

DISTRICT COURT OF QUEENSLAND

CITATION: *Clinical Excellence Pty Ltd and Anor v Forest Lakes Allied Health Pty Ltd* [2020] QDC 152

PARTIES: **CLINICAL EXCELLENCE PTY LTD (ACN 082869814)**
as trustee for the CHARLTON FAMILY TRUST and
CHELSEA HOLDINGS PTY LTD (ACN 010 235 588)
(first plaintiff/first respondent)

AND

KEITH CHARLTON
(second plaintiff/second respondent)

AND

FOREST LAKES ALLIED HEALTH PTY LTD (ACN 627491589)
(defendant/applicant)

FILE NO/S: BD 799 of 2020

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: 6 July 2020

DELIVERED AT: Brisbane

HEARING DATE: 29 June 2020

JUDGE: Sheridan DCJ

ORDER: **1. Pursuant to Rule 223(1) of the UCPR, within seven (7) days of the date hereof the plaintiffs make disclosure of the documents in each of the classes listed below:**

(a) All direct messages sent from any Facebook Messenger account under the management and control of the plaintiffs from and including 27 June 2019 that:

(i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;

(ii) advertise the business Keith Charlton Chiropractic; or

(iii) are referring to Daniel Tilley and/or the

Forest Lake Chiropractic Centre.

- (b) All direct messages sent from any social media account under the management and control of the plaintiffs from and including 27 June 2019 that:**
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;**
 - (ii) advertise Keith Charlton Chiropractic; or**
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.**

- (c) All publications posted through any social media account under the management and control of the plaintiffs from and including 27 June 2019 that;**
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;**
 - (ii) advertise Keith Charlton Chiropractic; or**
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.**

- (d) All emails sent from any email account under the management and control of the Plaintiffs from and including 27 June 2019 that;**
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;**
 - (ii) advertise Keith Charlton Chiropractic; or**
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.**

- (e) All letters sent by the plaintiffs or caused to be sent by the plaintiffs from and including 27 June 2019 that:**
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;**
 - (ii) advertise Keith Charlton Chiropractic; or**
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.**

- (f) All documents under the management and control of the plaintiffs from and including 27 June 2019 that;**
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;**
 - (ii) advertise Keith Charlton Chiropractic; or**
 - (iii) refer to Daniel Tilley and/or the Forest**

Lake Chiropractic Centre.

2. **Within fourteen (14) days of the date hereof, the plaintiffs swear file and serve an affidavit pursuant to Rule 223 (2) (a) and/or (b) of the UCPR in respect of the classes of documents referred to in paragraph 1 above that have ceased to exist or have passed out of the possession and control of the Plaintiffs.**

3. **The plaintiffs pay the defendant's costs of and incidental to the application filed 17 June 2020.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – DISCOVERY OF DOCUMENTS – APPLICATION AND ORDER – where defendant/applicant filed application for further and better disclosure pursuant to r 223(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* – whether order for further and better disclosure should be granted

COUNSEL: M Henry for the applicant/defendant
P W Hackett for the first and second respondents/plaintiffs

SOLICITORS: Hickeys Lawyers for the applicant/defendant
Forest Lake Legal Practice for the first and second respondents/plaintiffs

- [1] On 17 June 2020, the defendant filed an application for further and better disclosure against the plaintiffs pursuant to r 223(1) of the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR).

- [2] The litigation between the parties arises out of a business sale agreement entered between the first plaintiffs and the defendant for the acquisition by the defendant of a chiropractic clinic known as the Forest Lake Chiropractic Centre situated at 251 Forest Lake Boulevard, Forest Lake, previously owned by the first plaintiff. The director of the first plaintiffs is the second plaintiff (Keith Charlton) and the director of the defendant is Daniel Tilley. The sale agreement between the parties was dated 30 July 2018, with settlement occurring on 5 September 2018.

- [3] The proceedings commenced with the filing of a statement of claim by the plaintiffs on 18 July 2019 in the Magistrates Court. The claim by the plaintiffs is for moneys owing pursuant to that agreement.

- [4] In its defence, the defendant denies any monies are owing. The defendant counterclaims alleging that the plaintiffs have acted in breach of a restraint of trade clause which prohibited the first plaintiff from operating a chiropractic business within 10 kilometres of the Forest Lake Shopping Centre for 24 months and that it would obtain a similar covenant from the second plaintiff. The defendant also alleges that by his conduct the second plaintiff agreed to be bound by the agreement.

- [5] The defendant alleges that on 25 July 2019, an entity associated with the second plaintiff registered the business name of Keith Charlton Chiropractic, with a principal place of business at 505 Waterford Road, Ellen Grove, a place within a 10 kilometre radius of the Forest Lake Shopping Centre, that on 11 September 2019 the second plaintiff commenced providing chiropractic services from a location or locations within a 10 kilometre radius of the Forest Lake Shopping Centre, that on 18 September 2018 the second plaintiff and Chelsea Holdings Pty Ltd (an entity associated with the plaintiffs) advertised that Dr Charlton would commence trading at 235 Forest Lake Boulevard, Forest Lake “soon”, that on or about 13 September 2019 Chelsea Holdings Pty Ltd registered the domain name “kevincharltonchiropractic.com.au” and began advertising using that name the provision of services by the second plaintiff from a clinic located at the Forest lake Shopping Centre and that on 18 November 2019 the first and second plaintiffs commenced providing chiropractic services through a clinic located at the Forest Lake Shopping Centre.
- [6] Apart from admitting that the second plaintiff commenced providing services from a location or locations within a 10 kilometre radius of the Forest Lake Shopping Centre on or about 11 September 2019, all the other allegations relating to the breach of the restraint are either denied or not admitted. There is no real explanation of either. Included in the material filed in support of the application for further disclosure is an affidavit from Dr Tilley containing direct evidence of the truth of these allegations.
- [7] The defendant alleges that the plaintiffs caused a number of existing clients of the business to cease being clients of the business and to become clients of the plaintiffs, and that since on or about 27 June 2019 to the present time and continuing the second plaintiff has actively disparaged Dr Tilley and the business and further that in doing so has damaged the goodwill of the business. One of the particulars of the latter allegation is the specific allegation that from on or about 4 July 2019 the second plaintiff posted to his Facebook social media account a number of disparaging comments regarding Dr Tilley and the business. All of these allegations are not admitted by the plaintiffs; again without any real explanation for that non-admission.
- [8] Included in an affidavit filed by the solicitor for the defendant are copies of one Facebook post by Dr Charlton to a named recipient, a Facebook post from “Keith Charlton Chiropractic” made 8 October 2018, and a copy of a letter from Dr Charlton to various recipients. These documents have not been disclosed by Dr Charlton.
- [9] In response to the application, Dr Charlton says he does not have a Twitter or Instagram account, and that the “documents disclosed thus far are the only documents pertaining to the matters pertinent to these proceedings.” Particularly given that the only “explanation” offered for the denials that there were various acts of trading was the allegations were “contrary to the proper construction of the contract” (where no terms of the contract was alleged), it is difficult to know what to make of the assertion made in the affidavit by Dr Charlton.
- [10] In the alternative to the very general application for further and better disclosure, the defendant sought an order that the plaintiffs swear an affidavit in respect of various classes of documents including messages sent from Facebook or any social media

account or email accounts under the management or control of the plaintiffs and letters and documents sent from the plaintiffs.

- [11] In the course of submissions, counsel for the defendant was permitted to further reflect on the appropriate terms of the orders sought and to provide any proposed order by email to the court that day, copied to the plaintiffs. The proposed order forwarded on behalf of the defendant sought an order for the disclosure of all direct Facebook messages and messages from any social media account under the management and control of the plaintiffs and all publications through any social media account under the management and control of the plaintiffs and all emails sent from an email account under the management and control of the plaintiffs that:
- (a) are directed to the former patients of the Forest Lake Chiropractic Centre;
 - (b) advertised the business Keith Charlton Chiropractic; or
 - (c) are referring to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
- [12] In addition, the proposed order sought the disclosure of any emails sent from an email account under the management and control of the plaintiffs or letters sent by the plaintiffs or caused to be sent by the plaintiffs in relation to one of the matters identified in sub-paragraphs (a) to (c) above and further all documents under the management and control of the plaintiffs so far as they relate to one of the matters identified in sub-paragraphs (a) to (c) above.
- [13] The order sought all documents sent in the period from and including 1 June 2018.
- [14] Although the plaintiffs submitted that the social media posts and letter are not directly relevant to the facts in issue, the principal submission was that the issue in the proceedings was whether the restraint of trade was enforceable and whether the second plaintiff was a party to the contract.
- [15] Both submissions ignore the denials and non-admissions made as to the specific means by which the breach is alleged to have occurred and the allegation relating to the disparagement of the defendant and its business. The nature of the pleading in reply, the careful way which Dr Charlton has expressed his affidavit and the nature of the submissions made in defence of the application satisfies me both that there are special circumstances and that the interests of justice requires further disclosure. I am further satisfied that there is an objective likelihood that the duty to disclose has not been complied with and that there are classes of documents which exist which have not been disclosed.
- [16] In submissions in support of the application, counsel for the defendant did not explain the basis for a commencement date of 1 June 2018. The sale agreement was executed on 30 July 2018 and settled on 5 September 2018. The obligations placed on the first and second plaintiffs pursuant to the sale agreement commenced on 5 September 2018.
- [17] The pleading alleges that the second plaintiff has actively engaged in disparaging Dr Tilley and the business since 27 June 2019. The appropriate date for the commencement of any order in relation to the making of disclosure is therefore 27 June 2019. That would also be a relevant date at which to determine, for disclosure

purposes, the relevant patients to whom messages, letters, emails and documents have been sent.

[18] While the application and initial draft order lacked particularity, the classes of documents in respect of which disclosure was being sought was readily apparent. The nature of the request was further apparent from the rule 444 letters exchanged between the solicitors. In those circumstances, it is appropriate to make an order for the plaintiffs to pay the defendant's costs of and incidental to the application.

[19] Based on these reasons, orders will be made in the following terms:

1. Pursuant to Rule 223(1) of the UCPR, within seven (7) days of the date hereof the plaintiffs make disclosure of the documents in each of the classes listed below:
 - (a) All direct messages sent from any Facebook Messenger account under the management and control of the plaintiffs from and including 27 June 2019 that:
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;
 - (ii) advertise the business Keith Charlton Chiropractic; or
 - (iii) are referring to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
 - (b) All direct messages sent from any social media account under the management and control of the plaintiffs from and including 27 June 2019 that:
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;
 - (ii) advertise Keith Charlton Chiropractic; or
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
 - (c) All publications posted through any social media account under the management and control of the plaintiffs from and including 27 June 2019 that;
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;
 - (ii) advertise Keith Charlton Chiropractic; or
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
 - (d) All emails sent from any email account under the management and control of the Plaintiffs from and including 27 June 2019 that;
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;
 - (ii) advertise Keith Charlton Chiropractic; or
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
 - (e) All letters sent by the plaintiffs or caused to be sent by the plaintiffs from and including 27 June 2019 that:

- (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;
 - (ii) advertise Keith Charlton Chiropractic; or
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
 - (f) All documents under the management and control of the plaintiffs from and including 27 June 2019 that;
 - (i) are directed to people who were patients of the Forest Lake Chiropractic Centre as at 27 June 2019;
 - (ii) advertise Keith Charlton Chiropractic; or
 - (iii) refer to Daniel Tilley and/or the Forest Lake Chiropractic Centre.
2. Within fourteen (14) days of the date hereof, the plaintiffs swear file and serve an affidavit pursuant to Rule 223 (2) (a) and/or (b) of the UCPR in respect of the classes of documents referred to in paragraph 1 above that have ceased to exist or have passed out of the possession and control of the Plaintiffs.
3. The plaintiffs pay the defendant's costs of and incidental to the application filed 17 June 2020.