

LAND COURT OF QUEENSLAND

CITATION: *Apex Outdoor Pty Ltd v Cross River Rail Delivery Authority*
[2021] QLC 5

PARTIES: **Apex Outdoor Pty Ltd**
ACN 155 560 535
(applicant)

v

Cross River Rail Delivery Authority
(respondent)

FILE NO: AQL123-20

PROCEEDING: Application to restrain Respondent from calling nominated expert as a witness

DELIVERED ON: 11 February 2021

DELIVERED AT: Brisbane

HEARD ON: 3 February 2021

HEARD AT: Brisbane

PRESIDENT: FY Kingham

ORDERS: **1. The application is refused.**
2. Within 14 days, the parties may file and serve written submissions as to costs, which will be determined on the papers.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – EXPERT EVIDENCE – CONFIDENTIAL INFORMATION – where the respondent nominated an expert witness about billboard advertising in the applicant’s claim for compensation for resumption of land on which it intended to construct and operate a billboard – where the applicant had previously sought advice from another director of the expert witness’s firm – where the applicant sought to restrain the respondent from

calling its nominated expert witness - whether there was a real and sensible risk the respondent's expert witness might misuse confidential information – where the Court found there was not

ASIC v Rich & Ors (2005) 190 FLR 242; [2005] NSWSC 149, cited
Australian Leisure and Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs & Anor [2012] NSWSC 215, applied
D & J Constructions Pty Ltd v Head (1987) 9 NSWLR 118, cited
Elliott & Ors v Ivey & Anor [1998] NSWSC 116, cited
Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd [1995] 1 VR 1, applied
GS Coal Pty Ltd & Ors v Cross [2017] QLC 40, cited
Murphy Operator Pty Ltd v Gladstone Ports Corporation [2019] 3 Qd R 255, cited
Optus Networks Pty Ltd v Telstra Corporation Ltd (2010) 265 ALR 281; [2010] FCAFC 21, cited
Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd [2005] WASC 255, applied
Wagdy Hanna and Associates Pty Ltd v National Library of Australia (2004) 155 ACTR 39; [2004] ACTSC 75, cited

APPEARANCES: C Hughes QC with H Stephanos (instructed by TelcoTech Legal) for the applicant
G Diehm QC with J Hewson (instructed by Clayton Utz) for the respondent

- [1] Apex Outdoor Pty Ltd intended to construct and operate a digital advertising billboard on land it leased at the corner of Mary and Albert Streets in the Brisbane CBD. Before it constructed the billboard, the Cross River Rail Delivery Authority resumed the land. Apex Outdoor claims compensation for the value of its loss of that opportunity.
- [2] The case is in pre-hearing preparation and the parties have nominated their expert witnesses to provide joint expert reports. Each party has nominated an expert witness to advise on "Inputs for the discount cash flow analysis and attributes of the proposed LED advertising sign".¹ That evidence will inform other expert witnesses in estimating Apex's loss.

¹ Amended Notice of Nominated Expert Witnesses filed by the Applicant on 19 November 2020; Notice of Nominated Expert Witnesses filed by the Respondent on 6 November 2020.

- [3] Apex objects to Cross River Rail’s nomination of John Tyquin as an expert witness on that topic. He is a Joint Managing Director of General Outdoor Advertising Pty Ltd (GOA). So is his brother, Chris Tyquin. Some two and a half years ago, Apex engaged Chris Tyquin to “provide expert evidence and assistance in relation to the Applicant’s claim for compensation.”² However, Apex has nominated a different person as its expert witness for the hearing on this topic.
- [4] Apex seeks orders to prevent Cross River Rail from calling John Tyquin as a witness, because of a concern he might misuse information provided to Chris Tyquin, which it says is confidential. Cross River Rail says there is no real and sensible risk that the information will be misused, and Apex has not established the information is confidential.
- [5] The relevant legal test is not in dispute. A court will intervene to restrain a threatened breach of confidence if there is a real and sensible risk of the misuse of confidential information.³ The Courts have applied the principle to the relationship of expert witness and client.⁴
- [6] There are four requirements for a claim for breach of confidence:⁵
1. the information is question must be identified with specificity;
 2. it must have the necessary quality of confidence;
 3. it must have been received in circumstances importing an obligation of confidence; and
 4. there must be an actual or threatened misuse of the information without consent.
- [7] Although Cross River Rail contested that any of those requirements are met, senior counsel submitted I could dispose of the application on the basis that there was no real and sensible risk of a breach of confidence.

² Affidavit of Samuel John Norton filed 20 January 2021, paragraph 7.

³ *Farrow Mortgage Services Pty Ltd (in liq) v Mendall Properties Pty Ltd* [1995] 1 VR 1.

⁴ *Australian Leisure and Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs & Anor* [2012] NSWSC 215, [24] to [27].

⁵ *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] FCAFC 21 at [39].

[8] Apex identified the risk arises from the following factors, none of which are contested:

1. For approximately 2.5 years, GOA has had possession of information that Apex provided to Chris Tyquin so he could advise and give expert evidence in respect of the proposed claim.
2. John and Chris Tyquin, as brothers, employees, and Joint Managing Directors of GOA, have opportunities for daily contact over long periods.
3. John is aware that Chris has done some work for Apex, and they have had some conversations about that.
4. They share the same personal assistant to assist in the administration of their work.
5. GOA uses common files in which the Apex information is stored, and their personal assistant has access to those common files.
6. Until recently, John Tyquin had access to that information.

[9] Against that, Cross River Rail relies on the following evidence from John Tyquin:

1. In October 2020, Chris told him he was looking at the site and John understood this to mean that Chris had been asked to give advice to a landowner looking to establish signage on the site.
2. He did not know:
 - (a) about Chris' dealings with the site;
 - (b) that Apex had engaged Chris as an expert witness;
 - (c) about Chris' conversations with Apex's solicitors or other expert advisers;or
 - (d) what information Apex provided to Chris.
3. He has not accessed the information Apex provided to Chris.
4. He has put into effect measures to ensure:
 - (a) he no longer has the ability to access the information; and
 - (b) he will not discuss the matter with Chris.
5. Chris Tyquin and their personal assistant have agreed to those measures.

6. At all times he has acted, and will continue to act, solely on his own knowledge of the billboard advertising industry and his own knowledge and review of the site.

[10] The Court may intervene to prevent the risk of either intentional or inadvertent disclosure.⁶ Senior counsel for Apex submitted that, in considering whether there is a real and sensible risk of inadvertent disclosure, the Court should be sceptical about systems put in place to limit the flow of information.⁷

[11] Apex said the risk is real and sensible given the daily contact between the brothers, over long periods. In *D & J Constructions* Justice Bryson said:

“Enforcement by the court would be extremely difficult and it is not realistic to place reliance on such arrangements in relation to people with opportunities for daily contact over long periods, as wordless communication can take place inadvertently and without explicit expression, by attitudes, facial expression or even by avoiding people one is accustomed to see, even by people who sincerely intend to conform to control.”⁸

[12] That caution was expressed in the context of a relationship of solicitor and client:

“Cautious conduct by the court is appropriate because the spectacle or the appearance that a lawyer can readily change sides is very subversive of the appearance that justice is being done. The appearance which matters is the appearance presented to a reasonable observer who knows and is prepared to understand the facts. The court should weigh the facts and assess the risks in the eye of reality, theoretical risks should be disregarded and when as here there is no confidential information available and there never was a relationship of solicitor and client with any partner the appearance of the matter is not a basis for the court to assume control over the retainer.”⁹

[13] I accept the submission by senior counsel for Cross River Rail that there is a relevant distinction between the relationship of solicitor and client and that of expert witness and client. A solicitor must employ all information at their disposal for the benefit of the client. An expert witness is engaged to give independent evidence to the Court on specified

⁶ *Australian Leisure and Hospitality Group Pty Ltd & Anor v Dr Judith Stubbs & Anor* [2012] NSWSC 215, [24] to [27].

⁷ *ASIC v Rich & Ors* [2005] NSWSC 149 at [371]; *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 123.

⁸ *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 123.

⁹ *Ibid.*

factual assumptions made known to the Court.¹⁰ The Court's observations in *D & J Constructions* should be viewed in that context.

- [14] An important factor in my decision is whether John Tyquin had accessed the information in the past. Although senior counsel for Apex noted John had unrestricted access for more than 2 years and described the account of his conversations with Chris as vague and apparently incomplete, he did not test that by cross-examination. I accept John Tyquin's uncontested evidence on these matters. His lack of past exposure to the information Apex wants to protect reduces the risk he would inadvertently misuse it.
- [15] That is a key point of distinction between this case and two cases on which Apex relied.
- [16] In *GS Coal v Cross*¹¹ one party objected to the other's nomination of expert witness. The objecting party had previously engaged the witness to provide advice. The witness had access to confidential source information which had central relevance to a question he would be called to give evidence about. The witness himself raised a concern about a potential conflict of interest and, as a result, the matter was brought to the Court for a ruling.
- [17] In *ASIC v Rich*,¹² the expert witness was employed in the same forensic department of Price Waterhouse Coopers that had undertaken a lengthy and detailed investigation of the respondent, over a number of years, which required information to be shared across team members on the same subject matter as the expert was engaged to address. That involved a degree of risk of a completely different order to the one presented in this case.
- [18] John Tyquin has not accessed any of the Apex information. John and Chris, and their personal assistant, are aware of Apex's concern about disclosure. They have established a system to prevent John having access to the information. They have committed to that system. Apex has not identified any specific inadequacy in the system.

¹⁰ *Elliott & Ors v Ivey & Anor* [1998] NSWSC 116 at 12–13.

¹¹ *GS Coal Pty Ltd & Ors v Cross* [2017] QLC 40 at [17].

¹² *ASIC v Rich & Ors* [2005] NSWSC 149.

[19] The Court should weigh the facts and assess the risk in the eye of reality, disregarding theoretical risks.¹³ The duty of confidentiality does not extend to avoid a remote possibility of accidental disclosure.¹⁴ That is how I view the risk presented in this case. It was within Apex's power to eliminate even that risk, by directing Chris Tyquin to return or destroy the information, but it has not done that.

[20] Senior counsel for Cross River Rail argued the Apex information was not sufficiently identified, was not confidential, and was not imparted in circumstances that imported an obligation of confidence. Given the view I have taken on the risk of inadvertent disclosure, it is not necessary to resolve those arguments, but I will make a few observations.

[21] First, the following information appears on its face, and was presented in correspondence from a solicitor for Apex,¹⁵ to be directly relevant in this proceeding:

“...
(d) billboard advertising data produced by Apex relevant to the Claim;
(e) information concerning the attributes of the subject billboard sign and the visualisations of same;
(f) Apex's general business operations and procedures;
...”

[22] Further, it is arguable the following categories of information would also be subject to Apex's duty of disclosure:

“(a) instructions regarding the provision of expert witness evidence specifically for the Claim;
(b) a draft witness statement prepared by Apex's solicitors at the time;
(c) notes and comments in respect of the draft witness statement prepared by Apex's solicitors at the time;
...”

[23] In correspondence, a solicitor for Apex described the statement as an expert statement.¹⁶ Although Apex did not confirm this at the hearing, it is reasonable to assume it was a draft statement by Chris Tyquin.

¹³ *D & J Constructions Pty Ltd v Head* (1987) 9 NSWLR 118 at 123.

¹⁴ *Rapid Metal Developments (Australia) Pty Ltd v Anderson Formrite Pty Ltd* [2005] WASC 255 at [96]; *Wagdy Hanna and Associates Pty Ltd v National Library of Australia* [2004] ACTSC 75 at [18].

¹⁵ Affidavit of Lisa Katherine Brereton Exhibit Number LKB-2, paragraph 2.6(a).

¹⁶ Affidavit of Lisa Katherine Brereton Exhibit Number LKB-2, paragraph 2.5.

- [24] In *Murphy Operator Pty Ltd v Gladstone Ports Corporation*¹⁷ Justice Crow concluded a draft expert report must be disclosed pursuant to *Uniform Civil Procedure Rules 1999* r 212, even if the statement is not deployed in the proceeding.¹⁸
- [25] Senior counsel for Apex submitted that depended on whether the expert was engaged in anticipation of this proceeding. I do not have evidence on that point. As this may be the subject of a future dispute between the parties, I will not express a conclusion now.
- [26] It is possible the remaining categories of documents would be subject to a duty of confidence, but that was challenged by Cross River Rail. Without a better description of the material, or inspecting the documents themselves, I am not well placed to make that finding. Nor is it necessary to do so given my finding that there is no real and sensible risk of a misuse of confidential information.
- [27] I refuse the application.
- [28] Senior counsel for Apex sought the opportunity to make written submissions as to costs, if the application was refused. The parties have leave to file written submissions on costs within 14 days and costs will be determined without an oral hearing.

¹⁷ [2019] 3 Qd R 255.

¹⁸ *Ibid* at [85]–[86].