Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor [2011] NTSC 53

PARTIES:	MINKIE (NT) PTY LTD Plaintiff v WISE CHANNEL MARKETING PTY LTD First Defendant AND FREEZE BEVERAGES PTY LTD Second Defendant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	48 of 2010 (21015436)
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Application for particular discovery – Application for discovery before pleadings – Principles to be applied in applications for discovery before pleadings – Order is discretionary – Principles relevant to the exercise of the discretion – Test for discoverability of documents.

Supreme Court Rules 1.09, 11.09, 11.15, 29.02, 29.04, 29.07, 29.08

The Compagine Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company [1883] 11 QBD 55.

Computershare Ltd v Perpetual Registrars Ltd & Ors (2000) 1 VR 626.
Trade Practices Commission v CC (NSW) Pty Ltd (No.4) (1995) 58 FCR 426.
Matzat v The Gove Flying Club Inc. & Ors [1996] NTSC 9.
Murray Pest Management Pty Ltd v A & J Bilske Pty Ltd & Ors [2009] NTSC 68.

REPRESENTATION:

Counsel:

Plaintiff:	Mr McConnel
First Defendant:	Not represented
Second Defendant:	Mr Stewart

Solicitors:

Plaintiff:	Ward Keller
First Defendant:	Minter Ellison
Second Defendant:	Hunt & Hunt

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

Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor [2011] NTSC 53
No. 48 of 2010 (21015436)

BETWEEN:

MINKIE (NT) PTY LTD
Plaintiff

AND:

WISE CHANNEL MARKETING PTY LTD
First Defendant

AND

FREEZE BEVERAGES PTY LTD
Second Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 12 July 2011)

[1] This is an application for orders in respect of the Plaintiff's discovery by the Second Defendant. The Second Defendant seeks discovery of documents which fall into two categories. Firstly, documents relative to the insurance arrangements of the Plaintiff. Secondly, documents relative to insurance claims and investigations in respect of the fire referred to in the pleadings.

[2] The Second Defendant also seeks an order for a proper itemisation of the documents discovered by the Plaintiff and in respect of which privilege is claimed. That order is not opposed by the Plaintiff, nor could it be given the provisions of Rule 29.04(d) of the *Supreme Court Rules* ("the Rules").

[3] The background facts are that the Second Defendant is the supplier of frozen cocktail dispensing machines. Certain machines where supplied by the Second Defendant to the First Defendant who in turn supplied them to the Plaintiff to install and use them in the Plaintiff's hotel business.

[4] A fire at the Plaintiff's hotel business caused significant damage and loss. It is alleged the fire was caused by a fault in one of the dispensing machines.

[5] The Plaintiff claims against both Defendants for the loss and damage sustained as a result of the fire.

[6] The terms of the supply of the machine by the First Defendant to the Plaintiff were in evidence before me. One of those terms (paragraph 2.F) provides as follows:-

> "Customer *[the First Defendant]* shall maintain with its insurers General Public Liability and Property Damage Insurance that will extend to all liabilities of the customer and Freeze Beverages (NT) in relation to the use and possession of the equipment or the provision of the product to consumers;…"

It would appear the fire which caused the damage would be covered by such insurance if there was a complying policy in place.

[7] The First Defendant has served a Contribution Notice on the Second Defendant and the Second Defendant has filed a Defence to Contribution Notice.

[8] The application for an order that the Plaintiff give particular discovery of documents evidencing its insurance arrangements is made by the Second Defendant on the basis that it is unaware of whether or not the Plaintiff took out the insurance required by paragraph 2.F. The argument is that if such cover were to be taken, then the Plaintiff and the First Defendant will be co-insureds and the principle of circuitry of action will prevent the Plaintiff recovering against the First Defendant. In that event the Contribution Notice by the First Defendant against the Second Defendant would be rendered nugatory. By that process the Second Defendant claims to have a sufficient interest in the documents it seeks.

[9] Moreover, the Second Defendant proposes to file a Defence to the Plaintiff's Statement of Claim as against the First Defendant pursuant to Rule 11.09(2) of the Rules. That Rule relates to a defence which a third party may file in relation to a plaintiffs' claim as against the defendant who joined the third party. By Rule 11.15, that rule applies *mutatis mutandis* to the Contribution Notice issued by the First Defendant against the Second Defendant. Rule 11.09(2) provides as follows:-

> **11.09 Defence of third party**
>
> (1) Omitted.

(2) The third party may, on a ground not raised by the defendant in his defence, serve a defence to the statement of claim of the plaintiff by which he disputes the liability to the plaintiff of the defendant by whom the third party was joined.

(3) Omitted.

[10] Mr Stewart for the Second Defendant argues that it is unable to properly plead the proposed defence under Rule 11.09(2) without orders for discovery in respect of the first two categories of documents as the Second Defendant does not know what the relevant material facts are until those documents are inspected.

[11] The Second Defendant therefore seeks discovery before pleading. Discovery usually occurs after the close of pleadings. This is recognised by Rule 29.02(1) of the Rules which provides as follows:-

29.02 Discovery

(1) When the pleadings between the parties to a proceeding have closed, there is to be discovery by the parties of all documents that are or have been in their possession relating to a question raised by the pleadings.

(2) & (3) Omitted.

[12] As I explained in *Murray Pest Management Pty Ltd v A & J Bilkse Pty Ltd & Ors*,[1] the rationale behind that rule is that the question of relevance by which discoverability is determined is established by reference to the issues set out in the pleadings.

[1] [2009] NTSC 68

[13] Mr McConnel for the Plaintiff argues the application should be governed by Rule 29.02(1) and consequently, as the pleadings do not put the insurance arrangements of the Plaintiff in issue, the Second Defendant ought to be denied the order for discovery at this stage. He argued that the Second Defendant should plead its proposed defence as far as it can then seek discovery after that and to the extent that it is then shown to be necessary.

[14] However there is nothing in the Rules or that has been put to me or which I can see which makes Rule 29.02 paramount. In particular Rule 29.02 does not constrain the application of Rule 29.08, the relevant parts of which provides as follows:-

> **29.08 Order for particular discovery**
>
> (1A) This rule applies to all proceedings in the Court.
>
> (1) Where at any stage of a proceeding, it appears to the Court from evidence or from the nature or circumstances of the case, or from a document filed in the proceeding, that there are grounds for a belief that a document or class of documents relating to a question in the proceeding may be or may have been in the possession of a party, the Court may order that party to make and serve on any other party an affidavit stating whether the document or any and if so what document or documents of that class is or has been in his possession and, if it has been but is no longer in his possession, when he parted with it and his belief as to what has become of it.
>
> (2) An order may be made against a party under subrule (1) notwithstanding that he has already made or been required to make a list of documents or an affidavit verifying such a list.

[15] That rule was considered by Mildren J in *Matzat v The Gove Flying Club Inc. & Ors* ("*Matzat*").[2] That case concerned an application for discovery between defendants. There were no contribution notices between those defendants. It was argued that the absence of pleadings between those defendants denied the applicant standing to seek the relief sought. His Honour rejected that argument. His Honour pointed out that Rule 29.08 was not as narrowly confined as Rule 29.02 read in conjunction with Rule 29.03. He noted that Rule 29.02 was limited to situations where the pleadings were closed but that Rule 29.08 was not limited in the same way. He ruled that Rule 29.08 applied to all proceedings in the court irrespective of whether or not there were pleadings.

[16] His Honour also noted the use of the word "*question*" in the phrase "*documents relating to a question in the...*" in Rule 29.08(1) and said that given the definition of "*question*" in Rule 1.09(1), it meant that such documents were not confined to questions raised by the pleadings between the parties. That definition is in the following terms:-

> **1.09 Interpretation**
>
> (1) In this Chapter, unless the contrary intention appears:
>
> …
>
> ***question*** means a question, issue or matter for determination by the Court, whether of fact or law or of fact and law, raised by the pleadings or otherwise at any stage of a proceeding by the Court, by a party or by a person, not a party, who has a sufficient interest.

[2] [1996] NTSC 9

His Honour concluded that the absence of pleadings between parties did not prohibit an order for discovery under Rule 29.08 provided that the party had a "*sufficient interest*" in the question to be decided and to which the documents relate.

[17] Rule 29.07 of the Rules in any event makes it clear to me that orders for discovery can be made "*…at any stage…*" and notwithstanding that the pleadings have not closed. The full text of that rule is as follows:-

> **29.07 Order for discovery**
>
> (1) Notwithstanding that the pleadings between parties are not closed, the Court may order that any of those parties make discovery of documents to any other of those parties.
>
> (2) In a proceeding:
>
> (a) commenced by writ; or
>
> (b) in respect of which an order under rule 4.07 has been made,
>
> the Court may at any stage order a party to make discovery of documents.
>
> (3) An order under subrules (1) or (2) may be limited to such documents or classes of document, or to such questions in the proceeding, as the Court thinks fit.

[18] That rule does not provide for any pre-requisites to the making of an order. Clearly it is entirely a matter of discretion. In *Computershare Ltd v Perpetual Registrars Ltd & Ors* ("*Computershare*")[3] Warren J considered the exercise of the discretionary power of the court to order discovery

[3] [2000] VSC 139

before the close of pleadings. Her Honour adopted what was said in *Trade Practices Commission v CC (NSW) Pty Ltd (No.4)*("*CC*")[4] were Lindgren J said that discovery should be ordered whenever it was necessary in the interests of a fair trial or of the fair disposition of a case and specifically:

> "…where one party and not the other is likely to have documents relating to a matter in question, it seems to me to be prima facie "necessary" in the sense referred to that discovery be ordered."[5]

[19] Her Honour rejected the submission that the court should only exercise the relevant discretion in exceptional circumstances noting specifically that Order 29.07 of the Victorian Supreme Court Rules did not specify such a requirement. Rule 29.07 of the Rules is in very similar terms.

[20] Her Honour observed that the court's power to order discovery was entirely discretionary. She said that whether or not the discretion should be exercised should be determined on the circumstances of each case. Therefore instances of the exercise of the discretion in other cases can only be taken as a guide. She considered it appropriate for the court to exercise its discretion in that case for three reasons. Firstly, due to the existence of a pre-existing relationship between the relevant parties. Secondly, as there was "*…a strong and unrebutted suspicion…*" in respect of relevant matters and in respect of which discovery was sought. Thirdly, because of the possibility that the pleadings in that case would otherwise be attacked on adequacy grounds.

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[4] (1995) 58 FCR 426
[5] (1995) 58 FCR 426 at p 437-438

[21] Each of those factors has application in the current case. Firstly, the pre-existing relationship. That is self evident on the facts discussed above. Secondly, the *"suspicion"* is manifested sufficiently given the provisions of paragraph 2.F of the supply agreement between the Defendants. Thirdly, I am satisfied that the pleading proposed by the Second Defendant, if made without knowledge of material facts ascertainable by way of the discovery process, would also be susceptible to challenge on pleadings rules.

[22] Mr McConnel argued that *Computershare* was distinguishable for two reasons. Firstly, the application in that case was between parties who had pleaded as between each other. I think this is a restatement in different guise of the argument that Rule 29.02 should have precedence over Rule 29.08. I have already rejected that submission. Secondly, because in *Computershare* the applicants had pleaded its case as far as it could without the order for discovery and then sought discovery effectively to properly particularise its claim. Although that appears to be correct, there is nothing to indicate that the case should be confined to those situations. *Computershare* was decided on the basis of Order 29.07 of the Victorian Supreme Court Rules and that rule as it provided at that time is *para materia* with Rule 29.07 of the Rules. The submission runs counter to the specific wording of Rule 29.07 i.e., that an order for discovery under that rule can be made at any stage of the proceedings. It also runs counter to the decision in *Matzat* where an order under the same rules was made absent pleadings.

[23] In my assessment the Second Defendant has sufficiently established both the necessary sufficient interest and the necessity per *CC* to justify the making of the orders sought in respect of documents relevant to the Plaintiff's insurance arrangements.

[24] The Plaintiff also challenges the entitlement of the Second Defendant in respect of assessors' reports and investigators' reports.

[25] The Plaintiff's List of Documents discovers assessors' reports but claims privilege over such documents. A claim for privilege is commonly made with respect to documents of that nature. The Plaintiff however argues that notwithstanding that, such documents are not discoverable because they contain opinions. The argument proceeded on the basis that opinions are not admissible in their own right and consequently the reports are not discoverable. In my view, even if the reports set out opinions, they will also likely set out the facts upon which those opinions are based. To that extent, the Plaintiff's argument is negated and the Plaintiff's argument should be rejected on that account alone.

[26] The Plaintiff's argument also overlooks the fact that any opinions contained in the reports may be admissible. The author of the opinion may be entitled to express an opinion as that entitlement arises from qualifications or experience. It may be the opinion is admissible subject only to the weight to be given to those opinions. Even if the Plaintiff did

not seek to rely on those opinions, another party may endeavour to do so. I am of the view that on that basis also the argument should be rejected.

[27] In any event the test for discoverability is of long standing precedent. It does not depend on admissibility. It depends on relevance. The seminal authority is *The Compagine Financiere Et Commerciale Du Pacifique v The Peruvian Guano Company*.[6] There Brett LJ said:-

> "…the documents to be produced are not confined to those, which would be evidence either to prove or disprove any matter in question in the action; …
>
> The doctrine seems to me to go farther than that and go as far as the principle which I am about to lay down. It seems to me that every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which, it is reasonable to suppose, contains information which *may* – not which *must* – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage the case of his adversary…It seems to me, a document can properly be said to contain information which may enable the party requiring the affidavit either to advance his own case or to damage a case of his adversary, if it is a document which may fairly lead him to a train of enquiry, which may have either of these two consequences:"[7]

[28] The latter part of that dictum is qualified by Rule 29.02(3) but that does not change the application of the test.

[29] In my view assessors' reports, investigation reports and the documents in the second category sought by the Second Defendant are discoverable subject only to any properly made claim to privilege.

[6] [1883] 11 QBD 55
[7] [1883] 11 QBD 55 at p 62-63

[30] I have already made the order sought in paragraph 1(c) of the Summons filed 28 June 2011. For the aforesaid reasons there will also be orders in terms of paragraphs 1(a) and (b). I will hear the parties as to the time to be allowed for compliance.

[31] I will also hear the parties as to costs.