proceedings in another jurisdiction – Application of the clearly inappropriate forum test in applications for preliminary discovery.

Supreme Court Act 1979 (NT) ss 69(1), (2)
Supreme Court Rules 1987 (NT) rr 32.05, 43.03(2)

Australian Broadcasting Corporation v Seven Network Ltd [2005] FCA 1851; *Bell Group Ltd (in Liq) v Westpac Banking Corp (No 9)* (2008) 39 WAR 1; *BWS v ARV (No 2)* [2021] WASC 62; *CGU Insurance Limited v Malaysia International Shipping Corp Berhad* (2001) 187 ALR 279; *Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd* [2014] NTSC 28; *Hatfield v TCN Channel Nine Pty Ltd* (2010) 77 NSWLR 506; *Henry v Henry* (1996) 185 CLR 571; *Martynova v Brozalevskaia* [2023] NTSC 6; *Matrix Film Investment One Pty Ltd v Alameda Films LLC* [2006] FCA 591; *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197; *Piscioneri v Reardon (No 2)* [2017] ACTSC 242; *Schmidt v Won* [1998] 3 VR 435; *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460; *St George Bank Ltd v Rabo Australia Ltd & Anor* (2004) 211 ALR 147; *Talacko v Talacko* [2008] VSC 246; *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538; *Webcott Pty Ltd v Jephcott Pty Ltd* [2009] FCA 124.

REPRESENTATION:

Counsel:

Plaintiff:	Mr D Robinson SC
Defendant:	Mr J Otto KC and Mr Sheptooha

Solicitors:

Plaintiff:	Clayton Utz
Defendant:	Ward Keller

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Martynova v Brozalevskaia (No 2) [2023] NTSC 45
No. 2022-02203-SC

BETWEEN:

MARINA EFIMOVNA MARTYNOVA
Applicant

AND:

RAISA BROZALEVSKAIA
Respondent

CORAM: Luppino AsJ

REASONS

(Delivered 31 May 2023)

Introduction

[1] Two applications were concurrently heard before me in these proceedings. The first is an Originating Motion and Summons by the Plaintiff seeking orders for preliminary discovery against the Defendant pursuant to rule 32.05 of the *Supreme Court Rules 1987* (NT) ("*SCR*"). The second application is the Defendant's Summons seeking a permanent, or alternatively a temporary, stay of the proceedings.

[2] The Plaintiff is a Russian national and does not speak English. For that reason the evidence in support of her application comprised an affidavit of her daughter ("Tatyana") and three affidavits of her solicitor, Mr Spain.

The application being interlocutory in nature, affidavit evidence based on information and belief is permitted in set circumstances.[1] There was also minor reliance on affidavits read in an application for security for costs recently heard in this Court.[2]

[3] The Defendant's evidence was the affidavit of her solicitor, Mr Stuchbery. That affidavit annexes two further affidavits, namely an affidavit of the Defendant's lawyer in Panama in Spanish, together with an affidavit of its English translation.

[4] To put the two applications into context, I first set out the background facts.

[5] The Defendant is a resident of the Northern Territory and she is the only child of Semen Brozalevskiy ("the deceased") from a previous marriage. The Plaintiff and the deceased were married but had no children together. Tatyana is a child of the Plaintiff.

[6] There is some dispute as to whether the Plaintiff and the deceased had separated when the deceased died but the evidence establishes that the Plaintiff and the deceased remained married at the time of his death.

[7] The deceased died in Russia on 24 February 2020. He made a will on 3 February 2020 leaving his entire estate to the Defendant. That will did not

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1 Rule 43.03(2) of the SCR.

2 See *Martynova v Brozalevskaia* [2023] NTSC 6.

appoint an executor. That was not an omission as an appointment of an executor is not required under Russian law.

[8] The estate of the deceased comprised inter alia real estate outside Australia and the entire issued shares in a company registered in Panama known as Rhombus Developments Inc ("Rhombus"). Although not confirmed by documentary evidence (such documents being amongst those sought by the Plaintiff by her application currently before me), there is reason to believe that Rhombus has an account at a bank in Switzerland, but the Plaintiff claims that she does not know all of the details of that account. The Rhombus shares were acquired by the deceased during the marriage of the Plaintiff and the deceased.

[9] The terms of the will notwithstanding, Russian law mandates statutory entitlements for a spouse. In the current case the Plaintiff is entitled to one half of any property acquired during the marriage. That is known as a Spouse’s Share. That applies to the Rhombus share and therefore the Plaintiff is entitled to 50 of the 100 issued shares in Rhombus.

[10] A spouse is also entitled to what is known as a Compulsory Share, which is one quarter of the estate over and above the Spouse’s Share. Applied only to the Rhombus shares, by reason of those statutory entitlements the Plaintiff is therefore entitled to 62.5% of the Rhombus shares.

[11] The balance of the estate of the deceased after payment of those statutory entitlements then passes under the will of the deceased and therefore to the

Defendant. Again, applied only to the Rhombus shares, that means that the Defendant is entitled to 37.5% of the Rhombus shares.

[12] On 24 August 2020, by means unknown, the Defendant became the owner of the entire issued shares in Rhombus. Panamanian law requires an application to be made to a court to transfer shares in a company.

[13] There is a significant litigation history between the parties. Aside from the security for costs application, there have been three proceedings in Panama, including appeals, all of which were commenced by the Plaintiff. Two remain current but one is subject to an order for a temporary stay. Those proceedings involve a challenge to the validity of the will of the deceased and also seek to enforce rules of succession, including in respect of the shares in Rhombus and Rhombus' assets which comprise at least the funds in the Swiss bank account.

[14] A summary of the proceedings in Panama is necessary for the purposes of these reasons as the available remedies in Panama have a bearing on the Plaintiff's application for preliminary discovery. As the Defendant's application for a stay is based on forum grounds due to the existence of the Panamanian proceedings, the relevance of those proceedings to the stay application is obvious.

[15] The first of those proceedings is in the court known as the Seventh Civil Circuit Court of the First Judicial Circuit of Panama ("Will Proceeding"). The relief sought in that proceeding is firstly, a declaration that the will of

the deceased not be recognised in Panama. Secondly, that the deceased's assets in Panama be distributed according to the laws of intestate succession. Thirdly, a declaration that any transactions involving the Rhombus shares subsequent to the date of death of the deceased are null and void.

[16] Alternative relief is sought in the event that the deceased's will is recognised in Panama. That is firstly, a declaration that the Plaintiff is entitled to 62.5% of the Rhombus shares and secondly, again an order declaring that any transactions with the Rhombus shares subsequent to the date of death of the deceased are void. The reason for the apparent repetition in respect of the declaration concerning the Rhombus shares was not explained but I do not think that anything turns on that.

[17] There is also currently on foot an appeal from a decision made in the Will Proceeding but, as at the date of the hearing before me at least, that has not been finalised.

[18] The second proceedings in Panama were commenced in the court known as the Sixth Civil Circuit Court of the First Judicial Circuit of Panama ("Succession Proceeding"). The relief sought, other than mere procedural orders, is firstly, that the intestate succession of the deceased "is open". Precisely what that means is unclear but again I do not think that anything turns on that. Secondly, that the Plaintiff, as the surviving spouse of the deceased, be declared his legitimate heir.

[19] One of the applications made in the Succession Proceeding relevant to the matter currently before this Court is an application akin to the non-party discovery orders available under the *SCR*, namely for Rhombus to provide information and supporting documents regarding its shareholding. The Defendant submits that the evidence demonstrates a significant overlap between the information and documents sought by the Plaintiff in that discovery application and the application of the Plaintiff for preliminary discovery currently before this Court and in broad terms at least, I agree with that submission.

[20] Although the Succession Proceeding and the discovery application made in that proceeding remain pending, the Succession Proceeding has been stayed pending the outcome of the Will Proceeding. That apparently occurred on the Panamanian Court's own motion when evidence was produced of the will of the deceased as the existence of that will runs counter to any entitlement to the orders for intestate succession sought in the Succession Proceeding. I was informed during the course of argument that the Second Proceeding were intended to be in the alternative to the Will Proceeding in the event that the will of the deceased was found to be invalid under Panamanian Law.

[21] The third proceeding was criminal in nature and stems from the method and process for reporting criminal activity in Panama. The Plaintiff reported the Defendant for aggravated theft based on the transfer of the shares in Rhombus to the Defendant after the death of the deceased. The criminal

report alleges that that transfer was a misappropriation of those shares. That same conduct is alleged to give rise to the Defendant taking control of Rhombus' assets, most relevantly the Swiss bank account. A second report of a criminal nature was also made by the Plaintiff against the Defendant in which the allegations in the first complaint were largely repeated.

[22] The Panamanian public prosecutor dismissed both of the criminal complaints and the Plaintiff then appealed that decision. That appeal was also dismissed. Those quasi-criminal proceedings have therefore been completed but I mention them to the extent that they will be relevant to the current application.

[23] I will deal first with the Plaintiff's preliminary discovery application. In summary, the application seeks discovery of material from the Defendant in connection with the transfer of the Rhombus shares to the Defendant, the assets of Rhombus including bank accounts, correspondence of Rhombus and related persons or entities and documents relative to the marital status of the Plaintiff and the deceased.

[24] Preliminary discovery in the Northern Territory is regulated by rule 32.05 of the *SCR*. That rule provides:-

> **32.05 Discovery from prospective defendant**
>
> Where:
>
> (a) there is reasonable cause to believe that the applicant has or may have the right to obtain relief in the Court from a person whose description he has ascertained;

(b) after making all reasonable inquiries, the applicant has not sufficient information to enable him to decide whether to commence a proceeding in the Court to obtain that relief; and

(c) there is reasonable cause to believe that the person has or is likely to have or has had or is likely to have had in his possession a document relating to the question whether the applicant has the right to obtain the relief and that inspection of the document by the applicant would assist him to make the decision,

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

[25] At the outset, I was told by Mr Robinson, senior counsel for the Plaintiff, with the approval of Mr Otto, senior counsel for the Defendant, that the issues in dispute in respect of the preliminary discovery application were firstly, with respect to the prerequisite in rule 32.05(a) of the *SCR* namely, whether there is reasonable cause to believe that the Plaintiff has, or may have, a right to relief from this Court. Secondly, whether the Plaintiff has made all reasonable inquiries which is the prerequisite set by rule 32.05(b) of the *SCR* and if so, whether the Plaintiff still does not have sufficient information to enable her to decide whether to commence proceedings in this Court. Lastly, and relative also to rule 32.05(b) of the *SCR*, whether the Plaintiff already has sufficient evidence to commence the proposed proceedings.

[26] The prerequisite in rule 32.05(c) of the *SCR*, namely that there is reasonable cause to believe that the Defendant has, or has had, or is likely to have, or had, possession of documents relating to the question whether the Plaintiff has the right to obtain relief, is not in issue. Although the

Defendant does not concede that all of the documents referred to in each and every category of documents sought are actually within her possession or control, it is conceded that the evidence establishes reasonable grounds to believe that the Defendant may have that material. Presumably the concession applies also to the other requirement in rule 32.05(c) of the *SCR* namely, that inspection of the documents would assist the Plaintiff to decide whether she has available relief. Although not clearly stated, that seems to follow from the main concession and there was no subsequent argument on that requirement. Therefore I proceed on the basis that that requirement is also conceded. Therefore satisfaction of rule 32.05(c) of the *SCR* is conceded.

[27] As Mr Robinson noted in his submissions, rule 32.05 of the *SCR* has a corresponding and similarly worded rule in all jurisdictions save that in New South Wales the requirement is that it only needs to <u>appear</u> that the applicant may be entitled to relief. Under rule 32.05(a) of the *SCR* the requirement is for the Court to be satisfied that there is <u>reasonable cause to believe</u> that the applicant may be entitled to relief.

[28] In *Groote Eylandt Aboriginal Trust Incorporated (Statutory Manager Appointed) v Skycity Darwin Pty Ltd*,[3] I adopted, with minor modifications for the Territory, the summary by Hely J in *St George Bank Ltd v Rabo Australia Ltd & Anor*,[4] of the requirements for a successful application for

[3] [2014] NTSC 28.

[4] (2004) 211 ALR 147.

preliminary discovery under the equivalent of rule 32.05 of the *SCR*. I now restate that summary, again with modifications for the Territory and incorporating also other principles that were set out in *Hatfield v TCN Channel Nine Pty Ltd*,[5] namely:-

1. Rule 32.05 of the *SCR* is to be beneficially construed;

2. Each of the elements in the subparagraphs of the Rule must be established;

3. The test to determine whether an applicant has "*reasonable cause to believe*", in rule 32.05(a) of the *SCR* is an objective one and is to be assessed based on some recognised legal ground. Further, the words "*or may have*" means that an applicant does not have to make out a *prima facie* case;

4. Belief requires more than mere assertion, suspicion or conjecture but the Court does not have to reach a firm view that there is an actual right to relief;

5. While uncertainty as to only one element of a cause of action might still be compatible with the "*reasonable cause to believe*" as required by rule 32.05(a) of the *SCR*, uncertainty as to a number of such elements may be sufficient to undermine the reasonableness of the cause to believe;

6. The question posed by rule 32.05(b) of the *SCR* is not whether an applicant has sufficient information to decide if a cause of action is available but whether the applicant has sufficient information to make a decision whether to commence proceedings; therefore documents relevant to defences and quantum are also discoverable;

7. Determining whether an applicant has sufficient information for the purposes of rule 32.05(b) of the *SCR* requires an objective assessment to be made that an applicant is lacking information reasonably necessary to decide whether to commence proceedings;

8. Seeking documents which would be considered to be fishing in a regular discovery application is not prohibited in preliminary discovery applications.[6]

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5 (2010) 77 NSWLR 506.

6 (2004) 211 ALR 147 at para 26.

[29] The granting of an order under rule 32.05 of the *SCR* is discretionary, something which is clearly apparent from the wording of the rule. The discretion is enlivened by satisfaction of the prerequisites in the rule. Once enlivened, the discretion must be exercised judicially and after taking all relevant factors into account.

[30] The Plaintiff proposed the following as potentially available relief against the Defendant to satisfy the requirement in rule 32.05(a) of the *SCR*. Firstly, misrepresentation and/or deceit in connection with the transfer of the Rhombus shares into the name of the Defendant. The evidence that the Plaintiff relies on is inferential. That is, as Panamanian law requires an application for the transfer of shares to be made to a court, it must have been the Defendant, or someone on her behalf, who made the representation to the court that the Defendant was entitled to a transfer of those shares. Misrepresentation requires the claimant to suffer loss and it was submitted that the element was satisfied as the Plaintiff has lost the control of Rhombus and indirectly the assets of Rhombus. I agree with both submissions and that alone would satisfy rule 32.05(a) of the *SCR*.

[31] As to the cause of action of deceit, Mr Robinson did not rely on the common law tort of deceit as that requires a knowingly false representation to be made. He relied on equitable fraud, drawing on *Bell Group Ltd (in Liq) v Westpac Banking Corp (No 9)*.[7] That case confirmed that there does

[7] (2008) 39 WAR 1.

not need to be an actual intention to deceive and the gravamen of the cause of action is the effect on the other party to the transaction.[8]

[32] The next proposed relief identified by the Plaintiff is a claim for appropriation of assets of the deceased estate by the Defendant as executor *de son tort*. That relief is available where a person, who is not an executor or administrator, takes steps or actions which are in the nature of acts to administer the estate of a deceased person. The executor *de son tort* is liable to account to the rightful executor or administrator, or to creditors of the estate, or to the beneficiaries of the estate for any property received and for any loss or damage to the estate arising from that intermeddling.

[33] The evidence relied on, again inferential, and overlapping with the evidence in respect of the misrepresentation cause of action, is that as the Defendant is now registered as the owner of the Rhombus shares and as the Defendant is not an executor and as she alone has benefited by obtaining total control of the company and its assets, she is the person who has intermeddled or, at a minimum, contributed to the intermeddling.

[34] The Defendant does not dispute that this cause of action is a tenable potential claim, albeit not conceding that it establishes that the Plaintiff has reasonable grounds to believe that she has, or may have, the right to obtain that relief in this Court from the Defendant as is also required by

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8 (2008) 39 WAR 1 at paras 4908-4909.

rule 32.05(a). In my view however, an inference to satisfy that further requirement is able to be drawn on the available evidence.

[35] The next relief proposed is a claim for breach of fiduciary duty which overlaps with the claim for executor *de son tort*. The Plaintiff alleges that on that basis relief is available in the form of a declaration as to the Plaintiff having ownership, or being entitled to ownership, of 62.5% of the Rhombus shares as well as a mandatory injunction requiring the Defendant to transfer the Rhombus shares to that extent to the Plaintiff.

[36] The Defendant submitted that this is not potential relief and is only a remedy. I agree with the Plaintiff's response in argument that although the remedy is the injunction, the relief or cause of action is breach of fiduciary duty.

[37] I am satisfied that each of the causes of action nominated by the Plaintiff is relief the Plaintiff may have in this Court against the Defendant and that there is reasonable cause to believe that the Plaintiff has the right to obtain that relief. Accordingly, the requirements in rule 32.05(a) of the *SCR* have been made out.

[38] Next, rule 32.05(b) of the *SCR* requires the Plaintiff to have made "*all reasonable inquiries*" to obtain the required information. The Plaintiff relies on evidence of requests for information comprising multiple items of correspondence directed broadly to the Defendant, to the directors of Rhombus, to Morgan & Morgan (the firm where those directors worked), to

the Swiss Bank (LGT Bank), to the Defendant's lawyers in Russia and to the Defendant's Panamanian lawyers.

[39] The Defendant did not respond to the request to her. The directors of Rhombus declined to assist on the basis that the Defendant was not obliged to provide the information sought.

[40] As to the remainder, as Mr Otto pointed out, the only correspondence put in evidence in respect of inquiries to LGT Bank was a letter from the Plaintiff's French lawyers[9] but that letter only requested suspension of any dealings with the Rhombus account. It did not seek any information about the account. In his submissions in the course of argument, Mr Robinson said "…*we also made enquiries to the Swiss Bank. The Swiss Bank has claimed it was Swiss secrecy. I'm going to come to those*."[10] Mr Robinson however omitted to revert to that. There were passing references to the Swiss Bank during the rest of his submissions,[11] including a comment in reply that no information came from the inquiries that were made,[12] a comment which clearly also included the claimed inquiry to the Swiss Bank. So I do not have the benefit of whatever else Mr Robinson intended to say.

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9 Annexure MCS-17 to the affidavit of Mark Cameron Spain made 24 March 2023.

10 Transcript at p 10.3.

11 Transcript at p 11.5, 11.6, 46.5 and 48.10-49.1.

12 Transcript at p 49.1.

[41] The only evidence of any response by LGT Bank to that letter comes from paragraph 12(e) of Mr Spain's affidavit made 24 March 2023 where he states that "*LGT Bank responded* (to the French lawyers) *to the effect that the Bank can only deal with legally appointed directors of Rhombus. As at the time of making this affidavit, Mr Legendre* (the Plaintiff's French lawyer) *is unable to locate a copy the LGT Bank letter in response, however, further enquiries are underway to obtain a copy*."

[42] Details of this inquiry to LGT Bank were first revealed in this affidavit of Mr Spain, which was made three business days before the hearing and primarily in response to evidentiary objections and comments made by the Defendant in written submissions. There is no explanation as to why the correspondence from LGT Bank was not revealed in Mr Spain's primary affidavit. There was a general explanation for his omission to disclose some inquiries in his primary affidavit.[13] That explanation was the confidential nature of the documentation by reason that they comprised settlement negotiations but I do not see how that can explain this failure as there does not appear to be anything in those letters, or the circumstances surrounding their creation, which would obviously attract that privilege, and nothing concerning that was put to me during the hearing.

[43] The lack of any meaningful particulars concerning the lost letter, such as when it was last seen or when it was lost, who else saw it, how it was lost,

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[13] Paragraph 10 of the affidavits of Mr Spain made 24 March 2023.

whether there is any other form of the letter (such as it being attached to an email or enclosed in a letter or sent with a facsimile transmission) is concerning. It is concerning that the letter was apparently lost after the Plaintiff's French lawyer saw it and so soon that he was able to recall its contents in detail. Yet it was apparently lost before it was seen by anyone else, and also before it was passed on to other persons as an attachment to correspondence. I would have expected that the French lawyer would have passed on that letter to his instructors in Australia, promptly after its receipt. In any case, most concerning is the late disclosure of the inquiry resulting in there being no opportunity for the Defendant to seek further details of the loss or to verify events.

[44] This raises issues of the adequacy of inquiries, which goes to discretionary considerations. Although it may have been futile[14] to make an inquiry of the Swiss Bank for reasons of "*Swiss secrecy*" (which is what I think Mr Robinson intended to address on), the point is that the Plaintiff purported to make the inquiry no doubt because of the perceived need to comply with rule 32.05(b) of the *SCR*. If it is accepted that it was appropriate that the inquiry be made, that would concede that it was a reasonable, and therefore a necessary, inquiry. Therefore, full and proper disclosure of the inquiry and the results, including production of all relevant documents, should have been made. That has not sufficiently occurred.

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14 See the discussion in paragraph 58 below.

[45] There is another instance of tardy disclosure by the Plaintiff. In Mr Spain's affidavit made 24 March 2023, a letter from the Plaintiff's French lawyer to the firm of Morgan & Morgan is disclosed for the first time. Again, there is no explanation as to why that letter was not revealed in Mr Spain's primary affidavit. Again, it is not readily apparent that it attracted the settlement negotiations privilege. Although nonetheless concerning as it is indicative of incomplete information having initially been provided, it is of lesser significance as the directors of Rhombus are employed by that firm and I expect that the letter would have been directed to those directors for attention. There were separate and more timely letters to those directors, as discussed above, seeking the same information and I expect that had the letter to the firm been sent at the same time that would have resulted in the same response as those directors separately made.

[46] A number of other apparent errors in Mr Spain's affidavits were raised by Mr Otto as discretionary factors. One was very minor namely, the reference in paragraph 39 of Mr Spain's affidavit of 31 August 2022 where he recites that he was "*..informed by the Plaintiff..*". The complaint was that that was inconsistent with the evidence that the Plaintiff does not speak English. As Mr Otto also pointed out in submissions, paragraph 7(a) of Mr Spain's affidavit of 24 March 2023 demonstrates that the information was provided by Tatyana. I disregard that error as I think it is insignificant and that it has only occurred due to carelessness and insufficient attention to detail.

[47] Another minor complaint raised related to paragraph 12(k) of Mr Spain's affidavit made 24 March 2023, where he misquoted the text of the document referred to in the annexure MCS-21. I think that is an obvious and trivial error, again likely due to carelessness and insufficient attention to detail.

[48] Similarly, the complaint by Mr Otto in respect of paragraph 21 of Mr Spain's initial affidavit. He said that was incomplete as it failed to mention that the correspondence referred to therein was in fact without prejudice correspondence. Mr Otto argued that, as this was presented as evidence of reasonable inquiries, it ought to have been made on an open basis. That was conceded to be a minor objection and alone, I think it is also trivial.

[49] That issue however was a segue to a more pertinent objection namely, that Mr Spain's affidavit annexes, for the first time, a number of items of communication which were not without prejudice communications. Mr Otto submitted that was a failure on the Plaintiff's part to comply with the obligation for full and frank disclosure in respect of all inquiries made on behalf of the Plaintiff and the results of those inquiries. Although I would not describe that as a total failure of disclosure, clearly it was very late disclosure.

[50] An omission in Mr Spain's affidavits, relevant to that is with respect to paragraph 7(c) of his affidavit made 24 March 2023. In that subparagraph Mr Spain deposes that in various paragraphs of his first affidavit, including

the paragraph complained of, that evidence was on information and belief based on inter alia, reviewing documents that were annexed to his previous affidavit. Although it is not entirely clear, those documents, believed to be correspondence, were not annexed to that first affidavit. That is relevant on the substantive issue of assessment of whether all reasonable inquiries have been made as well as in regards to discretionary factors based on the obligation of full and frank disclosure.

[51] The Defendant raised a number of other issues which it was submitted showed that the Plaintiff's evidence was incomplete and was not full and frank disclosure. I thought all of the following instances in this regard were significant. The first related to paragraph 23 of the affidavit of Tatyana made 9 December 2022. Although there may be an incomplete temporal context, in that paragraph Tatyana refers to a number of occasions when she was present during discussions between the Plaintiff and the deceased about investments to be made from the funds in the Rhombus' Swiss bank account. She adds that on one occasion she met with a representative of the Swiss Bank. That evidence leads me to accept Mr Otto's submission that there has not been full and frank disclosure as given what is said in that paragraph, at some point both Tatyana, and the Plaintiff to a lesser extent, must have had some knowledge of the extent of the funds in that account and that has not been disclosed.

[52] The next instance derives from what is deposed to in the affidavit of Mr Stuchbery sworn 9 December 2022. At paragraph 6 he deposes to

information from a person by the name of Larisa Kirilova. That inter alia refers to the existence of a de facto relationship between the deceased and that person and that they cohabitated in a residence at Akatovo, Moscow from 2014. The Plaintiff disputes the existence of that relationship. Whether or not the relationship existed, or whether or not the deceased and that Larisa Kirilova cohabitated, is not the point. What is pertinent is that Larisa Kirilova informs that the deceased kept records and documents in a black folder in the bedroom of that residence and in particular there were documents relating to a number of properties and to Rhombus.

[53] The only evidence offered by the Plaintiff concerning this is in the affidavit of Tatyana where, relying on firstly, information provided to her by the Plaintiff, and secondly, her own observations and meetings with the deceased and the Plaintiff, and thirdly, on various pieces of documentary material which were annexed to her affidavit, she says that she was not aware of any separation between her mother and the deceased.

[54] I accept that the Plaintiff denies any separation with the deceased and that she also denies the existence of the alleged de facto relationship. However, the Plaintiff has chosen not to comment at all regarding the allegation of the existence of the documents of a financial nature or relating to properties, or the black folder which it is alleged held those documents, not even to deny their existence, despite that her evidence is that she resided at that house property at least until the date of death of the deceased.

[55] The most critical evidence suggesting an absence of full and frank disclosure by the Plaintiff, and that the Plaintiff knows more than she claims, also derives from the affidavit of Mr Stuchbery. In that affidavit he annexes translated copies of the documents titled Criminal Complaints, which record the criminal accusations made by the Plaintiff against the Defendant in respect of the criminal proceedings previously referred to. The allegations were made by a legal representative of the Plaintiff, hence presumably on instructions from the Plaintiff. The documents refer a number of times to the Plaintiff having suffered "*serious economic damage*" and also that the value of the stolen property, which was the Rhombus shares, exceeds 20,000 Balboas. There is also a reference that Rhombus handled important and substantial economic resources. Lastly there is a statement to the effect that the amount of the Plaintiff's loss is 500,000 USD which was said to represent the amount in Rhombus' account at the Swiss Bank. All that is indicative of knowledge regarding the Rhombus account far in excess of what the Plaintiff has disclosed to this Court. Relevantly, if the principal amount in the Rhombus account is of the order of 500,000 USD, I would have thought that would mean that the Plaintiff has enough information to at least assess the economic viability of taking proceedings, which Mr Robinson submitted was one important aspect of preliminary discovery.

[56] None of that was challenged by the Plaintiff.

[57] The Defendant disputes that the Plaintiff has made "*all reasonable inquiries*" as required by rule 32.05(b) of the *SCR*. I was referred to *CGU Insurance Limited v Malaysia International Shipping Corp Berhad* (*CGU Insurance*)[15] as authority for the proposition that the phrase contemplates a reasonable exhaustion of alternative sources of information and that alternative inquiries should be made beyond a request to a party where the party refuses to produce documentation.[16] In other words, if required information cannot be obtained from a party, the applicant may be required to attempt to obtain the information from another source before the applicant can show that all reasonable inquiries have been made.

[58] Mr Robinson sought to distinguish the case on the basis that it was decided on the contrast between the terms "*reasonable inquiries*" in one part of the relevant Federal Court rule and the term "*all reasonable inquiries*" in another part of that same rule. He referred me to subsequent cases as authority to the effect that the requirement does not involve any more than reasonable inquiries. Firstly, the case of *Australian Broadcasting Corporation v Seven Network Ltd* (*ABC v Seven*).[17] In that case, referring to Tamberlin J in *CGU Insurance*, Stone J noted the comment by Tamberlin J referred to in the preceding paragraph and then went on to say that what is reasonable depends on the context. Her Honour considered that a relevant consideration was the likelihood that the inquiries would yield a result.

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15 (2001) 187 ALR 279.

16 (2001) 187 ALR 279, at p 288.

17 [2005] FCA 1851.

Specifically her Honour said that the rule "*does not require applicants to make inquiries that are predictably fruitless*."[18] That was accepted and followed in *Piscioneri v Reardon (No 2)*.[19]

[59] In *ABC v Seven*, Stone J observed that, unlike in *CGU Insurance*, the range of reasonable inquiries were limited and the same situation presents itself to the Plaintiff in the current case.

[60] However, and with due regard to the possible futility of some inquiries, I do not accept the Plaintiff has made all reasonable inquiries. Although the evidence would otherwise be finely balanced, ultimately I think that the Plaintiff's evidence in respect of this prerequisite has been tainted by incomplete information in respect of the results of inquiries and failure to make full disclosure. I therefore find that the Plaintiff has not made all reasonable inquiries as required by rule 32.05(b) of the *SCR*.

[61] Notwithstanding that finding which alone will see the Plaintiff's application being declined, I will consider the remaining requirements.

[62] The second limb of rule 32.05(b) of the *SCR* requires the Plaintiff to show that she has insufficient information, after making all reasonable inquiries, to enable her to determine, not whether a cause of action exists, but whether to commence proceedings, and in this Court. For the reasons stated in paragraph 55 above, I consider that the Plaintiff has at least enough

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18 [2005] FCA 1851 at para 13.

19 [2017] ACTSC 242.

information to assess the economic viability of commencing proceedings. The requirement in the rule also brings in considerations of assessment of the likelihood of success of any proceedings, including what if any defences there may be to any claim and the likely costs. Mr Robinson said that as a result of the failure of the inquiries made to reveal any meaningful information, the Plaintiff does not have information to enable that assessment to be made.

[63] The Plaintiff also broadly relies on the beneficial construction which is to be given to rule 32.05 of the *SCR* and the overriding discretion given to the Court. The Plaintiff points out that inferences can be relied on to establish the necessary requirements and with that at least I agree.

[64] The Defendant submitted that the evidence reveals essentially that the Plaintiff already has enough information to decide whether to commence proceedings. As that is the purpose of preliminary discovery per rule 32.05 of the *SCR*, preliminary discovery is not to be used to facilitate the obtaining of evidence to support a claim that an applicant for an order already has sufficient information to decide to bring, or has already decided to bring. Rather it is intended to aid an applicant for an order who has yet to decide whether to commence a proceeding.[20]

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[20] *Matrix Film Investment One Pty Ltd v Alameda Films LLC* [2006] FCA 591; Webcott Pty Ltd v *Jephcott Pty Ltd* [2009] FCA 124.

[65] As to the overriding discretion, the Plaintiff referred me to the decision in *St George Bank Ltd v Rabo Australia Ltd & Anor*,[21] which is authority for the proposition that the overriding discretion and beneficial nature of the rule is to be given the full scope that the language of the rule will reasonably allow.[22]

[66] The Defendant also presented argument concerning the overriding discretion in arguing that a relevant factor in respect of the exercise of that discretion was consideration of whether there is any other adequate means available to the intending plaintiff of obtaining the information sought.[23] This ties in with the discovery available in Panama.

[67] In this respect, Mr Otto was critical of the failure of the Plaintiff to seek discovery in the Will Proceeding. The evidence of the Defendant's Panamanian lawyer, which has not been contradicted by the Plaintiff, is that the discovery procedures available to the Plaintiff in Panama are similar to those in Australia, permitting both preliminary discovery and routine discovery and that it is open to the Plaintiff to seek discovery in the Will Proceeding, including in respect of the documents currently sought on the application before this Court. Although the Plaintiff made a discovery application in the Succession Proceeding, those proceedings have been stayed. If the Plaintiff saw fit to seek discovery in the Succession

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21 (2004) 211 ALR 147.

22 (2004) 211 ALR 147 at para 26.

23 *BWS v ARV [No 2]* [2021] WASC 62.

Proceeding, I have no satisfactory explanation why she has not attempted to do so in the Will Proceeding as those proceedings have been on foot since January 2021.

[68] The Defendant's submission that the Plaintiff already has enough information to commence proceedings appears to be largely based on information the Plaintiff has obtained from the proceedings in Panama. However, there is not enough evidence available concerning the information obtained from those proceedings, or otherwise, to support that submission of the Defendant. With one exception in respect of information concerning the economic viability of commencing proceedings which I have dealt with in more detail above, applying a beneficial approach, I tend to acceptance of Mr Robinson's argument that the inquiries have not revealed sufficient information to enable the Plaintiff to make an assessment as to whether to commence proceedings. Divorced of considerations of failure of proper disclosure, I would go as far as saying that the inquiries have essentially revealed nothing worthwhile in the context of a decision to commence proceedings, but that appears to be finely balanced against the existence of the Panamanian proceedings and the nature of the relief sought there. The Plaintiff apparently believed she had all required information to commence those proceedings.

[69] That then leaves consideration of the residual discretion. My concerns regarding the multitude of significant evidentiary failings on the part of the Plaintiff are highly relevant to the exercise of the residual discretion. There

are many unanswered questions concerning the Plaintiff's evidence and in my assessment the Plaintiff has failed to make proper disclosure. There are significant shortcomings concerning the apparent knowledge of Tatyana and the Plaintiff in respect of Rhombus and its Swiss bank account. The criminal report made on behalf of the Plaintiff also demonstrates that the Plaintiff has substantially more knowledge regarding Rhombus and its assets than has been disclosed. Even leaving aside questions as to why the Plaintiff has not sought discovery in the Panamanian Will Proceeding, the major failings in the Plaintiff's evidence in my view inevitably leads to the rejection of the Plaintiff's application on the basis of the Court's discretion.

[70] As I will therefore dismiss the Plaintiff's preliminary discovery application, it is not strictly necessary for me to decide the issue of the stay but I will express my views on that in case it becomes relevant.

[71] The Plaintiff's case on the stay is twofold. Firstly, that a stay in respect of an application for preliminary discovery should be determined consistent with the approach of the Victorian Court of Appeal in *Schmidt v Won* (*Schmidt*)[24] and that the test in *Voth v Manildra Flour Mills Pty Ltd* (*Voth*)[25] only applies to the final relief and when a proceeding for that final relief is commenced. With that, I agree, as does the Defendant agree. Secondly, if the *Voth* test is to be applied, this Court is not a clearly

[24] [1998] 3 VR 435.

[25] (1990) 171 CLR 538.

inappropriate forum to hear the preliminary discovery application. That second aspect is disputed by the Defendant.

[72] As with the current matter, *Schmidt* also concerned an application for a stay based on forum grounds in respect of an application for preliminary discovery. At first instance the application was refused based on the application of *Voth*. On appeal, the Court of Appeal considered that the Judge at first instance erred as she had applied the *Voth* test to the putative cause of action. The Court of Appeal considered it inappropriate to apply the *Voth* test to the putative action primarily because it could not then be formulated with any certainty, and decided that the *Voth* test should have been applied to the interlocutory application. The Court of Appeal however accepted that matters pertaining to the proposed final relief may be relevant to the exercise of the discretion.[26]

[73] The *Voth* test is commonly referred to as the clearly inappropriate forum test. Specifically with respect to the current proceedings, that means that if, after considering all relevant factors (see below), this Court determines that it is a clearly inappropriate forum to determine the current application, a stay of the proceedings in this Court will inevitably follow.

[74] With respect to how the *Voth* principle ought to be applied, in Schmidt, Ormiston JA, with whom Charles and Batt JJA agreed, acknowledged that there may be cases where the interlocutory application itself can be an

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26 *Schmidt v Won* [1998] 3 VR 435 at 449.

abuse of process. His Honour provided an example where he considered it would be clearly inappropriate for hearing in the local forum namely, where the only belief as to a cause of action was as to a claimed right to title over foreign land. Relief in respect of title to land involves rights *in rem* and I query if the *in personam* rights in the current case regarding ownership of shares in Rhombus, and its assets outside Australia, would be considered to be within his Honour's example.

[75] His Honour then went on to say that:

> "Ordinarily, it would be inappropriate on an application such as the present to determine in advance whether a litigant ought to be shut out by an order staying the claims based on those rights to relief until all relevant facts are known. Though from time to time the answer may be obvious, in the usual case it would not be just to resolve that issue before the plaintiff is in possession of all necessary factual materials."[27]

[76] Relying on that Mr Robinson argued that as the current case was not one of abuse of process, assuming the prerequisites in the *SCR* for that purpose have been satisfied, the current application for preliminary discovery ought to be granted on authority of *Schmidt* and that the *Voth* principles should only be considered in the context of the putative cause of action when proceedings were actually commenced. However, I do not read *Schmidt* as laying down a hard and fast rule and requiring a more or less automatic rejection of a forum based stay application in the context of a preliminary discovery application, absent only circumstances amounting to abuse of process.

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[27] *Schmidt v Won* [1998] 3 VR 435 at 449.

[77] In contrast, Mr Otto argued that the *Voth* principles should now be assessed against the Plaintiff's preliminary discovery application. He submitted that *Schmidt* only stands for the proposition that the *Voth* principles must be applied to the preliminary discovery application not to the putative action, a proposition that he agreed with. He submitted that Ormiston JA, in the text recited in paragraph 75 above, was not referring to a stay of the preliminary discovery application but was referring to the making of a preliminary determination, at the hearing of a preliminary discovery application, as to whether the putative action should be stayed under the *Voth* principles. I agree that it can be read that way. He also relied on the dicta of Ormiston JA to the effect that the nature of the proposed action and its enforceability in the local forum may be relevant to the exercise of the discretion.

[78] In my view *Schmidt* cannot be authority for the routine rejection of a stay application made in respect of a preliminary discovery application. If it were such a hard and fast rule, I think that would run counter to *Voth* and to Deane J in *Oceanic Sun Line Special Shipping Co Inc v Fay* ("*Oceanic*").[28]

[79] The dicta of Deane J in *Oceanic* would later form the basis of the clearly inappropriate forum test for resolving forum issues adopted in *Voth*. In *Oceanic*, Deane J construed oppression and vexation liberally such that I

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28 (1988) 165 CLR 197.

think it has application in the current case. His Honour said that *"oppressive" should, in this context, be understood as meaning seriously and unfairly burdensome, prejudicial or damaging*" and that *"vexatious" should be understood as meaning productive of serious an unjustified trouble and harassment*".[29] His Honour also said that the terms were to be applied to the objective effect of the continuation of the proceedings in the selected forum, not the conduct of the Plaintiff in selecting, or persisting with, that forum.[30]

[80] Deane J said that determination of the question was a balancing exercise based on the circumstances of each particular case and said that the Defendant would be successful if the Defendant established that "*having regard to the circumstances of the particular case and the availability of the foreign tribunal, the local court is a clearly inappropriate forum for the determination of the dispute. The continuation of proceedings in that forum would then be oppressive or vexatious*."[31]

[81] The decision in *Oceanic* was not a majority decision. Before *Oceanic* the test in *Spiliada Maritime Corp v Cansulex Ltd*,[32] which essentially involved determination of the more appropriate forum, was applied. The High Court in *Voth* decided between the two in favour of the dicta of Deane J in *Oceanic*.

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29 (1988) 165 CLR 197 at 247.

30 (1988) 165 CLR 197 at 247-248.

31 (1988) 165 CLR 197 at 248.

32 *Spiliada Maritime Corp v Cansulex Ltd* [1987] AC 460.

[82] The Defendant, in applying the meaning of oppression and vexation formulated by Deane J in *Oceanic*, and with support from *Henry v Henry*,[33] said that one commonly recognised circumstance of unjustified vexation or oppression is the existence of simultaneous proceedings commenced against the same party and regarding the same issue and controversy which has direct application in the current case. I do not believe that the fact that the application in this Court is interlocutory in nature, whereas in Panama the proceedings appear to be for final relief, matters as the issue is what relief is available.

[83] Having regard to the foregoing and based on those authorities, in my view, the *Voth* principles are to be applied to the preliminary discovery application having regard to the existence of the proceedings in Panama which are between the same parties as in this Court and concerning the same subject matter and controversy.

[84] I think that in the assessment of whether or not the Supreme Court of the Northern Territory is a clearly inappropriate forum, the following considerations are relevant. I say at the outset that I recognise that some of these factors can be applied both to the preliminary discovery application to any putative final relief. I point that out only to demonstrate that I do not apply the *Voth* principle to the putative cause of action. Firstly, the connection between the Northern Territory and the subject matter of the

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33 (1996) 185 CLR 571.

action. Here, the only connection is that the Defendant resides in the Northern Territory. In *Voth* the plurality of the High Court said that residence in a particular jurisdiction, although a legitimate personal or juridical advantage, carried little weight beyond that.[34]

[85] Further, the subject matter of the controversy has no connection with the Northern Territory. Rhombus is a company incorporated in Panama, its directors reside in Panama, the event which appears to have been the impetus for the proceedings in this Court namely, the transfer of the Rhombus shares to the Defendant, all occurred in Panama and the documents sought concern either Rhombus or its assets, or the estate of the deceased to which Russian law applies, none of which has any connection with the Northern Territory.

[86] Secondly, whether there is any legitimate juridical advantage to the Plaintiff. In this case that again relates to the residence of the Defendant in the Northern Territory and her co-ownership of a house property, being an asset within the jurisdiction which might be relevant to enforcement.

[87] Mr Robinson said that the importance in this particular case of commencing proceedings in this Court is that the Defendant resides in the Northern Territory. Although, as I said above, residence alone is

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[34] *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 at 571.

insignificant. Nonetheless, the Plaintiff relied on this in arguing that it is preferable to have the option to enforce any order of the Court in the Northern Territory, especially in preference to a foreign country. Mr Robinson submitted that the only reason the Panamanian proceedings were commenced was that Rhombus was based in Panama and therefore that necessitated proceedings in Panama.

[88] Another relevant remedial consideration put by Mr Robinson was that the Panamanian court is unable to order interim injunctions in respect of the Rhombus shares, whereas this Court can do so.[35] That was not challenged by the Defendant. I think that is an important consideration going beyond mere residence.

[89] Thirdly, and as a corollary to the first factor, the Plaintiff's application has a substantial connection with the laws of the Russian Federation and Panama. In this respect, although the proceedings in Panama are largely for final relief, I assess this in the context of evidence that the discovery processes, which are interlocutory in nature in the Northern Territory, are also available in Panama.

[90] Fourthly, whether there are any differences between the law to be applied in the two forums. Relevant here is the evidence that discovery processes

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35 Section 69(1) and (2) of the *Supreme Court Act 1979* (NT).

and remedies are very similar in Panama. The evidence shows that the Plaintiff could seek discovery in the Will Proceeding in Panama. That is also apparent from the application made for discovery in the Succession Proceeding. I think the evidence supports a finding that the Plaintiff could, in the Panamanian proceedings, seek all of the documents the Plaintiff now seeks by preliminary discovery in the current proceedings. That appears to fall squarely within the description of vexation and oppression referred to by Deane J in *Oceanic* and by the plurality of the High Court in *Voth*.

[91] Fifthly, and with some overlap with the preceding factor, the simple fact that there are simultaneous proceedings commenced against the same party with respect to the same issue or controversy. That also falls squarely within the description of vexation and oppression referred to by Deane J in *Oceanic* and by the plurality of the High Court in *Voth*. Mr Otto also referred me to *Talacko v Talacko*,[36] where it was put very succinctly by Osborn J when he said:

> "It follows from the above authorities that it will not be prima facie vexatious to institute proceedings in both a foreign country and Australia, but it will be so if the Plaintiff has the same chance in each country and equal facility to obtain effective remedies."[37]

[92] Sixthly, the grant of a permanent stay, or the refusal of preliminary discovery for that matter, does not prevent the Plaintiff from commencing proceedings in this Court, or elsewhere, for final relief, whether in respect

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36 *Talacko v Talacko* [2008] VSC 246.

37 [2008] VSC 246 at para 44.

of one of the identified putative causes of action or otherwise. If commenced in this Court, although there may then be another stay application if the proceedings in Panama are then still on foot, automatic discovery processes would then apply. In addition the Plaintiff could seek additional discovery orders, for example particular discovery. If the stay the Defendant seeks was granted, that would not, at this stage at least, shut the Plaintiff out from whatever relief she feels entitled to.

[93] Related to the last consideration, Mr Robinson said that if preliminary discovery was completed, the Plaintiff was prepared to give an undertaking to discontinue the proceedings in Panama if and when proceedings for final relief in the Northern Territory were commenced and if and when a question arose concerning the two proceedings. That course cannot now be taken in any case as there will not be preliminary discovery. However, I do not believe that the suggested course would have been appropriate had I not refused the application for preliminary discovery. That is because the Defendant is entitled to a decision from this Court on her application and the proposed course would only delay that, and for an indefinite time i.e., until after preliminary discovery, if ordered, had occurred and after the Plaintiff had commenced further proceedings.

[94] The grant of a stay is a discretionary order. On the authorities discussed, that involves a subjective balancing process of the relevant factors. In turn those factors depend on the circumstances of the particular case and the

weight to be given to a particular fact is a matter for individual judgment. After balancing out the identified considerations, I would have found that this Court is a clearly inappropriate forum in the circumstances and therefore I would have granted the stay sought by the Defendant.

[95] I will hear the parties as to costs and as to any ancillary orders.