

# SUPREME COURT OF QUEENSLAND

CITATION: *Menkens v Wintour* [2006] QSC 342

PARTIES: **LEO IGNATIUS GEORGE MENKENS**  
(first applicant)  
**REID MATTHEW MENKENS**  
(second applicant)  
v  
**ROBERT DESMOND PETER WINTOUR**  
(first respondent)  
**NORTH COAST WOOD PANELS PTY LTD ACN 071**  
**968 771 t/a STANTIUM**  
(second respondent)

FILE NO/S: BS1975/06

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Brisbane

DELIVERED ON: 20 November 2006

DELIVERED AT: Brisbane

HEARING DATE: 31 October 2006

JUDGES: Mackenzie J

ORDER: **1. That the Defendants within 7 days of the date of this order disclose to the Plaintiffs:**

**(a) The documents, including in native format, being the attachments to the email, letters and faxes identified in the Defendants' List of Documents dated 13 June 2006 at numbers 21, 22, 24, 28, 29, 30, 33, 48, 49, 50, 54, 55, 56, 57, 58, 59, 74, 75, 76, 77, 78, 79, 88, 89, 90, 91, 93, 94, 96, 101, 106, 107, 108, 109, 120, 121, 123, 127, 128, 133, 143, 153, 159, 166, 181, 206, 228, 232, 314.**

**(b) The documents described as the 'Authorised Representative Statement', by producing a copy of those documents to the Plaintiffs.**

**2. That the Defendants within 7 days of the date of this order disclose to the Plaintiffs in the manner set out in paragraph 5 hereof the data base ("Data**

Base”) maintained by the Respondents in conducting the Stantium Business as pleaded in paragraph 23(d) of the Statement of Claim;

3. That the Defendants be at liberty to exclude from that Data Base any information or documents from the Data Base for which there is claim for legal professional privilege and serve on the Plaintiffs a list describing the documents for which there is a claim for legal profession privilege.
4. That the Defendants within 7 days of this order disclose to the Plaintiffs in the manner set out in paragraph 5 hereof the hard drives partitions and backups (“Hard Drives”) which have been maintained by the Respondents in conducting the Stantium Business as pleaded in paragraph 23(d) of the Statement of Claim.
5. That the Defendants make disclosure of the Data Base and Hard Drives by:
  - (a) Producing within seven (7) days of the date of the order such Data Base and those parts of the Hard Drive directly relevant to the issues in the proceeding during business hours and that a nominated person of the Plaintiffs be at liberty to inspect them and take copies of them on behalf of the Plaintiffs;
  - (b) Providing in writing, within seven (7) days of the date of the order, to the Plaintiffs solicitors the password(s) to access any data or files on such data base, hard drive partitions or backups.
6. Liberty to apply on two days’ notice.
7. The Defendants pay the costs of the Plaintiffs of the Application.

CATCHWORDS: PROCEDURE – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION – GENERALLY – where applicants claim restraint of information or knowledge gained by respondent during course of trusteeship – where applicants seek disclosure, among others, of computer files and documents in original electronic form – whether relief from disclosure of the whole document should be granted

*Uniform Civil Procedure Rules 1999 (Qld) r 211*  
*Acts Interpretation Act 1954 (Qld) s 36*

*Telstra Corporation v Australis Media Holdings* (Unreported, Supreme Court of New South Wales, McLelland CJ in Eq, 10 February 1997), considered  
*Australian Competition and Consumer Commission v McMahon Services Pty Ltd* [2004] FCA 353, considered

COUNSEL: P P McQuade for the applicant  
M K Stunden for the respondent

SOLICITORS: Hawthorn Cuppage & Badgery for the applicant  
Nicol Robinson Halletts for the respondent

- [1] **MACKENZIE J:** This is an application for further disclosure of a variety of documents in a claim for orders restraining the respondents from providing financial planning or risk management advice to specific former clients of the applicants, soliciting clients of the applicants, and using information or knowledge regarding the respondents' clients gained as a trustee of a trust of which the first respondent was a member along with the applicants.
- [2] On Friday 21 October 2005, the first respondent and the applicants had discussions about the first respondent's future with the business ("the firm") run by the trust. The first respondent told the other trustees that he was considering his future and would give his decision on the following Monday, 24 October 2005. His decision was that he wanted to leave the firm. According to him, although he was willing to stay for a transitional period, the applicants purported to terminate his trusteeship and excluded him from the premises immediately.
- [3] The first respondent set up his own business, using the second respondent as the vehicle, and, to put it neutrally, business was conducted with persons who had been clients of the firm where he had previously worked. It is alleged that he used information or knowledge gained as a trustee and took advantage of his fiduciary position. This was denied by the first respondent.
- [4] There is evidence that over the weekend between the discussion on the Friday and the decision being announced on the Monday, a number of computerised files and documents were accessed, a large proportion of which were accessed in the early hours of the morning on 22 October 2005. The whole database was exported to a zip file, which is a file compacted to facilitate transport of it by email or disc. There was information in the database which included clients' personal details, contact details and other client and non-client, but business related, information. Files relating to commission were also accessed.
- [5] Mr Johnson, who provided computer and network support for the firm deposes that the first respondent had a facility to gain remote access to the terminal server and to his personal office computer if it was switched on. By accessing both the profile used when accessing the terminal server and the profile for local access to the work station from within the office, it is possible to identify the date and time a file or

document was accessed or created. If there was remote access to the personal computer, a record of accessing or creating files appears in the profile for the local login for the work station but not in the profile for the terminal server. Mr Johnson also deposed that, in his experience, times shown as times of accessing were accurate within a range of about 10 minutes.

- [6] It seems to be common ground that the first respondent was authorised in the course of his duties to access the firm's computer records and, when necessary, to transmit parts of them to an external organisation which seems to be the supplier of the program used when problems arose. The work was often done at night to avoid interference with normal business operations applicants. However, the applicants rely on the timing of access over the weekend when the first respondent's position with the firm was under consideration as a cause for suspicion.
- [7] Four classes of documents were sought in the application. The first relates to documents concerning the purchase of software of the same kind as that used by the firm. According to the applicants, copies of the documents were belatedly conceded by the respondents to be relevant prior to this hearing. Logically, if there is an allegation that the respondent had engaged in prior planning to set up his own business and that was in issue, and documents tended to disprove that an essential resource, a computer program, was purchased before the respondent left the firm, it would seem, on the face of it, to be correct to concede that documents relating to the purchase would be directly relevant and liable to disclosure.
- [8] The second relates to attachments to the email letters and faxes identified in the list of documents. According to the applicants, they tend to prove or disprove what was sent to their former clients and whether the first respondent took the firm's client list or database. It was admitted in the defence that client election forms or a form requiring transfer of servicing rights was sent to the clients. One of the contentious issues is whether the electronic form of the documents must be disclosed. One of the submissions made is that, if that is so, the application does not extend to them. In my view, given the definition of document in s 36 of the *Acts Interpretation Act 1954* they should be disclosed in a form that allows the documents to be read by opening the electronic documents and their attachments, if any. The initial response made in correspondence that the request was "fishing" was not expressly raised in the respondents' written submissions. In my view the documents are disclosable.
- [9] The third class sought is the authorised representative statements from 25 October 2005 to date sent to the respondents. These documents are sent to the authorised representative and record the date of appointment of the client, a summary of remuneration per product, and the date of commission, the client, and earnings. It is said that these documents are directly relevant to matters in issue, namely whether as a result of the use of confidential information or knowledge of the firm by the respondent, clients of the firm transferred their business to his business, and the question of loss or damage or equitable relief.
- [10] The respondent did not resist the proposition that information directly relevant to those issues was disclosable and that some of the information was directly relevant. A CD containing extracts of the information in the documents which related to former clients of the firm was provided in spreadsheet form. Provision of the full sheets is resisted because the sheets also include information interspersed with

directly relevant information, about clients who were not former clients of the firm. An offer to disclose the documents themselves with those details masked had been made prior to the hearing.

[11] However, the applicants claim that they are entitled to disclosure of the documents in their unedited form, especially where no concerns over commercial sensitivity unable to be protected by the implied undertaking with respect to use of disclosed information had been identified by the respondents. In the absence of anything more, it was submitted that the right to mask portions of the documents should not be extended to the respondents.

[12] Reliance was placed particularly on *Telstra Corporation v Australis Media Holdings* (Unreported, Supreme Court of New South Wales, McLelland CJ in Eq, 10 February 1997) and *Australian Competition and Consumer Commission v McMahon Services Pty Ltd* [2004] FCA 353 (Selway J) as expressions of a practice that, generally, if a document contains discoverable material, the whole of the document should be disclosed. McLelland CJ in Eq, in the context of disclosure of classes of documents where it was not necessary to consider relevance to a fact or facts in issue as such, referred to the following as matters relevant to consideration of relief from disclosure of the whole of the document:

- “(a) Whether the part of a document sought to be excluded from production contains material which contributes to the document’s satisfying any of the criteria of the description which renders it discoverable;
- (b) Whether the exclusion of that part will, or is likely to, detract from a proper understanding of the meaning and significance of those parts of the document which do contribute to the satisfying of any of those criteria; and
- (c) Whether it is apparent that there are, or may be, substantial privacy or confidentiality interests which ought to be given protection.”

[13] The duty under r 211 *UCPR* to which a party to a proceeding is subject is to disclose to each other party each document in the possession or under control of the party which is directly relevant to an allegation in issue in the pleadings. When a document fitting that description contains extraneous material which may be irrelevant to an allegation in issue in the pleadings it is salutary to keep in mind another passage of McLelland CJ in Eq’s judgment in *Telstra* in which he emphasises the need for caution in exercising a discretion to allow parts of a documents to be concealed. He said:

“There is a serious risk that too assiduous a masking of documents on the grounds of irrelevance will create gaps affecting the ready comprehensibility of the remaining portions of the document and of the context in which those portions appear. If for this, or any other, reason, masking on the ground of alleged irrelevance would detract from a proper understanding of the meaning and significance of the admittedly relevant parts of the document, then such masking is not justified.”

[14] As the matter stands, I am not persuaded either that the difficulty referred to in that passage will be avoided or that anything that has been placed before me by the

respondents leads to the conclusion that disclosure of the documents in their original form should not be made.

- [15] The fourth category concerns the respondents' database, hard drive partitions and backups. It is said that they are directly relevant to the allegations in issue, one being that the first respondent planned to cease being a trustee and establish his own financial services advice business similar to that of the firm and was planning to take its clients for whom he was nominated authorised representative. It was submitted that it was also relevant to the allegation that he had copied the firm's database or compiled lists of clients' information. It appears not to have been in dispute that the hard drive partitions and backups are "documents", since the respondents have also sought access to the firm's hard drive and servers. The definition of "document" in s 36 *Acts Interpretation Act* appears to support this view.
- [16] In this instance, I am satisfied that, in principle, the applicants are entitled to disclosure of what is sought, subject to the restriction that the obligation extends only to those parts directly relevant to issues in the proceedings. The likelihood implicit in the evidence that there are areas that can be discretely identified as directly relevant to issues in the proceeding and ones which can be identified as not directly relevant enables a distinction to be made between the obligation of disclosure in this category and the principle discussed above with regard to the third category of documents.
- [17] In case there is any difficulty in the implementation of this or other parts of the order, or a need to refine what is required to be disclosed once the structure of the documents in the fourth category is more fully understood, I intend to include a provision for liberty to apply. The draft provided by the applicants was adverted to during submissions. The order reflects the amended form of the order that in my view is appropriate.
- [18] Accordingly the following orders are made:
1. That the Defendants within 7 days of the date of this order disclose to the Plaintiffs:
    - (a) The documents, including in native format, being the attachments to the email, letters and faxes identified in the Defendants' List of Documents dated 13 June 2006 at numbers 21, 22, 24, 28, 29, 30, 33, 48, 49, 50, 54, 55, 56, 57, 58, 59, 74, 75, 76, 77, 78, 79, 88, 89, 90, 91, 93, 94, 96, 101, 106, 107, 108, 109, 120, 121, 123, 127, 128, 133, 143, 153, 159, 166, 181, 206, 228, 232, 314.
    - (b) The documents described as the 'Authorised Representative Statement', by producing a copy of those documents to the Plaintiffs.
  2. That the Defendants within 7 days of the date of this order disclose to the Plaintiffs in the manner set out in paragraph 5 hereof the data base ("**Data Base**") maintained by the Respondents in conducting the Stantium Business as pleaded in paragraph 23(d) of the Statement of Claim;

3. That the Defendants be at liberty to exclude from that Data Base any information or documents from the Data Base for which there is claim for legal professional privilege and serve on the Plaintiffs a list describing the documents for which there is a claim for legal profession privilege.
4. That the Defendants within 7 days of this order disclose to the Plaintiffs in the manner set out in paragraph 5 hereof the hard drives partitions and backups ("**Hard Drives**") which have been maintained by the Respondents in conducting the Stantium Business as pleaded in paragraph 23(d) of the Statement of Claim.
5. That the Defendants make disclosure of the Data Base and Hard Drives by:
  - (a) Producing within seven (7) days of the date of the order such Data Base and those parts of the Hard Drive directly relevant to the issues in the proceeding during business hours and that a nominated person of the Plaintiffs be at liberty to inspect them and take copies of them on behalf of the Plaintiffs;
  - (b) Providing in writing, within seven (7) days of the date of the order, to the Plaintiffs solicitors the password(s) to access any data or files on such data base, hard drive partitions or backups.
6. Liberty to apply on two days' notice.
7. The Defendants pay the costs of the Plaintiffs of the Application.