PARTIES:	COMPLETE CRANE HIRE (NT) PTY LTD v MARCHETTI AUTOGRU SPA (ITALY)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	157 of 2011 (21143306)
DELIVERED:	4 JUNE 2015
HEARING DATES:	19 MARCH 2015
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

Practice and Procedure – Application for leave to interrogate – Order is entirely discretionary – Principles to be applied – Principles relevant to the exercise of the discretion – Party unable to obtain information necessary to conduct its case by other means – Fairness as between parties.

Practice and Procedure – Application for order for oral examination – Principles to be applied – Pre-requisites for an order – Order remains discretionary after pre-requisites are satisfied – Principles relevant to the exercise of the discretion.

Practice and Procedure – Application for particular discovery – Principles to be applied – Pre-requisites for an order – Order remains discretionary after pre-requisites are satisfied – Principles relevant to the exercise of the discretion.

Supreme Court Rules 1.09, 29.08, 30.02, 30.05, 30.06, 31.02, 31.03, 31.05, 31.10, 31.11, 31.12

Chatley v Northern Territory, Unreported, Supreme Court, Mildren J, 25 January 2001.
Barber v Nominal Defendant (1989) 153 LSJS 8.
Dalecoast v Monisse [1999] WASCA 103.
Pearce v Hall (1989) 52 SASR 568.
Schutt v Queenan Unreported, New South Wales Court of Appeal, Mason P, 23 November 2000.
Olley v Baranovskis [1964] SASR 62.
Leombruno v McQuillan [1966] SASR 67.
Bikstone v Henschke, Unreported, Supreme Court, Master Coulehan, 27 June 2002.
Davies v Lewis, Unreported, Supreme Court, Master Coulehan, 24 April 2002.
Dunbar v Perc [1956] VLR 583.
Lang v Australian Coastal Shipping & Anor [1974] 2 NSWLR 70.
Verdell Pty Ltd v F & G Nominees Pty Ltd [2000] WASC 142.
Hughes v Western Australian Cricket Association Inc (1986 ATPR 40–726).
Lyell v Kennedy (No 3) (1884) 27 Ch D 1.
Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor [2015] NTSC 53.
Trade Practices Commission v CC (NSW) Pty Ltd (No 4) (1995) 58 FCR 426.

Cairns, B. Australian Civil Procedure, Tenth Ed, Lawbook Co, 2014
Bailey, D. and Evans, E., *Discovery and Interrogatories Australia*, LexisNexis Butterworths.

REPRESENTATION:

Counsel:	
Plaintiff:	Mr Harding
Defendant:	Mr Wilson
Solicitors:	
Plaintiff:	Paul Maher
Defendant:	Hunt & Hunt
Judgment category classification:	B
Judgment ID Number:	Lup1501
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Complete Crane Hire (NT) Pty Ltd v Marchetti Autogru Spa (Italy) [2015] NTSC 32
No. 157 of 2011 (21143306)

BETWEEN:

COMPLETE CRANE HIRE (NT) PTY LTD
Plaintiff

AND:

MARCHETTI AUTOGRU SPA (ITALY)
Defendant

CORAM: MASTER LUPPINO

REASONS FOR JUDGMENT

(Delivered 4 June 2015)

Introduction

[1] These reasons deal with separate applications made by each of the parties in these proceedings. The Plaintiff has applied for an order for particular discovery pursuant to rule 29.08 of the Supreme Court Rules ("the SCR"). The Defendant seeks an order for oral examination pursuant to Order 31 of the SCR and alternatively an order for leave to interrogate pursuant to Order 30 of the SCR. Orders for particular discovery, for particulars and orders in relation to service of expert's reports and amended pleadings are also sought.

[2] The Plaintiff's summons was resolved prior to the hearing. The order sought in that summons was an affidavit on behalf of the Defendant stating whether the Defendant possessed any documents in relation to any fires in any other vehicle it has manufactured similar to the vehicle the subject of the current proceedings. Subsequent to the issue of the Plaintiff's summons, the Defendant provided an affidavit apparently indicating that there had been no other fires in any other vehicles manufactured by the Defendant. The Plaintiff accepts that and agreed to dismiss the summons save for the question of costs.

[3] In respect of the Defendant's summons, I was told that the issue of particulars was resolved and, in respect of expert reports, I understood that was resolved on the basis of agreement reached between counsel that further experts reports would be obtained and served by both parties. The issue of amended pleadings was also resolved by consent.

[4] Apart from questions of costs therefore the remaining issues are all on the Defendant's summons and are all in the nature of discovery, specifically, oral examination with leave to interrogate in the alternative, and particular discovery.

[5] The rules in so far as they are necessary for these reasons are:-

29.08 Order for particular discovery

(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.

30.02 Service of interrogatories

A party may serve interrogatories on another party relating to a question between them in the proceeding only with leave of the Court.

30.05 Source for answers to interrogatories

(1) A party interrogated shall answer each interrogatory, insofar as it is not objectionable, in accordance with the following:

(a) the party shall answer from his own knowledge of the fact or matter which is enquired after by the interrogatory and, if he has no such knowledge, from a belief he has as to the fact or matter;

(b) a party who has no knowledge of the fact or matter inquired after shall be taken not to have a belief as to the fact or matter where he has no information relating to it on which to form a belief or where, if he has such information, for reasonable cause he has no belief that the information is true;

(c) except as provided by paragraph (d), the party shall answer from a belief he has as to the fact or matter inquired after irrespective of the source of the information on which the belief is formed;

(d) the party shall not be required to answer from his belief as to a fact or matter where the belief is formed on information that was given to him in a communication the contents of which he could not, on the ground of privilege, be compelled to disclose;

(e) where the party has no knowledge himself of the fact or matter inquired after, he shall, for the purpose of enabling himself to form a belief as to the fact or matter (so far as he can), make all reasonable enquiries to determine:

(i) whether a person has knowledge of the fact or matter which was acquired by that person in the capacity of his servant or agent; and

(ii) if that is the case, what that knowledge is;

(f) the party shall make the inquiries referred to in paragraph (e) notwithstanding that at the time he is required to answer the interrogatory a

person having the relevant knowledge has ceased to be his servant or agent; and

(g) where the party is a corporation, this rule with the necessary changes, applies as if the person who answers the interrogatories on behalf of the corporation were the party and, in particular, as if the reference in paragraph (e) to a servant or agent of the party were a reference to a servant or agent of the corporation.

Order 31 Discovery by oral examination

31.02 When is examination available

(1) Where a party might, with the leave of the Court under rule 30.02, serve interrogatories on another party relating to a question between them in a proceeding, subject to this rule, the party may instead orally examine the other party on oath in relation to the question.

(2) A party must not orally examine another party unless:

(a) the other party has consented in accordance with rule 31.03 to being examined; or

(b) the Court has made an order under rule 31.03(9) requiring the other party to be examined.

31.03 Application for and consent to examination

(1) A party seeking to orally examine another party in accordance with this Order must serve on that other party a request in writing that the party served consent to be orally examined.

(2) A notice under subrule (1) may nominate an examiner for the purpose of the examination.

(3) A party served with a notice under subrule (1) may, by notice in writing served on the party seeking the examination:

(a) consent to be examined before the examiner nominated;

(b) consent to be examined but not before the examiner nominated; or

(c) refuse to be examined.

(8) If a party:

(a) refuses under subrule (3)(c) to be examined; or

(b) is to be taken under subrule (6) to have refused to be examined,

the party seeking the examination may apply to the Court for an order requiring the party to be orally examined in accordance with this Order.

(9) The Court may make an order requiring a party to be orally examined if satisfied that:

(a) the Court would have granted the party seeking the examination leave to serve written interrogatories on the party; and

(b) one or more of the following apply:

(i) it is likely that an oral examination will be less costly to the parties than preparing and answering written interrogatories in relation to the question in respect of which the examination is sought;

(ii) there is some other advantage to the parties that warrants the making of the order;

(iii) the party sought to be examined was taken to have refused to be examined only by virtue of subrule (6).

(10) If the parties cannot agree on an examiner, the Court may appoint a suitably experienced legal practitioner to be the examiner.

31.05 Examination of corporations

(1) A corporation may be orally examined under this Order.

(2) Where the party examined is a corporation:

(a) one of the following persons may be examined:

(i) an officer of the corporation;

(ii) if the party examined and the examining party agree – a person who is not an officer of the corporation; and

(b) an answer given by the officer or other person is to be taken to be the answer of the corporation.

(3) Unless the party examined and the examining party agree otherwise or the Court orders otherwise, nothing in subrule (2) authorises the examination of more than one person.

31.10 How party to be examined

(1) At the examination, the party examined may be questioned by or on behalf of the examining party but no questions may be asked of the party examined by that party's own counsel or solicitor.

(2) The examination is to be in the nature of an examination in chief of the party examined by the examining party.

(3) Subject to subrule (4), the party examined must answer each question asked of the party.

(4) The party examined may object to a question as if it were a written interrogatory and rule 30.07 applies (with the necessary changes) accordingly.

(5) The party examined is not required to answer a question to which the party objects unless the Court orders otherwise.

(6) Where the party examined answers a question, rules 30.05 and 30.06(1) apply (with the necessary changes) as if the answer to the question were the answer to a written interrogatory.

(7) A question may be answered by counsel or the solicitor for the party examined and the answer is to be taken to be the answer of the party.

(8) Where rule 30.05(1)(e) applies, the examiner may adjourn the examination to enable the party examined to conduct the enquiries referred to in that rule.

31.11 Order to answer question

(1) Where the party examined objects to a question under rule 31.10(4), the examining party may apply by summons to the Master for an order that the party examined is required to answer the question.

(2) The application is to identify each question to which it relates.

(3) The Master may order that the party examined is required to answer a question to which the application relates.

(4) If an order is made under subrule (3), unless the Master orders otherwise, the party examined must answer the question before the examiner and the Master may direct that the examining party be at liberty to ask further questions of the party examined as the case requires.

(5) The Master may order that the party examined answer the question in writing and may direct whether that written answer is to be given on oath.

31.12 Costs of examination

(1) Subject to this Order, as between the parties, the costs of and incidental to attending an oral examination are to be costs in the proceeding unless the Court orders otherwise.

(2) The party seeking the examination must pay the costs of the examiner in the first instance.

(3) The Court may fix the examiner's costs and, on the application of a party or the examiner, may order that those costs be paid in accordance with subrule (2).

Background Facts

[6] The proceedings relate to a vehicle, known as an All Terrain Crane, owned by the Plaintiff and which was manufactured by the Defendant. Some six months after the Plaintiff purchased the vehicle, it was totally destroyed by a fire which occurred on a remote road between Daly River and Wadeye and some 40 km from Daly River.

[7] The current Statement of Claim claims losses in the sum of $1.4 million. The Plaintiff claims in negligence and the case will turn on the cause of the fire which will in turn be determined on expert evidence. The Plaintiff pleads that the fire resulted from a short-circuit caused by a combination of the abrasion of insulation of the battery cable and damage to the reinforcement of hydraulic hoses. It is alleged that the former caused the short-circuit and the latter caused the escape of hydraulic oil. It is further alleged that the two events occurred in close proximity such that the spark from the short-circuit ignited the oil. The Statement of Claim, at least in its current form, pleads that this was caused by negligence in the design and manufacture of the vehicle specifically, in that the Defendant failed to take adequate steps to prevent damage to the hydraulic hoses and the battery cables and that it coupled the battery cables to the hydraulic hoses.

[8] The only witness to the fire was Mr Sutherland, the principal of the Plaintiff. No other witnesses have been identified at this stage.[1] Mr Sutherland was the operator of the vehicle at the time.

[9] The Plaintiff made a claim on its insurance and as a result the insurer engaged an assessor, Mr Cox, who conducted an investigation and provided a report at an early stage. Mr Cox was able to examine the burnt out vehicle and he interviewed Mr Sutherland, who re-enacted certain events for Mr Cox in the course of that interview.

[10] In outline form, with respect to leave to interrogate and/or oral examination, and to a lesser extent particular discovery, the focus of the argument by Mr Wilson, counsel for the Defendant, is that the Defendant cannot complete expert reports, nor can it prepare for trial unless it is provided with certain information regarding the circumstances at around the time of the fire. Mr Wilson submitted that without a firsthand account from the operator of the vehicle of the initiation, spread and eventual consumption of the vehicle in the fire, the Defendant will be prejudiced in its defence as the Defendant's expert says he does not have enough facts to enable him to finalise an opinion. This was supported by evidence in the form of correspondence to this effect from the Defendant's expert.[2]

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1 There is a suggestion that they may be another witness depending on how Mr Sutherland managed to return to Daly River from the location of the fire.

2 Annexure FO21 to the affidavit of Fabio Orlando sworn 17 March 2015.

[11] The Defendant's expert also points to a major contradiction in the report of Mr Cox and he also says that the Plaintiff's pleaded cause for the fire is impossible based on objective facts. Overall he claims a need to obtain further facts to enable him to finalise his opinion about the Plaintiff's claimed cause and the alternative possible causes pleaded by the Defendant.

[12] The Defendant argues that there are a number of possible causes of the fire and possible sites on the vehicle where the fire started. The alternative causes pleaded in the current Defence are, fuel spillage occurring while refuelling with the engine running, improper maintenance of the engine and fuel lines and spillage of fuel resulting from the storage of fuel in unsuitable containers placed in an unsuitable position on the vehicle.

Leave to Interrogate

[13] As the Defendant seeks alternative orders for interrogatories and/or oral examination, the question of leave to interrogate should be considered first given that it is a precondition to the making of an order for oral examination.[3]

[14] One of the aims of discovery, whether by production or inspection of documents or by interrogation, is to put the parties on an equal footing at trial and to reduce the prospects of surprise.[4] Until recent times a party could interrogate as of right. That right has been curtailed in most

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3 SCR r 31.02(1)

4 Cairns, B. *Australian Civil Procedure*, Tenth Ed, Lawbook Co, 2014, at p 369.

jurisdictions. In the Northern Territory, since 1998, leave of the Court has been required before a party can administer interrogatories.[5]

[15] This change came about because the utility of interrogatories had been brought into question having regard to the perceived high costs associated with the procedure. It was considered that interrogatories were too often routinely administered without proper consideration as to the need and that little benefit was perceived to result despite significant costs.[6] Another concern with interrogatories was the routine, often technical, objections being taken which led to delays while arguments occurred as to the validity of objections and/or for leave to further interrogate.[7]

[16] Discovery generally is a legitimate means of obtaining facts, particularly facts which a party would otherwise not have recourse to. The procedure is an appropriate way of identifying the true issues in dispute. With interrogatories there is an ancillary benefit in that they can help to determine the strengths and weaknesses of a party's case.[8] The utility of that in the settlement of proceedings has long been a recognised advantage of the procedures.[9]

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5 SCR r 30.02

6 *Chatley v Northern Territory*, Unreported, Supreme Court, Mildren J, 25 January 2001 at p 3 and *Barber v Nominal Defendant* (1989) 153 LSJS 8 at p10 and *Dalecoast v Monisse* [1999] WASCA 103.

7 Cairns, B. *Australian Civil Procedure*, Tenth Ed, Lawbook Co, 2014, at p 434.

8 *Pearce v Hall* (1989) 52 SASR 568; *Schutt v Queenan*, Unreported, New South Wales Court of Appeal, Mason P, 23 November 2000.

9 *Pearce v Hall* (1989) 52 SASR 568 at 573 where King CJ, referred with approval to the decisions of Hogarth J in *Olley v Baranovskis* [1964] SASR 62 and *Leombruno v McQuillan* [1966] SASR 67.

[17] There is no Northern Territory authority in respect of oral examination. There is limited authority in respect of the question of leave to interrogate, see *Chatley v The Northern Territory*[10] ("*Chatley*"), *Bikstone v Henschke*,[11] and *Davies v Lewis*[12] ("*Davies*")

[18] In *Chatley*, Mildren J said:-

> "The purpose of requiring leave for the administration of interrogatories is that interrogatories are an expensive means of finding information. Whilst they may have saved expense at one time, today they tend not to do that but, rather, to add to the expense of litigation. The experience of the courts is that they do not appear very much to be saving in costs, nor in the saving of court time.... Some particular reason needs to be given to justify the court making an order for the delivery of interrogatories. The particular reason may be that the interrogatories are necessary because the defendant does not know what the matters in issue are about because only the plaintiff knows."[13]

[19] Master Coulehan applied this in *Davies* and in *Bikstone v Henschke*[14] where he said that a party seeking to interrogate needs to demonstrate that the answers will serve some necessary or useful purpose or that the party would be at some disadvantage without the answers and that the process of interrogation as a means of addressing that would save significant trouble or expense, presumably when compared to the available options.

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10 Unreported, Supreme Court, Mildren J, 25 January 2001.
11 Unreported, Supreme Court, Master Coulehan, 27 June 2002.
12 Unreported, Supreme Court, Master Coulehan, 24 April 2002.
13 *Chatley v The Northern Territory* , Unreported, Supreme Court, Mildren J, 25 January 2001 at p 3.
14 Unreported, Supreme Court, Master Coulehan, 27 June 2002.

[20] There is some controversy in respect of cases relied on by the Defendant. Counsel for the Defendant relied on *Dunbar v Perc*[15] ("*Dunbar*") and *Lang v Australian Coastal Shipping & Anor*[16] ("*Lang*"). Mr Harding, counsel for the Plaintiff, argues that *Dunbar* should not be applied on the basis that it was a case where leave was sought to administer a second set of interrogatories, the need for which came about because of objections raised in answers to the first set of interrogatories.

[21] In *Dunbar*, the claim was by a widow for damages following the alleged wrongful death of her husband in a motor vehicle accident. The Plaintiff had delivered interrogatories and the Defendant objected to answering all of them on the ground that they were unnecessary, largely because the circumstances of the accident had been the subject of a coronial inquest which had fully investigated the circumstances of the accident. It was argued that the practice in Victoria at the time was to disallow interrogatories in such circumstances. The application was, as far as I can tell from the report, not for a second set of interrogatories but to compel answers to the existing interrogatories.

[22] Mr Harding also submitted that the case should be distinguished because it involved interrogatories administered by a plaintiff, not a defendant as in the current proceedings. He argued that the relevance of this was that a

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15 [1956] VLR 583.
16 [1974] 2 NSWLR 70.

plaintiff has the onus of proof. He relied on the following passage from the judgment of Scholl J in *Dunbar*:-

> "The Plaintiff is not in the unusual position of a widow seeking to enforce a claim under the Wrongs Act in respect of the death of her husband in a road accident, she not having been in the motor car at the time when the accident happened. She is compelled to make her case on the question of liability from some source other than her own evidence."

[23] Having considered the case, it is clear to me that matters concerning the onus of proof, notwithstanding the above comment, were not central to the decision in the case. In my view the issue is not necessarily where the onus of proof lies. Consistent with many other authorities, the case was one where the party seeking to interrogate required the information sought for the purposes of its case and had no other reasonably available means of obtaining that information. In other words, the information is necessary and interrogation is the most appropriate way of obtaining the information. This fits with *Chatley* and *Davies* as well as the authorities in other jurisdictions. I think that the principle applies equally to a plaintiff or a defendant. If, contrary to my view, it turns on the onus of proof, then the Defendant in any case has pleaded alternative causes of the fire and has the onus to establish that.

[24] *Lang* also involved a claim by a widow for damages following the alleged wrongful death of her husband, this time in a maritime accident. The accident occurred on a vessel in San Francisco Bay and other than reports resulting from inquiries conducted by United States authorities, the plaintiff

had no knowledge of the circumstances of the case. The only witnesses were the defendant's employees and the plaintiff claimed that she required the interrogatories to prove her case.

[25] As in *Dunbar* the interrogatories were sought to be administered by the plaintiff. The case report reveals that the relevant rules of court did not permit interrogatories as of right but the court had a discretion to order interrogatories if the court was satisfied that such an order was necessary.

[26] *Dunbar* was considered and discussed. The defendant's opposition to the order was based on a submission that interrogatories should not be ordered in cases where a party cannot administer them as of right unless the party can demonstrate that it cannot advance its case without them. It was argued that interrogatories could not be said to be necessary until that was demonstrated. The court considered decisions in a number of jurisdictions and concluded that the common thread in those decisions was "*…considerations of propriety, reasonableness and discretion*".[17] The onus of proof had no bearing on the matter.

[27] Although in *Dunbar* the issue was an order compelling answers rather than leave to administer, I am of the view that there is equal scope for the application of the principle which relates to the availability of facts concerning the causative matter. I am not convinced that anything turns on where the onus of proof lies and I do not consider that leave should depend

[17] [1974] 2 NSWLR 70 at p 73.

on that. Although it might be a relevant consideration in some cases, it would not then carry any greater weight than any other relevant factor. There is no basis to treat cases where the plaintiff seeks leave to interrogate differently to those where the defendant seeks leave on that account alone.

[28] The SCR do not specify any grounds or basis on which leave is to be given. It is therefore entirely in the discretion of the Court. As with all judicial discretions, it must be exercised properly and whether leave is granted will depend on the facts of each particular case. Authorities on leave are therefore only a guide to the proper exercise of the discretion.

[29] Summarised below are factors or guidelines relevant to the exercise of the discretion extracted from various authorities and which warrant consideration in the current matter:-

1. Case management considerations are relevant;
2. Draft interrogatories should be provided so that each interrogatory can be properly assessed;
3. Each interrogatory must be necessary, proper or relevant;
4. The party seeking to interrogate should first exhaust all practical available options to obtain the information it seeks;
5. Cross-examination at trial may be a suitable alternative;
6. Interrogatories may be required to ensure fairness between the parties and to reduce the possibility of surprise;
7. The likelihood of need to further interrogate is a factor;
8. Pre-trial affidavits of evidence in chief may be a suitable alternative;
9. The cost of administering and answering interrogatories is a factor;

10. An advantage of interrogation is that it enables the strength and weakness of a party's case to be assessed;

11. Interrogatories can also help to identify issues and disputes more clearly and thereby they can improve the prospects of settlement of the case;

12. Interrogatories may reduce the uncertainties and stresses of litigation because they will confront the opponent's witnesses with material that may otherwise be put to him for the first time in cross-examination.

[30] The authority for the proposition that case management factors are relevant, if one is required, is *Verdell Pty Ltd v F & G Nominees Pty Ltd*.[18] I have not case managed this matter and when considering the file for the purposes of this hearing, I could not understand why this matter is only at the stage it is given that proceedings issued on 16 December 2011. The matter should have been finalised by now, yet a whole new round of pleadings will commence with the leave I gave to file and serve a Further Amended Statement of Claim on 19 March 2015. At the same time I set a timetable for provision of expert reports in the lead up to trial. Since then I have dealt with a request by the Plaintiff for an extension of the timetable I had set because the Plaintiff now wishes to obtain two further expert reports which were not previously contemplated. The Defendant argued that those further reports were unnecessary. Overall, I suspect that better efforts could have been made to avoid the delays to date. The time to date has not been used efficiently. All other things being equal, the Court should make an order which best fosters appropriate case management of these proceedings and I

18 [2000] WASC 142.

think that is one which will best result in the timely and efficient disposition of these proceedings.

[31] The availability of other less costly options to obtain the information otherwise sought by interrogation is also a consideration. Such options include seeking particulars were appropriate, utilising procedures of notice to admit or notice to produce, seeking informal admissions, interviewing witnesses, obtaining information by searches, particularly utilising information available from government agencies (such as, in appropriate cases, police reports, coronial files and the like).[19]

[32] Some authorities go as far as to say that leave should only be granted if there are exceptional circumstances and that there is no other way of obtaining the information sought.[20] The Northern Territory authority is that a particular reason is required, not exceptional circumstances.[21] In either case I think that adequate reason has been demonstrated by the Defendant. The remote location where the fire occurred, that it does not appear to have been investigated by authorities, that it appears the only witness is Mr Sutherland, that the Defendant has not been able to examine the burnt out vehicle, are all factors which I would be prepared to treat as exceptional for that purpose if that was required.

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19 See *Barber v Nominal Defendant* (1989) 153 LSJS 8 for a fuller discussion of the options.
20 *Pearce v Hall* (1989) 52 SASR 568; *Barber v The Nominal Defendant* (1989) 153 LSJS 8.
21 *Chatley v The Northern Territory* , Unreported, Supreme Court, Mildren J, 25 January 2001.

[33] The Defendant claims to have exhausted all available options. In particular the Defendant relies on the numerous attempts made over a long period of time to interview Mr Sutherland as well as utilising the various procedures for disclosure and inspection of documents. The requests were initially for an interview of Mr Sutherland and subsequently for the provision, by the Plaintiff, of a statement taken from Mr Sutherland in relation to certain specified topics or matters. Requests have also been made for discovery of specified documents which would go part way to providing the Defendant with the required information.

[34] As far back as May 2013, the Plaintiff's solicitors sanctioned an interview of Mr Sutherland by the Defendant's solicitors. When approached for this purpose, Mr Sutherland refused to co-operate and following a change of solicitors for the Plaintiff, that permission was revoked. The reasons given for that were firstly, that the interview was in breach of Solicitors Conduct Rules which prohibit a solicitor from communicating directly with the opposing party and, secondly, that the information was subject to legal professional privilege. It was even suggested that steps would be taken to prevent the Defendant's solicitors continuing involvement in the matter, presumably due to the alleged breach of the Solicitor's Conduct Rules.

[35] As an aside at this point, I think those reasons are untenable but they demonstrate unwillingness on the part of the Plaintiff or its advisers to consider what I have concluded was a reasonable and proper request in the circumstances and that has led in part to the current application. It is clear

that Mr Sutherland will not agree to be interviewed. It is also clear that the Plaintiff's solicitors will resist it until it is compelled by Court order.

[36] Next by letter dated 11 March 2014 the Plaintiff's solicitors said "… *Under no circumstances should anyone from your firm be contacting Mr Sutherland*."

[37] By letter dated 14 August 2014 the Defendant's solicitors requested, amongst other things, a written statement from Mr Sutherland addressing the issues specified in quite some detail. The Defendant's evidence is that the Plaintiff has never responded to that part of the letter.

[38] Lastly a final request was made by letter dated 3 October 2014 from the Defendant's solicitors seeking to interview Mr Sutherland. An application for leave to orally examine if consent was withheld was intimated. The Plaintiff's solicitors replied by letter dated 20 October 2014 and although not specifically refusing, that is the effect of the letter in that they state that the course proposed by the Defendant was not appropriate.

[39] Also requests from the Defendant in the nature of discovery have proven to be fruitless and I query whether they have been properly addressed by the Plaintiff. The late discovery of notes taken by Mr Cox when he initially interviewed Mr Sutherland is an example. No reason has been given as to why these were not discovered earlier. Query that they may have been considered to be privileged but such a claim is dubious. Even if it could have been maintained then in any case it was likely waived when Mr Cox's

report was served. In any event a claim of privilege does not render the document immune to discovery.

[40] In *Hughes v Western Australian Cricket Association Inc*[22] leave to administer interrogatories was refused in part because much of the information sought to be obtained by the applicant could have been obtained in cross-examination. That is not overly significant for current purposes because in this case most of the information sought by way of interrogation or oral examination is required to enable the Defendant to finalise expert opinions. Mr Harding relied on this but I think there is limited scope for this in the current matter. Assuming, as I expect, that Mr Sutherland will be called as a witness, then although the Defendant will be able to cross-examine him, if the Defendant was left to obtain the information it now seeks at that time, I think that would likely lead to an adjournment of the trial to enable that information to be considered by the Defendant's expert. In that event, contrary to the aims of litigation procedure generally and the discovery process specifically, it could be said that the Defendant was taken by surprise. That would run counter to the object of better defining the issues between the parties, not to mention case management considerations.

[41] One of the perceived advantages of interrogation is the issue of achieving fairness between the parties. The Defendant points out that the Plaintiff's expert had discussions with the operator, the assistance of the operator in re-enacting various aspects of the events leading up to and at the time of the

22 (1986 ATPR 40–726)

subject fire and an opportunity to inspect the burnt out vehicle before it was disposed of. Leave to interrogate (or to orally examine) is an appropriate way to restore fairness in the process. As it appears clear that Mr Sutherland will not voluntarily agree to be interviewed by the Defendant, the best the Defendant can hope for to put it in an equal position is if interrogation is permitted. I am of the view that the Defendant will not be on an equal footing with the Plaintiff until interrogation or oral examination and proper discovery has occurred.

[42] In opposing the orders sought the Plaintiff relies heavily on the failure of the Defendant to provide a draft of the interrogatories. Although some jurisdictions have authority to the effect that a proper examination of the leave considerations might require draft interrogatories to be provided, as far as I can see it is only a mandatory requirement in Queensland and a matter of practice in the Federal Court. It is neither mandatory nor determinative in the Northern Territory.

[43] I accept that a draft will often be useful in that each interrogatory can be examined to determine that the interrogatory is appropriate. In this case however Mr Wilson submits that numerous follow-up questions will need to be asked and that will in turn depend on a response to a previous question. He submitted that there are numerous permutations, most of which cannot be anticipated and that it is not practical to draft interrogatories to cater for the possible permutations by alternative interrogatories. At the very least I agree that it would likely be very difficult and time-consuming and therefore a

costly exercise, to attempt to draft interrogatories in that way. Many interrogatories could become superfluous if they depended on an assumed answer to another interrogatory and where an answer other than that assumed answer was given.

[44] It was also argued that if interrogatories are ordered in lieu of oral examination that may result in further applications for leave to interrogate if an answer raises a further and unanticipated question. The Defendant consequently argues that there is an advantage and greater utility if the oral examination is ordered in preference to written interrogatories, notwithstanding the expense required, in that it will bring an end to that inquiry once and for all as all alternate questions can then be asked.

[45] I am satisfied that written interrogatories will have to attempt to deal with numerous alternative permutations and therefore I am satisfied that a draft of the interrogatories would not be of much assistance. Preparation of complicated draft interrogatories would therefore be an unwarranted cost. For current purposes, I think it suffices if I have a broad understanding of the nature of the information sought and an outline of the suggested permutations of follow up questions. In this respect, Mr Wilson has ably and convincingly presented this in the course of argument, supplemented by the letter sent to the Plaintiff's solicitors outlining the content required in a statement from Mr Sutherland.[23]

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[23] Annexure FO9 to the affidavit of Fabio Orlando sworn 17 March 2015.

[46] Another perceived benefit of the interrogation process is that it enables the strength and weakness of a party's case to be assessed. It has been said that this helps to identify issues and disputes more clearly and thereby improving the prospects of settlement of the case.[24] This is of even greater significance in the context of oral examination as there the strength of the witness can also be better assessed. This consideration overlaps with case management consideration and again, all other things being equal, the Court will prefer an order which enhances case management and the efficient disposition of cases.

[47] In *Schutt v Queenan*,[25] Mason P, identified another potential benefit of the interrogation process. In answering an argument that the requirement of answering interrogatories would unfairly prejudice a party's ability to properly present his case or delay the trial, he said that interrogatories may reduce the uncertainties and stresses of litigation because they will confront the opponent with material that may otherwise be put to him for the first time in cross-examination. He too expressed the view that the process could promote settlement by informing the parties of the strengths and weaknesses of their respective cases.

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24 *Pearce v Hall* (1989) 52 SASR 568 at 573 where King CJ, referred with approval to the decisions of Hogarth J in *Olley v Baranovskis* [1964] SASR 62 and *Leombruno v McQuillan* [1066] SASR 67; *Schutt v Queenan*, Unreported, New South Wales Court of Appeal, Mason P, 23 November 2000.

25 *Schutt v Queenan*, Unreported, New South Wales Court of Appeal, Mason P, 23 November 2000 referred to Master Coulehan in *Bikstone v Henschke*, Unreported, Supreme Court, Master Coulehan, 27 June 2002.

[48] What I think is particularly relevant to the grant of leave to interrogate in the current proceedings is that:-

1. The Plaintiff is the only party who has had access to the only known eyewitness;

2. The Plaintiff is the only party who has been able to conduct relatively contemporaneous investigations;

3. Although the vehicle was inspected by the Plaintiff's expert it has never been available to the Defendant and cannot now be examined by the Defendant.

[49] In the application of the principles discussed above, I am satisfied that the Defendant is unable to obtain information necessary for the preparation of its case and has exhausted all reasonably available options to obtain that information. It is appropriate to grant leave to at least deliver written interrogatories. Having concluded that, I can now consider whether oral examination should be ordered in lieu.

Oral Examination

[50] In Australia, the procedure for oral examination of a party is unique to the Northern Territory and to Victoria. Other than one very material aspect, the rules in each jurisdiction are near identical.[26] The major difference is that in Victoria the process cannot occur without the consent of the party to be

[26] Cairns, B. *Australian Civil Procedure*, Tenth Ed, Lawbook Co, 2014, at p 433 and Bailey, D. and Evans, E. *Discovery and Interrogatories Australia*, LexisNexis Butterworths at 21,245 both say that the rules are almost identical without qualification. This appears to overlook that in the Northern Territory it is possible for the Court to order an oral examination where a party refuses consent.

examined. In the Northern Territory, where the party to be examined does not consent, the Court can order the examination in any case.[27]

[51] That the procedure is only available in two jurisdictions and one of those only permits it with the consent of the party to be examined, accounts for the lack of authorities on the point. Although discussed in various texts, such discussion is limited to a cursory examination of the relevant rules. In relation to Court ordered oral examination, one author suggests possible advantages in the use of oral examination as opposed to interrogatories, such as the economy of time and costs, particularly where the written interrogatories would require substantial time and effort to draft.[28]

[52] Although the rules do not stipulate any pre-requisites in respect of applications for leave to interrogate, there are a number of pre-requisites before an order can be made for oral examination. Firstly, the party seeking to examine "*must*" serve on the other party a request in writing seeking that party's consent is to the examination.[29] If the request is refused then an application for an order for the examination by the Court can be made.[30]

[53] On the hearing of the application the Court "*may*" make an order for the oral examination if satisfied that firstly, the Court would have granted leave to interrogate and, secondly, either it is likely that the oral examination will be less costly than written interrogatories or there is some other advantage to

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27 Compare *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 31.02(2) with SCR r 31.02(2)(b)

28 Cairns, B. *Australian Civil Procedure*, Tenth Ed, Lawbook Co, 2014, at p 434.

29 SCR r 31.03(1)

30 SCR r 31.03(8)

the parties that warrants the making of the order.[31] There is an additional factor in rule 31.03(9)(b)(iii) but that is not relevant to this application. Accordingly, the power to order an oral examination is discretionary and the discretion is enlivened if the stipulated requirements are established.

[54] I have discussed and set out the evidence of the requests made by the Defendant for the information in detail above.[32] In summary, the requests were initially for an interview of Mr Sutherland and subsequently for the provision, by the Plaintiff, of a statement taken from Mr Sutherland in relation to certain specified topics or matters. Requests have also been made for discovery of specified documents which would go part way to providing the Defendant with the required information.

[55] The Defendant argues that the letter of 3 October 2014[33] satisfies requirement of notice in rule 31.03(1). I agree that it broadly satisfies the requirements and I do not understand that the Plaintiff suggests otherwise. Likewise the Defendant argues that the letter from the Plaintiff's solicitors dated 20 October 2014[34] is evidence of refusal of consent and again I think that broadly satisfies the requirements of rule 31.03(3)(c). Again the Plaintiff does not suggest otherwise.

[56] I have already determined that at least leave to interrogate should be ordered, hence rule 31.03(9)(a) is satisfied.

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31 SCR r 31.03(9)
32 See paras 33-39 above
33 See para 38 above.
34 See para 38 above.

[57] I think, as the current application demonstrates, there can be a degree of overlap in the two limbs of rule 31.03(9)(b) which apply in the current matter. The first limb calls for a comparison of the costs of the alternative procedures. I think it is too simplistic to look just at the precise cost of written interrogatories as compared to oral examination. Generally, the oral examination procedure will be more expensive than interrogatories in routine cases, so it must mean more than that else 31.03(9)(b)(i) would be otiose. In my view it requires a comparison of the cost of both processes after allowing for any steps or applications that might realistically follow from each procedure. The primary advantage relied on by the Defendant is that the oral examination procedure will better facilitate follow up questions. Mr Wilson suggests that if follow up questions are properly not anticipated, this could lead to an application for leave to further interrogate. In *Lyell v Kennedy (No 3)*[35] the court dealt with an application for leave to administer a second set of interrogatories. It was held that a factor relevant to considering the question of leave is the inability to anticipate questions, specifically follow-up questions, which arise from the unanticipated responses in the interrogatories. Mr Wilson argued that the oral examination procedure can better accommodate that and I agree.

[58] I think it is helpful to examine the process of an oral examination so that costs factors can be properly assessed. The examination is in the form of

35 (1884) 27 Ch D 1

examination in chief by the party requesting the examination.[36] Cross-examination is therefore not permitted. A question may be answered by counsel or the solicitor for the party examined and the answer is taken to be the answer of the party.[37] A corporate party is examined by an officer of the corporation or such other person as is agreed.[38] An answer of that person is taken to be the answer of the corporation.[39] Questions are subject to the same objections as are allowed in respect of written answers to interrogatories.[40] If there is an objection, the party is not required to answer[41] and an answer can only be compelled by court order.[42] Therefore the examiner does not rule on objections. Such a process necessarily means some delay and further expense if an objection is made. Likewise, as for written interrogatories, questions must be answered based on information and belief and after due enquiry if that is required.[43] The examination may be adjourned to enable a party to make any necessary enquiries.[44]

[59] It can be seen from this that one factor which militates against oral examination in preference to written interrogation from a costs point of view is the requirement for the person examined to answer questions based on information and belief and after having made all reasonable enquiries. That is a requirement when answering written interrogatories and that equally

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36 SCR r 31.10
37 SCR r 31.10(7)
38 SCR r 31.05(2)(a)
39 SCR r 31.05(2)(b)
40 SCR r 31.10(4)
41 SCR r 31.10(5)
42 SCR r 31.11
43 SCR r 31.10(6)
44 SCR r 31.10(8)

applies to an oral examination.[45] The person examined, assuming no prior knowledge of at least some of the questions to be asked, might be required to make enquiries before answering a question. The likelihood of an adjournment of the examination occurring to accommodate that obligation is apparent and that translates to additional costs.

[60] In this respect there is much about the way these proceedings have been handled that leads to a conclusion that there is a strong prospect of further delays. If the Plaintiff takes all available objections at an oral examination that will result in further delays as an examiner cannot rule on objections and an adjournment of the examination will be required while the objection is determined.[46] This can equally happen in the case of interrogatories, albeit in a different way, i.e., a separate application will need to be taken to compel answers. Cairns expresses the view that the procedure of an oral examination would better prevent that type of delay, but without explaining why.[47] The only reason I can see is that with oral examination the legal representatives for both parties will be present and, noting their overall duties to the Court, their presence should mean that discussions could resolve objections which are capable of resolution. That could not occur where written answers to interrogatories are provided.

[61] Having concluded that interrogation at least is appropriate, I think it is the likely comparative cost of the entirety of the alternative procedures that is

45 SCR r 30.05(1)(e), 31.10(6)
46 See SCR rr 31.10(4) and (5) and 31.11
47 Cairns, B. *Australian Civil Procedure*, Tenth Ed, Lawbook Co, 2014, at 434

the relevant consideration. In saying entirety in this context I mean having regard to all steps that are likely to occur before each of the alternative procedures are completed. In the case of an oral examination, that includes the costs of an adjournment for enquiries[48] or for rulings on objections.[49] In the case of written interrogatories, it must necessarily include any likely follow up applications for leave to further interrogate or to compel answers.

[62] I take into account, and accept, the submissions made by Mr Wilson that drawing interrogatories will be complex and time consuming and will involve significant costs. There will also be costs incurred by the Plaintiff in providing answers. As I have said above, based on the evidence and accepting Mr Wilson's submissions, in the case of written interrogatories there will be numerous permutations of possible follow-up questions, each depending on the answer given to preceding questions. Mr Harding suggests that this amounts to cross-examination of the witness which is prohibited. I disagree. A question cannot be classed as cross-examination merely because it is a follow-up question. In any case, objection can be raised if the question is cross-examination.

[63] Mr Wilson suggests that an application for leave to serve further interrogatories may be required if follow up questions are not able to be anticipated in written interrogatories. If that were to eventuate, and I agree that it is possible, that would swing the comparative costs in favour of oral

48 SCR r 31.10(6) and (8).
49 SCR rr 31.10(4) and 31.11

examination. It is curious that the more time and effort expended in drawing interrogatories which attempt to anticipate answers and deal with further and alternative follow up questions, the greater the costs of that procedure will be such that it will tend to render the oral examination more economic.

[64] There will be additional costs incurred in the oral examination process which will not apply in the case of the costs in delivering answers to written interrogatories. For example there is the cost of an examiner. An examiner must be a suitably experienced legal practitioner.[50] Fees will be payable to the examiner and that is an additional cost which would not be incurred in the interrogation process.[51] Although there will be representation both for the Plaintiff and for the Defendant at the examination, that could be offset in part at least by the cost of the involvement of legal representation for each party if the alternative course of answers to interrogatories was taken.

[65] A deposition of the examination must be made[52] and that will also involve extra external cost, although I expect that cost could be partly offset at least against the drawing and engrossing fee in respect of the answers to interrogatories.

[66] A venue for the examination will be required. I expect that that will occur at the offices of either the Plaintiff or the Defendant. The principal solicitors, and counsel for the parties are all Brisbane based. I expect that the

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50 See SCR 31.03(10). Although that requirement does not seem to apply to an examiner appointed by agreement between the parties, it is difficult to envisage that other than an experienced legal practitioner would be able to undertake that function.

51 Per SCR r 31.12(2), the Defendant would be required to pay those costs at first instance.

52 SCR r 31.09

examination will be conducted in Brisbane and hence the only likely travel costs will be those of Mr Sutherland who I believe is Darwin based, but I will seek confirmation of that to the extent that it becomes necessary.

[67] Mr Harding referred to *Dalecoast Pty Ltd v Monisse*[53] where Owen J said:

> "It is often the case that the benefit to be obtained from delivering interrogatories is far outweighed by the inconvenience and expense to the other party in having to answer them. As a mechanism for understanding the case which a party has to meet they have, at least to some extent, been replaced by the pre-trial exchange of witness statements which is ordered in most cases. The standard form of pre-trial documents orders means that a party will seldom go to trial not knowing what documents it has to prove strictly."[54]

[68] Mr Harding submitted that when pre-trial statements[55] are provided in due course, the Defendant will have adequate notice of the matters it needs to prove at trial, presumably suggesting the Defendant will then have sufficient time to prepare for trial. I am not convinced of the latter aspect. The main reason is that I am satisfied, both by the submissions of Mr Wilson and the evidence produced in the form of correspondence from the Defendant's expert, that the information requested is required well in advance of trial to enable experts reports to be finalised.

[69] Weighing up all the relevant factors discussed above, I have come to the conclusion that there is at least an advantage in ordering an oral examination, namely that an oral examination will be more efficient in dealing with likely follow up questions and will better avoid subsequent

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53 [1999] WASCA 103

54 [1999] WASCA 103 at para 5

55 In the Northern Territory the usual order is that affidavits, not statements, are provided

follow up applications which will otherwise delay the final disposition of this matter. I think that is sufficient to warrant the making of an order. In any case, I think that it is possible that the costs of an oral examination will be less than interrogatories in the circumstances of this case.

[70] Notwithstanding my view that pre-trial affidavits are not a viable alternative to interrogatories and/or oral examination in this instance, consideration of this factor led me to consider a limited form of preliminary affidavits of evidence in chief in the current proceedings as a way of reducing the costs associated with the oral examination.

[71] As the Defendant has identified the information it requires in a statement to be taken from Mr Sutherland,[56] I expect that the provision of that in the form of a preliminary and limited form of pre-trial affidavit prior to the oral examination will result in savings in costs. There should not be any significant increase in the costs of the Plaintiff with that proposal given that the affidavit would have had to have been prepared and sworn in due course in any case.

[72] Accordingly in conjunction with an order for oral examination I propose an early and limited order for affidavits of evidence in chief, specifically that the Plaintiff file and serve an affidavit of the proposed evidence in chief of Mr Sutherland in relation to at least all of the topics specified in paragraph number 2 of the letter from the Defendant's solicitors to the Plaintiff's

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[56] Annexure to FO9 to the affidavit of Fabio Orlando sworn 17 March 2015

solicitors dated 14 August 2014.[57] That affidavit is to set out the entirety of Mr Sutherland's evidence in chief in respect of all of those topics. It will be on the basis that leave will be required to supplement that and then only if it can be established that any further evidence proposed was not known to the Plaintiff or to Mr Sutherland at the time of making the affidavit and could not have been known after reasonable enquiry.

[73] The Plaintiffs have been on notice of that since August 2014 so I think that 21 days should be sufficient for that purpose. However as this was not discussed at the hearing I will allow each party time to provide written submissions, both as to the order generally and specifically as to a suitable timeframe. I will set a timetable for that after I hear further from the parties.

[74] Thereafter, I will make the appropriate orders by way of oral examination and I will also invite further submissions and hopefully consensus, as to the precise orders to be made in that respect.

Particular Discovery

[75] The Defendant also seeks an order for particular discovery pursuant to rule 29.08. The specific documents identified in the Defendant's summons are documents in relation to the events and circumstances relating to the pre-ignition, ignition and development of the subject fire, including specifically documents falling within the following categories:-

[57] Annexure FO9 to the affidavit of Fabio Orlando made 17 March 2015

1. Documents relating to the actions or observations of the operator relative to the subject fire;

2. Documents relating to the fuelling of the vehicle;

3. Documents relating to the maintenance of the vehicle for an undefined period leading up to the subject fire.

[76] The Defendant also seeks particular discovery of relevant insurance files. This order was not sought on the summons but the Plaintiff was apparently on notice that this would also be sought as I have not had any objection. Insurance is a matter which has been raised on the pleadings. It has been raised in the defence in conjunction with a denial of the Plaintiff's claim for loss. The insurance file would likely contain documents relating to the investigation of the claim and the assessment of the loss. That may well be the subject of a claim for privilege but if that is actually claimed, and whether it is maintainable, is another issue. Privilege is not a bar to discoverability.

[77] As to the applicable law concerning this issue, I discussed the principles relevant to particular discovery in *Minkie (NT) Pty Ltd v Wise Channel Marketing Pty Ltd & Anor*.[58] I concluded that, given the definition of "*question*" in rule 1.09(1), the use of that word in the phrase "*documents relating to a question in the proceeding...*" in rule 29.08(1) meant that documents were not necessarily confined to questions raised by the pleadings between the parties. I found that an order pursuant to rule 29.08

58 [2011] NTSC 53

was still available provided a party had a "*sufficient interest*" in the question to be decided and to which the documents relate.

[78] In that case, I referred to the decision of Lindgren J in *Trade Practices Commission v CC (NSW) Pty Ltd (No 4)*[59] where he said that discovery should be ordered whenever it was necessary in the interests of a fair trial or 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."[60]

[79] I have already discussed questions relating to fairness in the context of discussion of the question of interrogatories and oral examination and those considerations are equally applicable to this issue.

[80] Rule 29.08(1) specifies a prerequisite for an order for particular discovery namely, there must be 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. Once that is satisfied, the order remains discretionary.

[81] In respect of the insurance files, it is apparent that an insurance claim has been made yet no documents of that nature have been discovered. There is sufficient reason to believe those documents exist. Clearly a claim has been made on insurance as it is common ground between the parties that the

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59 (1995) 58 FCR 426
60 (1995) 58 FCR 426 at 437-438

Plaintiff claims by its insurer pursuant to subrogation rights. That is confirmed in numerous documents in evidence before me. There must be many documents which exist that are discoverable, whether privilege is properly claimed or not.

[82] Mr Harding for the Plaintiff submits that it is difficult to envisage what documents would exist in respect of the first and second category of documents sought. With respect, that is not the issue. The issue is whether there is a basis for believing documents may exist. In any case it is not so difficult to envisage which documents falling within the first category might exist. But for the late discovery of the notes made by Mr Cox when he interviewed Mr Sutherland, those notes would have fallen within that category. Despite disclosure obligations those notes were only recently provided. The existence of notes means that it is not difficult to envisage the existence of other documents of a like nature and the absence of an explanation by the Plaintiff for the tardy disclosure of those notes reinforces that.

[83] In respect of the second category, I was told that no fuel records have been discovered despite requests. Records are likely to have existed at some time as the crane requires fuel to operate and for transit. Clearly any such records are discoverable given the pleadings specifically that the Defendant has pleaded the storage of fuel in unsuitable containers positioned on unsuitable parts of the vehicle as an alternative cause for the fire. That opens up discovery not only to fuel purchases but also to documents relating to

purchase of any containers and any work to construct the storage mechanism. That work may for example have been performed by a contractor in which case one would expect an invoice for that work. If performed internally by the Plaintiff then one would expect documents relating to the purchase of the materials, perhaps inspections and the like. It is unlikely that no such documents have ever existed.

[84] I am of the view that there is a basis for a belief that documents exist sufficient to require the Plaintiff to respond by way of an order pursuant to rule 29.08 and I will make appropriate orders.

[85] In summary, there will be an order for oral examination in terms of paragraph 1 of the Defendant's summons. There will also be an order for particular discovery of the documents referred to in paragraph 3 of the Defendant's summons with the addition of the insurance documents discussed from paragraph 76 above. The Defendant will need to file an amended summons first and I give the necessary leave for that to occur. I will make final orders after I have heard from the parties in relation to the proposed order for a preliminary affidavit of evidence in chief of Mr Sutherland and in respect of the details of the order for oral examination. Likewise I will hear the parties as to costs and as to any other consequential orders.