

AUSTRALIA / JUDGMENT

# Petrie v Ingogo Ltd [2020] NSWDC 291

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District Court

New South Wales

Medium Neutral Citation: Petrie v Ingogo Ltd [2020] NSWDC 291

Hearing dates: 13 May 2020; 18 and 20 May 2020 (submissions on costs)

Date of orders: 13 May 2020

Decision date: 10 June 2020

Jurisdiction: Civil

Before: Gibson DCJ

Decision: Orders made on 13 May 2020

- (1) Defendant's notice of motion granted.
- (2) Note that the defendant agrees to produce the documents sought in categories 2, 3, 4, 11 (noting the parties' agreement as to the documents to be produced, as recorded in the transcript), 12 and 13.
- (3) The defendant is to give discovery of documents in categories 1 – 5, 6A, 6B, 7 – 10 and 19 – 20.
- (4) Application for discovery of categories for category 31 is refused.
- (5) Parties have 7 days to provide written submissions as to why the court should (or should not) order the defendant to pay the plaintiff's costs of this motion.
- (6) Matter stood over for directions on 21 May 2020 before the Case Managed List, to give the parties an opportunity to prepare Consent Orders including: (a) A timetable for discovery and inspection of documents; (b) Service of experts reports; (c) Any agreements for conclave of experts; and (d) Whether the evidence at trial should proceed by way of affidavit, statement or outlines.

**Order made on 10 June 2020**

- (1) Defendant to pay the plaintiff's costs of the Notice of Motion, including all preparation and hearing costs of both the application determined on 13 May 2020 and the subsequent costs application.

Catchwords: PRACTICE AND PROCEDURE – argument concerning categories of discovery – whether costs should follow the event in interlocutory applications or an order for costs to be costs in the cause should be made

Legislation Cited: Civil Procedure Act 2005 (NSW), s 56

Evidence Act 1995 (NSW), s 75

Uniform Civil Procedure Rules 2005 (NSW), rr 21.2, 42.1 and 42.7

Cases Cited: Ainsworth v Hanrahan (1991) 25 NSWLR 155

Australian Securities Commission v Aust-Home Investments Ltd (1993) 44 FCR 194

Azzi & Ors v Volvo Car Australia Pty Ltd [2006] NSWSC 283

Boscolo v TCN Channel Nine Pty Limited (No 2) (Supreme Court of New South Wales, Young J, 28 April 1994)

Brand v Digi-Tech (Australia) Limited (2001) NSWSC 425

British American Tobacco Australia Services v Fairfax & Anor [2006] NSWSC 1328

Donald Campbell and Co Ltd v Pollak [1927] AC 732

Evans v Davantage Group Pty Ltd (No 2) [2020] FCA 473

Freehill Hollingdale & Page v Bandwill Pty Ltd [2000] WASCA 150

Harman v Secretary of State for the Home Department [1983] 1 AC 280

**Hearne v Street (2008) 235 CLR 125**

His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand & Anor v The Macedonian Orthodox Community Church St Petka Incorporated & Anor (No 2) [2007] NSWCA 142

Hospitality Group Pty Ltd v Australian Rugby Union Ltd (2001) 110 FCR 157; [2001] FCA 1040

In the matter of Gutsy Jnr Pty Limited [2015] NSWSC 2046

Joukhador v Network Ten Pty Limited [2020] FCA 746

Latoudis v Casey (1990) 170 CLR 534

Milne v Attorney-General for the State of Tasmania (1956) 95 CLR 460

Oshlack v Richmond River Council (1998) 193 CLR 72

Re Minister For Immigration and Ethnic Affairs; ex parte Lai Qin (1997) 186 CLR 622; [1997] HCA 6

Ren v Jiang [2014] NSWCA 1

Ritter v Godfrey [1920] 2 KB 47

Sciacca v Langshaw Valuations Pty Ltd [2012] NSWSC 1450

Sklavos v Australasian College of Dermatologists [2014] FCA 476

Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4) [2010] FCA 863

The New South Wales Bar Association v Clarence James Stevens [2005] NSWCA 351

Vale v Rosychamp Pty Ltd [2006] NSWSC 1341

Wong v Sklavos [2014] FCAFC 120

Zmudzinski v Cheapa Campa Pty Limited and Camper Travel Pty Limited [2011] NSWSC 997

Texts Cited: Ritchie's Uniform Civil Procedure New South Wales

Category: Procedural and other rulings

Parties: Plaintiff: Hamish Petrie

Defendant: Ingogo Ltd

Representation: Counsel:

Plaintiff: Mr D Mahendra

Defendant: Mr J Knackstredt

Solicitors:

Plaintiff: Keypoint Law

Defendant: Clyde & Co

File Number(s): 2019/143986

Publication restriction: None

## Judgment

### The pleadings in these proceedings

1. The plaintiff, by statement of claim filed in the Supreme Court of New South Wales (Equity General List) on 8 May 2019, commenced proceedings for injunctive relief and damages following the termination of his contract of employment by the defendant. The defence pleads that the plaintiff was dismissed by reason of "serious misconduct" (paragraph 16(b) of the Amended Defence) and denies the plaintiff is entitled to any of the orders sought. The central issues in the proceedings are whether the plaintiff engaged in the "serious misconduct" alleged, whether that gave the defendant the right to summarily terminate his employment and the quantum of damages.
2. The plaintiff has filed a Reply to the Amended Defence and retained the services of an expert valuer as to the entitlement of the plaintiff's claims under the contract of employment. As the plaintiff was the co-founder of the defendant's business and its Chief Executive Officer, those claims may be presumed to be substantial.
3. As to the stage of the proceedings at the date of this judgment, they are next listed for directions on 14 July 2020, at which time, the List Judge notes in his orders, the parties ought to be in a position to take a hearing date.

### The application before the court

1. This is an application by the plaintiff (by notice of motion filed on 26 March 2020) for the defendant to provide discovery in accordance with a schedule of 31 categories. The items in dispute have been narrowed in the course of correspondence and (in relation to two of the categories) in the course of oral argument on 13 May 2020.
2. The remaining categories in dispute are as follows:
  1. Documents asserted to be relevant to the quantum of the claim (categories 1 – 5, 6A, 6B and 7 – 11).
  2. Documents asserted to be relevant to the circumstances of the grounds upon which the plaintiff was dismissed (categories 19 and 20).
  3. An insurance policy asserted to be relevant to the issue of injunctive relief (Category 31).
1. The parties provided the court with an agreed tender bundle, which is Exhibit A. As is set out in the orders below, on 13 May 2020, I made rulings in favour of the plaintiff in relation to the first two categories and in favour of the defendant in relation to the third category.

2. The defendant requested reasons for the decision. The giving of an ex tempore judgment by AVL during the restrictions on court attendance by practitioners is not an easy task. I am grateful to the parties for agreeing to my request that I should be permitted to provide my reasons in writing at a later date.
3. This has also enabled me to consider the parties' further submissions on the issue of costs. As is set out below, the defendant submits that by reason of the interaction between Uniform Civil Procedure Rules 2005 (NSW) ("UCPR"), rr 42.1 and 42.7, the general starting point for costs in any interlocutory application is that the costs should be costs in the cause, regardless of success or failure of the motion, and that costs orders of any other kind should only be made in clear cases. This judgment accordingly determines that issue as well.

### Challenge to the expert's letter of advice

1. I will first set out my reasons for permitting the plaintiff to rely, for the purposes of this application, upon two letters (dated 3 March and 4 May 2020) from their expert, Mr Samuel.
2. In a letter dated 11 May 2020 forming part of Exhibit A, the defendant objected to the tender of both these documents on the basis that they "contain hearsay and other qualified opinion evidence, in circumstances where the maker is available to give an affidavit but has not been called."
3. Mr Knackstredt enlarged upon this submission by stating that such evidence should be given by way of affidavit with the deponent available for cross-examination and that, in the absence of entitlement to cross-examine (which Mr Knackstredt conceded arose by way of leave), he was not in a position to challenge the assertions made in Mr Samuel's letters of advice to the plaintiff's solicitors.
4. Should Mr Samuel have sworn an affidavit and made himself available for cross-examination? While it is true to say that cross-examination in an interlocutory application is an entitlement that can be granted by leave, such leave is normally granted "cautiously" and "somewhat sparingly" as Leeming JA noted in *Ren v Jiang* [2014] NSWCA 1 at [11]. His Honour explains the rationale for this at [11] – [12]:

"11 But to return to the ultimate question, the issue is whether, in the event that Mr Guo's affidavit be read, I grant leave for him to be cross-examined. Cross-examination in support of an interlocutory application is not as of right but requires leave (contrary to the submissions which were initially made to me at the directions hearing), which leave is granted "cautiously" and normally "somewhat sparingly": see the decisions collected and applied by Kenny J in *Wu v Avin Operations Pty Ltd (No 3)* [2006] FCA 1321 at [18]. It is common practice not to permit cross-examination at all in interlocutory matters; see, for example, *Markisic v Commonwealth of Australia* [2010] NSWCA 273 at [31] (Beazley and Young JJA).

12 Freehill Hollingdale & Page v Bandwill Pty Ltd [2000] WASCA 150 bears some resemblance to the application before me. There the primary judge refused an application to cross-examine on affidavits served in support of a stay for an abuse of process. No appeal was brought from that decision, but Owen, Steytler and Miller JJ confirmed that "the discretion to permit cross-examination in interlocutory applications will be sparingly exercised": at [29] (an appeal was allowed from the primary judge's refusal to permit the stay application to be heard in advance of the trial). The different position in the United Kingdom may be seen in the authorities considered in Matthews v SPI Electricity Pty Ltd (No 6) [2013] VSC 422 at [25]-[26]."

1. I note similar observations by the Court of Appeal of the Supreme Court of Western Australia in Freehill Hollingdale & Page v Bandwill Pty Ltd [2000] WASCA 150 at [29]:

"29 That the question whether the application should proceed purely on the affidavit material or whether there should be cross-examination of deponents loomed large in the consideration of the parties and the trial Judge is hardly surprising. It was a procedural issue that required determination and there is no doubt that the parties were ready to argue, and did argue, their respective positions on that question. There is ample authority for the proposition that the discretion to permit cross-examination in interlocutory applications will be sparingly exercised: Sullivan v Henderson [1973] 1 WLR 333 and In the Matter of Whitemark Pty Ltd (1992) 7 WAR 54 at 56. This is even more so where there is a likelihood that the cross-examination will cover broad issues raised in the action: Scanlon v American Cigarette Co (Overseas) Pty Ltd (No 1) [1987] VR 261 at 274."

1. An important factor in such cross-examination is the need for compliance with the overriding principles set out in s 56 of the Civil Procedure Act 2005 (NSW), which requires not only the court but the parties to have regard to facilitate a "just, quick and cheap" resolution of the real issues in dispute. In Zmudzinski v Cheapa Campa Pty Limited and Camper Travel Pty Limited [2011] NSWSC 997 at [4], Black J refused leave to cross-examine for such reasons:

"4 In determining the application for leave to cross-examine the Plaintiff, I have had particular regard to s 56 of the Civil Procedure Act which requires me to have regard to the overriding purpose of the Act and, in particular, the purpose of facilitating a just, quick and cheap resolution of the real issues in dispute in the motion. I am required in exercising the discretion under that section to have regard to the objects of case management specified in s 57 of the Act which include a just determination of the proceedings and also to have regard to the matters referred to in s 58 in determining the dictates of justice. In my view, the matters as to which Ms Shaw seeks to cross-examine the Plaintiff would not assist with the just determination of the motion and the time spent in that cross-examination would not be conducive to the efficient disposal of the Court's business."

1. I consider these principles extend not only to deponents, but also to challenges as to admissibility in relation to an asserted right to cross-examine persons who are the authors of correspondence tendered. I particularly note that, for the purposes of resolving the

matter, the solicitors for the plaintiff obtained and sent a letter from their expert valuer and sent it to the solicitors for the defendant, following which there were changes to positions on both sides. To require that expert to swear an affidavit, in circumstances where cross-examination is unlikely to be permitted, is contrary to the overriding principles of s 56 as well as established procedure on interlocutory applications.

2. There is another difficulty. As noted above, Mr Samuel's letters of advice as to the categories were sent to the solicitors for the defendant in the course of discussions endeavouring to resolve the issues out of court. As a result, the opinions expressed by Mr Samuel are the subject of discussion between the parties and played a role in some of the concessions made. All of this correspondence is before the court and is not objected to. Some of the documents which relate to Mr Samuel (for example, his curriculum vitae) are not the subject of objection at all.
3. In addition to the general undesirability of having an expert give evidence in an interlocutory application, it is a highly artificial exercise to seek to extract Mr Samuel's own emails from the otherwise unobjectionable exchange of correspondence between the solicitors for both parties discussing the merits of his opinions (or lack thereof).
4. There is a further reason for caution, namely the role that s 75 of the Evidence Act 1995 (NSW) must play in interlocutory applications such as the present. The interaction between s 75, the admissibility of evidence and the circumstances in which a party gives evidence in interlocutory proceedings have most recently been analysed in *Joukhador v Network Ten Pty Limited* [2020] FCA 746 and I respectfully adopt Abrahams J's analysis of these principles. The tender of his letter of advice is well within the parameters of material that is permissible on an interlocutory application such as the present.
5. Finally, as Mr Samuel's curriculum vitae as well as the contents of his letters demonstrate, these are not unqualified opinions but the reasoned explanations of a valuer with appropriate expertise and who is not only qualified but entitled to explain what documents he requires, and why.

The obligations to give discovery

1. UCPR r 21.2 provides:

"21.2 Order for discovery

- (1) The court may order that party B must give discovery to party A of—
  - (a) documents within a class or classes specified in the order, or
  - (b) one or more samples (selected in such manner as the court may specify) of documents within such a class.
- (2) A class of documents must not be specified in more general terms than the court considers to be justified in the circumstances.

- (3) Subject to subrule (2), a class of documents may be specified—
  - (a) by relevance to one or more facts in issue, or
  - (b) by description of the nature of the documents and the period within which they were brought into existence, or
  - (c) in such other manner as the court considers appropriate in the circumstances.
- (4) An order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue."
- 1. The history behind the circumstances in which general orders for discovery were replaced by orders for categories is set out in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd* (No 4) [2010] FCA 863 at [2] – [12]. I agree with Logan J that it is helpful to consider this history, but I must do so in relation to the rules of this court, and exercise caution when considering judgments from other courts where the entitlement to discovery may turn on different rules. Particular regard must be had to the application of the provisions of the Civil Procedure Act 2005 (NSW) and to analysis of the differences between discovery by category and general discovery, as set out in *Azzi & Ors v Volvo Car Australia Pty Ltd* [2006] NSWSC 283, Brereton J, where his Honour explained the circumstances in which courts would hear arguments as to categories:

"10 Since the amendments to the rules, not only the recent Uniform Civil Procedure Rules but also the more recent versions of the Supreme Court Rules, the right to general discovery has been limited, and the rules have provided for discovery by reference to classes. The relevant rule is now to be found in UCPR rule 21.2, which provides that the court may order that one party give discovery to the other of documents within a class or classes specified in the order. The purpose of adopting this approach to discovery was to reduce the burdens of unlimited general discovery, by confining its scope through requiring that the classes of documents of which discovery would be required be identified by the parties and agreed by them and, if not, then determined by the court."

- 1. As Brereton J went on to explain (at [11]), this restriction did not alter other areas of the law and, in particular, do not permit a party to issue subpoenae or notices to produce to the opposing party for documents later found to be relevant. The appropriate course for a party is to determine what documents should be discovered and, if additional material was asserted to be of relevance, to bring an application for determination as to categories and/or further and better discovery of the kind brought before the court in this application. Getting discovery right is an important step in the litigation process, and this requires the obtaining of documents with apparent relevance to the issues in the proceedings.
- 2. Mr Knackstredt acknowledges the test of "apparent relevance" in his submissions. The Full Court of the Federal Court considered the term "apparent relevance", albeit in relation to the issuing of subpoenae, in *Wong v Sklavos* [2014] FCAFC 120 at [12]:

"Although the parties referred to several authorities concerning the requirement for subpoenaed documents to have apparent relevance to an issue in a proceeding, in our opinion, the applicable principles are well established. The party issuing a subpoena bears the onus of demonstrating that the subpoena has a legitimate forensic purpose in relation to the issues in the proceedings: Santos Ltd v Pipelines Authority of South Australia (1996) 66 SASR 38 at 52. A subpoena may be set aside if it requires the production of documents which do not have apparent relevance to the issues arising on the pleadings: Trade Practice Commission v Arnotts Ltd (No 2) (1989) 88 ALR 90; Campaign Master (UK) Ltd v Forty Two International Pty Ltd (No 4) [2010] FCA 398; (2010) 269 ALR 76 at [39]-[40]; McHugh v Australian Jockey Club Limited [No 2] [2011] FCA 724 at [13]; McIlwain v Ramsey Food Packaging Pty Ltd [2005] FCA 1233; (2005) 221 ALR 785 at [35]; Dorajay Pty Ltd v Aristocrat Leisure Ltd [2005] FCA 558 at [17]. Other cases have used different terminology, but with essentially the same effect, for example, by requiring that, viewed realistically, the documents sought have a bearing on an issue which is not unreal, fanciful or speculative (R v Barton (1981) 2 NSWLR 414 at 420), or that the material sought is reasonably likely to add in some way to the relevant evidence in the case (Spencer Motors Pty Ltd v LNC Industries Ltd (1982) 2 NSWLR 921 at 927), or that it be "on the cards" that the documents sought will materially assist the party at whose request the subpoena has been issued: Allister v The Queen (1984) 154 CLR 404 at 414; Tamawood Ltd v Habitare Developments Pty Ltd [2009] FCA 364 at [13], [35]-[38]."

1. The test for "apparent relevance" is acknowledged by Mr Knackstredt to be a low one; as Brereton J notes, judges are not to be expected to determine the ultimate probative value of the material sought.
2. Where a claim for special damages is made, the net for documents of apparent relevance may be particularly wide. Mr Mahendra referred in particular to the decision of Jagot J in Sklavos v Australasian College of Dermatologists [2014] FCA 476. Her Honour, noting her inability to determine the ultimately probative value of the documents in question, nevertheless permitted the plaintiff to issue subpoenae for comparable earnings on the basis of only an "arguable" category of loss where those documents "may" be relevant:

"8 ... Dr Sklavos wishes to prove alleged loss. The difference in income between what he says he would have earned but for the unlawful conduct and what he will now earn if not admitted as a Fellow is an arguable category of loss. The income of other dermatologists may be relevant to that issue. I accept that I cannot now assess the ultimate probative value of the documents required to be produced. It may be that the accountant's opinions are ultimately of little weight because allowance has not or cannot be made for all of the potential differences between what would have been Dr Sklavos' position and the position of any of the 11 dermatologists who have received a subpoena. It may be that I am persuaded the sample is too small to be meaningful. None of these things can currently be known. What I do know now is that documents disclosing the income and expenditure of any dermatologist in Sydney may be relevant to Dr Sklavos' case in a manner which is not unreal, fanciful or speculative. That is sufficient to require production. It does not matter that the documents are sought for the purpose of provision to an expert.

Apparent relevance does not require that the documents themselves be directly admissible. There is nothing improper in using the subpoena process for the purpose of obtaining documents relevant to expert evidence intended to be adduced in a proceeding."

1. In referring to these decisions concerning subpoenae, I acknowledge that the test of "apparent relevance" in the context of a subpoena or notice to produce is wider than in the context of discovery: *British American Tobacco Australia Services v Fairfax & Anor* [2006] NSWSC 1328. This is in part because, in the case of a subpoena or notice to produce, documents arguably capable of providing a legitimate basis for cross-examination on credit have sufficient relevance: *Brand v Digi-Tech (Australia) Limited* (2001) NSWSC 425 at [36]. However, challenges of this more extended nature are not the ones advanced here. The plaintiff submits that the challenged categories are either documents stated by their expert to be relevant to the assessment of quantum or (as to categories 19 and 20) to determination of specific issues raised in relation to liability and the asserted misconduct of the plaintiff.
2. For the opposing party to meet such claims, the question of whether there is apparent relevance requires more from the opposing party than the bald statement that the document has no apparent relevance. As is set out below, the defendant has essentially repeated this statement in relation to all categories, although some additional observations were proffered in oral argument.

### The documents the subject of challenge

1. The discovery documents sought fall into three main categories. The first series of challenged categories, which was the major topic for argument, arises from Mr Samuel's letter of advice as to documents he states are relevant to quantum issues.

### Documents relevant to the quantum of the claim (categories 1 – 5, 6A, 6B and 7 – 11)

1. It is quicker to set out the relevant portion of Mr Samuel's letter dated 4 May 2020 than to summarise each of these categories. The reason for seeking each of the categories relevant as to quantum is as follows:

"I refer to the amended plaintiff's categories of discovery dated 28 April 2020 (Document Request) and Clyde and Co's letter to Keypoint Law in response dated 29 April 2020. You have asked me to provide my opinion as to whether the documents referred to in categories 2 to 5, 6a and 6b, and 7 to 12 of your Document Request are necessary in order to value the options held by Mr Petrie. In this letter I have also provided my opinion on the Category 1 amendment requested by Clyde and Co.

In my opinion, in order to value the options held by Mr Petrie you first need to determine a value for Ingogo Limited (Company). For ease of reference, in the paragraphs that follow I have copied the category request and then provided my opinion as to the relevance of the documents to assessing the value of the Company at the current date.

### Category 1 Amendment

You requested audited financial statements for the Company during the period 1 July 2016 to date. Clyde and Co have requested this period be narrowed as follows:

- b) Subject to the following amendment to the date range in category 1, being the date of alleged breach of contract – that is, the termination date of the Plaintiff's employment and consistent with the date ranges in categories 6, 13 and 14:

"1. All audited financial statements for the Defendant company in the period 1 July 2016 27 September 2-18 to date."

One possible methodology for valuing the Company may be the maintainable earnings approach (a methodology regularly adopted by valuers in the absence of forecast cash flow or as a cross check to a discounted cash flow methodology). If this methodology is utilised, then a history of the trading results for the Company will be required. Based on usual valuation practice, in my opinion, audited financial statements for at least the last 3 years prior to the valuation date will be relevant. If I choose a discounted cash flow methodology, then the financial history will still be relevant. In my view, the audited financial statements in the period since 1 July 2016 are necessary documents.

### Category 2

- 2. All financial statements in the period 1 July 2016 to date including, but not limited to, profit and loss statements, balance sheets, cash flow statements, monthly management accounts since the last audited accounts, and documents recording details of:
  - a. all major assets, intangible assets, such as intellectual property, software, goodwill;
  - b. forecast research and development grant cash flow and borrowing;
  - c. all major liabilities including, but not limited to, borrowings, creditors, tax, lease, superannuation and employee entitlements; and
  - d. any contingent liabilities.

In my opinion, the categories referred to in 2a, c and d should be captured in the financial statements referred to in Category 1. The management accounts of the company recording the year to date results for the months of June 2017, June 2018 and June 2019 will be relevant as they will provide more detailed information relating to the historical revenues and expenses of the Company than that recorded in the audited financial statements. This information is necessary for the purpose of a valuation.

In addition, monthly management accounts for the months of July 2019 to March 2020 are necessary to assess the actual profit and loss recorded by the Company from the date of the last audited financial statements (being 30 June 2019) to the current date. Further, the latest set of management accounts (March 2020) will record the assets and liabilities of the Company today [sic] which is directly relevant to its current Valuation [sic]. Valuing a business without regard to its assets and liabilities at (or near) the valuation date would be impossible.

### Category 2b

One methodology used by valuers to value companies is the discounted cash flow approach. This methodology requires me to estimate the future cash flow of the Company and determine the risk of the Company earning those cash flow. In my opinion, to the extent that category 2b will include documents recording the forecast cash flows of the Company at a date close [sic] the valuation date this category is directly relevant to a valuation of the Company.

### Category 3

3. All documents in the period 27 September 2018 to date recording or containing the profit / cash flow projection used for the most recent round of capital raising.

With respect to this category of documents I repeat my opinion expressed with respect to the Category 2b documents.

### Category 4

4. All documents in the period 27 November 2018 to date recording or containing the budgets that were set by the defendant for the most recent round of capital raising measuring performance to past budgets.

Budgets prepared by the Company at or around the valuation date will assist in estimating the future cash flows of the Company. Being able to measure the Company's actual performance with past budget estimates allows a valuer to determine how much reliance should be placed on the Company's budgets. In my opinion, the documents referred to in this category are relevant to estimating the Company's value.

### Category 5

5. All documents recording or containing the current capitalisation table listing the type of security and the defendant's top twenty shareholders.

When valuing Mr Petrie's options, it is necessary to understand the number of shares the options could have been converted into and to determine whether those shares (along with other shares he may have held) represented a minority interest or a controlling interest. Discounts and premiums to value may apply depending on the conclusions reached. It is therefore necessary to understand how many shares were on issue and the parties who held each share. Therefore, in my opinion, this category of documents is relevant to determining the value of the options held

by the [sic] Mr Petrie.

### Category 6a and 6b

6. All documents in the period 27 September 2018 to date, recording or containing forecast information for the Defendant company, including but not limited to:
  - a. business plans;
  - b. timelines of key events.

With respect to category 6a to the extent that business plans will assist me to analyse the Company's forecast cash flows I repeat my opinion expressed with respect to the Category 2b documents.

With respect to category 6b, a timeline of key events will assist in analysing historical earnings and using those earnings to forecast future cash flows. For example, if a key event included losing a major contract in financial year 2019 then you would know not to forecast cash flows from that customer in 2020.

### Category 7

7. All documents in the period 27 September 2018 to date recording or containing the defendant's customer list and value of the defendant's top twenty customers.

As referred to above, valuation is about estimating the future cash flows of a company and determining the risk of generating those cash flows. Understanding the Key contracts and customers a company has is directly relevant to estimating both cash flows and risk. For example, if a company only has one large key customer the risk of it earning its forecast future cash flows is significantly higher than if it had five large key customers. The risk would be reduced further if those customers were locked in for a period with a contract. In my opinion, historical sales revenues by customer including the key customers, forecast revenue by key customer and any existing key customer contracts are all relevant.

### Category 8

8. All documents in the period 27 September 2018 to date recording or containing an organisation chart and information regarding the expertise or experience of the defendant's senior executives and board.

An organisational chart is key to understanding the company being valued and ensuring there are no profits, losses, assets or liabilities being recorded in a subsidiary company that may not be accounted for in the financial statements provided. Ordinarily I would expect the audited financial statements referred to in Category 1 to refer to any and all subsidiary companies. However, special purpose financial statements may not record this information and therefore in my opinion an organisational chart is relevant.

In my opinion information regarding the expertise or experience of the Company's senior executives is not essential.

### Category 9

9. All documents in the period 27 November 2018 to date recording or containing a pitch deck or presentation made by or on behalf of the Defendant company including, but not limited to, any presentation to Artesian AFOF Pty Ltd, Artesian Venture Capital Fund and/or Artesian Hostplus VC Fund 1.

In my opinion the information contained in this category of documents is likely to be directly relevant to forecasting the future cash flows of the Company and therefore relevant to the valuation of the Company.

### Category 10

10. The document commissioned by the Defendant company and titled Independent Expert Report (IER) for ASIC dated 16 September 2019.

This document will likely contain the Company's historical financial data as well as Company estimates of future cash flows and performance. Further, it will contain an independent opinion as to the valuation of the Company at that date. In my opinion this document is relevant to determining the current value of the Company.

### Category 11

11. All documents in the period 27 September 2018 to date recording or containing:
  - a. information relied on by the defendant to obtain a research and development grant for the financial year ending 30 June 2020; and
  - b. details of the research and development grant obtained by the defendant in [sic] for the financial year ending 30 June 2020.

I repeat my response to Category 2b. Further, in my opinion details of actual cash balances to be received or that have been received by the Company by way of a grant is directly relevant to determining the net cash position of the Company at the valuation date and estimating the cash flows into the future. This category of documents is therefore relevant to determining the Company's current value.

### Category 12

12. All documents recording or containing an agreement to sell, transfer, or acquire shares in the Defendant company in the period between 27 September 2018 to date.

One methodology used by valuers to value shares is the market approach. Evidence of recent market transactions in the Company's shares may provide evidence of the market value of those shares at the date of the transaction and is directly relevant to determining the Company's current value.

If you have any queries with respect to the attached, please do not hesitate to contact me.

Yours sincerely,

Tony Samuel

Managing Director

sapereForensic"

1. The defendant's objections, as set out in Mr Knackstredt's written submissions, may be summarised as follows:
  1. Categories 1 – 5 (described in the written submissions as categories 1 – 4) and 9 – 11 "appear to have no relevance to the issues in dispute or the relief sought, given their lack of direct relevance to the valuation (particularly given agreed production under categories 1, 6 and 13 – 15, as amended)". Additionally, category 11 "calls for a subjective judgment" (submissions, paragraph 15).
  2. Categories 5, 7 and 8 "contain commercially sensitive information" and "appear to have no relevance to the issues in dispute or the relief sought".
1. Mr Knackstredt added, in his oral submissions, that I should pay particular regard to the fact that the categories were drawn up by the solicitors for the plaintiff, because the expert's justification of these categories, as it occurred after this was done, should be viewed with caution.
2. I do not accept that it is necessary, or even desirable, that a list of this kind be drawn up by the expert, as opposed to a solicitor with commercial law experience and appropriately instructed by his client, both of whom have the requisite knowledge of the defendant's affairs (and, in the case of the solicitor, the relevant issues in dispute at the trial) to determine what documents will be of assistance.
3. However, if I am wrong in this regard, I should note that Mr Mahendra's submissions (at paragraph 8) in fact state that the categories in question were prepared "in consultation" with the expert, who made changes to them as well as confirming that provision of the documents in these categories was necessary in order for him to conduct a proper valuation. That puts to an end Mr Knackstredt's complaints about the method of preparation of the categories.

4. Mr Knackstredt next submitted, as to all the documents sought, that Mr Samuel should make up his mind how he is going to make his valuation and only ask for documents relevant to that method, not ask for documents first and then decide how to value the company. He did not, however, submit that the proposed methods of valuation referred to were without basis or expertise.
5. Mr Samuel is, in my view, entitled to see these documents first and make up his mind about the method of valuation after comparing what has been provided, not only in relation to each category but across a series of categories. This will enable him not only to prepare his own report but also, if the defendant's valuer adopts a different valuation method, to consider the competing methods in the light of having seen the material that method is based upon. I am guided in this regard by the observations of Jagot J as set out above, notwithstanding the different basis upon which "apparent relevance" is tested by relevance to subpoenae, as the documents sought in both cases relate to quantum issues and not to documentation relevant to the wider basis upon which apparent relevance may be tested in subpoenae.
6. I also note that, while there are complaints as to relevance, there is no submission that the provision of these documents is in any way oppressive or otherwise objectionable (save for the issue of confidentiality, dealt with in more detail below).

### The individual categories

1. As to category 1, where the defendant acknowledges the relevance of some material but seeks to limit it to a one-year period, the plaintiff submits that historical data for the full period sought is necessary to assess the value of the shares over a longer period. I agree with Mr Mahendra's submission, based on the expert's observations, that limiting these documents to the shorter period sought by the defendant will reduce the accuracy of the assessment.
2. As to categories 2(a) and 2(b), I accept that these details are necessary for the reasons set out in the expert's letter. In particular, since the report must be prepared now, monthly management accounts for July 2019 to March 2020 will be required.
3. As to categories 3 and 4, the projected cash flow and budgets used for the defendant's most recent round of capital-raising are clearly relevant to the valuation of shares in the company. Comparison of actual performance with past budget estimates will enable valuers for both parties to determine how much reliance should be placed on the defendant's budgets.
4. Category 5 is relevant because discounts and premiums as to value may apply depending upon the shareholding information provided.

5. As to categories 6(a) and 6(b), the relevance is conceded, but the defendant seeks to restrict the extent of the documentation sought. All that the defendant's submissions say on this point is that, in general terms, "for the same reason" as the other categories, the documents sought "are not apparently relevant to the issues in dispute or the relief claimed" (submissions paragraph 15(b)(ii)).
6. Without a clear explanation of the difficulty, I see no reason why the plaintiff's entitlement to these documents should be read down. I propose to direct the defendant to provide these documents, as well as the documents set out in categories 1 – 5 above.
7. Categories 7 to 11 seek a variety of documents, ranging from key contracts to recent market transactions to actual cash balances. Apart from the issue of confidentiality (addressed further below in relation to categories 5, 7 and 8), these are dealt with only briefly in Mr Knackstredt's written submissions as follows:
  1. Categories 9 – 12: in paragraph 15(a) of the submissions, Mr Knackstredt states that these "appear to have no relevance to the issues in dispute or the relief claimed".
  2. Category 11 calls for "a subjective judgment" as to the information relied upon and additionally appears to have no relevance to the issues in dispute or the relief claimed.
1. In the absence of a more precise objection to each of these categories, I see no reason why I should not accept the opinion of Mr Samuel, and I have accordingly directed the defendant to give discovery, noting in my orders that the transcript will be relied upon in relation to precisely what is to be provided in relation to category 11.

#### Commercially sensitive material

1. Additionally, challenges based on the need for confidentiality were raised by the defendant in relation to categories 5, 7 and 8.
2. Confidentiality is not of itself a reason to set aside a subpoena or refuse discovery: *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157; [2001] FCA 1040 at [80]-[83]. Mr Mahendra readily offered an undertaking, the terms of which could be identified by the parties, which would ensure the protection of the confidentiality.
3. Mr Mahendra also points out that the use of these documents outside the litigation is contrary to the "implied undertaking". The headnote to *Hearne v Street* (2008) 235 CLR 125 records a short summary of the principles (as set out in more length at [108]):

"...the "implied undertaking" not to use documents or information filed in court for a purpose unrelated to the conduct of proceedings was a substantive obligation which arose by virtue of the circumstances under which the relevant person obtained the documents or information."

1. The "implied undertaking" rule precludes the actual documents produced being used for some purpose other than for the purposes of these proceedings. The rule is the same for documents obtained through discovery (*Harman v Secretary of State for the Home Department* [1983] 1 AC 280) and for interrogatories (*Ainsworth v Hanrahan* (1991) 25 NSWLR 155).
2. I am satisfied that the giving of an undertaking in mutually agreed terms is sufficient to protect the defendant's interests. The parties were accordingly given leave to attend to the drafting of such an undertaking.

Documents relevant to the circumstances of the grounds upon which the plaintiff was dismissed (categories 19 and 20)

1. Mr Mahendra sets out in his written submissions at paragraph 20 that these are directly relevant to the issue of whether the plaintiff engaged in serious misconduct warranting dismissal. The defendant has alleged that the plaintiff was responsible, *inter alia*, for the employee share option plan and that he failed in those responsibilities; in particular, he failed to ensure the plan was "tax neutral" and also directed an employee to revise the relevant exercise price in the plaintiff's own option agreement (see paragraph 16(b) of the defence and the letter of termination), allegations which have been denied (see the Reply at paragraphs 1 and 2). The Option documents sought would demonstrate whether or not the plaintiff was solely responsible (Reply, paragraph 2(a)), whether the defendant obtained tax advice from any third party (Reply, paragraph 1(e)), whether or not the plaintiff directed the employee as claimed (Reply, paragraph 1 (r)) and whether or not the defendant was aware of all issues concerning the exercise price (Reply, paragraphs 1 and 2).
2. The defendant's submissions merely state that the documents sought in these categories "appear to have no relevance to the issues in dispute or the relief sought" (paragraph 13).
3. These categories seek documents relevant to matters pleaded in the Reply in circumstances where their relevance is not merely apparent but obvious. The defendant should provide documents in answer to these categories as well.

### **An insurance policy asserted to be relevant to the issue of injunctive relief (Category 31)**

1. The plaintiff submits that whether or not the defendant has made a claim on an insurance policy is relevant to the injunctive relief sought and also as to its ability to pay any award of damages.
2. The defendant submitted that insurance policies of this kind are not relevant to the issues in dispute and are therefore not generally discoverable: *Evans v Davantage Group Pty Ltd* (No 2) [2020] FCA 473 at [31], [46], [72] and [95] – [98].

3. Mr Mahendra effectively conceded that the relevance of this policy to any issue in these proceedings other than the asserted concern that the company, if uninsured, might not have assets to pay any judgment sum, and withdrew the request for this policy in argument. In those circumstances the defendant is under no obligation to provide them.

## Costs

1. The plaintiff seeks an order for costs of the motion. The defendant submits that the proper order should be that costs are costs in the cause, for the following reasons:
  1. The measure of success of the parties, having regard to certain concessions made prior to the argument, meant that the measure of success "can only be described as mixed" (submissions, paragraph 10).
  2. The application was of an interlocutory nature, and the New South Wales Court of Appeal has stated that the "usual rule" for costs in an interlocutory application should be costs in the cause: *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand & Anor v The Macedonian Orthodox Community Church St Petka Incorporated & Anor* (No 2) [2007] NSWCA 142 at [16]-[32]; see also *Boscolo v TCN Channel Nine Pty Limited* (No 2) (Supreme Court of New South Wales, Young J, 28 April 1994).
  3. It is "well established that where there has been no determination on the merits, the usual position is that the Court cannot make a costs order, as to do so would involve trying a hypothetical action" (submissions, paragraph 15, citing *Re Minister For Immigration and Ethnic Affairs; ex parte Lai Qin* (1997) 186 CLR 622; [1997] HCA 6. It is not possible to unpick the success of these categories from the various degrees of success enjoyed by the parties on the motion.
  4. The defendant should be rewarded for "doing the right thing" by complying with s 56 of the Civil Procedure Act by making a number of concessions prior to and during the hearing (submissions, paragraph 17).
1. The plaintiff submits in reply:
  1. The plaintiff had the lion's share of success, not only in relation to the issues put before the court for determination but in relation to the other categories which had been sought and were agreed, after extended argument in the correspondence tendered to the court, to be provided.
  2. There is no general rule that the costs in all interlocutory motions should be costs in the cause. To the contrary, as the costs orders in interlocutory applications demonstrate, costs follow the event and costs orders are accordingly made by the judge hearing the application. There are specific exceptions for specific forms of relief, such as interlocutory injunctions, and this was the issue before the Court of Appeal in *His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand & Anor*

v The Macedonian Orthodox Community Church St Petka Incorporated & Anor (No 2). That exception does not create a rule for interlocutory applications generally.

3. The "usual rule" in interlocutory applications is not that which was set out in *Re Minister For Immigration and Ethnic Affairs; ex parte Lai Qin* (which dealt with what costs orders could be made after proceedings were settled but where there was no agreement as to costs) but that "ultimately costs in interlocutory proceedings, like costs in the main proceedings, lie in the exercise of discretion of the court, which discretion must be exercised judicially" (*Australian Securities Commission v Aust-Home Investments Ltd* (1993) 44 FCR 194 at 199 per Hill J). Making an order for costs to be costs in the cause on an automatic basis, especially where a costs order has been sought by the successful party on the motion, does not amount to a judicial exercise of that discretion.
4. As to the obligations of the parties under s 56 of the Civil Procedure Act, before filing the Notice of Motion, the solicitors for the plaintiff wrote to the solicitors for the defendant on 17 March 2020, setting out at length why it considered its position regarding the documents sought to be appropriate (I note that this included obtaining and providing a letter of advice on the categories from the plaintiff's valuer). The defendant's failure to agree necessitated the filing of the motion. The plaintiff's solicitors continued to correspond with the defendants in an endeavour to seek a resolution but without success. The plaintiff's solicitors did what they could to resolve the issues, while also making it clear to the defendant's solicitors that a costs order would be sought should it be successful.

The relevant legislation

1. UCPR r 42.1 provides:

"42.1 General rule that costs follow the event

Subject to this Part, if the court makes any order as to costs, the court is to order that the costs follow the event unless it appears to the court that some other order should be made as to the whole or any part of the costs."

1. UCPR r 42.7 provides:

"42.7 Interlocutory applications and reserved costs

- (1) Unless the court orders otherwise, the costs of any application or other step in any proceedings, including—
  - (a) costs that are reserved, and
  - (b) costs in respect of any such application or step in respect of which no order as to costs is made,

are to be paid and otherwise dealt with in the same way as the general costs of the proceedings.

- (2) Unless the court orders otherwise, costs referred to in subrule (1) do not become payable until the conclusion of the proceedings."

### Costs orders in interlocutory applications

1. The rule set out in UCPR r 42.1, namely that costs follow the event, is one of general application. UCPR r 42.7 applies to all costs, including costs not involving court appearances, where costs are payable but not the subject of a specific order. It is designed to cover costs which have not been the subject of a specific application to the court. It also permits certain special variations, such as costs payable forthwith and an order for the costs to be "the plaintiff's (or defendant's) costs in the cause", regardless of the result.
2. Costs are invariably sought in a notice of motion for interlocutory relief, and the general approach taken on motions is for costs to follow the event: see the discussion of this rule by McCallum J in *Sciacca v Langshaw Valuations Pty Ltd* [2012] NSWSC 1450. That means that the successful party is entitled to seek a costs order at the time, and to ask the judge who has heard the application to determine it on the merits of the application, as opposed to waiting until the case is over to argue whether or not these possibly long-forgotten issues should follow the event or otherwise. Even less desirable is the reserving of costs, as costs reserved can become "costs forgotten" (see for example *The New South Wales Bar Association v Clarence James Stevens* [2005] NSWCA 351).
3. The application of the "costs follow the event" rule is an important part of case management. As is noted in *Ritchie's Uniform Civil Procedure New South Wales* at [42.7.10], there is a public interest in encouraging parties to compromise interlocutory applications "without risking the penalty of an adverse costs order." I consider that there is also a public interest in ensuring that parties are not emboldened to trouble the court for interlocutory rulings which are unnecessary or oppressive to the opposing party, in circumstances where that potential risk of a costs order is lessened by a threshold of the kind argued for by Mr Knackstredt. An order for costs to be costs in the cause, either as the starting point or as a general rule, would be inconsistent with justice being not only quick but cheap. As for justice, the fact that a party later wins a case is not necessarily determinative of the issues in the motion.
4. I agree that there are a number of situations where courts are cautious about making costs orders more specific than costs in the cause, or costs reserved. A commonly referred to example is an application for injunctive relief, where costs orders are often expressed as being "in the cause", but this is not a general rule; see for example *Vale v Rosychamp Pty Ltd* [2006] NSWSC 1341.
5. The court has the discretion to make an order for costs where one is sought. That discretion is unfettered, although it must be exercised judiciously and not capriciously: *Latoudis v Casey* (1990) 170 CLR 534 at 537, cited with approval in *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 86. A successful party is entitled to seek an order for costs, even on an

interlocutory application: *Ritter v Godfrey* [1920] 2 KB 47 at 52; *Donald Campbell and Co Ltd v Pollak* [1927] AC 732 at 809; *Milne v Attorney-General for the State of Tasmania* (1956) 95 CLR 460 at 477.

6. In the present case, the plaintiff both sought an order for costs in the notice of motion and referred to costs in their correspondence. Indeed, the defendant's solicitors wrote to the plaintiff's solicitors about costs as well; in their letter of 11 May 2020, they warned the plaintiff that they would rely upon his solicitor's allegedly unsatisfactory responses in correspondence "in relation to that motion, including (without limitation) as to costs". The basis for the defendant's solicitors seeking costs, according to that email, was the asserted inadmissibility of Mr Samuel's letter of advice on the basis that his correspondence contains "hearsay and unqualified opinion evidence, in circumstances where the maker is available to give an affidavit but has not been called". The defendant was unsuccessful in relation to all of the objections dealt with by Mr Samuel but no doubt, if they had been successful, they would have sought to rely upon this warning for a costs order in their client's favour.
7. As to the submission that the relevant principles to apply are those set out in *Re Minister For Immigration and Ethnic Affairs; ex parte Lai Qin*, as *Ritchie's Uniform Civil Procedure New South Wales* sets out at [42.1.55], special rules apply where proceedings are settled but where the parties are unable to agree on costs. The fact that parties have compromised or otherwise resolved even a significant part of the issue does not mean that the principles discussed in *Minister for Immigration and Ethnic Affairs (Cth); Ex Parte Lai Qin* are engaged, as *Brereton J* specifically notes in *In the matter of Gutsy Jnr Pty Limited* [2015] NSWSC 2046 at [3].
8. As to the parties' respective submissions concerning compliance with their obligations under the Civil Procedure Act, having read the correspondence between them, I consider the plaintiff's solicitors went out of their way to explain why these documents were required, including forwarding a letter from their expert valuer explaining these issues in concise and helpful detail. The defendant's solicitors' response was to challenge both the admissibility of this correspondence and his expertise, in terms of some vehemence. Those concessions that were made occurred largely after extended argument.
9. I do not consider the defendant's solicitors' conduct of this application warrants any variation of the order I propose to make, namely that the defendant pay the plaintiff's costs of this Notice of Motion together with the subsequent costs argument. For the benefit of any costs assessor considering this issue at a future date, I would add that I would expect this to include Mr Samuel's costs as well.

## Orders

1. I note the parties have agreed that this judgment may be emailed to them and that there is no need for the proceedings to be listed for the purpose of making the costs order consequential upon my orders of 13 May 2020.

2. As these are reasons for the orders I made on 13 May 2020, I note that these orders were as follows:
  1. Defendant's notice of motion granted.
  2. Note that the defendant agrees to produce the documents sought in categories 2, 3, 4, 11 (noting the parties' agreement as to the documents to be produced, as recorded in the transcript), 12 and 13.
  3. The defendant is to give discovery of documents in categories 1 – 5, 6A, 6B, 7 – 10 and 19 – 20.
  4. Application for discovery of categories for category 31 is refused.
  5. Parties have 7 days to provide written submissions as to why the court should (or should not) order the defendant to pay the plaintiff's costs of this motion.
  6. Matter stood over for directions on 21 May 2020 before the Case Managed List, to give the parties an opportunity to prepare Consent Orders including:
    1. A timetable for discovery and inspection of documents;
    2. Service of experts reports;
    3. Any agreements for conclave of experts; and
    4. Whether the evidence at trial should proceed by way of affidavit, statement or outlines.
1. The additional order made in this judgment is as follows:
  1. Defendant to pay the plaintiff's costs of the Notice of Motion, including all preparation and hearing costs of both the application determined on 13 May 2020 and the subsequent costs application.

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Decision last updated: 10 June 2020

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