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**TRANSCRIPT OF PROCEEDINGS**

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O/N H-1883452

**FEDERAL COURT OF AUSTRALIA**

**NEW SOUTH WALES REGISTRY**

**JACKMAN J**

**No. NSD 1086 of 2021**

**PETER DAVID SCHIFF**

**and**

**NINE NETWORK AUSTRALIA PTY LTD and OTHERS**

**SYDNEY**

**3.01 PM, THURSDAY, 23 NOVEMBER 2023**

**MR K. SMARK SC appears for the applicant**

**MR D.R. SIBTAIN SC appears for the respondent**

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HIS HONOUR: Yes, Mr Sibtain.

MR D.R. SIBTAIN SC: If your Honour pleases, I appear for the respondents in that concluded proceeding. This is an application - - -

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HIS HONOUR: These are fresh proceedings, are they?

MR SIBTAIN: - - - which we brought in – fresh proceedings in the inherent jurisdiction of the court to control the use of discovered documents. Because your Honour had made - - -

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HIS HONOUR: I'm just taking appearances at the moment.

MR SIBTAIN: I'm so sorry.

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HIS HONOUR: Yes, Mr Smark.

MR K. SMARK SC: I appear for the respondent.

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HIS HONOUR: Mr Schiff, is that?

MR SMARK: Mr Schiff.

HIS HONOUR: Yes. Thank you.

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MR SIBTAIN: I'm sorry for jumping ahead, your Honour.

HIS HONOUR: Now - - -

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MR SIBTAIN: I'm waiting for materials to come up. Can I - - -

HIS HONOUR: Well, why don't you explain it to me while we wait?

MR SIBTAIN: I will explain it. As your Honour will recall, final orders were made in the proceedings disposing of them by the entry of judgment.

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HIS HONOUR: Yes.

MR SIBTAIN: And costs orders, etcetera.

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HIS HONOUR: Yes.

MR SIBTAIN: On that day, there was a publication by Mr Schiff where he said that he was going to start a full-time job of exposing the journalists in question who were parties to the proceeding as complete liars and frauds. His tweet went:

45

*Consider this as a public service for the Australian people. You guys deserve better. Check out the evidence soon on ninefraud.com.*

5 There are similar tweets which I will come to when I have the evidence of it to that effect. And there is a reference on that forum, on that platform to what was included in discovery and what the discovery revealed. Now, Mr Schiff back in July of this year has foreshadowed that when he gets documents – foreshadowed that when he got documents in discovery, he would release them himself. So the relevant issue that's engaged is the implied undertaking and the operation of rule 20.3 and whether 10 or not documents are covered by that implied undertaking and whether that implied undertaking continues. The obvious position is yes, without further order. But the difficulty that has arisen in this case is that during the course of – your Honour will recall the last application under – for approval of the 1782 United States application.

15 HIS HONOUR: Yes. Yes. Yes. Yes.

MR SIBTAIN: Evidence was led by the applicant in support of a discretionary exercise by your Honour refusing the application, namely, that the respondents had engaged in conduct revealed by, so it was put, discovery, engaged in a process that, 20 so the submission went, reflected unfavourably on them and not only would be relied upon in aggravation but also would be a discretionary reason why your Honour would refuse the application. Your Honour will recall that there was an affidavit of Nathan Buck sworn I think it was 16 November which excerpted various materials, etcetera.

25

HIS HONOUR: Yes.

MR SIBTAIN: Against the possibility that by reason of that deployment consistent with the treasury case – the deployment in open court of evidence and the implied 30 undertaking thereby coming to an end - - -

HIS HONOUR: Yes.

MR SIBTAIN: - - - we have approached this application – we're making this 35 application ultimately for a declaration that the implied undertaking continues - - -

HIS HONOUR: Right.

MR SIBTAIN: - - - for the reason that, as your Honour will observe from the rule, if 40 a document is read or referred to in open court in a way that discloses its contents.

HIS HONOUR: Yes. Yes.

MR SIBTAIN: So that's the primary basis, or in the alternative, we seek an order 45 - - -

HIS HONOUR: Well, Mr Buck's affidavit was read.

MR SIBTAIN: It was read.

HIS HONOUR: And relied upon, and Ms Chrysanthou made some strong criticisms of the journalists in questions.

5

MR SIBTAIN: She did. And I couldn't say anything about the transcript. The transcript of that hearing, of course, would be something that would be available and could be relied upon by any member of the public. One perhaps nuanced consideration – your Honour will recall at the end of the argument Ms Chrysanthou handed up to your Honour for completion of the record audio files.

10

HIS HONOUR: Yes.

MR SIBTAIN: Yes, they were tendered in the proceeding.

15

HIS HONOUR: Yes.

MR SIBTAIN: But the question then engages with the rule were they tendered in a way – read or referred to in a way that revealed their contents.

20

HIS HONOUR: Yes.

MR SIBTAIN: Now, to the extent that they – to the extent that anything that was said in open court was said, I accept there could be no restriction on a party because there could be no restriction upon any person who was present in court to not refer to what was said in open court consistent with principles of open justice.

25

HIS HONOUR: Yes.

MR SIBTAIN: But to the extent that anything was not explicitly referred to, we are concerned that what Mr Schiff intends to do – and I will go to the documents in a moment – what we are concerned that Mr Schiff intends to do is to setup a platform, if it hasn't been setup already, for the express purpose of humiliating and deprecating those who were engaged in the broadcast. And what we say that that is capable – and we accept that there is an argument involved in it. Fortunately, we are not submitting that a contempt has occurred as yet, but the taking of reprisal action against a litigant for having engaged in the conduct the subject matter of the proceeding or, indeed, engaged in the proceeding is capable of constituting a reprisal, so an independent form of contempt itself. So what we are seeking is an order to restrain that from occurring.

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HIS HONOUR: To restrain a contempt.

MR SIBTAIN: To restrain a contempt by a breach of an order, that order being the implied undertaking.

45

HIS HONOUR: Well, if there's already an order, then I wouldn't make the order again, would I?

5 MR SIBTAIN: No. Well, this is the difficulty, your Honour. Your Honour wouldn't – the relief that we seek – and perhaps it's - - -

HIS HONOUR: Have you got the documents there?

10 MR SIBTAIN: Yes, I do.

HIS HONOUR: Let's go to that.

15 MR SIBTAIN: Could I hand up to your Honour the – these are multiple copies. I will hand up to your Honour two copies of an originating application and an affidavit. Would your Honour excuse me one moment. I'm sorry, your Honour. The - - -

20 HIS HONOUR: I have an originating application which also has a claim for interlocutory relief in it.

MR SIBTAIN: It does. I see that now.

HIS HONOUR: All right. So the interlocutory relief – right.

25 MR SIBTAIN: And your Honour will see from the final relief that we seek we either seek a declaration that the implied undertaking continues in respect of the documents produced under discovery, including those that were included as exhibits or affidavits to Mr Buck's affidavit, bearing in mind, of course, that there was  
30 reference to excerpts from documents, but certainly not the disclosure, to use the words that have been used previously – the disclosure in a way that someone who was an observer in court would have understood what was being said – what we seek is either a declaration that the implied undertaking continues notwithstanding that  
35 affidavit so as to prevent against what has been threatened by Mr Schiff, namely, the publication, namely, the use and disclosure of the contents of those documents in a public forum not for the purposes of the proceedings, or alternatively, as an alternative order, we seek an order that your Honour make an order in respect – that the implied undertaking continues, which subsection (2) permits, notwithstanding the matters referred to in subsection (1) of the rule.

40 HIS HONOUR: So is the issue whether the material in Mr Buck's affidavit and annexed or exhibited to it was read or referred to in open court in a way that disclosed its contents? Is that the central issue?

45 MR SIBTAIN: Insofar as the exhibits are concerned or annexures are concerned - - -

HIS HONOUR: Yes.

MR SIBTAIN: - - - yes. I don't think I can make a submission that what was said in open court - - -

HIS HONOUR: No. No.

5

MR SIBTAIN: - - - or what was read in open court was.

HIS HONOUR: Yes. No.

10 MR SIBTAIN: So there inevitably - - -

HIS HONOUR: I understand.

MR SIBTAIN: - - - will be parts that won't.

15

HIS HONOUR: Yes. Well, have you got a problem in that *Hearne v Street* refers to that public domain exception in a different way? And I think there's – I think *Hearne v Street* says that if it's received into evidence, then that's enough to destroy any protection you might have from the implied undertaking, and - - -

20

MR SIBTAIN: I'm sorry for interrupting, your Honour.

HIS HONOUR: The material - - -

25 MR SIBTAIN: Yes.

HIS HONOUR: - - - in Mr Buck's affidavit was undoubtedly received into evidence.

30 MR SIBTAIN: Yes. Yes.

HIS HONOUR: So how do you get over that?

35 MR SIBTAIN: Well, if I can't get over that, your Honour, I can get over it by your Honour making an order to the effect to prevent because your Honour can - - -

40 HIS HONOUR: But why would I do that if the High Court has said that once material is received into evidence that's the end of the implied undertaking? If that's what *Hearne v Street* – I don't have *Hearne v Street* with me. I've come along to court today not knowing what this is about.

MR SIBTAIN: Yes, your Honour.

45 HIS HONOUR: But I'm just posing a problem.

MR SIBTAIN: Yes.

HIS HONOUR: And I'm wondering what the answer is.

MR SIBTAIN: Yes. *Hearne v Street* certainly says that it overcomes the problem that was raised in *Harman v Home Office* and explicitly says – and if *Harman*  
5 doesn't put it in – if *Hearne v Street* doesn't put it in these terms, I think *Treasury Wines* certainly did – that the reading or tender of evidence means that it comes to an end.

HIS HONOUR: Right.

10

MR SIBTAIN: The implied undertaking comes to an end.

HIS HONOUR: Okay.

15

MR SIBTAIN: Right.

HIS HONOUR: And you want to have that overturned?

20

MR SIBTAIN: I don't want – certainly I'm not seeking for it to be overturned. What subrule (2) contemplates is the court making - - -

HIS HONOUR: I see. What, even though - - -

25

MR SIBTAIN: Yes.

HIS HONOUR: Even though the material has gone into evidence?

MR SIBTAIN: Yes, your Honour.

30

HIS HONOUR: Is that the operation of subrule (2)?

MR SIBTAIN: Yes. Well, yes, your Honour. That's – in my submission, yes, it is.

35

HIS HONOUR: I see. All right. Okay.

MR SIBTAIN: So we say that - - -

HIS HONOUR: So the order you want is one pursuant to subrule (2), is it?

40

MR SIBTAIN: Yes, your Honour.

HIS HONOUR: I see. That's your final order (2).

45

MR SIBTAIN: Final order (2). And, your Honour, there are some other final orders that are consistent obviously with the effect of that in the sense that we want an order under 2.32 that - - -

HIS HONOUR: And are there cases that deal with subrule (2), or is this - - -

MR SIBTAIN: It's - - -

5 HIS HONOUR: - - - virgin territory?

MR SIBTAIN: It's very much virgin territory. I wasn't – I'm not entirely sure I was able to find anything – would your Honour excuse me one moment. I wasn't able to find anything of assistance in relation to subrule (2). Would your Honour  
10 excuse me one moment. There was – sorry. There was one, but it wasn't – I didn't consider it to be - - -

HIS HONOUR: All right.

15 MR SIBTAIN: - - - of great assistance.

HIS HONOUR: All right. None the worse for that. Someone has got to deal with it for the first time, but - - -

20 MR SIBTAIN: So what we're seeking is that order. And the basis, as your Honour put to me, "Why would I make that order?" is in a circumstance where there is a threat to commit a different kind of contempt, not a threat to commit a contempt of an implied undertaking that on your Honour's interpretation has now evaporated, but a different contempt, namely, a civil contempt, namely, to exact reprisal or  
25 recrimination against parties to a proceeding, that is an intersection with the administration of justice as a going concern that is capable of protection, and where it is so explicit, as it is in this case, that allegations of lying and fraud have been made  
- - -

30 HIS HONOUR: Well, Ms Chrysanthou said that in open court. She accused people of dishonesty. I think that was her word, wasn't it?

MR SIBTAIN: I'm sure she did, your Honour. I'm sure she did.

35 HIS HONOUR: Well, it was a very strongly worded criticism.

MR SIBTAIN: Yes.

40 HIS HONOUR: I think she used the word "dishonesty".

MR SIBTAIN: And if it be the case that the word "dishonesty" was used in open court by an advocate no doubt properly instructed on a proper basis, then there would be absolutely no criticism of a party to that proceeding repeating that submission. This is somewhat different. What has been advertised, which is the best way of  
45 putting it by reason of the platform on which it was made – what has been advertised is an intention to reveal the inner and confidential workings of a broadcaster, the inner and confidential communications engaged with by a broadcaster in the



preparation of a program in circumstances where those materials would never have –  
would not necessarily have become - - -

5 HIS HONOUR: All right. Well, you will have to take me to the evidence on that  
because, as I recall Mr Buck's affidavit, it was really directed to a complaint that  
your client had deceived Mr Schiff into submitting to an interview on a false basis,  
which doesn't sound very much like an inner working. It sounds like the relationship  
with an external party, namely, Mr Schiff. But maybe the evidence will disclose that  
10 he wants to go beyond that, but - - -

MR SIBTAIN: Well - - -

HIS HONOUR: All right. Let me find out from Mr Smark what his position is.  
15 Yes, Mr Smark. Have you been able to get any instructions?

MR SMARK: Yes.

HIS HONOUR: Thank you. Good.

20 MR SMARK: From my solicitors.

HIS HONOUR: Yes. I mean, I appreciate that there's a time difference and I  
assume that Mr - - -

25 MR SMARK: I think he was asleep.

HIS HONOUR: - - - Schiff is in the northern hemisphere.

30 MR SMARK: Well, he was asleep. I don't know if he has woken up.

HIS HONOUR: Yes. All right.

MR SMARK: My solicitor has spoken to him.

35 HIS HONOUR: Thank you. Yes. What's your position?

MR SMARK: On the substantive issues raised or - - -

40 HIS HONOUR: On what I should be doing. Are you in a - - -

MR SMARK: Yes.

HIS HONOUR: - - - position where you're ready to proceed with this or do you  
45 need time?

MR SMARK: No, I don't need time.

HIS HONOUR: You don't need time?

MR SMARK: No.

5 HIS HONOUR: All right. Can you tell me in a nutshell what - - -

MR SMARK: Yes.

HIS HONOUR: - - - Mr Schiff's position is?

10

MR SMARK: *Hearne v Street* makes clear that once documents are in evidence, the implied undertaking has no further application.

HIS HONOUR: Yes.

15

MR SMARK: Rule 20.03 has nothing to do with that.

HIS HONOUR: Well, yes. I mean, if rule 20.03 didn't exist, then *Hearne v Street* would simply bind me, and the fact that rule 20.03 does exist may not alter that.

20

MR SMARK: Can I illustrate it in this way.

HIS HONOUR: Yes.

25 MR SMARK: Shortly, of course.

HIS HONOUR: Yes.

30 MR SMARK: I don't know if your Honour has access to the practice – the – but I will – it's dealt with at there. Would your Honour pardon me a moment. So looking at 20.03 - - -

HIS HONOUR: Yes. Yes.

35 MR SMARK: In the practice – after dealing with the implied undertaking - - -

HIS HONOUR: Yes.

40 MR SMARK: - - - the practice deals with the public domain exception to the implied undertaking and quotes - - -

HIS HONOUR: Yes.

45 MR SMARK: It's at twenty-O-three-twenty.

HIS HONOUR: Yes. I have that.

MR SMARK: And refers to - - -

HIS HONOUR: Yes.

5 MR SMARK: - - - Hearne v Street at paragraph 96, where one party is compelled  
- - -

HIS HONOUR: Yes. Well, that's – yes. Well, that corresponds to my recollection  
- - -

10 MR SMARK: Indeed.

HIS HONOUR: - - - about something being received in evidence.

15 MR SMARK: Indeed.

HIS HONOUR: And - - -

20 MR SMARK: And I've looked at Hearne v Street this afternoon, and that's a fair –  
in my submission, a fair reflection of it, and that's consistent with the way the Full  
Court proceeded in the Treasury case. Now, the next paragraph - - -

HIS HONOUR: Yes.

25 MR SMARK: - - - twenty-O-three-twenty-five, documents read or referred to in  
open court, the second paragraph:

30 *The effect of 20.03(1) is to make the general principle inapplicable to a  
document that has been read or referred to in open court but only if it was read  
or referred to in a way that disclosed its contents. This exception to the general  
rule is distinct from disclosure of documents that have entered the public  
domain - - -*

HIS HONOUR: Yes.

35 MR SMARK:

*- - - such as by being admitted into evidence. See above.*

40 HIS HONOUR: Yes.

45 MR SMARK: In other words, 20.03(1), before we get to (2), is an additional way in  
which the implied undertaking doesn't apply. So it's not documents that go into  
evidence, but a document that might be read out or referred to, for example, in a  
submission.

HIS HONOUR: Yes.

MR SMARK: So not about documents in evidence. Now, what subrule (2) – so it's a very small rule, if I can put it that way. It's – so - - -

HIS HONOUR: In that it's narrowly case.

5

MR SMARK: Yes.

HIS HONOUR: Yes.

10 MR SMARK: It has a small subject matter.

HIS HONOUR: It is. Yes.

15 MR SMARK: Subrule (2) then is a relieving provision, if I can put it that way, from that rule. So if, for example, Ms Chrysanthou or another advocate had referred to a document that wasn't in evidence, then by force of subrule (1), that would also be in the public domain and the implied undertaking wouldn't apply, but it would have been open – would be open to my learned friends on behalf of their client to apply that it be swept in under the Harman shield.

20

HIS HONOUR: Yes.

MR SMARK: That's what the rule is about.

25 HIS HONOUR: Yes.

30 MR SMARK: It's not granting to the court a power to reinvigorate the Harman undertaking to documents that are in evidence. And it would be very surprising if it were so given the principles of open justice that inform the limits of that principle as referred to in *Hearne v Street* and the *Treasury* case. So that's our submission.

HIS HONOUR: Right. Yes.

35 MR SMARK: So the application is misconceived. At least – I'm sorry. I shouldn't be – that's unfairly dismissive because I think Mr Sibtain was foreshadowing a second limb, if I understood it correctly, about contempt, and I'm not quite sure where that's going today.

40 HIS HONOUR: Well, there was a good deal of retreat from his starting position when we discussed the fact that Ms Chrysanthou had made accusations of dishonesty or deceit.

45 MR SMARK: In the transcript of the – just pardon me a moment – I will just get it up – 16 November 2023 – just pardon me. I've got it here ..... at page 33, Ms Chrysanthou said at line 36:

5           *The history of the matter prior to publication we've given a summary of. That's in my instructing solicitor's affidavit. And we say it's relevant. The manner in which these respondents approached the publication of the matter in a dishonest and deceitful way and made allegations during the broadcast which was plainly wrong is relevant.*

And then over on the next page - - -

10       HIS HONOUR: Yes.

MR SMARK: - - - she said – so that's page 34 of the transcript. Sorry. At line 29. Now, that's not the end of the matter:

15           *We say that the entire broadcast was prepared on a misleading and dishonest basis and we've set out in the affidavit –*

and so on –

20           *the misrepresentations –*

and so on:

25           *The misrepresentation made by my client in order to induce him to participate in the interview –*

that's the matter to which your Honour referred. And further:

30           *We have now seen and have produced to your Honour transcripts of the unedited footage and interview.*

And it may be – and I apologise I don't know this, but it may be that the documents that were tendered at the end to which my learned friend referred to, some footage – may be in that character. I'm sorry I don't know that. And:

35           *We have now seen and have produced to your Honour –*

I'm reading again:

40           *...and in particular have highlighted in the affidavit – I don't want to spend too much time on it – some dishonest editing in the context of what was actually asked and answered.*

45       So direct allegations of dishonesty were made before your Honour by reference to the discovered documents, including the interview material and the raw material, and that was deployed as being relevant to the discretion that your Honour was called upon to exercise. And of course, prior to that, the affidavit was read and the exhibit was tendered. And so I won't repeat myself. I've said about rule 20.03. On the face

of it, Mr Schiff, of course, remains bound by his implied undertaking. Your Honour knows that my solicitor has spoken to him today because I've just conveyed that. He was in any event aware of that. I have an affidavit here, but I won't go to it just now.

5 It – there's one factual matter, if I could. I don't want to take too much time, your Honour. I appreciate the urgent basis of it. But I have – do you have a stapler by any chance? I'm sorry. I'm stationary-deficient here. Could I ask you to staple that? I can do it, if you want. Yes. there's only – there's a very short affidavit. Have you got this? No. Okay. Can we get – for present purposes, I only want to go  
10 to one document in this affidavit, but I do read the affidavit of Nathan Albert Buck of today.

HIS HONOUR: I see. Right.

15 MR SMARK: It may have infelicities. I obviously prepared it in short order, your Honour. But what I wish – sorry. And I should say subject to any objection, but I'm only going to one of the annexures at the moment.

HIS HONOUR: Yes.

20

MR SMARK: So at page 2, using the numbering in the top right-hand corner - - -

HIS HONOUR: Yes.

25 MR SMARK: - - - your Honour will see a document which is self-evidently an article.

HIS HONOUR: Yes.

30 MR SMARK: Paragraph 5 identifies it as an article published by Lawyerly, which your Honour may know is an online news article – news service relating to legal matters.

HIS HONOUR: Yes.

35

MR SMARK: And it's about your Honour's judgment, in short – or I should say the orders your Honour made to give effect to the settlement.

HIS HONOUR: Yes.

40

MR SMARK: So there's the background to that. Now, turning onto the second page of the article, which is the third page of the annexure, there having been some quotes from Mr Schiff's lawyers, does your Honour see about a third of the way down a paragraph beginning “a Nine spokesman acknowledged the settlement on  
45 Tuesday”?

HIS HONOUR: Sorry. A third of the way down?

MR SMARK: Yes.

HIS HONOUR: Yes. Yes. Yes. Yes.

5 MR SMARK: Could I invite your Honour to read the statement attributed to the  
Nine spokesmen. It comprises the following five paragraphs commencing with the  
quotations.

HIS HONOUR: Yes. Yes. I've read that.

10

MR SMARK: So on the assumption, of course, that they haven't been quoted out of  
context and so on, it appears that the respondents – or at least the corporate  
respondent in these proceedings following up the judgment, which your Honour will  
recall was a judgment in favour of the applicant by consent, saw fit to say to the  
15 public, "We stand by our journalists and the articles – and then to laud the journalists  
and the articles which will remain online." So they consent to judgment against the  
respondents for a substantial sum of money and then see fit to say those things.  
Now, obviously Mr Schiff rights to sue for defamation in respect of that are fully  
reserves. But the point for present purposes is that it may fairly be assumed that Mr  
20 Schiff may choose to publish something in response to that sort of statement. Not  
saying he will, but he may. And he may choose in doing so to refer to documents  
which were available to him, documents not caught by the implied undertaking.

25 And the order now sought both on an interim basis and apparently on a final basis is  
an order – and here I'm referring to the form of the application. Because they're  
fresh proceedings, I think it's in the form of an originating application, which I don't  
suggest is – there's any difficulty with that. The final relief is an order – it's a  
declaration that the documents are caught by the implied undertaking. Plainly  
wrong. Your Honour wouldn't grant that for the reasons I've stated. An order under  
30 rule 20.3(2). Plainly unavailable for the reasons stated.

35 But dealing with interlocutory relief, I think order (3) – obviously there's no  
difficulty with (1) and (2), procedural orders. But order (3), an order until further  
order – presumably your Honour wouldn't contemplate that, but it would be until a  
fixed time; otherwise, we would need to move to discharge it – that the respondent  
be restrained from using or disclosing any documents produced under discovery,  
including those under the affidavit. In other words, the interim order is seeking to  
restrain Mr Schiff from using documents which are not caught by the implied  
undertaking.

40

HIS HONOUR: I understand. Yes.

MR SMARK: Well - - -

45 HIS HONOUR: Well, it seems to go beyond that, but I'm not sure to what extent.  
The focus of it seems to be on the material in Mr Buck's affidavit, but - - -

MR SMARK: Yes. But - - -

HIS HONOUR: All right. Thank you. Well, let me return to Mr Sibtain then. All right. Mr Sibtain, you wish to apply for the interlocutory relief - - -

5

MR SIBTAIN: Yes, your Honour.

HIS HONOUR: - - - do you? And the evidence in support is?

10 MR SIBTAIN: I rely upon an affidavit which I don't know if I've provided it to your Honour as yet.

HIS HONOUR: I have an unsworn affidavit by Mr Bartlett.

15 MR SIBTAIN: Will your Honour excuse me one moment. Your Honour, I only have an unsworn version.

HIS HONOUR: Right. Okay. Well, that's not fatal.

20 MR SIBTAIN: Mr Bartlett is available.

MR SMARK: Can I say I don't, of course, seek to cross-examine him, and there's no objection to either the form or the content of the affidavit.

25 HIS HONOUR: Thank you. Thank you, Mr Smark.

MR SIBTAIN: And, your Honour, I - - -

HIS HONOUR: Yes.

30

MR SIBTAIN: I'm sorry, your Honour. I interrupted.

HIS HONOUR: No. Go ahead. Yes.

35 MR SIBTAIN: And I need to tender some documents that I understand have been provided to in some way which I - - -

HIS HONOUR: Not to me.

40 MR SIBTAIN: No. Would your Honour excuse me yet again.

HIS HONOUR: Anyway. Let's look at the text of the affidavit while you're waiting for the documents.

45 MR SIBTAIN: Yes, your Honour. Yes, your Honour.

HIS HONOUR: So you read that affidavit.



MR SIBTAIN: I read the affidavit.

HIS HONOUR: And – all right. I grant you leave to read that affidavit despite the fact that it hasn't been sworn or affirmed in light of the fact that Mr Smark doesn't  
5 take objection on that basis. So what does this – now, do you say this provides a threat to disclose material beyond what's in Mr Buck's affidavit?

MR SIBTAIN: Yes, your Honour. Yes, your Honour.

10 HIS HONOUR: Okay. What do I look for that?

MR SIBTAIN: And your Honour would go to the threat – I need to some extent the documents to be able to do this, but hopefully the extracts will suffice. If your Honour goes to paragraph 32.

15 HIS HONOUR: Yes.

MR SIBTAIN: There was a tweet. Indeed, your Honour, I apologise. The document may well be able to be viewed in a different context, namely, the affidavit  
20 upon which my learned friend relied.

HIS HONOUR: All right.

MR SIBTAIN: I think may contain at least one of those tweets, and certainly one of  
25 them is. It's behind paginated – page 11 at the top:

I'm on vacation this week. Next week, I will start my full-time job exposing .....  
complete lies –

30 etcetera.

HIS HONOUR: All right.

MR SIBTAIN:  
35

*Check out the evidence soon.*

And it's the reference to "the evidence" - - -

40 HIS HONOUR: Yes.

MR SIBTAIN: - - - which reference is also consistent with what appears at paragraph 28.

45 HIS HONOUR: Of Mr Bartlett's affidavit?

MR SIBTAIN: Of Mr Bartlett's affidavit.

HIS HONOUR: Right. Yes.

MR SIBTAIN: Which is a similar statement:

5           *When I finally get it in discovery, I will release it myself.*

HIS HONOUR: Yes.

10       MR SIBTAIN: So is not a threat merely to repeat the substance of what Ms  
Chrysanthou said or what was read in Mr Buck's affidavit.

HIS HONOUR: But do we know what it is? I mean - - -

15       MR SIBTAIN: On the relevant day.

HIS HONOUR: Why shouldn't I assume that Mr Schiff will bona fide seek to  
comply with his implied undertaking a la *Hearne v Street* and disclose only matters  
which are no longer covered by the implied undertaking? Because he thinks that the  
world at large ought to know about things that have been tendered in evidence.

20       MR SIBTAIN: Well, what the tweet reveals is that he is making it his full-time job  
to expose the evidence, combined with – I'm at some difficulty because I haven't  
been able to take your Honour to at least one of those documents but only the - - -

25       HIS HONOUR: Well, do you want to proceed this afternoon, or do you want to  
proceed at another time?

MR SIBTAIN: No, your Honour.

30       HIS HONOUR: I mean, I can hear this tomorrow morning. But if you're not ready  
to proceed now, I'm going to decide it on the evidence that you have led.

MR SIBTAIN: If your Honour pleases. Would your Honour excuse me. I will take  
some instructions.

35       HIS HONOUR: Right.

MR SMARK: Could I say this in case - - -

40       HIS HONOUR: Yes.

MR SMARK: - - - it assists my learned friend. I don't mind if he wishes to, as it  
were, read some evidence out informally. I mean, we're ready to go. So - - -

45       HIS HONOUR: Yes. I understand that. I understand.

MR SMARK: Just in case that's any help.

HIS HONOUR: Right. Thank you, Mr Smark.

MR SIBTAIN: I'm taking some instructions. Your Honour, if your Honour is prepared to stand the matter over till tomorrow morning, we will get it in some proper order to be able to make the application.

HIS HONOUR: Well, that might be a bit better.

MR SIBTAIN: I apologise, your Honour, for the state of the papers.

HIS HONOUR: 9.30 tomorrow morning. Is that convenient, Mr Smark?

MR SMARK: I think it's fine. Yes. That's fine.

HIS HONOUR: Thank you. In the meantime, I will make orders (1) and (2) in the interlocutory relief that you seek. Well, no. I will amend it. I mean, you can file this in the registry, can't you?

MR SIBTAIN: Yes, your Honour.

HIS HONOUR: And so I grant leave to the applicants to file in the registry an originating application, an interlocutory application and a genuine steps statement together with the affidavit of Mr Bartlett of 23 November 2023.

(2) I order that the interlocutory application be returnable on 24 November 2023 at 9.30 am.

(3) The costs of today are reserved.

MR SIBTAIN: My it please the court. I'm - - -

HIS HONOUR: Is there anything further that I need to do?

MR SIBTAIN: No, your Honour.

HIS HONOUR: All right. Thank you.

MR SIBTAIN: Thank you.

HIS HONOUR: Very well. I would be grateful for advance notice of any authorities you wish to rely upon other than the rules and *Hearne v Street*.

MR SIBTAIN: We have – we had a short outline of submissions that we had prepared which at least identifies some authority. Would your Honour be assisted by that now?

HIS HONOUR: Yes. Thank you. Yes.

MR SIBTAIN: And I will give my learned friend a copy.

5 MR SMARK: Thank you. I'm grateful. Could I also, if it's convenient, hand up  
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HIS HONOUR: Yes.

10 MR SMARK: I don't know if your Honour wants it, but an extract from Professor  
Rofe's recent book on - - -

MR SIBTAIN: Rolph's.

15 MR SMARK: Rolph's.

HIS HONOUR: Yes.

MR SMARK: Did I say Rofe? Rolph's recent book on contempt. And - - -  
20

HIS HONOUR: Yes. Yes. Certainly.

MR SMARK: It's two weeks off the press, I think.

25 HIS HONOUR: The one that Federation Press launched - - -

MR SMARK: Yes. That's right.

HIS HONOUR: - - - very recently.  
30

MR SMARK: And the relevant – it's the bit dealing with the implied undertaking,  
and the relevant section, we say, is at page 575 under the heading When Does the  
Implied Undertaking Cease to Apply.

35 HIS HONOUR: Leave that open. Thank you.

MR SIBTAIN: At the top of the page.

MR SMARK: At the top of the page. Yes. And I don't know if your Honour wants  
40 it or not, but we have a copy of the Treasury case.

HIS HONOUR: Yes. I will take that. Thank you. Thank you. Let me just have a  
look at this and see if there's anything I wish to raise with you.

45 MR SMARK: And by reference – the sin of doing it by reference to the headnote,  
but just as a mud map - - -

HIS HONOUR: Yes.

MR SMARK: - - - on the headnote, the relevant point seems to be on page – the second page of the FCR report down the bottom - - -

5

HIS HONOUR: Yes.

MR SMARK: - - - sub (2) or paragraph 2, “the primary judge was not in error in concluding” and the reference then is to 14 and 84 and the discussion of the Hearne v Street obligation, 39 to 85, if that - - -

10

HIS HONOUR: Thank you.

MR SMARK: Just as a mud map, your Honour.

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HIS HONOUR: Yes. Thank you.

MR SIBTAIN: And, your Honour, one final thing, if I might raise.

20

HIS HONOUR: Yes.

MR SIBTAIN: Your Honour, I can’t make a submission that anything that has been read in open court or explicitly said in open court could be in any way protected. So in terms of the leave that your Honour has granted me, I may well amend the interlocutory relief to limit it.

25

HIS HONOUR: Well, I will hear that amendment application tomorrow at 9.30.

MR SIBTAIN: If your Honour pleases. Your Honour is - - -

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HIS HONOUR: Sorry. What you file in the registry can be amended. I mean, you’ve got a right to amend without leave at this point, so - - -

MR SIBTAIN: Yes. So we will - - -

35

HIS HONOUR: Yes.

MR SIBTAIN: - - - turn our minds to that question - - -

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HIS HONOUR: Very well.

MR SIBTAIN: - - - because I won’t be making a submission that to the extent something has been - - -

45

HIS HONOUR: Yes. All right.

MR SIBTAIN: - - - said in open court or - - -

HIS HONOUR: It seems prudent to exclude - - -

MR SIBTAIN: Yes.

5 HIS HONOUR: - - - from – to make an exclusion in the orders in relation to things  
- - -

MR SIBTAIN: Yes.

10 HIS HONOUR: - - - that have been said in open court. But you wish to pursue the  
contention that matters received in evidence but not deployed in a public way in  
court are still subject to the implied undertaking, do you?

MR SIBTAIN: No. Are susceptible to your Honour making an order - - -

15

HIS HONOUR: Right. I see.

MR SIBTAIN: - - - pursuant to subsection (2) because - - -

20 HIS HONOUR: Right.

MR SIBTAIN: Yes. I would be – I think I would have to give notice to have a  
larger bench if I were seeking to contend to the contrary.

25 HIS HONOUR: All right.

MR SMARK: Could I just also – just in case it's of assistance, your Honour, to the  
extent the contempt limb is to be pursued - - -

30 HIS HONOUR: Yes.

MR SMARK: - - - we apprehend that that would be by reference to principles  
exemplified by a decision of Rares J. Could I give your Honour a citation. I don't  
have a copy to hand up.

35

HIS HONOUR: Yes.

MR SMARK: It's of Bastiaan, B-a-s-t-i-a-a-n, v Nine Entertainment, which I  
assume is an entity in some way connected with - - -

40

HIS HONOUR: Yes.

MR SMARK: - - - the present applicant. The reference is [2022] FCA 60.

45 HIS HONOUR: Yes.

MR SMARK: And it's in the ALR reports.

HIS HONOUR: And have you got the reference there?

MR SMARK: Yes. 405 ALR, page 50.

5 HIS HONOUR: Thank you. That's concerning, what, an injunction to restrain a threat in contempt?

MR SMARK: Yes.

10 HIS HONOUR: I see.

MR SMARK: On the basis of intimidation of parties and so on.

HIS HONOUR: I see.

15

MR SMARK: Now, we're only guessing that that's the line of country we're in, but  
- - -

20 HIS HONOUR: All right. All right. Thank you. I will adjourn until 9.30 in the morning. Please adjourn the court.

**MATTER ADJOURNED at 3.45 pm UNTIL FRIDAY, 24 NOVEMBER 2023**