Young Lawyers Seminar on Discovery

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Introduction

1. This paper is a discussion of the principles of discovery and the relevant provisions of the *Civil Procedure Act* 2005 ("the Act") and the *Uniform Civil Procedure Rules* ("the Rules"). This paper will not review electronic discovery that has yet to be fully implemented by the courts in NSW. This paper will review the two types of discovery available under the Rules being:

    a. Preliminary discovery in Part 5 of the Rules.
    b. Discovery in the course of proceedings in Part 21 of the Rules.

2. Discovery historically originated in the ecclesiastical courts and Chancery in England. Common law courts could not order discovery until statutory reforms gave that power in the 19th century. The basis for discovery is therefore equitable and it is a substantive right in equity. The principles of equity permitting discovery apply where the rules governing litigation are silent. By requiring parties to disclose documents in existence and relevant to the issues in dispute, the discovery process is crucial to civil litigation as the following advantages flow from it:

    a. it reduces surprise;
    b. it puts the parties on an equal footing at the trial; and
    c. it helps to define the issues.[1]

3. Specific provision is made for discovery in the Rules. The Rules govern the majority of civil litigation in NSW. In accordance with section 4 and Schedule 1 of the Act, the Act and Rules apply to all civil proceedings in the Supreme Court, District Court and the Dust Diseases Tribunal. The Act and Rules apply to proceedings under Class 1 – 4 proceedings in the Land and Environment Court and apply to civil proceedings under Part 7 of the *Local Court Act* and under the *Property (Relationships) Act* 1984. "Civil proceedings" is defined by section 3 of the Act to mean any proceedings other than criminal proceedings. Therefore, the Act and Rules apply to a diverse range of disputes litigated in the civil courts in NSW (except for Federal courts such as the Family Court and Federal Magistrates Court) including tort, equity (including injunctive relief), contract, wills and probate disputes, compensation to relatives for death and insolvency.

4. The application of the Rules to discovery is subject to Part 6 of the Act "Case Management and Interlocutory Matters" which contains sections 56 – 89. Section 56(1) of the Act states that the overriding purpose of the Act and the Rules is to "facilitate the just, quick and cheap resolution of the real issues in the proceedings." Section 56(2) states that the court "must seek to give effect to the overriding purpose when it exercises any power given to it by this Act" or the Rules. This necessarily extends to the statutory powers in the Rules with respect to discovery. Section 57 of the Act refers to the objects of case management and states that proceedings are to be managed having regard to the following objects:

    a. the just determination of the proceedings;
    b. the efficient disposal of the business of the court;
    c. the efficient use of available judicial and administrative resources; and
    d. the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

5. Lastly, section 59 of the Act states that in any proceedings, the practice and procedure of the court should be implemented with an object of eliminating any

lapse of time between the commencement of proceedings and their final determination beyond that reasonably required for interlocutory applications. The process of discovery must therefore be viewed through the prism of the overriding purpose of case management as stipulated by the Act.

Preliminary discovery in Part 5 of the Rules

6. This part of the Rules provides a limited means of preliminary discovery to enable a party to obtain information necessary either to identify a potential defendant or to determine whether to commence proceedings against a prospective defendant (rules 5.1 – 5.3); to obtain orders for discovery against persons who are not party to proceedings (rule 5.4); and to obtain orders ancillary to discovery including for inspection, costs and security for costs and preservation of privilege (rules 5.5 - 5.8). Part 5 has been adapted from Order 15A of the Federal Court Rules. It reflects the general law entitlement to discovery to disclose the identity of a wrongdoer, which is part of a superior court's inherent jurisdiction to see justice done.[2]

7. Rule 5.2 permits orders to be made to ascertain a prospective defendant's identity or whereabouts. It applies if it appears to the court that the applicant, having made reasonable enquiries, is unable to sufficiently ascertain the identity or whereabouts of a person ("the person concerned") for the purposes of commencing proceedings against the person and some other person may have information or may have or have had possession of a document or thing that tends to assist in ascertaining the identity or whereabouts of the person concerned. In these circumstances, the court may make orders under rule 5.2(2) for the other person to attend court to be examined as to the identity or whereabouts of the person concerned or an order that the other person give discovery to the applicant of all documents that are or have been in the other person's possession and that relate to the identity or whereabouts of the person concerned. Rule 5.1 defines "identity or whereabouts" broadly to include "the name and (as applicable) the

place of residence, registered office, place of business or other whereabouts, and the occupation and sex, of the person against whom the applicant desires to bring proceedings, and also whether that person is an individual or corporation."

8. What constitutes "reasonable enquiries" depends on the nature of the information sought and possible sources other than preliminary discovery including Freedom of Information. It is notable that in one instance the problems with FOI applications including delay mean that it was not unreasonable to claim an order under Part 5 of the Rules.[3] Whether an order is to be made will depend on the court exercising its discretion in favour of the applicant. While rule 5.2 does not require an applicant to establish its likely success in the proposed proceedings, it may be required to establish the existence of at least an arguable case against the proposed defendant and an intention to prosecute the cause of action.[4] Pursuant to rule 5.2(7), an application under the rule must be supported by an affidavit stating the facts on which the applicant relies and specifying the kinds of information, documents or things in respect of which the order is sought and must, with the affidavit, be served personally on the other person. Pursuant to rule 5.2(8) an application is to be by way of Notice of Motion where it is in respect of proceedings to which an applicant is a party and, in any other case, by summons.

9. Rule 5.3(1) permits orders to be made for the discovery of documents from a prospective defendant. The rule applies if it appears to the court that the applicant may be entitled to make a claim for relief for the court against a person ("the prospective defendant") but, having made reasonable inquiries, is unable to obtain sufficient information to decide whether or not to commence proceedings against the prospective defendant; further, the prospective defendant may have or have had possession of a document or thing that can assist in determining whether or not the applicant is entitled to make the claim for relief; and lastly inspection of such a document would assist the applicant to make the decision concerned. As the provisions of rule 5.3(1) applies to orders against a prospective defendant to a claim, it does not permit discovery for the purpose of prospective claims against

other parties nor discovery for the purpose of assessing the capacity of the proposed defendant to satisfy a judgment.[5] Rule 5.3(4) states that the rule applies, *mutatis mutandis*, where the applicant is a party to the proceedings and wishes to decide whether or not to claim or cross claim against a person who is not a party to the proceedings.

10. Rule 5.4(1) permits orders for discovery of documents from a person who is not a party to the proceedings but in respect of whom it appears may have or have had possession of a document that relates to any question in the proceedings. This provision is in effect discovery as against non-parties and persons who are not prospective defendants. It entails a greater obligation on the non-party than a subpoena as it avoids the prohibition on "fishing" and the need for particularity. Before an order under rule 5.4 may be made, the applicant must satisfy the court that, firstly, the non-party probably possesses the documents and, secondly, that they do relate to questions in the proceedings.[6] The court may also refuse to make an order for discovery against a non-party where the applicant cannot demonstrate the subject documents are not available from the other parties to the proceedings.[7]

11. Once an order for discovery is made under rule 5.2, 5.3 or 5.4 the process for discovery and inspection is governed by Division 1 of Part 21 of the Rules. Rule 5.6 provides that the court may impose an order that the applicant is to give security for costs of the person against whom the order is made. Such an order is usually made to cover indemnity costs. Rule 5.7 provides that the rules of discovery against a non-party in Part 5 of the Rules do not abrogate the normal entitlement to claim privilege that would apply as if the non-party were a party to the proceedings or had been issued with a subpoena. As such, the usual bases to claim privilege under the *Evidence Act* and the general law apply to the obligation to comply with an order for discovery.

Discovery in the course of proceedings in Part 21 of the Rules

12. Division 1 of Part 21 governs discovery between parties. Rule 21.1 specifies relevance to facts in issue as the criterion of discoverability in compliance with an order under rule 21.2. It excludes from discovery various documents including the pleadings, documents created or served since the commencement of the proceedings and certain classes of original and copied documents. Rules 21.2 – 21.8 permits the court to order discovery of specified classes or examples of documents. Special reasons are required to obtain discovery in personal injury cases. The rules prescribe the formal contents of lists of discovered documents and the verifying affidavit.

13. Rule 21.2 permits the court to order that party B must give discovery to party A of documents within a class or classes specified in the order or one or more samples of documents within such a class (selected in a manner as the court may specify). Rule 21.1 defines party A as the party to whom another party is giving discovery while party B is the party giving discovery. Rule 21.2(3) states that a class of documents may be specified by relevance to one or more facts in issue; by description of the nature of the documents and period in which they were brought into existence; or in such other manner as the court considers appropriate in the circumstances. Rule 21.2(4) states that an order for discovery may not be made in respect of a document unless it is relevant to a fact in issue. Rule 21.1 defines a document or matter to be "relevant to a fact in issue" if it could, or contains material that could, rationally affect the assessment of the probability of the existence of that fact (otherwise than by relating solely to the credibility of a witness), regardless of whether the document or matter would be admissible in evidence.

14. The pre-condition for discoverability under Part 21 of the Rules is whether the document or matter is relevant to a "fact in issue". Relevance is be determined by

capacity of the document or matter to "rationally affect the assessment of the probability of the existence" of a contentious fact. If a document has that capacity it will be "relevant" and thereby satisfies the test of admissibility under sections 55 and 56 of the *Evidence Act* 1995. However, admissibility is not a pre-condition to discoverability and therefore the ambit of discoverability is very wide to the extent that the documents need not be directly probative. The test of discoverability is therefore whether the document is something that would "throw light on the case"? If the answer is "Yes", it is discoverable.[8]

15. Whether a court grants discovery is entirely at its discretion. Rule 21.2 is clear in its words that "the court may" order discovery. Therefore the court will have regard to the competing interests in any application for discovery, the issues in dispute and the surrounding circumstances of the case. The court may limit discovery or delay discovery until a preliminary issue is tried such as liability.[9] The court may also relieve a party from giving discovery where the extent of discovery would be oppressive.[10] The court may also refuse to order or may restrict discovery where the parties to proceedings are trade rivals.[11]

16. Once an order for discovery is made, pursuant to Rule 21.3 within 28 days of the order or such other period as the court orders, party B must comply with the order by serving on party A a list of documents that deals with all of the documents. Rule 21.3(2) provides that the list of documents must be divided into two parts, being Part 1 relating to documents in the possession of party B and Part 2 relating to documents that are not, but have been within the last 6 months prior to the commencement of the proceedings, in the possession of Party B. The list must include a brief description of each document or group of documents (by reference to nature and date or period); must specify against the description of each document or group in Part 2 of the list of documents, the person (if any) who party B believes to be in possession of the document or group of documents; lastly, the list must identify any document that is claimed to be a privileged document and the circumstances under which the privilege arises (e.g.: client

legal privilege under section 118 or 119 of the *Evidence Act*; exclusion of evidence of matters of state under section 130 of the *Evidence Act*.).

17. Pursuant to rule 21.4(1), the list of documents provided by party B must be accompanied by a supporting affidavit and, if a solicitor is acting for party B, a solicitor's certificate of advice. Pursuant to rule 21.4(2), the affidavit provided by party B must state that the deponent:

    a. has made reasonable enquiries as to the documents referred to in the order; and
    b. believes there are no documents (other than excluded documents) falling within any of the classes specified in the order, or that within the last 6 months before the commencement of the proceedings have been, in the possession of party B; and
    c. believes that the documents in Part 1 are within the possession of party B; and
    d. believes that the documents in Part 2 are within the possession of the person(s) specified; and
    e. as to any document in Part 2 as to which no person is specified, has no belief as to whose possession the document is in.

18. The affidavit must also state the facts relied upon to support any claim for privilege. The solicitor's certificate must state that the solicitor has advised party B as to the obligations under an order for discovery (including which corporate officers have been advised) and that the solicitor is not aware of any documents within any of the classes specified in the order that are, or within the last 6 months before the commencement of the proceedings have been, in the possession of party B. The solicitor's certificate reinforces the solicitor's positive duty to ensure that all relevant documents are disclosed. To properly discharge this duty, the solicitor must make an independent appraisal of the case, assess what the client is likely to have and form an opinion as to whether any material has been left out.[12]

If a discoverable document is found after discovery has been given, the solicitor's duty is to serve a supplementary list of documents.[13]

19. Rule 21.5(1) requires that party B must ensure that the documents described in Part 1 of the list of documents (other than the privileged documents) are to be physically kept in a way that makes the documents readily accessible and capable of convenient inspection by party A and are identified in a way that makes the documents easily retrieved. Rule 21.5(2) provides that within 21 days after service of the list of documents (or such other period as the court specifies), party B must on request by party A produce for inspection the documents; make available a person who can explain the way the documents are arranged and assist in the process of identifying the documents; provide facilities for inspection and copying; and provide copies subject to costs.

20. Rule 21.8 provides that if after initial disclosure a document is in party B's possession but has not been disclosed or is claimed to be privileged when it is not, then party B must give written notice and comply with rule 21.5.

21. It is important to note that rule 21.7 provides that no copy of a document, or information from a document, obtained by party A as a result of discovery by party B is to be disclosed or used otherwise than for the purposes of the conduct of the proceedings, except by leave of the court, unless the document has been received into open court. This rule prevents the use of discovered documents for "collateral" or "improper" purposes, being purposes outside the scope of the proceedings for which the documents were discovered.

22. Historically, discovered documents could be used for any purpose in the absence of an undertaking to the contrary. The practice of requiring an undertaking as part of the discovery application developed in the 19th century, possibly as a corollary of an industrialized, mercantilist society in which information could be used against a commercial competitor. It is now the general law that documents that are

the subject of discovery are subject to an implied undertaking that they will not be used for a collateral or improper purpose.[14] This implied undertaking extends beyond the parties to the litigation to incorporate anyone who obtains the documents knowing they were discovered, such as an industrial advocate[15]; a party's solicitor[16]; the managing director of a company that is a party[17]; and a managing director who is also an adviser to the ultimate holding company. [18] The undertaking is not limited to *mala fides* or deliberate impropriety. Any use of documents that is not limited to the conduct of the proceedings in which they were produced is collateral or improper. Use may only be made of discovered documents outside the proceedings with the leave of the court in a proper case, such as for use in a subsequent set of proceedings[19] or in a public examination under the *Corporations Act* 2001.[20] Disclosure to the media to satisfy the concept of "public interest" is not regarded as a proper purpose.[21]

Conclusion

23. Discovery is a laborious and costly process but an essential one in civil litigation. It assists the courts and the parties to define the issues and the evidence.

24. Despite recent criticism by commentators, discovery remains a process that will be an essential component of civil (especially commercial) litigation. As stated by Her Honour Justice Bergin of the Supreme Court: "I am of the very firm view that when people's reputation and companies' reputations are at risk with this sort of case, they must know and they must have access to the relevant documents".[22]

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[1] This summation is adapted from the excellent commentary in Chapter 10 "Discovery, Interrogatories and Inspection", Bernard Cairns, *Australian Civil Procedure*, 7th Edn (2007).
[2] *Norwich Pharmacal Co v Customs and Excise Cmrs* [1974] AC 133; [1973] 2 All ER 943; *British Steel Corp v Granada Television Ltd* [1981] AC 1096; [1981] 1 All ER 417; *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1; [1990] 2 All ER 1. See also section 23 of the *Supreme Court Act* which vests that court with "all jurisdiction which may be necessary for the administration of justice in New South Wales."
[3] *Hughes Aircraft Systems International v CAA* (1995) 217 ALR 303.
[4] *Barton v Osborne* [1975] ACLD 69; *Exley v Wyong Shire Council* (NSWSC Allen M, 9 Dec 1976, unreported).
[5] *Glencore International AG v Selwyn Mines Ltd* (2005) 223 ALR 238; [2005] FCA 801.
[6] *Dover Fisheries Pty Ltd v Bottrill* (1995) AIPC ¶ 91-158.
[7] *Tipperary Developments Pty Ltd v Western Australia* (1999) 21 WAR 250; [1999] WASC 62; *Richardson Pacific Ltd v Fielding* (1990) 26 FCR 188.
[8] *Hutchinson v Glover* (1875) 1 QBD 138.
[9] *Schreiber v Heymann* (1984) 63 LJQB 749; *Fennessy v Clark* (1887) 37 Ch D 184.
[10] *Alexander v Fitzpatrick* [1981] 1 Qd R 359.
[11] *Mobil Oil Australia Ltd v Guina Developments Ltd Pty Ltd* [1966] 2 VR 349.
[12] *Woods v Martin Banks Ltd* [1959] 1 QB 55; [1958] 3 All ER 166.
[13] *Myers v Elman* [1940] AC 282; [1939] 4 All ER 484.
[14] *Church of Scientology of California v Dept of Health and Social Security* [1979] 3 All ER 97.
[15] *Hamersley Iron Pty Ltd v Lovell* (1998) 19 WAR 316;
[16] *Harman v Secretary of State for the Home Department* [1983] 1 AC 280; [1982] 1 All ER 532.
[17] *Pacific Basin Exploration Pty Ltd v XLX (NL)* [1985] WAR 11.
[18] *Street v Hearne* [2007] NSWCA 113.
[19] *Crest Homes Plc v Marks* [1987] 1 AC 829.
[20] *Bell Group Ltd (in liq) v Westpac Banking Corp* (1998) 166 ALR 699.
[21] *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 All ER 41.
[22] Quote of Bergin J in "Defendants have rights to see documents", *Sydney Morning Herald*, 10 April 2008.