

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE

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No. 9575 of 2004

GUNNS LIMITED AND OTHERS

Plaintiff

v

ALEXANDER MARR AND OTHERS

Defendant

<u>MASTER</u>	Evans
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	16 July 2008
<u>DATE OF JUDGMENT</u>	3 September 2008
<u>CASE MAY BE CITED AS:</u>	Gunns Limited and Ors. V Marr and Ors.

PRACTICE AND PROCEDURE - Discovery- R29.08
Production - Masking irrelevant, confidential and privileged parts of documents

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr Waller	
For the Defendants	Mr J Burnside	

The proceeding ('Gunns')

- 1 The First Plaintiff ('Gunns') by itself and through its wholly owned subsidiaries carried on the business of forest management and the milling processing and merchandising of timber products in Tasmania. The Sixth Defendant ('Wilderness Society') had engaged in public campaigns and activities for the purpose of raising public awareness of environmental issues in Tasmania. The Second Defendant ('Law') was a member of Wilderness Society.
- 2 It is alleged that Wilderness Society
 - (i) planned co-ordinated and supported public campaigns addressing the harvesting of timber and the sale and export of woodchips by Gunns;
 - (ii) co-ordinated and directed the conduct of its members and other persons who volunteer to take part in those campaigns;
 - (iii) engaged in its public campaigns in association with other environmental interest groups;
 - (iv) encouraged and enlisted the support of volunteers to carry out its work and objects in its public campaigns.
- 3 Law and Wilderness Society each responded to these allegations (in paragraph 18 of version 4) by asserting in their defences that these allegations are irrelevant to the causes of action pleaded against each of them respectively. I agree. They provide nothing more than part of the background against which the relevant events unfolded.
- 4 The gravamen of Gunns' claims against Wilderness Society is that in 2003 and 2004
 - (i) with others it engaged in wrongful acts at various sites in Tasmania with the intention of interfering with contractual relations to which Gunns was a party and injuring it in its trade and business;
 - (ii) those acts were done in concert and with a common end;
 - (iii) those acts were planned, co-ordinated and supported by The Wilderness Society;
 - (iv) those wrongful acts had the effect intended and caused damage to Gunns;

- (v) some of those acts constituted a trespass to land of which Gunns had possession and caused damage;
- (vi) some of those acts done in concert were done wilfully, maliciously, recklessly and contumeliously.

5 Law is alleged to have been one of the persons who engaged in some of the wrongful acts.

6 **The application**

In this application, Gunns sought by Summons filed 20 March 2008, various forms of relief in the nature of discovery and/or production against the Second, Sixth and Thirteenth Defendants. The relief is no longer sought against the Thirteenth Defendant as the proceeding against him has been settled.

7 **The history of discovery by Law and The Wilderness Society**

Although this proceeding was commenced in December 2004, the discovery process did not commence until September 2007 as a result of a series of successful challenges to the Statement of Claim. That time consuming and expensive exercise came to an end when the Plaintiffs provided Further and Better Particulars of version 4 of its Statement of Claim in July 2007.

8 **Law's Discovery**

Law affirmed his Affidavit of Documents on 21 November 2007. He discovered 52 documents in the first part of the First Schedule.

9 In it he stated that 14 of the documents had masked parts which were irrelevant and also contain confidential information and one of those had a part masked which contained a record, evidence or reference to confidential communications made for the dominant purpose of obtaining or receiving legal advice. It is not clear from the Affidavit whether that part was also irrelevant.

10 The statement should not be taken as meaning what it says. The First Schedule to the Affidavit reveals that he was discovering original documents and not part of those documents. If he had indeed 'masked' them in the manner in which the copies of them produced for inspection were 'masked', he would have put it beyond his power to produce the originals unmasked. His statement should be treated as an inaptly worded claim to comply with his obligation to produce the documents by production of copies with those parts to which objection to production was made masked by obliteration.

- 11 On the day this application was filed and after the First Plaintiff requested further discovery, he served a further Affidavit in which he sought to extend his claim to mask documents to an additional document, part of which was irrelevant and contained confidential information. In a confused and confusing paragraph, he then sought to mask document 34 in respect of which he had already made a claim to mask as irrelevant and confidential part or parts, This claim was made on the basis that it recorded evidence or referred to confidential communications for the dominant purpose of obtaining or receiving legal advice. It is not clear whether or not that part was the same part of one of the parts the subject of the original claim.
- 12 On 10 April 2008, the return date of the application, it was ordered by consent that, inter alia each of the Respondents make, file and serve a Further and Better Affidavit of Documents.
- 13 After an extension of the time for compliance with that Order was granted and had expired, Law affirmed an Affidavit on 26 May 2008 purportedly in response to that Order. It was not a Further and Better Affidavit of Documents. If anything, it was worse.
- 14 In it, he discovered a further 58 documents in his possession and five others no longer in his possession and solemnly swore that he did not have and had never had any documents in his possession, custody or power other than those documents. I can only conclude from this that he did not read it before swearing it and relied on the solicitor as to the accuracy of its contents. That the solicitor procured his oath to such an inaccurate statement is to say the least, unsatisfactory.
- 15 In that Affidavit, he claimed (in the same inapt way) to mask part of 17 of the discovered documents in his possession on the grounds of irrelevance and claimed that they also contain confidential information. That is not quite the same as saying they comprise confidential information and I take it as intending the latter. In respect of two of those documents, a claim is also made to mask an irrelevant part on the additional ground that it records evidence or refers to confidential communications made for the dominant purpose of obtaining or receiving legal advice. In respect of two more of the discovered documents, a claim to mask parts is made solely on the latter ground. In respect of another of the documents, a claim is made to mask an irrelevant part on the additional ground that it records evidences or refers to a confidential communication made for the purpose of resolving litigation.

16 Law also chose to affirm an Affidavit on 26 May 2008 substantially in the form contemplated by R. 29.08, in relation to documents in the classes of documents in respect of which the First Plaintiff sought discovery under that Rule from him in the Summons save for class 1 (i). In a further Affidavit sworn 30 May 2008, he addressed that class in the same manner.

17 The hearing of the application on 2 June 2008 was adjourned to give Law and Wilderness Society an opportunity to file further Affidavits in support of their claims to mask parts of the documents discovered by them.

18 Law took advantage of that opportunity by filing and serving an Affidavit affirmed on 8 July 2008, which condescended to much greater detail as to the grounds on which he sought to mask parts of the documents to which the claims related. In that Affidavit, he waived his claim to mask part of one of the documents and part of his claim in respect of three other documents.

Wilderness Society's discovery

19 The process of discovery by the Society began with an Affidavit of Documents affirmed on its behalf by its legal co-ordinator, Gregory Ogle on 20 November 2007.

20 In the first part of the first schedule to that Affidavit, Wilderness Society discovered 53 documents. In the same manner as Law did, it made a claim to mask on production parts of 18 original documents as irrelevant and as containing confidential information. It also founded the claim to mask one document (No 11) as the part (to be masked) was privileged from production on the ground that it records evidences or otherwise refers to confidential communications for the dominant purpose of obtaining or receiving legal advice.

21 In a second Affidavit affirmed by Ogle on 15 January 2008, a similar claim to mask on production an irrelevant part of another of the discovered documents which contained confidential information. It also expanded the claim already made in respect of a document (No 50) relying on the same head of legal professional privilege. Although this claim is somewhat ambiguously expressed, I take it to be in respect of the same part of one of the documents to which the original claim to mask relates. Document 50 is a bundle of e-mails. The claim is made on the footing that it is one document. This is entirely unsatisfactory. The claims to mask should have been made in respect of each email individually.

22 In response to the order made on 10 April 2008, Wilderness Society filed and served an Affidavit affirmed by Ogle on 30 May 2008. In it, a further 84 documents were discovered in Part 1 of Schedule 1. It did not list the documents originally discovered. Ogle solemnly swore that these documents listed in this Affidavit were the only relevant documents which were or had been in the possession of Wilderness Society. The comments made in respect of Law's 'Further and Better Affidavit of Documents apply with equal force to this Affidavit.

23 Wilderness Society also filed and served an Affidavit affirmed by Ogle on 30 May 2008 substantially in the form contemplated by R. 29.08 in respect of documents in the classes of documents specified in the summons in relation to which an order was sought under that Rule.

24 Wilderness Society also took advantage of the adjournment on 2 June 2008 to file and serve a further Affidavit affirmed by Ogle on 30 June 2008 condescending to much greater detail as to the grounds on which it based its claims to mask parts of the documents. In this Affidavit, it wholly waived its claim to mask 6 of the documents made in the Affidavit affirmed on 20 November 2007. It also waived part of the claim to mask made in respect of two other documents, identifying the passage to which the waiver relates. It then waived the claim to mask an email which was included in the bundles of emails being documents numbered 50 and 51. It also condescended to identification of the email in 'document' 50 for which the claim to mask part of which on the ground of privilege was made in the Affidavit affirmed on 15 January 2008.

25 **The Masking Claims - Irrelevant and confidential information**

Any basis for relying on the general conclusiveness of the original Affidavits of Documents of Law and Wilderness Society was substantially eroded by the generally unsatisfactory course of discovery by each of them and, in particular, in relation to the claims to mask parts of the discovered documents.

26 Nevertheless, the court ought not compel production of documents except to the extent that such production is necessary in the interests of justice. The practice of making a claim to seal up (mask) irrelevant parts of discoverable documents is well established. If the parts sought to be withheld from production also contain confidential information that claim is strengthened.

27 The First Plaintiff did not demonstrate in relation to any one document in respect of which the claim is made that its contents could not be understood without disclosure of the part sought to be masked.

28 Absent such a basis for compelling production of the whole of each of the documents to which the claims relate, it is appropriate to accept the claims as now formulated by Law and Wilderness Society without inspection of any of them. I am comforted in this conclusion by the greater care taken in addressing the grounds to mask evidenced in the final Affidavit relied on by each of them. That care resulted in the waiving of a number of claims and satisfied me that at last they had addressed their discovery obligations and rights properly.

29 **Masking of privileged information**

Although the process of discovery by Law and Wilderness Society has not been a satisfactory one, Gunns have not advanced any specific basis on which to doubt the claims made in respect of parts of identified documents to withhold production on the specified head of legal professional privilege. The manner in which privilege is now claimed can be contrasted with the broad brush omnibus claims too commonly made in Affidavits of Documents in respect of all documents for which privilege is claimed. The court can be confident that the claims made are made on the basis of legal advice after a consideration of the discrete part of the documents sought to be masked. The party making discovery will not ordinarily be required to disclose when and from whom the advice was sought (other than to indicate that it was from a lawyer) or what the subject matter of the advice was at the interlocutory stage of the proceeding.

30 **R 29.08 Discovery**

(i) Law

As a result of the further discovery made in Law's Affidavit affirmed on 26 May 2008, Gunns did not pursue this part of its application against him.

(ii) Wilderness Society

Notwithstanding the detailed response to this part of the application contained in Ogle's Affidavit affirmed on 30 May 2008, Gunns persisted in it in relation to the class of documents specified in paragraph 5 (a). At the hearing on 16 July 2008, it sought to amend the Summons to add 3 further classes of documents. Leave to make the amendment was opposed but was granted.

31 The failure to discover documents in these classes was raised in Gunns' solicitor's
letter to Wilderness Society's letter dated 27 June 2008 and application for an order
under R.29.08 was foreshadowed in a letter dated 22 July 2008.

32 Class 5 (a) - Any 'constituent profile' in respect of 136 persons named and numbered in the
annexure to the Summons.

33 Discovered examples of constituent profiles in relation to Defendants were contained
in the exhibit comprising the relevant discovered documents. The profiles include
address and email address and membership history of the subject of the profile

34 The application was based upon inferences to be drawn from discovered documents
exhibited to the principal Affidavit in support of the application. References to these
documents and, in some cases, certain heads of claim in the Statement of Claim were
contained in the schedule to the summons but the contents of those documents were
not referred to by counsel so as to develop the argument that the profiles of each
individual was relevant to issues in the proceeding.

35 In respect of Simon Brown (1), Jason Coles (30), Lou Geraghty (47), Will Mooney
(96), India Illet (68), Michael Higgins (61) and Vica Bayley (10) there were said to be
references in the Statement of Claim.

36 In response to this part of the application, Ogle in his Affidavit of 30 May 2008,
stated that in respect of 48 of the named individuals Wilderness Society does not
have any data base record of and cannot generate constituent profiles for those
persons. Even if it had been demonstrated that the profiles of such persons were
relevant to issues in the proceeding, I see no useful purpose in requiring Wilderness
Society to depose as what has become of such of those profiles as it could be inferred
it once had.

37 In respect of the remainder of the persons named, Ogle states that Wilderness
Society is not in possession of any constituent profile that contains any matter that
relates to any of question in the proceeding.

38 Documents of this class might be relevant if for example, the pleadings alleged that
the act of a person named was the act of Wilderness Society (or other Defendant) as
it might establish that that person was a member at the relevant time, but apart from
such a case, their relevance is not obvious. Absent a properly developed argument in
relation to the relevance of each such profile and grounds for a belief that such a
profile exists, I will accept the oath of Ogle that there are no other relevant profiles in

the possession of Wilderness Society. I note that he did not say that other relevant profiles were once but are no longer in its possession, but I can see no utility for ordering an Affidavit pursuant to R 29.08 even if relevance had been demonstrated simply to elicit such a statement.

39 In relation to the additional classes of documents, I am not persuaded that there is any good reason to go behind the oath of the deponent in relation to documents in these classes of documents. The deponent has addressed documents in these classes discovering those which, on the advice of Wilderness Society's solicitors are relevant. No grounds were demonstrated which would give the court a foundation for the conclusion that a too narrow view of the relevance has led to the discovery which has been made. Accordingly, the application for orders in relation to those classes should be dismissed.

40 Accordingly, the application against Law and Wilderness Society will be dismissed.

41 It seems that the application and the proceeding itself insofar as it relates to the Thirteenth Defendant has been resolved save for the question of costs.

42 I will hear argument as to the costs of this application after the parties have had an opportunity to consider these reasons.