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TRANSCRIPT OF PROCEEDINGS

O/N H-1883451

FEDERAL COURT OF AUSTRALIA

NEW SOUTH WALES REGISTRY

JACKMAN J

No. NSD 1400 of 2023

NINE NETWORK AUSTRALIA PTY LTD

and

PETER DAVID SCHIFF

SYDNEY

10.26 AM, FRIDAY, 24 NOVEMBER 2023

MR D.R. SIBTAIN SC appears for the applicants

MR K. SMARK SC appears for the respondents

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HIS HONOUR: Yes, Mr Sibtain.

MR D.R. SIBTAIN SC: Firstly, thank you, your Honour, for your Honour's
indulgence yesterday evening and - - -

5

HIS HONOUR: Fine.

MR SIBTAIN: - - - today, hopefully, we're in a slightly better order, at least from
an evidentiary perspective.

10

HIS HONOUR: Right.

MR SIBTAIN: Does your Honour – I will hand up to your Honour a bundle that
comprises everything, unless your Honour has already noted.

15

HIS HONOUR: All right, yes.

MR SIBTAIN: This includes an amended originating application.

20

HIS HONOUR: Yes, I've seen that.

MR SIBTAIN: That has been filed.

HIS HONOUR: Yes.

25

MR SIBTAIN: And amended interlocutory – well, an interlocutory application.

HIS HONOUR: Yes.

30

MR SIBTAIN: And there is the affidavit which was in draft and with its exhibits.

HIS HONOUR: Yes, thank you.

MR SIBTAIN: And your Honour, there is a further affidavit which we – that I
would read.

35

HIS HONOUR: Yes, a short one from Mr Bartlett?

MR SIBTAIN: That's so.

40

HIS HONOUR: Yes, I have that, yes.

MR SIBTAIN: Yes, it attaches a communication from an Andrew Schiff to the
Australian newspaper.

45

HIS HONOUR: Yes.

MR SIBTAIN: So I read that as well. I - - -

HIS HONOUR: Very well. Are there any objections to those affidavits?

5 MR K. SMARK SC: No.

HIS HONOUR: Thank you.

MR SIBTAIN: I understand my friend may have some evidence.

10

HIS HONOUR: Mr Smark, do you read the affidavit that you handed up yesterday of Mr Buck?

MR SMARK: I do.

15

HIS HONOUR: Thank you. That's Mr Buck's affidavit of 23 November 2023. Are there any objections to that, Mr Sibtain?

MR SIBTAIN: No, your Honour.

20

HIS HONOUR: Thank you.

MR SMARK: And I have a further affidavit.

25 HIS HONOUR: Yes?

MR SMARK: Which, in part, is responsive to the short affidavit – further affidavit of Mr Bartlett, that was just read.

30 HIS HONOUR: Very well.

MR SMARK: So I read the affidavit of Nathan Buck of today.

HIS HONOUR: Thank you. Are there any objections to that, Mr Sibtain?

35

MR SIBTAIN: No, your Honour.

HIS HONOUR: Thank you. Very well, any evidence in reply?

40 MR SIBTAIN: No, your Honour.

HIS HONOUR: Good.

45 MR SIBTAIN: Well, there is something from the bar table in reply, which arises from Mr Buck's affidavit of today, affirmed – affirmed today.

HIS HONOUR: Yes?

MR SIBTAIN: In relation to the matters dealt with at paragraphs 4 and 5, I have instructed that that was correct until a few moments ago, but I am instructed it is now – the embedded video is now removed.

5 HIS HONOUR: All right, thank you.

MR SIBTAIN: I accept - - -

MR SMARK: And I apologise – the court should proceed on that basis.

10

HIS HONOUR: Thank you, Mr Smark.

MR SIBTAIN: And I apologise to the court for the delay.

15 HIS HONOUR: No, not at all.

MR SIBTAIN: And to our learned friends.

HIS HONOUR: Thank you. Yes, thank you.

20

MR SIBTAIN: I will be brief. I will need to go to some evidence.

HIS HONOUR: Yes.

25 MR SIBTAIN: But I apprehend that your Honour has some understanding of the issues.

HIS HONOUR: Yes.

30 MR SIBTAIN: There are really three principal issues for determination. The first is the court's power to restrain a threatened contempt. That's an overarching consideration. Then there is, as a subset of that, the power to restrict the use of material that might be used in that threatened contempt. And then finally, whether there is a sound basis for the exercise of any power, whether it be a power to restrain
35 a contempt or a power to limit the ability of a party to engage in a contempt. And those are the matters that I wish to address. I put this squarely: the implied – we accept that the implied undertaking operates until documents are read in open court, or affidavits are read in open court. And I accept that the reading of an affidavit or the tender of a document has the effect of dissolving what might be described as an
40 implied obligation, because as the authorities say, it is an obligation that arises by operation of law.

HIS HONOUR: Yes, we should move away from the language of “undertaking,” as the High Court said in *Hearne v Street*, but that's a minor quibble.

45

MR SIBTAIN: Quite. Well, I've tried to describe it as an implied obligation, but the implied obligation - - -

HIS HONOUR: Yes. No, I think that's right.

MR SIBTAIN: The doing of an act by any party has a certain effect, and that certain
5 effect is either reading or tender of a document that it produces a result that that
implied obligation dissolves.

HIS HONOUR: Yes.

MR SIBTAIN: Now, that cannot be the end of the matter, and it's not to suggest
10 that the dissolution of that implied obligation in some way restricts or limits the
ability of the court to impose any express prohibitions, whether it be on a reading of
the way in which rule 20.3 subsection (2) operates, which isn't limited as to time.
Doesn't say prior to the expiration of the implied obligation the court may order that
15 the obligation continues. That's the first source of power.

HIS HONOUR: Well, isn't there a problem with subrule 2 in the – it begins with
the word, "however," which indicates that it's a qualification to subrule 1.

MR SIBTAIN: Yes.

20

HIS HONOUR: And therefore, it seems to me on its ordinary meaning that subrule
2 applies only to the subject matter of subrule 1, which is the reading or reference in
open court in a way that discloses contents, which was true only to a very limited
extent of what Ms Chrysanthou put to me on 16 November. There's a lot of material
25 in the Buck affidavit of 15 November, which wasn't disclosed in open court. So
subrule 2 would only apply, would it not, to what was actually said by Ms
Chrysanthou in court at transcript pages 33 to maybe 35 or so.

MR SIBTAIN: Well, save for this: that logic, I say with respect, presumes an
30 interpretation of subsection (1) that is limited to the reading or referring to a
document – I will break it up this way – if a document is read or referred to in open
court in a way that discloses its contents. So if one distinguishes between those two,
what the High Court has said and what the Full Court has said is a document is read,
that means, the tender of a document, it's taken as read. Or it is somehow not read in
35 a formal sense but is otherwise disclosed, then an application – then subrule 2 has
application. So I'm not taking issue with your Honour's reading of it. My – the
issue that I do take is that subrule (2) has application beyond that which appears in
paragraph 22 of Mr Buck's affidavit and paragraph – and transcript 33. But would –
I'm sorry, your Honour.

40

HIS HONOUR: Paragraph 22 of Mr Buck's affidavit being which one?

MR SIBTAIN: That – Mr – I will take it step by step. Ms Chrysanthou at transcript
33 and following, read from a particular paragraph of Mr Buck's affidavit, and I can
45 – I will take it - - -

HIS HONOUR: Yes, right. Okay. Yes.

MR SIBTAIN: And my submission is this: the paragraph that subsection (1) of the rule is addressed to the reading of a document, not as in the reading out loud.

HIS HONOUR: Yes.

5

MR SIBTAIN: But the reading - - -

HIS HONOUR: Disclosure.

10 MR SIBTAIN: The disclosure. And so everything was, on that understanding – everything was disclosed, to the extent that it was formally read or tendered.

HIS HONOUR: Well, I don't read subrule (1) in that way. I mean, I read subrule (1) as relating only to what was, in fact, disclosed.

15

MR SIBTAIN: If your Honour reads it that way, then I - - -

HIS HONOUR: Which is a very limited amount of Mr Buck's affidavit.

20 MR SIBTAIN: Yes, and - - -

HIS HONOUR: And then subrule (2) would give me the power to say that the implied obligation still continues to that material.

25 MR SIBTAIN: Yes, and I can't make an application about that and your Honour will see from the amended originating application that I don't.

HIS HONOUR: Yes, you don't. Yes so - - -

30 MR SIBTAIN: But I don't.

HIS HONOUR: Well, it struck me that one of the oddities about the substantive order that you seek is that you want to use subrule (2) in a way that, on its face, has nothing to do with subrule (1).

35

MR SIBTAIN: Yes, your Honour. I do.

HIS HONOUR: It's a question of construction of the rule.

40 MR SIBTAIN: It is, I accept that.

HIS HONOUR: Which, at the moment, I'm against you on.

45 MR SIBTAIN: I understand that, your Honour, loud and clear. Your Honour, as to another source of power, to the extent that I – there is the need to identify it in my originating application – which I think there probably would be, and I might need to amend further to seek this as the source of power – it must be a power within the

inherent jurisdiction of the court to control its own processes to impose appropriate restrictions on the use of documents if there is an apprehension that they will be used improperly and not for the purposes of a proceeding before it. If – this is adopting your Honour’s reading of the rule, that the rule is an aggregating rule said to describe what happens to documents as a consequence of the exhaustion of the implied obligation. There must be a power – a - - -

10 HIS HONOUR: Well, you have only got to show a serious question at the moment, so.

MR SIBTAIN: Yes.

HIS HONOUR: Yes, right.

15 MR SIBTAIN: And so in my submission, the court would have a power to control its own processes, notwithstanding the dissolution of the implied obligation. Where there is material before the court to demonstrate that a document – that there is a prima facie case that a document will be used in aid of a contempt.

20 HIS HONOUR: In aid of a contempt? What is the contempt?

MR SIBTAIN: In aid of a – well, in aid of a threatened contempt. That - - -

25 HIS HONOUR: Yes? And what’s the threatened contempt?

MR SIBTAIN: The threatened contempt – and I will go to the material now – the threatened contempt is a intention explicitly – explicitly made – by the respondent in this proceeding to engage in a vendetta against the two journalists involved in the preparation of the broadcast, which vendetta would – on one view – be engaged in not for the purpose merely of setting the record straight, but rather, to harm or damage the reputation and career of those journalists. And out submission – and I will go to the evidence that, in my submission, supports that conclusion in terms of a threat.

35 HIS HONOUR: Yes.

MR SIBTAIN: The nature of the contempt is a contempt after judgment to execute a reprisal against a party.

40 HIS HONOUR: Now, does a reprisal have to involve some tendency to interfere with the administration of justice?

MR SIBTAIN: Well, it does by reason of reprisal itself, in that the administration of justice as a – as a going concern, or as an ongoing administration, contemplates that those who come before the court will not sustain reprisal. So the very fact of reprisal against a party for taking a position in a proceeding – on the authorities such as Butterworth’s case, which has been the subject of reference in – certainly in Tate v

Duncan-Strelec, to which we referred in our brief note. The punishment of a witness, for example, for engaging in a case, if a witness comes to a court, gives evidence and then as a consequence of having given evidence – perhaps against one of the parties – they suffer some employment loss or they suffer some demotion at work or
5 disciplinary action – all of that is aimed at preserving the administration of justice for all litigants so that those who come before the court won't come before the court in fear.

10 HIS HONOUR: I see. So it's your submission that there's an element of deterrence here. That is, deterring – well. It – maybe “deterrence” is the wrong word. But it's
- - -

MR SIBTAIN: Preservation.

15 HIS HONOUR: Yes. Preserving the proper administration of justice so that witnesses don't feel intimidated in coming along or litigants don't feel intimidated in defending a case.

MR SIBTAIN: Yes.

20

HIS HONOUR: I see, yes.

MR SIBTAIN: That's the basis on which we put it. And if I could go then to the evidence in support of that, perhaps a convenient starting point is PB – exhibit PB8
25 to Mr Bartlett's affidavit, which appears on page 89 in the bottom right corner.

HIS HONOUR: Yes, right?

MR SIBTAIN: Your Honour will see that there is a tweet exchange here – or I think
30 it's a tweet exchange. It's some form of social media publication.

HIS HONOUR: All right, yes.

MR SIBTAIN: And your Honour will see the third entry:
35

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

Now - - -

40 HIS HONOUR: Yes?

MR SIBTAIN: That's a starting point for indicating an intention on the part of Mr Schiff to use discovered documents. Now, I don't think I'm in a position to make
- - -

45

HIS HONOUR: Yes, but not to destroy the reputation and careers of anyone.

MR SIBTAIN: I haven't got there yet.

HIS HONOUR: That would fall into the category of setting the record straight, wouldn't it?

5

MR SIBTAIN: Well, I wouldn't necessarily accept that in its context. It is an indication – one doesn't know whether or not he was made aware by his legal advisors of his obligation in relation to discovered documents or not. It's – there's no evidence as to whether or not that occurred. Assuming it did, he was – assuming it did, he was acting in a way – he was making clear that he intends to release all documents – or release certain documents on discovery, when he gets them.

10

HIS HONOUR: Yes, yes.

15 MR SIBTAIN: That's the starting point. Then can I invite your Honour to go to PB3.

HIS HONOUR: What page?

20 MR SIBTAIN: Which appears on page 76.

HIS HONOUR: Yes?

MR SIBTAIN: And this is where the commencement of the vendetta, in my submission – in our submission – begins.

25

HIS HONOUR: Yes?

MR SIBTAIN: Your Honour will see it's a peculiar attack on an award that was given to this particular journalist and your Honour will see in the tweet, he says:

30

Australian judge just ruled defamatory against me.

HIS HONOUR: Yes?

35

MR SIBTAIN: Now, it's not clear what that ruling was, but - - -

HIS HONOUR: This is September last year, is it? I can't remember the dates, so.

40 MR SIBTAIN: Yes, this was - - -

HIS HONOUR: 23 September 2022?

MR SIBTAIN: Yes. Yes, it was.

45

HIS HONOUR: I can't remember whether that ties in with Jagot Js judgment.

MR SIBTAIN: No. I – it seemed to be - - -

HIS HONOUR: Anyway.

5 MR SIBTAIN: - - - inconsistent with the chronology but, in any event, I pause to say just:

Australian judge just ruled defamatory against me.

10 HIS HONOUR: Yes.

MR SIBTAIN:

The segment was pure tabloid trash.

15

HIS HONOUR: Yes.

MR SIBTAIN: Ms Grieve needs to return her award.

20 HIS HONOUR: Yes.

MR SIBTAIN: Now, one can give two readings to that. It might have been said in a light-hearted way. Clearly, from what follows, it was not. On the – then turning to this year, I invite your Honour to go page 78.

25

HIS HONOUR: Yes.

MR SIBTAIN:

30 *In preparing for the damages portion of my lawsuit, I'm appalled by the extent to which they deliberately –*

and he says –

35 *mispresented the truth to the audience, fabricated quotes, exculpable evidence and edited comments out of context, misleading viewers into thinking the opposite of what was actually said. This is not just defamation. It's outright fraud.*

40 HIS HONOUR: Well, Ms Chrysanthou said much the same thing on the 16th of - - -

MR SIBTAIN: She said “dishonesty.”

45 HIS HONOUR: - - - November about dishonest editing, didn't she?

MR SIBTAIN: She made a submission about dishonest editing, but the – in terms of – as what is described as – by him as exculpable evidence, what was selected for the

purpose of that was a number of interviews – certainly not everything – but interviews that tended to favour the applicant’s case, as opposed to anything that might be to the contrary. And the difficulty is, of course, what would – what was inevitably – and what one would have expected relied upon – were those interviews
5 with persons who had nothing bad to say about the bank.

HIS HONOUR: Yes.

10 MR SIBTAIN: Then on 22 November – this appears at page 96.

HIS HONOUR: Yes?

MR SIBTAIN:

15 *I’m on vacation this week. Next week, I will start my full-time job.*

HIS HONOUR: Yes.

20 MR SIBTAIN: And your Honour, it can’t be a – if it is a full-time job, it wouldn’t be a full-time job merely to comment on those matters that - - -

HIS HONOUR: No, I do see an element of hyperbole in that.

25 MR SIBTAIN: Yes. But it also – there is an element of hyperbole, but it shows a – it shows a passion on the part of the respondent to engage in an act of reprisal against litigants in a now-concluded case, a case which was the subject of consent orders. And the way he describes it:

30 *Consider this a public service for the Australian public, you guys deserve better.*

It is not merely providing some context for the proceedings now settled. It is a declaration of war. “I’m on vacation, but I’m going to make it my full-time job of exposing the journalist,” is a complete lie.
35

HIS HONOUR: What’s the date of this one?

MR SIBTAIN: This is 22 November 2023.

40 HIS HONOUR: Yes, thank you. Two days ago.

MR SIBTAIN: Yes, your Honour. And then if your Honour goes to 98. This was a tweet yesterday morning:

45 *Discovery in my winning defamation lawsuit against the journalist.*

And your Honour will see, the – Mr Schiff keeps tagging the journalist. A tag, if your Honour isn't aware, is by the inclusion of the @ sign in a way that – in some way, it connects this publication to the journalist's own account. So every time a tag appears, the person in question sees that tag. So it's done in a very – what are you
5 saying about his case is being done in a very ad hominem way by the connection of the journalist.

HIS HONOUR: But how does that differ from what Ms Chrysanthou said to the court at transcript page 34?
10

MR SIBTAIN: Well, your Honour - - -

HIS HONOUR: And if a barrister can say it, why can't a client?

15 MR SIBTAIN: A – what a barrister – the barrister – can I break it up this way? Your Honour will see what's in the quote, and I hear what your Honour says in relation to the lines. That is broadly – broadly – consistent with what Ms Chrysanthou said. I don't understand the making up quotes was - - -

20 HIS HONOUR: Well, dishonest editing is a pretty severe allegation.

The entire broadcast was prepared on a misleading and dishonest basis.

MR SIBTAIN: I'm sorry, is your Honour reading from the same document - - -
25

HIS HONOUR: Transcript page 34.

MR SIBTAIN: I'm sorry. Yes, your Honour. Yes. It is – it is the last sentence. It's the last sentence of that tweet that is indicating an intention to go beyond merely
30 the repetition of what has been said. There is an intention to continue, and then – to continue to damage the reputation of the journalist and some minutes later – this appears now at page 80, 8-0.

HIS HONOUR: Page 80.
35

MR SIBTAIN: Yes.

HIS HONOUR: Yes?

40 MR SIBTAIN: Your Honour will see that's written there:

For one, there wear damages.

I think, "for one, there were damages," I think is what he meant to say.
45

HIS HONOUR: Yes?

MR SIBTAIN:

So only courts can order her to pay. I'm not an anarchist, but hopefully the free market will end her career.

5

Now, whilst he saying, “hopefully the free market will,” it is clearly – it is clear from the chain of tweets that he wants to damage her career.

10 HIS HONOUR: Well, he wants to see others damage her career if one reads it in a natural way.

MR SIBTAIN: Yes. And he will continue from – at – what your Honour will take from the continuing publications about her and the tagging of her – is that he is going to do what he can to damage her career. Now, assuming that for a moment that he’s going to do what he can to damage her career, there are a number of considerations implicit in that. One is: does it satisfy a test of contempt? In my submission – or a test of a threat of contempt – in my submission, the exercise of a reprisal and the engagement of – in a vendetta is capable of constituting contemptuous conduct, because litigants who come before the court will be afraid to come before the court if they are going to be tweeted about and tagged on a relentless basis. That’s the first thing.

25 The second thing is – or the second matter is – is the extent going to be limited merely to what was said by her barrister in court, or will it go beyond that? Now, that is an inference that last – yesterday afternoon, your Honour raised as to whether or not that inference can be drawn. In my submission, the evidence – by the repetition of the matters by the reference to matters such as the ending of a career and a desire to publish in a way that connects this journalist over and over again to the – to any tweet – it is an intention to go beyond merely the repetition of what her – what his counsel said in court. And that inference is clear from the language that’s used.

35 HIS HONOUR: Can I just expose one aspect of this for your consideration, and it’s a matter on which you may wish to take instructions. The argument that you’re putting now does require me to compare these tweets with what Ms Chrysanthou said in court, and to record in my reasons for judgment what Ms Chrysanthou said in court. That may have a prospect of a wider dissemination of Ms Chrysanthou’s comments than would otherwise be the case. But I see no way out of that, if you wish to proceed with your application. So if you proceed with your application, I’m going to decide it.

MR SIBTAIN: Yes, your Honour.

45 HIS HONOUR: But this line of argument exposes a problem which there may be some sensitivity about in the interests of the two journalists in question. I simply raise that for your consideration, because your client should proceed with its eyes open as to that risk.

MR SIBTAIN: Yes, your Honour. I was going to make a submission that your Honour could restrict the judgment in some way – the material that was in it. However - - -

5 HIS HONOUR: Well, I may have been able to do that if it were not for the fact that you're running this argument about reprisal.

MR SIBTAIN: I hear what you - - -

10 HIS HONOUR: And there's no suggestion Ms Chrysanthou committed a contempt of court.

MR SIBTAIN: No.

15 HIS HONOUR: So Mr Schiff is entitled to an answer to the question: well, if it's good enough for Ms Chrysanthou, why isn't it good enough for me? And I think I have got to answer that question.

MR SIBTAIN: I will take some - - -

20

HIS HONOUR: But I accept it only arises if you pursue the reprisal argument. If you don't, then I don't see any need to refer in my judgment to what Ms Chrysanthou said.

25 MR SIBTAIN: Well, your Honour - - -

HIS HONOUR: Ms Chrysanthou's comments may not be true as a matter of fact, and I deliberately refrained from expressing a view about it in my judgment number 7. But I do see a risk of damage to people's reputations, which may be quite
30 uncalled-for.

MR SIBTAIN: Yes, your Honour.

35 HIS HONOUR: If this line is to be pursued.

MR SIBTAIN: Would your Honour excuse me so I can take some instructions on that?

40 HIS HONOUR: Yes, certainly.

MR SIBTAIN: I may need a little – would your Honour be prepared to give me five minutes?

45 HIS HONOUR: Well, why don't you continue with your argument? I'm very keen to wrap this up this morning.

MR SIBTAIN: Yes, your Honour.

HIS HONOUR: So you continue with your argument. You've got more than one person behind you, so instructions can be obtained while you continue with your argument.

5 MR SIBTAIN: Yes, your Honour. I will continue. On the basis of the question of reprisal, I – if I am to maintain that argument – it I am to maintain that argument – then I – that is the only matter to which I can point for the making of any order that might restrain the use of any other documents.

10 HIS HONOUR: Right, beyond the rule 20.3?

MR SIBTAIN: To the – quite. 20.3, there will be – by reason of the implied undertaking, there will be documents that were produced on discovery that were not read or tendered in open court. There's no need to make an order in respect of that.
15 Indeed, it would be inappropriate because the obligation continues. In respect of those matters that were actually read in open court, I have no basis for making an application that they be treated in some other way because it is clear that, to the extent that they appear on the transcript, they are in the public domain and inevitably, any order would lack utility. So I don't seek that order. The order would be limited
20 to those documents that were not actually read.

HIS HONOUR: I've seen that, yes.

MR SIBTAIN: And those documents that were not actually read, your Honour, the
25 utility in making that order must – I cannot point to another basis other than the fact that these proceedings have concluded – perhaps I can put it independently of reprisal that – independently of a submission that they would be used for the purposes of reprisal – I can make this submission. Your Honour, for those
30 documents that were not actually read aloud in open court, this is a proceeding that has concluded. And as her Honour Jagot J said in one of the Porter judgments, there is a – there is an interest in having parties having their settlements and that operating as a conclusion.

I will just get your Honour the reference for that. It's the proceeding – it's a
35 proceeding where there was some discussion about Treasury Wines, but I will give your Honour a reference. In a proceeding that is concluded – and concluded with a judgment in favour of the applicant, there is no utility served by a party having documents that were produced under compulsion which cannot, as a matter of fact, be used further in the proceeding but nevertheless, being permitted to use those in a
40 public forum.

HIS HONOUR: And what's the principle on which the court would be acting to restrain that use?

45 MR SIBTAIN: The preservation of the public interest in parties coming to settlements of a proceeding. Just as in the Porter proceeding, the underlying – there

was a restriction imposed upon the pleadings given that the parties had resolved their proceeding.

HIS HONOUR: Was that by way of a suppression order?

5

MR SIBTAIN: Yes. Well, it was by way of - - -

MR SMARK: It was removed from the file, wasn't it?

10 MR SIBTAIN: It was removed from the file. It was by operation of the - - -

HIS HONOUR: I see.

15 MR SIBTAIN: - - - intersecting rules in 2.26 through to 2.32. And her Honour Jagot J approached it on the basis that there really is a consistency between the making of orders or the consideration of orders under 2.32(1) where an order is made that access not be given – and the principles that apply under 37(a)(f) to the making of suppression orders.

20 HIS HONOUR: Well, I think that submission as well is going to require me to refer to Ms Chrysanthou's statements at transcript page 34, because the counter argument would be well, this is now in the public domain anyway. So you can't unscramble that egg.

25 MR SIBTAIN: No. So your Honour is perfectly correct. Some of it is in the public domain. We – what - - -

HIS HONOUR: Well, the conclusion of it was very forcefully put.

30 MR SIBTAIN: It was.

HIS HONOUR: The evidence, such as it may be, which gives rise to that alleged conclusion is not disseminated, but the – anyway. I'm just putting you on notice that I think that outline of argument would also require me, in my reasons, to refer in
35 some detail to what Ms Chrysanthou said.

MR SIBTAIN: Yes, it - - -

HIS HONOUR: So - - -

40

MR SIBTAIN: It may, your Honour.

HIS HONOUR: Yes, anyway. You're still awaiting instructions, I understand.

45 MR SIBTAIN: I understand a process is taking place while I continue these, and I will finish those submissions. I will just add the reference to Porter, your Honour, is 2021 – [2021] FCA 1036.

HIS HONOUR: Thank you.

MR SIBTAIN: And your Honour, in – one must recall the context in which those materials were read and received into evidence as well. The affidavit was read on
5 the application for the purposes of the exercise of a discretion in relation to the approval application.

HIS HONOUR: Yes.

10 MR SIBTAIN: Now, I embrace the problem that I face, which is, well, it doesn't matter what application may be before the court. It is the use of the document in court that gives rise to certain conclusions. But in circumstances where, as your Honour observed, the truth or falsity of any submission that was made by counsel was, effectively, reserved and the admission of any document for the finding of
15 ultimate facts in relation to those matters were – didn't rise above allegation. The use of documents in a – that were not referred to in a way that might tend to suggest or intend to expose, one way or the other, that this was more than just allegation, would be a continuation then of the argument of a case post-settlement.

20 To put it another way, as his Honour Wigney J observed in one of the Rush judgments, the public are able to tell what is mere allegation, what is going to be the subject of a dispute. And the mere fact that matters are alleged does not mean that they should be suppressed. Now, taking this as it was, an allegation made by Ms Chrysanthou that material support at a certain conclusion, what this would result then
25 in is a – after the trial, the documents that were produced under compulsion being able to be used by a party to continue that argument to establish it. So that's another basis that's – my instructions are to withdraw the application on the basis of reprisal.

30 HIS HONOUR: Thank you. And on that – also on that further basis? That – the Porter basis, or not?

MR SIBTAIN: I – while I was still going, the instructions were being taken. Would your Honour excuse me again?

35 HIS HONOUR: Yes, certainly. Yes.

MR SIBTAIN: I think I have to withdraw it, and those are my instructions.

40 HIS HONOUR: Thank you, very well.

MR SIBTAIN: Your Honour, the – would your Honour excuse me? I'm sorry for my back, your Honour. Your Honour, I'm hesitant to do this, would your Honour be prepared to go off the bench for five minutes?

45 HIS HONOUR: All right.

MR SIBTAIN: So it might – your Honour has had two withdrawals from me.

HIS HONOUR: Yes.

MR SIBTAIN: There might be some utility if your Honour - - -

5 HIS HONOUR: All right.

MR SMARK: Your Honour, can I say, we wouldn't oppose that if that's of any relevance.

10 HIS HONOUR: Thank you, Mr Smark. Very well. Well, is five minutes enough, or - - -

MR SIBTAIN: We had better say 10 minutes, if that's convenient.

15 HIS HONOUR: 10? Fine, yes, certainly.

MR SIBTAIN: Thank you, your Honour.

HIS HONOUR: Please adjourn the court.

20

ADJOURNED

[11.06 am]

25 **RESUMED**

[11.20 am]

HIS HONOUR: Yes, Mr Sibtain.

30 MR SIBTAIN: Your Honour, I seek leave to file a Notice of Discontinuance.

HIS HONOUR: Yes, and the question of costs?

MR SIBTAIN: I don't wish to be heard.

35

MR SMARK: We seek costs.

HIS HONOUR: Yes, thank you. Well, I grant you leave to file the Notice of Discontinuance, and I order that the applicant pay the respondent's costs of the proceedings.

40

MR SIBTAIN: May it please the court.

MR SMARK: May it please the court.

45

HIS HONOUR: Thank you. Please adjourn the court.

MATTER ADJOURNED at 11.21 am ACCORDINGLY