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Précis Paper

Preliminary Discovery

A discussion about the recent decision in the case of *O'Connor v O'Connor* [2018] NSWCA 214 and how an application for preliminary discovery is determined in NSW and Federal jurisdictions.

Discussion Includes

- What is preliminary discovery?
- Differences between NSW and Federal Court Rules
- The Facts
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- The need to make reasonable enquiries
- The Appeal
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- Costs
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Preliminary Discovery

1. **In this edition of BenchTV, Nick Kaillipolitis (Principal Lawyer, Coleman Grieg Lawyers – Parramatta) and Mario Rashid-Ring (Commercial Lawyer, Coleman Grieg Lawyers - Parramatta discuss the recent decision in the case of *O'Connor v O'Connor* [2018] NSWCA 214 and how an application for preliminary discovery is determined in NSW and Federal jurisdictions.**

What is preliminary discovery?

2. **Preliminary discovery may assist persons who are uncertain about whether they should commence proceedings. The process of preliminary discovery is relatively quick and it can be an effective way to obtain critical information that can inform their decision about whether or not they wish to commence proceedings.**
3. **Traditionally, preliminary discovery referred to an application where one party, the applicant tries to identify prospective defendants to a proceeding or to ascertain whether the applicant has a particular cause of action against a prospective defendant. This is prior to the commencement of substantive proceedings. In the usual course this involves making an application to the court requesting that the prospective defendant give discovery to the applicant of documents that are in their possession that are related to the question of whether the applicant is entitled to relief**
4. **Preliminary discovery will only be permitted where the applicant, after having made reasonable enquiries is unable to obtain sufficient information to decide whether or not they should commence proceedings against a prospective defendant.**

Differences between NSW and Federal Court Rules

5. **There are different rules for preliminary in NSW and the Federal Court system. An application for preliminary discovery in NSW is determined by reference to Rule 5.3 of the *Uniform Civil Procedure Rules* 2005 (NSW), whereas an application in the Federal Court is determined by reference to the corresponding Federal Court Rule Order 15A Rule 6.**
6. **There are some important differences between the tests applied by the respective courts. The NSW Court considers whether it appears to the court that the applicant may be entitled to a claim for relief whereas the Federal Court looks at whether there is a reasonable cause to believe that the applicant has or may have the right to claim some form of relief. This means that the threshold that the NSW courts consider is lower than the corresponding Federal Court.**
7. **The case of *O'Connor v O'Connor* [2018] NSWCA 214 evidenced the intermingling of**

Rule 5.3 of the Uniform Civil Procedure Rules and Order 15A Rule 6 in the Federal Court system

The Facts

8. **Diona was owned by John and Margaret O'Connor. In 2005, Morgan, John's brother and Michael a family friend each contributed $150,000.00 to the company on the understanding that they would be entitled to a 1/12th shareholding in the company. No shares were issued to them although in 2006 both Morgan and Michael were appointed as directors of the company and were treated as shareholders of the company.**
9. **By mid-2013 the parties were subject to dispute regarding the shares and both Morgan and Michael were removed as directors by a meeting of the other shareholders. The disputes were resolved between the parties in a Deed of Mutual Settlement and Release which was executed on 29 July 2015 which provided that Morgan and Michael would settle their claims against John and the company by the company paying them respectively a sum of $1.38 million and $1.68 million**
10. **However, on 16 November, 2015, a company named Calibre Limited purchased all of the shares in Diona from John and Margaret for $45 million with a potential further $45 million to be paid to them subject to Diona's successful performance. Morgan and Michael formed the view that it is very likely that Caliber had already entered into negotiations with Diona and John prior to the execution of the Deed and that both Diona and John were aware of the potential for the sale prior to the execution of the Deed.**
11. **In Morgan and Michael's view each of Diona and John owed them a fiduciary duty and had in turn breached that duty and John had held a 1/12th share in Diona on trust for both Michael and Morgan which meant that Morgan and Michael each had an equitable interest in Diona by reason of their shareholding. They formed this view by reference to a case *Brunninghausen v Glavanics* [1999] NSWCA 199**
12. **After having made reasonable enquiries to try to establish whether Diona or John knew about the deal prior to the Deed being executed, Morgan and Michael were not able to ascertain sufficient information to decide whether or not they wanted to commence substantive claim against John and Diona. Consequently, Michael and Morgan sought orders in the Supreme Court before Parker J pursuant to Rule 5.3 Uniform Civil Procedure Rules.**

Decision at First Instance

13. **The documents being sought were evidence of negotiations between Diona and Caliber and when these took place. These documents were being sought not only to determine whether or not Michael and Morgan had a cause of action that they could rely on but**

also, they wanted to understand what quantum was involved if they were to pursue the claim.

14. **His Honour in the first instance refused the application for preliminary discovery, forming the view that Morgan and Michael did not meet the threshold required under Rule 5.3 and had failed to establish that there was a reasonable cause to believe that John was obligated to disclose the potential deal with Caliber or that there were any special facts resulting in a director of a company owning shareholders fiduciary duties. His Honour also found that the categories of discovery being sought were too broad and would not order discovery in relation to documents linked to the overall value of Michael and Morgan's claim.**

The need to make reasonable enquiries

15. **In this matter, it was not in dispute that reasonable enquiries were made, but those reasonable enquiries entailed writing to both Diona and John seeking details of the particular transaction and the deal that had been entered into with Calibre to try to ascertain when the potential for the deal was came into. There was no satisfactory information provided by John or Diona for Morgan and Michael to determine whether or not they wanted to commence proceedings.**

The Appeal

16. **The basis for the appeal against His Honour's decision can be split into 4 broad categories;**

    1) That there had been a failure to find that John and Diona owed both Morgan and Michael a fiduciary duty

    2) An error that His Honour Parker J had concluded that the Deed was a complete answer to any claims that Morgan and Michael may bring at some latter point in time

    3) That it was inappropriate and premature for his Honour Parker J to decide the merits of the potential claims that Morgan and Michael had raised in their application for preliminary discovery

    4) That his Honour had incorrectly determined that any order for preliminary discovery would exclude comments that related solely to the value of the any claim that Morgan and Michael would file

17. **In the case of *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCA 285, Chief Justice Allsop made the comment that there was an emerging trend of preliminary discovery applications being heard as mini trials, that is a determination of the merits of potential claims rather than strict application of the preliminary discovery rules.**

18. **Preliminary discovery extends beyond what causes of action exist but also what defenses are available to prospective defendants, the strength of those defenses, the quantum involved and then it becomes a commercial decision about whether or not it is worthwhile for them to commence proceedings.**
19. **In *Pfieser* the court had made a determination on the merits of a particular case without having the benefit of cross examination, expert evidence or the benefit of seeing a full case being run by the respective parties.**
20. **Rule 5.3 does not impose any reasonable cause to believe test, rather the correct test and the test that should be adopted was whether it appeared to the court that a cause of action may exist which is a much lower threshold that the one applied by Parker J at first instance. Ultimately the Court of Appeal made an order that Preliminary discovery be granted and ordered that John and Diona pay Morgan and Michael's costs of the appeal and of the initial proceedings before Parker J.**

<u>Key Takeaways from Court of Appeal decision</u>

21. **The determination for an application for preliminary discovery under Rule 5.3 does not involve a determination of the merits of any claim for relief an applicant might propound.**
22. **The documents of discovery, which may be ordered under Rule 5.3 are not limited to those relating to an applicant's entitlement to make a claim but extend to documents going to the quantum of a particular claim and defenses available to the defendant**
23. **The Court of Appeal noted that the test under Rule 5.3 was one which considered if it appeared to a court that a cause of action may exist rather than whether than if there was a reasonable cause of action and the reasonable cause test was not one that the NSW courts were concerned with.**

<u>Costs</u>

24. **At first instance, Morgan and Michael were ordered to pay costs at first instance of the respondents to the application. Being successful on the appeal, the Court of Appeal ordered that Morgan and Michael recover their costs both at first instance and on the appeal.**

<u>Tips for dealing with preliminary discovery</u>

25. **One of the key things that the court needs to see is that an applicant has made reasonable enquiries to try and obtain the information prior to making the application for preliminary discovery.**
26. **It is important to avoid a situation where the preliminary discovery application becomes a mini trial.**

27. **Lawyers should make clear to the applicant that they will be liable for paying the producing parties' costs of providing those documents. They also may be subject to an order for security of costs. It is important for clients to understand these risks**
28. **It is important to consider whether there are any limitation periods that apply as if you are approaching the limitation periods, it may not be possible to extract the information before the limitation period ends for the potential cause of action**

BIOGRAPHY

Nick Kallipolitis

Principal Lawyer, Coleman Grieg Lawyers, Parramatta

Nick Kallipolitis is a Principal Lawyer and a member of Coleman Grieg's Litigation and Dispute Resolution Team and has been an Accredited Specialist in Commercial Litigation since November 2013. Having worked for businesses, individuals, government bodies and corporations, Nick has significant experience in the fields of Trade Practices, Contract Disputes (including issues involving the departure of former employees), Building and Construction Disputes, Banking and Finance Disputes, Intellectual Property, Professional Negligence and Corporations Law Disputes. Practising exclusively in the area of Commercial Litigation since becoming a lawyer in 200, Nick has also become a skilled solicitor advocate, appearing in the majority of Commonwealth and State Courts and Tribunals at both Hearings and Interlocutory Applications. As a result, Nick has gained firsthand knowledge of the risks and complexities of being involved in litigation, whilst at the same time being an advocate for alternative dispute resolution, seeking achieve commercially sound outcomes at all times.

Having been involved in the full circle of a wide range of major litigious matters, Nick understands the importance of working closely with his clients in order to come to a clear understanding of their individual business and/or personal requirements – making the tailoring of his services a priority at all times. Since joining Coleman Grieg in 2011, Nick has developed a particular expertise in the building and construction industry, delivering presentations, working with clients and their employees (including Project Managers) and authoring articles. He has been involved in large and complex disputes relating to both the Home Build Act and Security of Payments legislation amongst others, having acted for developers, builders and homeowners in that time. Nick has also built a strong insolvency practice, having developed a number of referral networks with insolvency practitioners. In doing so, he has equipped himself

with the ability to provide high level advice to clients at both ends of the spectrum, including those struggling with issues relating to insolvency, as well as those who require advice with regard to the restructuring of their business.

Outside of his litigation practice, Nick enjoys giving back to the local community, which he does through his involvement in the Coleman Grieg Challenge. He is also involved in the Parramatta District Law Society and works as an advisor to the Western Sydney University School of Law.

Mario Rashid-Ring

Commercial Lawyer, Coleman Grieg Lawyers - Parramatta

Mario works with a diverse mix of clients, ranging from large multinationals to individuals, and believes that the key to building and maintaining strong relationships is continuous, open and effective dialogue. His technical knowledge of the law coupled with his degree in Business and Commerce helps Mario deliver tailored and practical solutions to his clients at all times. Ever mindful of the commercial realities of disputes and the specific merits of each case, Mario encourages the strategic use of alternate dispute resolution methods when appropriate. However, when litigation is deemed necessary, he readily assists clients across a range of Australian jurisdictions.

Joining the firm as a legal cadet, Mario has been with Coleman Grieg for over 6 years. In this time, he has been exposed to a range of practice areas including Commercial Law, Intellectual Property Law, Employment Law, Commercial Property Law and Wills and Estate Planning. Mario has predominantly worked within the Litigation and Dispute Resolution team and has played an integral role in a number of notable matters, including many which have seen him gain a high level of specialist experience. Outside of his work, Mario is passionate about social change and community engagement issues which he actively pursues through his involvement in various charitable organisations. In recent years, he attended the Humanitarian Affairs University Scholars Leadership Symposium in Phnom Phenh and has also been presented with a Community Service Award from Western Sydney University.

BIBLIOGRAPHY

Cases

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Legislation

***Uniform Civil Procedure Rules* 2005 (NSW)**