

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION: *Hoogendoorn v State of Queensland & Ors* [2020]
QCAT 24

PARTIES: **MICHAEL HOOGENDOORN**
(applicant)

v

STATE OF QUEENSLAND
(first respondent)

SERCO ASIA PACIFIC PTY LTD
(second respondent)

LUKE MAKEJEV
(third respondent)

APPLICATION NO/S: ADL038-18

MATTER TYPE: Anti-discrimination matters

DELIVERED ON: 3 February 2020

HEARING DATE: On the papers

HEARD AT: Brisbane

DECISION OF: Member Traves

ORDERS: **The application for leave to use the Statement of Luke Makejev for another purpose is refused.**

CATCHWORDS: ADMINISTRATIVE LAW – ADMINISTRATIVE
TRIBUNALS – QUEENSLAND CIVIL AND
ADMINISTRATIVE TRIBUNAL – where applicant
seeks leave to use a statement prepared for use in
proceedings before the Tribunal for another purpose –
where use of statement for another purpose opposed by
its author – where implied undertaking or obligation
imposed by law not to use documents disclosed for any
other purpose – whether rule extends to witness
statements – whether undertaking may be released or
modified - where no special circumstances exist to grant
leave – application dismissed.

Queensland Civil and Administrative Tribunal Act 2009
(Qld), s 218

Central Queensland Cement Pty Ltd v Hardy [1989] 2 Qd
R 509

**APPEARANCES &
REPRESENTATION:**

Applicant: Self-represented
Second and Third Respondents: Carter Newell

REASONS FOR DECISION

[1] The applicant has applied to the Tribunal seeking leave to use the statement of the third respondent, Luke Makejev, dated 5 December 2019 as evidence in a complaint to the Office of the Health Ombudsman. I have assumed that this is a reference to Mr Makejev's statement dated 4 December 2019. That statement was prepared and filed as a response to the complaint of victimisation made by Mr Hoogendoorn, in short, that Mr Makejev threatened to transfer him from the prison in which he was held to another prison after Mr Hoogendoorn said he was going to make a complaint to the Health Ombudsman. I note there is no suggestion by Mr Hoogendoorn that he was going to make a complaint to the Anti-Discrimination Commission. Mr Makejev states that he was unaware at the time of the alleged threat to transfer him, of any discrimination complaint.

[2] In the application¹ Mr Hoogendoorn states:

I apply for leave of the Tribunal of QCAT for the statement of Luke Makejev that has been signed for Carter Newell Lawyers dated 5/12/19 consisting of 30 paragraphs & 4 pages in content & has been requested by Manager of the intake complaint section of the Qld Health Ombudsman Mr Clifford Thomson so I can use Mr Makejev's signed statement as evidence.

[3] Under the heading, 'The reasons I seek these directions are:', Mr Hoogendoorn states:

So I can send this signed statement of Mr Makejev to the Qld OHO as evidence for a Qld Health Ombudsman complaint for reprisals where Mr Makejev admits to Carter Newell that SQCC medical staff refused me medical treatment & involves false admissions in his signed statement that contradicts my medical files & coincides & referres (sic) to Health Ombudsman complaints that are current at the moment

[4] The second and third respondents resist Mr Hoogendoorn's application on the basis that there is an implied undertaking on the parties to Tribunal proceedings not to disclose documents or information for any purpose other than that for which it was given. Further, they submit, that the Tribunal should only release the applicant from the undertaking where "the applicant as shown some circumstance which takes the

¹ Application for Miscellaneous Matters filed by the applicant on 2 January 2020.

matter out of the ordinary course” and where “the exercise of the court’s discretion in favour of the applicant would be in the interests of justice”.²

Consideration

[5] Although there is some debate as to the source of the obligation, that is, as an implied undertaking to the court or as a substantive obligation imposed by law, the rule itself is settled.

[6] The rule has been expressed by the High Court in *Hearne v Street*³ 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. The types of material disclosed to which this principle applies include documents inspected after discovery, answers to interrogatories, documents produced on subpoena, documents produced for the purposes of taxation of costs, documents produced pursuant to a direction from an arbitrator, documents seized pursuant to an *Anton Pillar* order, witness statements served pursuant to a judicial direction and affidavits. The appellants did not dispute the existence of this principle, and in particular did not dispute its potential application to the affidavit of Mrs Hesse and the witness statement of Dr Tonin.⁴

[7] The implied undertaking has been said to be independent of any obligation existing under the general law relating to confidentiality and to afford a particular protection accorded in the interests of the “proper administration of justice”. It is owed to the court rather than to the owner or author of the relevant documents. The purpose of the undertaking has been said to protect the privacy of the person disclosing the document and to encourage full and frank disclosure during litigation. The rationale behind the restriction on the use of such documents has been said to be due to the compulsion under which those documents were obtained.

[8] A party who uses, or attempts to use, material to which the implied undertaking or obligation attaches without first obtaining leave of the court will be guilty of contempt. An injunction may be used to prevent the use of documents in breach of the implied undertaking.⁵ The Tribunal has a statutory power in s 218 of the *Queensland Civil and Administrative Tribunal Act 2009 (Qld)* (QCAT Act) to punish for contempt. The circumstances in which a person may be in contempt of the Tribunal include if the person contravenes an undertaking the person has given to the Tribunal.⁶ There is an issue as to whether that extends to an implied undertaking of the nature raised here. But, in any event, the Tribunal has, under s 219 “all the protection, powers, jurisdiction and authority the Supreme Court has, for that court, in relation to contempt”. The Tribunal also has power under s 59 to grant an injunction, including an interim injunction, in a proceeding if it is just and convenient to do so.

² Second and Third Respondents’ submissions in response to complainant’s Application, dated 22 January 2020.

³ (2008) 235 CLR 125.

⁴ Ibid at [96].

⁵ *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] QB 613.

⁶ QCAT Act, s 218(1)(f).

- [9] The obligation was applied by McPherson J in *Central Queensland Cement Pty Ltd v Hardy*.⁷ There, it was held to be “well accepted” that a person who inspects a document produced on discovery in an action does so under an implied undertaking or obligation that he will not use it for a collateral or ulterior purpose: referring to *Nicol v Brisbane City Council*⁸ and *Harman v Home Office*.⁹ However, McPherson J rejected the submission that the obligation should be confined to discovered documents and should not be applied to witness statements. This was because of the underlying principle of the obligation which he thought clear: “It is that a document furnished for use for one purpose may not legitimately be used for another.”¹⁰ He went on:

I am therefore in no doubt that the undertaking applies equally to the witness statement by Mr Town as it would to any other document produced by one side to the other for the purpose of litigation.¹¹

- [10] This position was affirmed in *Springfield Nominees Pty Ltd v Bridgelands Securities Ltd* where Wilcox J held:

I respectfully agree with McPherson J. In addition to the points made by his Honour I add that a witness statement fulfills a function very similar to that of an affidavit or an admission of facts. In this court there is a rule (O 46, r 6) limiting the documents on court files which may be inspected without leave of the court or a judge. They include affidavits, interrogatories and answers to interrogatories, lists of documents given on discovery and admissions. All are documents brought into existence for the purpose of the instant litigation which may contain confidential or personal information and which may, or may not, ultimately be read in open court. There is every reason for subjecting their use to the same constraints.¹²

- [11] McPherson J held that when Lucas J in *Nicol v Brisbane City Council* spoke of not using the document for any “collateral or ulterior purpose” that he took that to mean “any purpose collateral or ulterior to the purpose which the document or its production or delivery is intended to serve”.¹³
- [12] As it was in *Hardy*, so it is here that the witness statement from Luke Makejev was filed with the purpose of the proper conduct of the discrimination proceedings. The statement by Mr Makajev was also prepared and delivered pursuant to a Tribunal direction. It has been held that serving an affidavit in response to an application for a freezing order, in circumstances where the court processes required that any affidavits on which they sought to rely be filed by a certain date, was sufficient to meet the element of “compulsion”.¹⁴
- [13] The issue then arises as to whether the Tribunal should give leave to the applicant to use the witness statement for a collateral purpose and by doing so, release or modify the rule or implied undertaking.

⁷ [1989] 2 QdR 509.

⁸ [1969] QdR 371 at 377.

⁹ [1983] 1 AC 280 at 304.

¹⁰ *Ibid* at 510.

¹¹ *Ibid*.

¹² (1992) 110 ALR 685 at 691.

¹³ (1989) 2 QdR 509 at 510.

¹⁴ *Laen Pty Ltd v At the Heads Pty Ltd* [2011] VSC 315 at [7]-[8]; *Prime Finance Pty Ltd v Randall* [2009] NSWSC 361 at [17].

- [14] In *Springfield Nominees* it was held that the court would not release or modify the implied undertaking save in special circumstances and where the release or modification will not occasion injustice.¹⁵ There Wilcox J held, referring to *Crest Homes* that:

For “special circumstances” to exist it is enough that there is a special feature of the case which affords a reason for modifying or releasing the undertaking and is not usually present. The matter then becomes one of the proper exercise of the court's discretion, many factors being relevant. It is neither possible nor desirable to propound an exhaustive list of those factors. But plainly they include the nature of the document, the circumstances under which it 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 into the hands of the applicant for leave and, perhaps most important of all, the likely contribution of the document to achieving justice in the second proceeding.

- [15] Mr Makejev was compelled to give the statement within the meaning of the authorities. Mr Makejev opposes the use of the document as proposed. The document is yet to be admitted into evidence. I would add that the discrimination proceedings and the complaint appear to have a commonality of factual allegations and issues. It is not desirable, in my opinion, that a document to be evidence in these proceedings is subject to consideration in another proceeding at the same time. The document may well be the subject of further evidence and cross examination. It is not in the interests of the proper and just administration of this proceeding that it be contemporaneously considered in a second proceeding.
- [16] There was no basis raised in the application or any special feature of the application otherwise which, in my view, constituted “special circumstances” sufficient to warrant modification or release from the rule. There is therefore no basis for the grant of leave to use the statement prepared for the purpose of the discrimination proceedings for the purpose of making the relevant complaint.
- [17] Accordingly, I dismiss the application.

¹⁵ See also *Crest Homes PLC v Marks* [1987] AC 829 at 854.