SUPREME COURT OF QUEENSLAND

CITATION:	*BSO Network Inc v EMClarity Pty Ltd* [2020] QSC 186
PARTIES:	**BSO NETWORK INC COMPANY NO. 4980727** (First Plaintiff) **APSARA NETWORKS INC** (Second Plaintiff) AND **EMCLARITY PTY LTD ACN 88 139 128 180** (Defendant)
FILE NO/S:	BS No 12112 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane Supreme Court
DELIVERED ON:	19 June 2020
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2020
JUDGE:	Brown J
ORDER:	**The order of the Court is that:** **1. These reasons are only to be published to the parties until further order.** **2. The matter will be listed for mention on Monday, 22 June 2020 for submissions as to costs and the appropriate form of order.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – DISCOVERY AND INTERROGATORIES – DISCOVERY AND INSPECTION OF DOCUMENTS – PRODUCTION AND INSPECTION OF DOCUMENTS – DOCUMENTS IN POSSESSION OF NON-PARTY – where plaintiffs claim for specific performance and breach of confidence – where plaintiff alleges objective likelihood of noncompliance with r 211 –

where documents would be with third-party in United States – where defendant subsidiary of third-party – whether defendant should disclose documents in identified categories – whether a *Sabre* order should be granted against Unites States parent company

Uniform Civil Procedure Rules 1999 (Qld) r 211, r 223, r 367

Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 3) (2013) 306 ALR 414, considered
Ceneavenue Pty Ltd v Martin [2008] SASC 332, cited
Harris v Australand [2010] QSC 385, considered
In the matter of Kavia Holdings Pty Limited (Administrators Appointed) (Receivers and Managers appointed) [2013] NSWSC 1269, considered
Integrated Medical Technology Pty Ltd v Gilbert (No 2) [2015] QSC 124, considered
McGoldrick v Sports TG Pty Ltd [2019] NSWSC 1154, considered
Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd [2001] 1 Qd R 276; [1999] QCA 276, considered
Psalidis v Norwich Union Life Australia Ltd (2009) 29 VR 123, considered
Sabre Corporation Pty Ltd v Russ Calvin's Haircare Company (1993) 46 FCR 428, followed
Sogelease Australia Ltd v Griffin [2003] NSWSC 178, considered
The Queensland Local Government Superannuation Board v Allen [2016] QCA 325, cited

COUNSEL: D O'Brien QC with F Lubett for the plaintiffs
G Beacham QC with G Coveney for the defendant

SOLICITORS: Johnson Winter & Slattery for the plaintiffs
Ashurst Australia for the defendant

Application

[1] The Plaintiffs seek orders requiring the Defendant (**EMC**) to:

(a) complete disclosure as required by r 211 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) which it contends if viewed objectively, is likely to be incomplete; or

(b) request certain documents from its parent company, McKay Brothers LLC (**McKay**) which it contends are directly relevant to the issues in the proceeding, and are likely to be in the possession of McKay (a *Sabre* order).

Background

[2] The following matters are a summary of allegations made in the Amended Statement of Claim (ASOC).

[3] The Plaintiffs and EMC entered into agreements in relation to the development (**Development Agreement**) and supply of a new product (**Supply Agreements**). Due to confidentiality issues I will refer to the product, the subject of the agreements, as "P".

[4] McKay is an American Company. The First Plaintiff, BSO Network, and McKay are said to be competitors within the NJ Equity Triangle.

[5] McKay acquired 100 percent of EMC on or about 27 September 2019. Subsequent to the takeover, the Defendant's board appointed four new directors which, included two senior executives of McKay, Dr Tyc and Dr Meade and a senior employee of an affiliate company of McKay, Mr Boyle.

[6] In a telephone conversation of 8 October 2019 with the Plaintiffs and EMC representatives, it is alleged that Dr Meade informed the plaintiffs that McKay was going to start a quality assessment project. Soon after the conversation, Dr Baines of EMC informed the plaintiffs that the Board had resolved that it was implementing a "Quality Review" in relation to its products (the **Quality Review**).

[7] The Plaintiffs allege that EMC, by its conduct in subjecting P to the Quality Review, or alternatively, delaying the development and shipment of P because of the Quality Review, has breached the Development Agreement and/or the two subsequent Supply Agreements. It further claims that the Plaintiffs hold a reasonable belief that EMC will commit further breaches of the Development and/or Supply Agreements by delaying development and shipment of P.

[8] The relief sought by the Plaintiffs includes seeking an order for specific performance of the Development Agreement and Supply Agreements and damages as a result of the breach.

[9] The Plaintiffs also allege that EMC breached confidentiality provisions and its duty of confidence by providing confidential information in relation to P and the terms of the Development Agreement and other documents to McKay. They further allege that the Plaintiffs hold a reasonable belief that the Defendant will commit further breaches. Permanent injunctions are sought against EMC, preventing EMC from using the Plaintiffs' confidential information or supplying P to McKay.

Disclosure by EMC

[10] The parties exchanged critical documents and subsequently completed disclosure by reference to the rules contained in the UCPR.

[11] The Plaintiffs contend that EMC has failed to make complete disclosure by failing to disclose five categories of documents outlined in this application.

[12] The Defendant resists the application on the basis that the documents sought are not directly relevant to the matters in issue in the pleadings or that the categories are too broad and/or there is no objective likelihood that they exist.

[13] Rule 211(1)(b) of the UCPR requires that documents that are 'directly relevant to an allegation in issue in the pleadings' be disclosed. In *The Queensland Local Government Superannuation Board v Allen*,[1] Burns J (with whom McMurdo P and Philippides JA agreed) said that:

> "The touchstone of a party's obligation to give disclosure of a document is direct relevance to an allegation in issue on the pleadings. A document will be directly relevant in that sense if it tends to prove or disprove such an allegation." (citations omitted)

[14] Rule 223(4) of the UCPR provides that the court can order a party to disclose documents only if:

> (a) there are special circumstances and the interests of justice require it; or
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> (b) it appears that there is an objective likelihood that:
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> (i) the duty of disclosure has not been complied with; or
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> (ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party.

[15] Satisfaction of r 223(4) is a precondition to an order for further disclosure being made.[2]

[16] The Plaintiffs contend that there is an objective likelihood that the duty of disclosure has not been complied with by EMC. In order to establish an objective likelihood of non-compliance there must be something more than mere suspicion to justify granting relief to a party complaining of incomplete disclosure.[3]

[17] The Plaintiffs rely on a number of paragraphs of the ASOC to demonstrate that the categories of documents are directly relevant.[4] In relation to category 4, the Plaintiffs modified the scope of the documents sought in oral submissions conceding those categories as drafted are too wide. They further conceded that they

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1 [2016] QCA 325 at [74].

2 *Intergrated Medical Technology Pty Ltd v Gilbert (no 2)* [2015] QSC 124 at [9].

3 *Mercantile Mutual Custodians Pty Ltd v Village/Nine Network Restaurants & Bars Pty Ltd* [2001] 1 Qd R 276 at 283 per Pincus JA.

4 Plaintiffs' Outline of Submissions [34] and [35], [42] and [43].

only sought documents from McKay or Presido Brothers LLC which was an intermediary company used by McKay to acquire their shares.

[18] In relation to an objective likelihood that complete disclosure has not been made, the Plaintiffs contend that it is supported by the fact that the EMC have only disclosed emails where at least one of the recipients is an EMC representative (and who is not also a McKay Affiliated Director). In particular, the Plaintiffs state that EMC has not disclosed any written communications between the McKay Affiliated Directors themselves, whether emails, text messages, or otherwise. Nor has EMC disclosed any email, documents or texts sent or received by the McKay Affiliated Directors from other McKay directors or employees in relation to the performance of their role on the Board of EMC and the business of EMC, including the Agreements with the Plaintiffs and the Quality Review. The Plaintiffs claim such communication would have been sent or received in the McKay Associated Directors' capacity as a director of EMC, even if also sent or received in their capacity as a director of McKay and that those communications would be disclosable.

[19] The Plaintiffs further rely on the fact that an affidavit sworn by Ms Pedler, who is a partner of Ashurst, in relation to the disclosure by the Defendant is noticeably silent on whether or not EMC has taken any steps to ask all of its directors for relevant emails from their non-EMC email accounts or for relevant text messages. Nor does Ms Pedler depose to being instructed that EMC has conducted the necessary enquiries for documents and has disclosed all documents that meet the five categories.

[20] If directors of EMC received emails on behalf of EMC or in their dual roles, albeit using a different email address such as the McKay email address, the emails would be found in the records of EMC and would be within the control of EMC in the sense that it has the enforceable right to inspect the document.[5]

[21] To support the fact that there is an objective likelihood that the duty of disclosure has not been complied with, the Plaintiffs contend that it is inconsistent with commercial experience to suggest that there were no communications between the directors affiliated with McKay about EMC and P. The Plaintiffs rely on the decision of White J in *Ceneavenue Pty Ltd v Martin*,[6] where his Honour stated:

> "An applicant may establish the doubt by demonstrating, amongst other things, that the party making the disclosure has proceeded under some form of misconception, whether as to the nature of the issues arising on the pleadings, or as to the documents which may be directly relevant to those issues, or as to the reach of the rules concerning possession. It may also satisfy the evidential onus by pointing to the documents which one would expect to have come into

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5 *Re Kavia Holdings Pty Ltd (admin apptd) (recrs and mgrs appointed)* [2013] NSWSC 1269 at [44]; *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group pls (no 3)* [2013] 306 ALR 414 at [117].

6 [2008] SASC 332, [12].

> existence in the circumstances of the case by reason of ordinary commercial practice or experience, by reference to the pleadings themselves or by reference to other documents already disclosed."[7]

[22] EMC points to the fact that each of the categories for which disclosure is sought are directed to documents "relating to" various matters. It contends that requiring documents to be disclosed by reference to such a broad phrase would result in documents having to be disclosed which would go beyond the test of "direct relevance".

[23] It further contends that given that the extent of a party's disclosure obligations are determined by ascertaining and identifying the "allegations in issue" from the pleadings, a proper analysis of the pleadings demonstrates that the documents sought are not directly relevant and are therefore not disclosable.

Category 1, 2, 4 and 5

[24] The Plaintiffs contend that the documents in categories 1, 2, 4 and 5 are directly relevant to the issues in dispute on the pleadings because the reasons why McKay acquired EMC and its interest in P technology will be probative of the issues arising out of [7(c)], [47], [48(a)], [48(aa)], [48(b)], [48(1)] and [48(2)] of the ASOC.[8]

[25] Paragraph 7(c) pleads that material that is said to have been provided to EMC by the Plaintiffs was commercially valuable to McKay for a number of reasons, including McKay's interest in the P technology and since no later than 28 May 2019 EMC's P manufacturing capabilities.

[26] Paragraph 47 of the ASOC pleads that subjecting the order of P products to the Quality Review and in the alternative, delaying of the development and shipment of P because of the Quality Review, was a breach of the Development Agreement. In the alternative, it pleads that it amounted to an intention by EMC to undertake its obligations under the Development Agreement in a manner wholly inconsistent with its obligations under that agreement so as to amount to a repudiation by EMC of that agreement.

[27] Paragraph 48 of the ASOC pleads that the Plaintiff holds a reasonable belief that EMC will commit further breaches of the Development Agreement by delaying the development and shipment of P under the agreements referred to. The Plaintiffs allege the Quality Review is not a genuine and/or necessary review of the products to be developed and supplied by EMC. Further that it is a deliberate slowing down

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7 Rule 145 of the *Supreme Court Civil Rules 2006* provided "if there is reason to doubt whether a party has fully complied with the parties' obligations to disclose and produce documents under this part…" the court may make orders to enforce those obligations. White J pointed out that the degree of satisfaction required needed to go beyond the mere possibility that the Plaintiff's disclosure is inadequate. The test is stated in terms of a lower threshold than required under r 223(4) of the UCPR.

8 The issues to which they are said to be probative arising out of the pleading are identified at [42] of the Plaintiff's Outline of Submissions.

of the development of P so as to provide a competitive advantage to McKay in the particular markets identified.[9]

[28] The Plaintiffs rely on a number of matters with respect to the reasonableness of the belief held including that:

(a) McKay only expressed interest in acquiring the Defendant after learning of the P project being undertaken by the Plaintiffs through the CEO of EMC;

(b) McKay knew that P was being developed for the Plaintiffs;

(c) McKay determined to undertake the Quality Review before acquiring EMC and before ascertaining whether there was any reason to delay the production and delivery of P;

(d) McKay determined that it would pause the delivery of P in October 2019;

(e) By the end of October 2019 the Defendant had determined that the supply of P was not a priority and had determined to delay the supply of P to the Plaintiff until the third quarter of 2020 and instead a McKay project was to be given priority.

[29] Paragraph 48(b) of the ASOC pleads that the Plaintiffs hold a reasonable belief that the Defendant will breach the exclusivity provisions of the Development and/or Supply Agreements referred to by providing P to McKay or some other party and pleads the basis for that inference. The basis for the belief is alleged to be that McKay seeks to secure P technology for itself.

Category 1

[30] Category 1 seeks any documents relating to EMC's development of P technology being a factor in McKay's decision to acquire EMC. EMC contends that what motivated McKay is not in issue in the pleading as the ASOC makes no allegation of causation. The Plaintiff accepts that there is no pleading of causation against McKay, but they have pleaded allegations which raise as an issue that McKay brothers acted on the basis of knowledge of the P technology in acquiring EMC.

[31] The Plaintiffs directed the Court in particular to [48(aa)(i)] of the ASOC which pleads that the McKay only expressed an interest in acquiring EMC after learning of the P project being undertaken by the Plaintiffs through Dr Baines. The Defendant contends the pleading is only as to the timing of the acquisition not what motivated it. It further states that there is no direct allegation of how it would cause the Defendant to breach its contract.

[32] While the Plaintiffs do not plead that McKay only expressed an interest in acquiring EMC <u>because of</u> the P project, the pleading of the word "only" in "<u>only</u> expressed interest" after learning of the project, does raise the issue of whether the knowledge of the development of P technology by the Plaintiffs through EMC was a factor in McKay's acquisition of EMC. That is alleged to be one of the bases for the

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9 [48(aa)(1) and 48(aa)(2)] of the ASOC.

reasonableness of the belief held by the Plaintiffs about EMC's predicted conduct in the future and in particular that it is one of the factors which leads to the Plaintiffs holding the belief that EMC will commit further breaches of the Development Agreement or Supply Agreements in the future. It is a fact which supports the reasonableness of the belief held by the Plaintiffs and the genuineness of the Quality Review. The fact it relates to EMC's predicted conduct, not McKay's, does not result in it not being directly relevant. The pleaded relationship between EMC and McKay as a result of the takeover which, according to the Plaintiffs, pleaded case has resulted in McKay's interests taking precedence to or influencing EMCs conduct in relation to the Development Agreement and/or Supply Agreements with a competitor, namely the First Plaintiff. I am satisfied that the documents in category 1 would prove or disprove the allegations relied upon and are directly relevant to any matter pleaded in the ASOC.

[33] I consider that the Plaintiffs have established an objective likelihood that EMC has not complied with its obligation of disclosure. In this regard, Ms Pedler has only deposed to the fact documents annexed to Mr Piesiewicz, which he says are relevant to this category. Ms Pedler, consistent with the Defendant's position that they are not directly relevant, has not deposed to the fact that they have all been discovered supports the fact full disclosure has not been made. The existence of the emails in May and July 2019 prior to the due diligence supports the objective likelihood further communications or documents exist in relation to this category. There is an objective likelihood that EMC would have in its possession or control documents relating to McKay's motivation for seeking to acquire EMC, particularly given the period of due diligence before the acquisition and that they would not only be within McKay's possession or control. The Plaintiffs therefore have discharged the onus of showing that EMC has breached its duty of disclosure in relation to category 1.

[34] EMC contends that the work "relating to" is too broad and vague. That certainly can be the case depending on the context in which it is used. However, the scope of what the documents are to relate to is clearly defined and I do not consider that the reference to "relating to" needs to be removed in order to ensure the documents disclosable are directly relevant.

Category 2

[35] Category 2 seeks any documents relating to McKay's consideration of or attempts to develop P technology from 2019 onwards. The Plaintiffs contend that one of the issues arising out the ASOC is whether or not the McKay has incentive to move off of its existing spectrum and move to the P technology.[10] EMC contends that it is not an issue arising out of the pleaded allegations in the ASOC, nor do the Plaintiffs plead that McKay gave any consideration to or attempted to develop P technology from 2019 onwards.

[36] The documents sought in category 2 may have some relevance to the allegation in paragraph 7(c)(iv)(A) of the ASOC which pleads that the confidential material

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[10] Relying on [7(c)] and [48(b)] of the ASOC.

provided by EMC to McKay was of commercial value to them including because of their own interest in P technology and specifically EMC's P technology manufacturing capabilities since no later than 2019. That allegation is supported to some extent by the emails exchanged between Dr Baines and Mr Boyle in May and July 2019 pleaded in the ASOC. However it is an allegation as to the significance of the Plaintiffs' information that is said to have been provided to McKay rather than raising an issue of McKay's consideration of or attempt to develop the P technology.

[37] Paragraph 48(b)(3) pleads that it should be inferred, based on other facts pleaded in [30] – [48(a)] of the ASOC, that McKay is seeking to secure the P technology in anticipation of a future event or to commercially exploit the P technology. The documents sought relating to the consideration of or attempted development of the P technology by McKay would not prove or disprove that allegation although they may prove to be of indirect relevance. That is not however sufficient to meet the threshold. The Plaintiffs also point to the allegation that EMC has given McKay's project prioritisation over the P technology project. That does not raise an issue by which the documents sought would be of direct relevance to an issue on the pleadings. The prioritisation of a McKay project over the Plaintiffs project does not raise an issue of McKay's own consideration of or attempt to develop the P technology. Nor are the documents directly relevant to any of the other issues in dispute which are identified by the Plaintiffs as relevant to this application.

[38] I am not satisfied that the documents sought are directly relevant and I accept EMC's argument in that respect.

Category 3

[39] In contrast to category 2, Ms Pedler has deposed to the fact that all category 3 documents have been disclosed. EMC contends that there is no objective evidence to suggest that further documents exist which have not been disclosed. In terms of objective likelihood the Plaintiffs rely on the fact that there are no documents disclosed between the EMC directors who are affiliates of McKay and/or that one would infer from commercial practice or experience that such documents should exist. In the context of category 3, which relates to documents said to have been provided to McKay by EMC, there is no apparent commercial practice or experience which would suggest that such documents exist. Otherwise, Ms Pedler has sworn that all category 3 documents have been disclosed. I am not satisfied that the Defendant has established any objective likelihood that full disclosure has not been made by EMC.

Category 4

[40] As to category 4, the Plaintiff indicated in oral submissions that the category as drafted was too broad and that it should be confined to any documents relating to any involvement by McKay in relation to the performance of EMC obligations under the Development Agreement or the Supply Agreements. EMC contends that even with that narrower scope, the category is not directly relevant to any matters pleaded.

[41] The Plaintiff particularly relies on references by Mr Boyle of EMCs exploitation of P technology for themselves and to EMC determining the supply of P was not a priority, notwithstanding the Development Agreement, but instead were prioritising McKay's project.[11]

[42] The fact that EMC has given McKay projects priority or that McKay had expressed interest in P technology and asked about whether the Development Agreement could prevent the P technology being able to be sold is quite different from an allegation of involvement in the performance of the Development Agreement or Supply Agreements. Further, while there are a number of issues pleaded as to EMC's performance of the Development Agreement and Supply Agreements after McKay took EMC over, they are allegations about EMC's conduct, not McKay. There is no allegation of involvement by McKay in the performance of EMC's obligations albeit that the pleading attributes McKay's interest as being relevant to the delayed performance under those agreements. Documents relevant to that prioritisation of McKay's project would be relevant to a fact in issue on the pleadings but that does not raise an issue to which category 4 would be relevant. Similarly the allegations of the involvement of McKay in the Quality Review which is alleged to have had an effect on the performance of EMC in respect of the Development and Supply Agreements is not an allegation of McKay's involvement in the performance of those agreements.

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[11] Amended Statement of Claim, [48(aa)(B)(vii)].

[43] I am not satisfied that the documents sought are not directly relevant to the matters in issues and the Plaintiffs have not discharged the onus of proof that EMC has breached their duty of disclosure.

Category 5

[44] Category 5 seeks that any documents relating to the Quality Review referred to in section K of the Mr Baines affidavit, including:

(a) The reasons for the imposition of the Quality Review;

(b) The conduct, management and progress of the Quality Review; and

(c) The status of the Quality Review.

[45] In that regard, Ms Pedler has sworn to the fact that she had caused to be disclosed on behalf of the Defendant documents in its possession and/or under its control that are responsive to category 5 that are relevant to issues in the proceedings.

[46] The McKay directors were appointed to the EMC Board on 27 September 2019. On 8 October 2019, a telephone conversation took place between Dr Baines, the Managing Director of EMC, Dr Tyc and Dr Meade, who were part of the senior executive management of McKay and on the EMC Board. In that telephone conversation they informed the representatives of the Plaintiffs that McKay was starting a quality assessment project. On 18 October 2019 the EMC Board resolved to pause shipments of products in which a review of the product quality and production process was undertaken and advised the Plaintiffs that there was a pause on all shipments pending the Quality Review.

[47] The conversation between Mr McGowan and Dr Tyc, Dr Meade and Dr Baines notifying of the quality assessment project and delay in shipping took place within 10 days of the acquisition of EMC by McKay and there was a resolution of the Board 8 days later. It is surprising there are no documents between the McKay appointed directors, as it does not accord with ordinary commercial experience that new members of a Board who worked with each other and for the parent company who had just taken over EMC, would not have had any exchange of correspondence between themselves as to the proposed course of action to be adopted in relation to the carrying out of an assessment of the quality of the products of a newly acquired subsidiary where the shipment of products was to be paused before engaging in discussions with the Plaintiffs in that new role.

[48] However, Ms Pedler is a senior practitioner in litigation and would no doubt be well aware of her obligations and those of her clients in relation to disclosure, including where directors are working for the parent company, but are also directors of the subsidiary. While the Plaintiffs raise the fact that she has not deposed to the inquiries she made to satisfy herself that full disclosure has been made, she has sworn that full disclosure has been made of the documents relevant to category 5 which EMC accepts are directly relevant. She was not cross-examined. In the circumstances I am not persuaded that complete disclosure has not been made.

***Sabre* order**

[49] The Plaintiffs contend that the general power to make directions under r 367 of the UCPR empowers the Court to make orders that a party take steps to obtain documents from a third party, such as McKay, which is referred to as a "*Sabre* order". Rule 367 of the UCPR provides the Court with a broad power:

> "The court may make order or direction about the conduct of a proceeding it considers appropriate, even though the order or direction may be inconsistent with another provision of these rules."

[50] In determining whether to make an order, or direction under r 367 of the UCPR, the interests of justice are paramount.[12] The application of the rule must be considered in the context of the stated purpose of the rules in r 5 to "facilitate the just and expeditious resolution of the real issues in civil proceedings at a minimum expense".[13]

[51] In *Harris v Australand*,[14] Wilson J considered that r 367 of UCPR provided the Court with the power to order a Plaintiff to make disclosure by counterclaim.

[52] Lockhart J in *Sabre Corporation Pty Ltd v Russ Calvin's Haircare Company*,[15] relying on the general power to make directions under s 23 of the *Federal Court of Australia Act*, ordered an Australian corporation to request a United States corporation to produce documents relevant to the proceedings. Section 23 provided that the court has power to make orders of such a kind as the court thinks appropriate. His Honour stated that the power "may be exercised where there is a real likelihood that the party to the proceeding against whom the order is made would be given access to the documents by the third party upon request".[16] In that case, the Court found that it was sufficient to satisfy the "real likelihood" criterion that the Australian corporation had an exclusive distributorship agreement with the United States corporation for the distribution of their hair products. The power to make a *Sabre* order pursuant to the directions power was similarly recognised by Palmer J in *Sogelease Australia Ltd v Griffin*.[17]

[53] Section 61 of the *Civil Procedure Act* 2005 (NSW) empowers the court, by order, to give such directions as it thinks fit for the speedy determination of the real issues between the parties of proceedings. Section 61 was relied upon by Ierace J to make a *Sabre* order in *McGoldrick v Sports TG Pty Ltd*,[18] requiring a subsidiary to request documents from its parent company. In that case, his Honour stated that a *Sabre* order should only be considered after inter-parties discovery has taken place. He then identified six matters which are relevant to the Court's consideration as to whether to make the order.[19] The matters his Honour identified are:

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12 *Uniform Civil Procedure Rules* 1999 (Qld) at r 367(2).

13 *Barker v Linklater* [2005] 1 Qd R 405; [2007] QCA 363 at [53].

14 [2010] QSC 385.

15 (1993) 46 FCR 428.

16 (1993) 46 FCR 428 at 432.

17 [2003] NSWSC 178 at [37] referred to with approval by Ward J in *Bova v Avarti* [2009] NSWSC 921 at [373].

18 [2019] NSWSC 1154.

19 *McGoldrick v Sports TG Pty Ltd* [2019] NSWSC 1154 at [25] – [30].

(a) There must be a real likelihood that the documents sought are in fact in existence in the possession of a third party;

(b) There must be a real likelihood that the party to the proceeding would be given access to the documents on request;

(c) The order must be restricted to requiring the person against whom it is made to take all reasonable steps to obtain the documents;

(d) The documents must be relevant to the issues in dispute;

(e) The court must consider whether or not the documents are necessary for disposing fairly of the proceedings; and

(f) The court must consider the degree of oppression and hardship that would be occasioned to the third party by the making of such an order.

[54] The making of such orders are exceptional and discretionary.[20] In *Psalidis*,[21] Cavanough J, however, stated that most cases where a *Sabre* order has been sought are those where there has been a real difficulty about using the ordinary processes of party-party discovery, third party discovery or subpoenas to obtain the relevant information or documents. A typical example is where the documents are overseas and in the possession of some person or entity not readily amenable to the ordinary processes of jurisdiction.

[55] I am satisfied that r 367 of the UCPR empowers the Court to make a *Sabre* Order if it is in the interests of justice to do so and that the considerations identified by Ierace J in *McGoldrick* are relevant considerations in determining whether to make such an order.

Should a Sabre Order be granted?

[56] McKay is the parent company of EMC and has three nominated directors on the Board of EMC.

[57] Categories 1, 3 and 5 are the only relevant categories for consideration in relation to the *Sabre* Orders, given that they are the only categories where I am satisfied the documents sought are directly relevant to the issues in dispute.

[58] As to category 1, there is evidence supporting that McKay became aware of the existence of P technology in May 2019 through Mr Boyle after an exchange with Dr Baines from EMC and expressed interest in its possible commercialisation. He later made inquiries in relation to whether or not P technology would be saleable, as is apparent from the emails of 18 July 2019. Soon after the purchase of EMC by McKay, emails were sent by EMC representatives to McKay's representatives referring to discussions about the cost of using a particular alloy in P.[22] That

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20 *Psalidis v Norwich Union Life Australia Ltd* (2009) 29 VR 123 at [124].

21 *Psalidis v Norwich Union Life Australia Ltd* (2009) 29 VR 123 at [124].

22 Pleaded at 30K of the ASOC.

supports the fact that the P technology was potentially a factor that influenced the purchase by EMC. Those documents would support the likelihood of the existence of documents in category 1 within McKay's possession. I consider there is a real likelihood that documents in category 1 will be within the possession of McKay.

[59] As to the documents in category 3, there is nothing to suggest that there are documents that would be likely to be in the possession McKay, additional to those disclosed by EMC. I am therefore satisfied that no order should be made in relation to that category.

[60] In relation to category 5 there is evidence that as a result of the McKay takeover that the Quality Review and the pause in shipment was instigated by the McKay appointed Directors, given the timing of the Quality Review and the involvement of Dr Tyc and Dr Meade in the conversation with the Plaintiffs on 8 October 2019 some two weeks after the takeover and the EMC Board resolution passed on 18 October 2019. Prior to acquiring EMC, McKay had carried out due diligence. Dr Meade had informed Dr Baines by email on 5 October 2019, 8 days after taking over EMC that "We will pause delivery of all new units they [the Plaintiffs] ordered while we review the quality of the products and processes." It may be inferred that the Quality Review was an issue of importance to McKay given that it was sought to be implemented so quickly after the takeover. While the Quality Review is one being undertaken by EMC there is evidence from which I infer McKay had a role in determining that it should occur and it is likely that there were communications within McKay about the review given the immediacy of the steps taken to implement it. It is also likely that reports or communications are made by the McKay appointed directors to the McKay management of the progress and status of the review in light of its genesis.

[61] I therefore consider that there is an objective likelihood that documents sought in category 5 are in existence and in the possession of McKay, which would be additional to those documents that would be disclosable by EMC, particularly given no document has been disclosed stating the reason for the review. It would fly in the face of commercial experience and corporate practice, particularly given EMC is in Australia while McKay is in the United States, that such documents would not exist within McKay.[23] However, the category should be confined to documents "identifying" the matters in (a)–(c) not as "including" those documents.

[62] As is apparent from the above discussion, I am satisfied that the documents in categories 1 and 5 are relevant to the issues in dispute and that they are necessary for fairly disposing of the proceedings. These are matters which need to be resolved in these proceedings and the documents sought are relevant to that resolution.

[63] As to the real likelihood that EMC would be given access to the documents upon request, there is evidence from which I infer that there is a real likelihood that EMC would be given access to the documents upon request. The members on the EMC Board are Dr Tyc and Dr Meade, who are cofounders of McKay, and Mr Boyle, who is an employee of an affiliate of McKay. It may be inferred that McKay is

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[23] Amended Statement of Claim at [39].

providing assistance in the proceedings insofar as Mr Boyle has provided a draft affidavit in these proceedings.[24] Given that EMC is a wholly owned subsidiary of McKay and the fact that McKay executives and Mr Boyle are on the EMC Board and it is in both entities' interests the matters be resolved, particularly given EMC and McKay Brothers had an existing business relationship before these matters arose. I consider that while McKay will not be compelled to provide the documents requested, there is a real likelihood that they would give EMC access to any documents, upon request, in the categories identified. Although the solicitors for EMC have stated that it was not in a position to compel McKay to provide it with any documents,[25] that is not relevant to this question.

[64] Given the limited nature of the documents to be requested and the limited time period, the likely cost and time of locating the documents sought and producing them to EMC is unlikely to be onerous. In the context of the specific nature of the documents described in category 1, I do not consider that the reference to "relating to" broadens the category such that it is not directly relevant or too onerous. I do not consider the order would be oppressive or create hardship. I will hear submissions from the parties as to whether the order should provide for the Plaintiffs to pay McKay's reasonable costs.

[65] While the *Sabre* Order is an order only granted in very specific circumstances the present case is one which meets the criteria for the making of such an order. McKay has had a role in the matters which have given rise to these proceedings and the pleaded allegations. That is not to suggest that role is an improper one but that the provision of the documents in category 1 and 5 will assist in the resolution of the issues between the parties to the proceedings. The proceedings are being vigorously defended by EMC. Given that it is the parent company of the Defendant, which is located in the United States where applications for non-party production of documents cannot be readily made, and that this matter has been brought on for trial relatively quickly with a trial commencing on 20 July 2020, it is a case where I consider that it is in the interests of justice to make the order and I will exercise my discretion accordingly.

[66] The Order will only be directed to McKay as there is no evidence of involvement by any other related entities of McKay having involvement in the issues to be determined in these proceedings.

[67] The draft order provides for EMC to request the relevant documents from McKay within five business days of the order being made. That is a reasonable time period. The order should provide for EMC to file and serve an affidavit of the steps taken to obtain the documents and any documents provided 14 days after that request has been made.

Conclusion

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24 As to which see *McGoldrick v Sports TG Pty Limited* [2019] NSWSC 1154; *Gambro Pty Ltd v Fresenius Medical Care Australia Pty Ltd* [2002] FCA 58 at [17].

25 Fourth Affidavit of Piesiewicz, at [12]–[13], and exhibit APP4 at p 17.

[68] Given the above reasons, the Court will order further disclosure be made by EMC and a *Sabre* order will be made. These reasons will be published to the parties only until Monday, 22 June 2020, to permit the parties to consider whether they contain any confidential matters. I will list the matter for mention on 22 June 2020 at 9.15am to hear the parties in relation to that matter, the form of order and in relation to costs.

[69] Having heard the parties further and being satisfied that some references in the reasons revealed confidential information containing commercially sensitive information, those references have been removed from the published reasons.