SUPREME COURT OF QUEENSLAND

CITATION:	*Corbiere & Another v QPCU Limited* [2018] QSC 32
PARTIES:	**PAUL HERMAN HENRI CORBIERE AND ANDREW FRANCIS MONKS (AS TRUSTEES OF THE JEFFERSON LANE PROPERTY TRUST AND AS EXECUTORS OF THE WILL OF DUDLEY ERNEST SANDFORD DULLEY, DECEASED)** (Applicant) **v** **QPCU LIMITED (ACN 087 651 036)** (Respondent)
FILE NO/S:	BS No 5459 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	28 February 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 November 2017
JUDGE:	Lyons SJA
ORDERS:	**I will hear the parties as to the form of the orders and as to costs.**
CATCHWORDS:	PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – UNDERTAKING IN COURSE OF LEGAL PROCEEDING – implied undertaking to not use documents obtained from the defendant as a result of compulsory disclosure for a purpose other than for which those documents were provided – where the plaintiffs/applicants obtained documents by disclosure pursuant to rule 242 of the *Uniform Civil Procedure Rules* 1999 (Qld) – where the plaintiffs/applicants commenced proceedings on the basis of information obtained in disclosure and information already available – where after filing the claim the plaintiffs/applicants realised some material may not be before the court – whether the plaintiffs/applicants should be released from their implied undertaking *Esso Australia Resources Limited and Ors v Plowman* (1995) 183 CLR 10 *Forty Two International Pty Ltd v Barnes* [2010] FCA 397

Hearne v Street (2008) 235 CLR 125

Liberty Funding Pty Ltd v Phoenix Capital Limited (2005) 218 ALR 238

Miller v Scorey [1996] 1 WLR 1122

Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 4) [2011] 1 Qd R 145

Springfield Nominees Pty Ltd v Bridgelands Securities Ltd (1992) 38 FCR 217

Uniform Civil Procedure Rules 1999 (Qld) r 242

COUNSEL:	P G Bickford for the applicants P K O'Higgins for the respondent
SOLICITORS:	Clayton Utz for the applicants Minter Ellison for the respondent

The current applications

[1] The plaintiffs/applicants (the Trustees) seek orders that they be released from their implied undertaking not to use documents obtained from the defendant in another proceeding as a result of compulsory disclosure, for a purpose other than that for which those documents were provided.[1]

[2] The defendant (whom I shall refer to as QBank) cross applies for the current proceedings to be struck out as an abuse of process due to the Trustees' breach of their implied undertaking. Alternatively, QBank seeks orders that the proceedings be permanently stayed.

Background

[3] The Trustees were appointed as Executors and also the Trustees of three property Trusts established pursuant to the Will of the late Dudley Ernest Sandford Dulley who died in 1991. Dudley Dulley was a bookmaker and he left an estate, the majority of which was comprised of two real properties. Relevant to these proceedings is the property at Jefferson Lane, Palm Beach. A testamentary trust titled the 'Jefferson Lane Property Trust' was established pursuant to the Will and the plaintiffs are Trustees of the Jefferson Lane Property Trust.

[4] The deceased's son, Bruce Dulley, who is a solicitor, received a life interest in the Jefferson Lane Property pursuant to the Will and his three children are equal remaindermen of the property. As the Palm Beach land was vacant land and not generating any income it was decided between Bruce Dulley and the Trustees that the property would be sold. It was also decided that Bruce Dulley in his capacity as a

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1 *Hearne v Street* (2008) 235 CLR 125 at [96].

solicitor would handle the transactions associated with the Jefferson Lane Property Trust.

[5] The Jefferson Lane Property was sold on 20 December 2007 for $3,515,080.52.

[6] It is alleged that without the knowledge of the plaintiffs, Bruce Dulley invested the proceeds of the sale of the Jefferson Lane Property into two accounts in the names of the plaintiffs as "Legal Personal Representatives of the Estate of DES Dulley deceased" held by QBank in 2008. The allegations are that the accounts were structured so that Bruce Dulley directly received the interest on the money invested. It is also alleged that Bruce Dulley made a number of withdrawals from the accounts without the knowledge or approval of the plaintiffs and also used money withdrawn from the QBank accounts to purchase two properties in New South Wales in his name and his children's names. Bruce Dulley has admitted in the primary proceedings that he withdrew various amounts from those accounts in 2008, 2009, 2010 and 2011.

[7] The affidavit of Andrew Deane sworn 13 November 2017 deposes that the signature on all of the authorities at QBank is that of Bruce Dulley and that the Trustees had no dealings with QBank until June 2011 when they were contacted by the bank to provide an authority for Bruce Dulley to operate the account and for their tax file numbers. The Trustees maintain that they have never authorised the disbursement of trust funds and no account was opened in the name of the Trustees until December 2011. On 13 December 2011 the Trustees attended with Bruce Dulley at QBank and an account was opened in the name of the Trustees. Over the ensuing 12 month period the plaintiffs became aware of the withdrawals from the account by Bruce Dulley.

[8] The Trustees ultimately initiated proceedings against Bruce Dulley in 2013. As part of those proceedings, the Trustees requested, pursuant to r 242 of the UCPR, disclosure of records held by QBank in relation to the two accounts opened and accessed by Bruce Dulley. QBank provided documents to the plaintiffs on 6 and 12 June 2014.

[9] The Trustees initiated these proceedings against the defendant, QBank on 1 June 2017 and submit that, on the basis of information already available to them at the time and from information contained in the documents provided to them by QBank under the r 242 Notice, QBank received money from Bruce Dulley knowing it to be trust property and subject to Bruce Dulley's fiduciary duties. On that basis the trustees claim that the defendant was a constructive trustee for the plaintiffs and is liable to account to the plaintiffs for the receipt and subsequent application of the trust money deposited by Bruce Dulley.

[10] The Trustees argue that approximately six weeks after filing the Claim against the defendant on 1 June 2017, the solicitor acting for the Trustees realised that material obtained from QBank and referred to in the Claim may not already be before the Court. After this realisation, the solicitor for the Trustees reviewed all documents in the substantive proceedings. The Trustees submit that, given the amount of material to be reviewed by the solicitor together with his various other commitments, "it is only recently that the need for this application has become apparent to [the solicitor]".[2]

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[2] Plaintiff's Outline of Submissions, filed with leave on 17 November 2017.

[11] On 13 November 2017 the Trustees filed the current application to be released from their implied undertaking.

The defendant's submissions

[12] The defendant argues that the Trustees should not be released from their implied undertaking and that these proceedings should be struck out or dismissed. In particular, it is argued that the Trustees are applying to be retrospectively released from their implied undertaking, which QBank notes has been breached by the Trustees on their own admission.[3] Counsel for QBank argues that the implied undertaking is well known to practitioners and that breach of it is a contempt of court as Rimer J made clear in *Miller v Scorey.*[4] Counsel argues and that allowing the proceedings to remain on foot "effectively gives the Court's imprimatur to the breach of the obligation and contempt, and 'wipes away' the abuse of process in circumstances where the plaintiffs will benefit from their own wrongdoing".[5] Counsel for QBank also notes that despite being on notice since July 2017, the Trustees did not inform QBank or seek its views about the issue until November 2017.

[13] Counsel for QBank argues that releasing the Trustees from their implied undertaking will result in significant prejudice to QBank as it will preclude it from relying on a limitation defence that would otherwise be available, given that the cause of action relied upon to initiate these proceedings would have expired soon after filing on 1 June 2017. In this regard QBank notes that the Trustees have accepted that one reason for the breach occurring in the first place was an apprehension that the limitation period on the claim would expire.

[14] In the event the Court releases the Trustees from their undertaking, Counsel for QBank submits that the approach in *Miller v Scorey*[6] should be adopted with orders that the proceedings be struck out and the plaintiffs should be given leave to use the documents prospectively for the purposes of a fresh claim.

The relevant law

[15] An "implied undertaking" was described in *Hearne v Street*[7] as follows:

> "Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise…to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence." [8]

[16] The Court may exercise its discretion to release parties from their implied undertaking where the existence of special circumstances can be shown by the party seeking

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3 See the Affidavit of Andrew Deane sworn 13 November 2017 at [1]-[5].
4 [1996] 1 WLR 1122.
5 Defendant's Written Outline of Submissions filed with leave on 17 November 2017 at [21].
6 [1996] 1 WLR 1122.
7 (2008) 235 CLR 125.
8 (2008) 235 CLR 125 at [96].

release.[9] In *Liberty Funding Pty Ltd v Phoenix Capital Limited*[10] the notion of special circumstances was described as follows:

> "The notion of 'special circumstances' does not require that some extraordinary factors must bear on the question before the discretion will be exercised. It is sufficient to say that, in all the circumstances, good reason must be shown why, contrary to the usual position, documents produced or information obtained in one piece of litigation should be used for the advantage of a party in another piece of litigation or for other non-litigious purposes". [11]

[17] It was made clear in *Hearne v Street* that the "implied undertaking" is in fact a substantive obligation imposed by law to use documents obtained by coercive processes, such as through non-party disclosure, only for the purposes of the action in which they were obtained.[12] Indeed, the purpose of the undertaking is to prevent documents produced under such processes from being used for "collateral or ulterior purpose[s]".[13]

[18] The rationale for the rule was examined by Chesterman JA in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 4)*[14] and included the following:

> "It is instructive that in the context of using documents disclosed in one proceeding to advance another Lord Oliver in *Crest Homes* described the improper purpose as the use of documents in another "different and wholly unrelated proceeding". The proceedings here, curial and non-curial, are not relevantly different and are closely related.
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> The rationale for the law's imposition of the undertaking was described, by reference to the authorities, in *Bailey* (156):
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> > "… the policy consideration is that of minimising invasions into the privacy and confidentiality of others.
> >
> > A like rationale … was … that the … basis for the rule is that where one party compels another … to disclose documents or information … the party obtaining the disclosure is given this power because the invasion of the other party's rights has to give way to the need to do justice between those parties in the pending litigation between them. To similar effect are the comments … that the implied undertaking should not be seen merely as an inducement to a litigation to disclose documents which … he might otherwise have been inclined to conceal but that it was more a matter of justice and fairness to ensure that privacy and confidentiality were not invaded more than was absolutely necessary for the purposes of justice.
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> > It is apparent from the terms in which the implied undertaking or obligation has been formulated, and from this last rationale which has been offered for

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9 (2008) 235 CLR 125 at [107].
10 (2005) 218 ALR 238.
11 (2005) 218 ALR 238 at [31].
12 (2008) 235 CLR 125 at [107] – [108].
13 *Esso Australia Resources Limited and Ors v Plowman* (1995) 183 CLR 10 at [36], citing *Alterskye v Scott* [1948] 1 All ER 469 at 470.
14 [2011] 1 Qd R 145.

> it, that the invasion of privacy and confidentiality inherent in the giving of discovery is … justified for the purpose of doing justice in the proceedings in which discovery is given."[15]

[19] McMurdo P in *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 4)*[16] also referred to Wilcox J's decision in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*.[17] In that decision, a number of factors that could be relevant to the exercise of the Court's discretion to release a party from its implied undertaking were identified and considered as follows:

- "the nature of the document;
- the circumstances under which the document came into existence;
- the attitude of the author of the document and any prejudice the author may sustain;
- whether the document pre-existed litigation or was created for that purpose and therefore expected to enter the public domain;
- the nature of the information in the document (in particular whether it contains personal data or commercially sensitive information);
- the circumstances in which the document came in to the hands of the applicant;

  and…

- the likely contribution of the document to achieving justice in the other proceeding."[18]

[20] Ultimately, after a consideration of those factors, the Full Court of the Federal Court in *Liberty*[19] held that there were compelling reasons in that case why leave should be given. In particular it was held that the affidavit in question there was created for the "purpose of the appellants relying on it" and it was clear that the applicants in the earlier proceedings were "intended to rely upon it and act upon it".

Should leave be granted?

[21] Relevant to the application here is the fact that retrospective release is sought. While retrospective release from the implied undertaking may be granted by the courts,[20] the exercise of the Court's discretion to do so was described by Rimer J in *Miller v Scorey*[21] as being appropriate only in "rare circumstances" essentially because granting such a

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15 [2011] 1 Qd R 145 at [51] - [52].
16 [2011] 1 Qd R 145.
17 (1992) 38 FCR 217.
18 *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* (1992) 38 FCR 217 at [31].
19 *Liberty Funding Pty Ltd v Phoenix Capital Limited* (2005) 218 ALR 238.
20 *Forty Two International Pty Limited v Barnes* [2010] FCA 397 per Yates J.
21 [1996] 1 WLR 1122 at 1133.

release effectively wipes away the abuse of process which has been committed.[22] In *Forty Two International Pty Ltd v Barnes*[23] Yates J however stated that whilst it is a matter of concern that a breach has occurred he considered that "the matter must be viewed in a wider context."[24] Reference was also made to the decision of Wilcox J in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd*[25] who held that perhaps the *most important* consideration of all is the likely contribution of the documents in achieving justice (my emphasis).

[22] There is no doubt that the Court may also strike out a proceeding instituted on the basis of information or documents used in breach of the implied undertaking.

[23] Accordingly there can be no doubt that it is not usual to give leave *nunc pro tunc*. There can, however, be circumstances which justify such a release. Whilst special circumstances are required to give the relief sought the circumstances do not have to be extraordinary. In *Northbuild Construction Pty Ltd v Discovery Beach Project Pty Ltd (No 4)*[26] McMurdo P discussed the competing principles in the following terms:

> "The dispute between the parties has been long, expensive and bitterly fought. One thing that is common ground is that the builder was restrained from using the documents it obtained or became aware of through discovery in the freezing order proceedings for any purpose other than those proceedings, unless and until it was relieved of that obligation by the court. This obligation is commonly called an implied undertaking, but which is in fact a substantive legal obligation to the court: *Hearne v Street*; *Minister for Education v Bailey*. The onus is on the builder to establish why it should be relieved from it. Discharging that onus and persuading the court to relax or waive those obligations is no easy matter. The public policy considerations behind them are to ensure that, in compelling specified conduct (in this case, the production of documents in proceedings for a freezing order) privacy and confidentiality are not invaded more than is absolutely necessary for the purpose of securing that justice is done: *Hearne v Street*; *Home Office v Harman*; *Minister for Education v Bailey*. Whilst all parties are expected to comply with court practice, procedure and orders, the implied undertaking is thought to encourage frank and full compliance: *Home Office v Harman*; *Hearne v Street*.
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> It is also common ground that, because of the public policy considerations to which I have referred, the builder was required to show what are conveniently termed as special circumstances before this Court would release it from its implied undertaking: *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd.*
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> …
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> The important public policy considerations behind implied undertakings of this kind are about securing justice between the parties and maintaining public confidence in the justice system. It follows then that courts will usually relieve a

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22 *K & S Corp Ltd v Number 1 Betting Shop Ltd* (2005) LSJS 398; *Forty-Two International Pty Limited v Barnes* [2010] FCA 397 at [94]; *Barnes v Forty-Two International Pty Ltd* [2010] FCAFC 87 at [14].

23 [2010] FCA 397.

24 [2010] FCA 397 per Yates J at [95].

25 (1992) 38 FCR 217 at [225].

26 [2011] 1 Qd R 145 at [13] – [14], [16].

party from its implied undertaking where, after giving proper consideration to the public policy reasons behind it, the circumstances of the case demonstrate this is plainly in the interests of justice: *Springfield Nominees Pty Ltd v Bridgelands Securities*; *Minister for Education v Bailey*." (footnotes omitted).

[24] One of the relevant considerations in that case was the fact that the documents sought were "closely related and raised interlocking issues":[27]

> "One gleans from this review of some of the authorities that what a party to litigation may not do with documents produced pursuant to compulsive processes is to utilise them for purposes "unconnected" with the litigation; or "unrelated" to it; or for a purpose "not reasonably necessary for the conduct of the litigation".
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> The scope of the undertaking is, I think, not entirely accurately expressed in the narrower phrase; "for the purposes of that action" or "use in the action in which they are disclosed".
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> The wider designation has the support of Mason CJ in *Esso* and Kirby P in *Ainsworth* as well as Lord Diplock in *Harman*. The undertaking will not be broken unless the disclosure which is impugned can be seen to be for a "collateral purpose", or an "ulterior purpose". Both terms indicate some disconnection between the proper conduct of the proceedings or litigation, and the use to which the documents are put.
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> …
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> When one comes to answer the question: are documents produced on discovery being used for a purpose unrelated to or unconnected with the proceeding, or litigation, in question or not for a purpose reasonably necessary for the conduct of the litigation?, one must analyse what is the litigation or proceeding in question. One should not take any narrow or technical approach to the analysis.
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> …
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> The scope of the undertaking may be better expressed by saying that documents produced on discovery or other compulsive process may only be used for a purpose connected with or related to the determination of the dispute in which the parties are engaged and to assist in the resolution of which the documents were required. Such a formulation extends to the determination of disputed rights other than by trial."[28]

[25] Turning then to the factors identified in those decisions, I consider that there are some factors in this case which are significant in the determination as to whether leave should be granted. There can be no doubt that there are interlocking issues as between the current proceeding against QBank and the primary proceeding given that they arise out of the same factual issues.

[26] I also accept the plaintiff's submission that a significant amount of the information relied upon to initiate proceedings against the defendant on 1 June 2017 was in fact

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[27] *Northbuild Construction Pt Ltd v Discovery Beach Project Pty Ltd* [2011] 1 Qd R 145 at [17].

[28] *Northbuild Construction Pt Ltd v Discovery Beach Project Pty Ltd* [2011] 1 Qd R 145 at [38] – [40], [47], [50].

available to them at the time, from information obtained by methods other than non-party disclosure. The plaintiffs identified[29] the following matters as matters not specifically known to them, except as a result of QBank's disclosure:

i. The fact that the signature on all of the various roll-over authorities with respect to the moneys invested by Bruce Dulley in the name of the plaintiffs with the defendant was that of Bruce Dulley; and

ii. The fact that the defendant's internal files noted Bruce Dulley as giving directions for operating the accounts and contained handwritten notes by Bruce Dulley that he wished to use the funds in those accounts to pay for a unit in the name of his private company.

[27] These matters correspond to the documents which Mr Deane acknowledged in paragraph 7 of his affidavit dated 13 November 2017 were used in drafting the statement of claim.

[28] To put that in context, Mr Deane also deposed to matters known to the plaintiffs before they commenced the present proceedings from sources other than documents disclosed by QBank. In broad terms, they provide the basis for the plaintiffs'' case against QBank. He also deposed to admissions in the primary proceedings about the purchase of the Yamba property in the name of Yas Yo Pty Ltd, and the Ocean Shores property in the names of Yasmin Dulley and Yolanda Dulley, with money of which the plaintiffs were trustees, and which had been deposited with QBank; and that these transactions were not authorised by the plaintiffs. He also deposed to a number of other admissions by Mr Dulley, of the withdrawals of money from accounts with the defendant, for the benefit of Mr Dulley or persons or entities associated with him. They appear to correspond with the transfers and withdrawals pleaded in paragraph 26 of the plaintiffs' statement of claim. Mr Deane also deposed that in June 2011, QBank asked the plaintiffs to provide authority for Mr Dulley to operate the accounts. There was no challenge to any of this evidence.

[29] In addition, the plaintiffs pleaded that on 13 December 2011, Bruce Dulley informed them that "Fund monies" (in context, a reference to monies of the Trustees which had been deposited with QBank) had been used to acquire the Yamba property in the name of Yas Yo Pty Ltd, and the Ocean Shores property in the names of Yasmin Dulley and Yolanda Dulley. While Mr Deane referred to a meeting on that date, his evidence did not mention this communication. He did, however, say that over the ensuing period of approximately 12 months, the plaintiffs learned the details of a series of transactions involving the capital of the trust that had been invested with QBank.

[30] Paragraph 9 of Mr Deane's affidavit dated 13 November 2017 seeks leave to use identified documents obtained on non-party disclosure from QBank in the principal proceedings. Some, but not all, of the allegations in those paragraphs are matters which Mr Deane deposed in paragraph 37 were not specifically known by the plaintiffs without the benefit of QBank's disclosure. The application for leave appears to extend beyond the use of disclosed documents relied upon for the statement of claim.

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[29] Affidavit of Andrew Deane sworn 13 November 2017 at [37].

[31] Of the documents relied on in settling the Statement of Claim, a number relate to the rollover of funds of the plaintiffs in QBank accounts. They thus demonstrate occasions where QBank acted on the instructions of Bruce Dulley, notwithstanding that he was not an authorised signatory for the accounts; but there is no suggestion that rollovers alone caused loss to the plaintiffs. I have already discussed the plaintiffs' sources of knowledge of withdrawals and transfers from the accounts. The documents may well be of evidentiary importance, demonstrating that Bruce Dulley operated the accounts, and they contribute to a history of the accounts; but they do not provide information not otherwise available to the plaintiffs which was important for pleading their case.

[32] The other documents relied upon also show that Bruce Dulley gave instructions to QBank about the operation of the accounts. The most significant of them appears to be a note from him stating that he wanted to use funds to purchase the Yamba property in the name of his company Yas Yo Pty Ltd. This appears to provide the basis for pleading paragraph 26(l) of the statement of claim. It appears to be particularly strong evidence of QBank's knowledge that Bruce Dulley was using monies of the plaintiffs for his own purposes, relevant to the claims based on its assistance provided to Bruce Dulley in his breaches of fiduciary duty and breaches of trust. Yet those claims were extended to other transactions, where no similar document exists; and its use was not critical to making the claims. The plaintiffs knew from Bruce Dulley's admissions that he had withdrawn money from the account on a number of occasions.

[33] The question whether leave should be granted retrospectively and whether the action should be struck out are interrelated; for if leave were granted, then there would be no ground to strike out the action.

[34] Unlike *Miller*[30] and, it would seem, *Forty Two International*[31], this is not a case where the plaintiffs could not have brought their claims without the use of the documents protected by the "implied undertaking". To strike out the action now would give the defendant the benefit of being able to plead a limitations defence which it could not have pleaded at the time when the action was commenced. A question arises as to whether that is an appropriate response to the contempt committed by the plaintiffs and their legal representatives.

[35] There is no suggestion that the contempt was in any sense the personal fault of the plaintiffs, or committed with their knowledge. Rather, it is the result of the conduct of their solicitor and barrister. Yet if the action were struck out, the plaintiffs would be directly affected, by the apparent expiry of the limitations period. Whether those at fault would be affected is a matter of some uncertainty. It has not been suggested that the conduct of the plaintiffs, or their legal advisers, was contumacious, a factor which Rimer J identified as relevant to the punishment or other consequences ought to be imposed upon them[32].

[36] Also relevant to the consideration here is the fact that the Trustees are trustees of a testamentary trust and they have a duty to get in the trust property and trace assets. Furthermore, the documents disclosed clearly raise concerns about some wrongdoing and there can be no doubt that there is a public interest in disclosing any such

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30 *Miller v Scorey* [1996] 1 WLR 1122 at 1126G and 1127D.
31 [2010] FCA 387 at [78]-[79].
32 *Miller v Scorey* [1996] 1 WLR 1122 at 1132E.

wrongdoing. In this regard it would seem clear that records for which leave is sought are records of QBank held by them in relation to accounts in the Trustees' names.

[37] The affidavit material also indicates that the opening of the accounts by Bruce Dulley was not authorised by the Trustees and that Bruce Dulley was not authorised by them to be a signatory on the accounts. The Trustees argue that the withdrawals made by Bruce Dulley all occurred without the plaintiffs knowledge or approval.

[38] It is of significance in my view that in the normal course of events, the Trustees would have been entitled to access most, if not all, of the documents the subject of this application because the accounts held by QBank are in fact held in the Trustees' names. They did not however have any knowledge that they were customers given that they did not authorise the placement of funds into the QBank account. It would appear that there were letters addressed to the Trustees from QBank but they were not received by them as they were sent to care of Bruce Dulley, who did not forward them to them. Indeed, as the Trustees note, this application would not have been necessary but for the fact that the documents came to them by way of a request under r 242 of the UCPR and not in the normal course of business.

[39] As to the question of how the documents came into existence, they appear to be routine documents which were brought into existence during the normal course of QBank's banking operations. As counsel for the Trustees submits, there may well be some information which is confidential as between QBank and the "customer" but the Trustees were at all times strictly the customer. These banking records were already in existence and were not created for the purpose of litigation. They also do not appear to contain any commercially sensitive information.

[40] I also accept that the plaintiffs' failure to seek release from the implied undertaking before the documents were used in these proceedings was not deliberate. I am satisfied on the basis of the affidavit material that the plaintiffs' failure to comply was due to inadvertence on the part of their solicitor, who overlooked the issue due to pressures of work, other commitments and a looming time limitation on the claim. The inadvertence was also due to a failure on the part of the Trustee's solicitor and counsel to realise that information used to provide particulars in the pleadings had not yet been put before the Court. It is also noted that the solicitor, counsel and the plaintiffs have all unreservedly apologised to the Court[33].

[41] In my view the circumstances of this case the likely contribution of the documents in achieving justice are such that the failure should be excused and there should be leave granted to relieve the Trustees from their implied undertaking in relation to the documents identified in paragraph 1 of the Application.

[42] I will hear the parties as to the form of the orders and as to costs.

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[33] Contrast *Miller v Scorey* [1996] 1 WLR 1122 at 1132F-H.