FEDERAL COURT OF AUSTRALIA

Blue Sky Water Partners Pty Ltd v Blakeney [2019] FCA 549

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| File number: | QUD 247 of 2019 |
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| Judge: | **LOGAN J** |
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| Date of judgment: | 16 April 2019 |
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| Cases cited: | *APT Technology Pty Ltd v Aladesaye, in the matter of APT Technology Pty Ltd* [2014] FCA 966  *TS & B Retail Systems Pty Ltd v 3fold Resources Pty Ltd* [2003] FCA 371  *Universal Thermosensors Limited v Hibben* [1992] 1 WLR 840 |
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| Date of hearing: | 18 April 2019 |
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| Registry: | Queensland |
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| Division: | General Division |
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| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Category: | No Catchwords |
|  |  |
| Number of paragraphs: | 27 |
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| Counsel for the Applicants: | Mr P Dunning QC with Mr CA Johnstone |
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| Solicitor for the Applicants: | Norton Rose Fulbright |
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| Counsel for the Respondents: | The respondents did not appear |

ORDERS

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|  | | QUD 247 of 2019 |
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| BETWEEN: | BLUE SKY WATER PARTNERS PTY LTD ACN 127 513 099  First Applicant  BLUE SKY ALTERNATIVE INVESTMENTS LLC  Second Applicant | |
| AND: | MICHAEL BLAKENEY  First Respondent  NICHOLAS WATERS  Second Respondent  PATRICK HAYDEN (and others named in the Schedule)  Third Respondent | |

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| JUDGE: | LOGAN J |
| DATE OF ORDER: | 16 APRIL 2019 |

PENAL NOTICE

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| TO: Michael Blakeney;  Nicholas Waters;  Patrick Hayden;  Alexander Ihlenfeldt;  Riparian Capital Partners Pty Ltd ACN 630 179 752  Pinnacle Investment Management Group Pty Ltd ACN 100 325 184  IF YOU (BEING THE PERSON BOUND BY THIS ORDER):   1. REFUSE OR NEGLECT TO DO ANY ACT WITHIN THE TIME SPECIFIED IN THE ORDER FOR THE DOING OF THE ACT; OR 2. DISOBEY THE ORDER BY DOING AN ACT WHICH THE ORDER REQUIRES YOU NOT TO DO,   YOU WILL BE LIABLE TO IMPRISONMENT, SEQUESTRATION OF PROPERTY OR OTHER PUNISHMENT.  ANY OTHER PERSON WHO KNOWS OF THIS ORDER AND DOES ANYTHING WHICH HELPS OR PERMITS YOU TO BREACH THE TERMS OF THIS ORDER MAY BE SIMILARLY PUNISHED. |

UPON THE APPLICANTS BY THEIR COUNSEL GIVING THE USUAL UNDERTAKING AS TO DAMAGES, THE COURT ORDERS:

1. That until 4pm on Thursday 18 April 2019, except with the written consent of the applicants, each of the respondents be restrained from using the information contained in all or any of the documents identified on the applicants’ database as follows:
   1. 06.03.04.11 Real Assets – 5 Year Model.xlsx;
   2. Allocation Supply Model 20180518.xlsx;
   3. Australian Investible Universe 20160330.xlsx;
   4. Australian Water Market Data 20170702.xlsx;
   5. BSWF – Portfolio Dashboard – 20180921 sp.xlsm;
   6. FSS Portfolio – Portfolio Dashboard – 20180920.xlsm; and
   7. Investment Management Agreement Blue Sky – FSS version 24 02 2015 KSM.docx; and
   8. Blue Sky IMA – FSS Blue Sky executed – 1 of 3.pdf,

and any other information obtained by the first, second or third respondents in the course of their employment with the first or second applicants (**together the Confidential Information**) PROVIDED THAT nothing in this Order 1 shall prevent the respondents, or any of them from providing any such Confidential Information or copies of any documents containing such Confidential Information to their legal, accounting or expert advisers or expert witnesses for the purposes of complying with this order, defending, or seeking advice in relation to defending, this proceeding or bringing any cross-claim in this proceeding.

1. That until 4pm on Thursday 18 April 2019, each of the respondents be restrained from taking any steps to delete or destroy any of the Confidential Information in their respective possession or control.
2. That pursuant to rule 2.32(3) of the *Federal Court Rules 2011* (Cth), and subject to Order 7, until 4pm on 18 April 2019, the affidavit of Kim Scott Morison filed 16 April 2019 be, and be kept, confidential.
3. The application be adjourned to a Case Management hearing on 18 April 2019, at not before 10:30am.
4. The question of whether to extend all or any of these orders be reserved to the Case Management hearing on 18 April 2019.
5. The costs of the application be reserved.

**THE COURT DIRECTS THAT**:

1. The applicants forthwith serve (including by email to the following email addresses haydenpatricka@gmail.com; nejwaters@hotmail.com; mgblakeney@gmail.com; mbhoulahan@hotmail.com; alex.ihlenfeldt@pinnacleinvestment.com, the following documents on the respondents:
   1. The originating application in this proceeding dated 16 April 2019;
   2. The following affidavits filed and read in this proceeding on 16 April 2019;
      1. Affidavit of Kim Scott Morison sworn 16 April 2019, Exhibit KM-1 and Confidential Exhibit KM-2;
      2. Affidavit of Brendan Read sworn 16 April 2019;
      3. The two Affidavits of Bernard Colin Walrut sworn 16 April 2019; and
      4. Applicants’ outline of argument dated 16 April 2019.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

LOGAN J:

1. Earlier this afternoon, Blue Sky Water Partners Pty Ltd, ACN 127 513 099, hereafter **BSWP**, and Blue Sky Alternative Investments LLC (**Blue Sky**) a Delaware limited liability company, filed an originating application in which they sought the following relief against Mr Michael Blakeney (first respondent), Mr Nicholas Waters (second respondent), Mr Patrick Hayden (third respondent), Mr Alexander Ihlenfeldt (fourth respondent), Riparian Capital Partners Pty Ltd, ACN 630179752 (fifth respondent) (**Riparian Capital**) and Pinnacle Investment Management Group Pty Ltd, ACN 100325184 (**Pinnacle**):

1. An order in the nature of an injunction permanently restraining each of the respondents, from using the information contained in all or any of the following documents:

(a) 06.03.04.11 Real Assets - 5 Year Model.xlsx;

(b) Allocation Supply Model 20180518.xlsx;

(c) Australian lnvestible Universe 20160330.xlsx;

(d) Australian Water Market Data 20170702.xlsx;

(e) BSWF - Portfolio Dashboard - 20180921 sp.xlsm;

(f) FSS Portfolio - Portfolio Dashboard - 20180920.xlsm; and

(g) Investment Management Agreement Blue Sky - FSS version 24 02 2015 KSM.docx; and

(h) Blue Sky IMA - FSS Blue Sky executed - 1 of 3.pdf,

and any other information determined by this honourable Court to be confidential to the applicants (together, the Confidential Information) and obtained by, or in the possession of, the respondents (or any of them).

2. An order in the nature of a mandatory injunction requiring each of the respondents to permanently destroy any and all records of the Confidential Information.

3. A declaration that each of the first respondent, second respondent and third respondent has each breached his contract of employment.

4. A declaration that each of the first respondent and second respondent has breached his equitable duty of confidence owed as an employee of the first applicant.

5. A declaration that the third respondent has breached his equitable duty of confidence owed as an employee of the second applicant.

6. A declaration that each of the first respondent, second respondent, third respondent and fourth respondent has contravened sections 180(1) and/or 181(1) and/or 182(1) and/or 183(1) of the *Corporations Act 2001* (Cth) (**Corporations Act**).

7. Damages for breach of contract.

8. Equitable compensation.

9. Compensation pursuant to section 1317H of the *Corporations Act 2001*

10. Costs.

11. Interest.

12. Such further or other order as the Court deems fit.

1. At the same time, those applicants sought interlocutory relief as follows:

1. That until further order, each of the respondents be restrained from using the information contained in all or any of the documents identified on the applicants ' database as follows:

(a) 06.03.04.11 Real Assets - 5 Year Model.xlsx;

(b) Allocation Supply Model 20180518.xlsx;

(c) Australian lnvestible Universe 20160330.xlsx;

(d) Australian Water Market Data 20170702.xlsx;

(e) BSWF - Portfolio Dashboard - 20180921 sp.xlsm;

(f) FSS Portfolio - Portfolio Dashboard - 20180920.xlsm; and

(g) Investment Management Agreement Blue Sky - FSS version 24 02 2015 KSM.docx; and

(h) Blue Sky IMA - FSS Blue Sky executed - 1 of 3.pdf,

and any other information obtained by the first, second or third respondents in the course of their employment with the first or second applicants (**together the Confidential Information**).

2. That until further order, each of the respondents be restrained from taking any steps to delete or destroy any of the Confidential Information in their respective possession or control.

3. Until further order, each of the respondents whether by themselves, their directors, servants, employees, agents or otherwise be restrained from contacting either directly or indirectly, or in any way dealing with:

(a) LGIA Super

(b) First State Super

(c) RI Investments Holding B.V.;

(d) Texas Municipal Retirement System,

or their related entities that are involved in or responsible for existing mandates of the First Applicants

4. By 4.00pm on 18 April 2019, the respondents shall, file and serve on the applicants, an affidavit identifying:

(a) each of the documents containing the Confidential Information in their possession; and

(b) each of the persons to whom the Confidential Information has been given by all or any of the respondents.

5. That the costs of the interlocutory application be reserved.

1. In respect of the claim for interlocutory relief, only that sought in paragraphs 1 and 2 came to be pressed this afternoon. As to the relief sought in paragraph 3, it was recognised that the law does not restrain legitimate competition, and in the absence of some restraint in a contract of employment, an applicant would not, without more, be entitled to complain of conduct by any of the respondents obtaining orders from customers of each or either of the applicants by lawful means: see, in this regard, *Universal Thermosensors Limited v Hibben* [1992] 1 WLR 840. It is not necessary to reach any concluded view as to the entitlement, if any, of the applicants to the claim for relief in paragraph 3.
2. The question for resolution this afternoon is only whether to grant, on an interim basis, the relief sought in paragraphs 1 and 2. As to that, and having regard to the affidavits of Mr Kim Scott Morison and Mr Brendan Read filed today, the summary offered by the applicants in their counsels’ outline of submissions is accurate.
3. The individual respondents are, each, former employees of either the first or, as the case may be, second applicants. As to the corporate respondents, Riparian Capital is a company established by Messrs Waters and Hayden, two of the respondents; although, on present materials, neither appears to be a director of that company.
4. Mr Blakeney, another individual respondent, is presently subject to a restraint pursuant to his employment contract. He does not appear from Riparian Capital’s advertising to have any involvement although an interrogative note as to his involvement with Riparian Capital’s business is sounded in the evidence of Messrs Morison and Read. The other corporate respondent Pinnacle is an investor in Riparian Capital. Its chief financial officer, the remaining individual respondent Mr Ihlenfeldt, is a director of Riparian Capital.
5. The application for interlocutory relief is, strictly speaking, not made *ex parte*. It has been brought on quite urgently, but endeavours by the solicitors for the applicants have, at least, had the effect of drawing the proceedings to the attention of K&L Gates who apparently act for Pinnacle. Mr Bernard Walrut of the applicant’s solicitors had a conversation earlier today with a solicitor Ms Christa Lenard of K & L Gates. He has yet earlier today, also had a conversation with Pinnacle’s general counsel, Mr Calvin Kwok. His affidavits filed today by leave also depose to emails which he has sent to Messrs Blakeney, Waters, Hayden, Houlahan and Ihlenfeldt. He has come to send those emails to addresses of those gentlemen, as they appear in a policy email chain which is defined in and exhibited to Mr Morison’s affidavit filed today. Mr Houlahan is not a respondent, but his presence in the email chain made it understandably prudent for Mr Walrut also to endeavour to give him notice of the present proceedings.
6. Whilst these endeavours have been made and whilst, strictly speaking, the application is not *ex parte*, I have, nonetheless, approached it on the basis that, in the prevailing circumstances, it was not reasonably possible for the respondents to appear this afternoon.
7. The second applicant, the Delaware incorporated company Blue Sky, is a publicly listed company. The first applicant BSWP is a wholly owned subsidiary of Blue Sky. It emerges from the evidence that Blue Sky is a specialist investment manager of alternative investments. One of these is a water fund which invests in water markets in Australia. BSWP is the manager of that fund. In turn, Mr Morison is BSWP’s Managing Director.
8. BSWP was incorporated in 2007. It operates Blue Sky’s Real Assets Division. The water fund mentioned was established in April 2011. It was the first publicly offered water fund in Australia. Initially, the fund included only investments in water rights, but this has been expanded to include other agricultural investments. In his affidavit, Mr Morison deposes to the development related to the establishment and continuance of the fund of proprietary information. He undertook this development and, from 2014, so also did Mr Blakeney. They did so to develop BSWP’s investment strategy in respect of the water fund. BSWP also manages another fund, namely, the Blue Sky Strategic Australian Agriculture Fund.
9. BSWP holds an investment mandate of AU$90 million on behalf of Local Government Investments Australia Super. That is a public superannuation fund which manages over $12 billion in retirement savings for over 80,000 members. BSWP also holds investment mandates on behalf of Rabo Investments, Texas Municipal and Retirement System (Texas Retirement) and First State Super. The existence of these mandates is public, but the terms of them are, as Mr Morison deposes, confidential.
10. Included in Mr Morison’s affidavit evidence is reference to the employment contracts of the respondent former employees which, materially, include obligations in relation to confidential information. In addition, Messrs Blakeney and also Waters were directors of, amongst other Blue Sky companies, BSWP.
11. According to Mr Morison, on 5 and 9 April 2019, he became aware that Riparian Capital had been established by Messrs Waters and Hayden, and that that company had employed other employees of BSWP, including Mr Houlahan, previously mentioned, and a Mr Loeskow. Apparently, on Mr Morison’s evidence, Riparian Capital had been established as a specialist water and agriculture investment firm.
12. Whilst they were still employees, Messrs Blakeney and Waters had, on 26 August 2018, proposed a so-called management buyout of BSWP’s “strategic agriculture fund and club”. Pinnacle was proposed as an investor in this management buyout. That proposal was considered, but rejected by BSWP on 9 August 2018.
13. Having become aware of the establishment of Riparian Capital, Mr Morison engaged KordaMentha and thus a forensic IT specialist, Mr Read, came to conduct a review of Mr Blakeney’s BSWP computer, mobile telephone and email accounts and Mr Water’s BSWP computer and email accounts. The result of that review is to be found in Mr Read’s affidavit. What the evidence establishes is that, on the weekend of 28 and 29 July 2018, a person not presently identified used Mr Waters’ computer to access the “O-drive”. The O-drive is the database on which Blue Sky’s confidential information is stored.
14. The result of that access was a downloading of some 2.2 gigabytes of data. To date, the downloaded documents which the applicants have been able to identify, which were treated by it in July 2018 and remain confidential, are particular lists. Those lists, in turn, engage with the information in respect of which orders 1 and 2 are sought on an interlocutory basis.
15. The applicants submit, and I am prepared to accept, having regard to Mr Waters’ involvement with Riparian Capital, that, *prima facie*, an inference arises that it was Mr Waters who undertook that downloading. Mr Morison’s evidence is that he can see no logical reason for Mr Waters to have undertaken the downloading of this volume of material for employment purposes. That is because employees who require access to that information on that drive could always access the information on that drive.
16. Another factor which is of relevance is that a number of the documents downloaded, although not all, were deleted. On the evidence to hand, the deleted documents were those relevant to the investment mandate of First State Super. Once again, an inference arises on the evidence given by affidavit by Mr Morison that there was no legitimate reason for the downloading and then deletion of this information.
17. The forensic examination has also unearthed an email chain which commenced on 20 December 2018 between the individual respondents and Messrs Houlahan and Ihlenfeldt at Pinnacle in which those gentlemen discuss a valuation policy adjusted to include specifics around water entitlements and water allocation transaction data. This, as a matter of inference, at least on the evidence to hand, may well be a reference to BSWP’s valuation methodology.
18. Other evidence offered by affidavit by Mr Morison includes the following – other documents which were deleted following the July download were the new code term sheet. As to that, an inference arises, on the evidence to hand, that Messrs Waters, Hayden and Blakeney were contemplating some type of divergence from BSWP, taking with them the terms of various mandates, including the local government superannuation fund previously mentioned and another fund Stratag. The parties to that transaction appear to have included, amongst others, Texas Retirement.
19. As to the latter, the evidence discloses that a letter was sent from Texas Retirement dated 21 December 2018 in which that entity sought to convene a meeting to remove BSWP as trustee of the agriculture fund. Also disclosed on the evidence is that, on 29 December 2018, various documents relating to Pinnacle which were relevant to the management buy-out proposed, but not otherwise to the business of BSWP, were accessed. That access occurred after the management buy-out proposal was rejected. Mr Morison deposes to the fact that BSWP’s receipt of a letter from Texas Retirement on 21 December 2018 in which it sought to convene a meeting to remove BSWP as trustee of Blue Sky Strategic Australian Agriculture Fund. *Prima facie*, I agree that may not be coincidental.
20. The long and the short of it is that Mr Morison’s concern on behalf of the applicants is that the individual former employees and, also, as the case may be, directors together with Riparian Capital have accessed proprietary and confidential information of the applicants and are using this as a springboard for the establishment of a new investment fund. His further concern is that the confidential information looks likely to have been used to attract the investment of Pinnacle. As the evidence stands to date, there is a reasonable basis for that concern. In turn, the foregoing satisfies me, at least *prima facie*, that there has been conduct by the individual respondents in breach of confidentiality undertakings and that Riparian Capital and Pinnacle have each been concerned in those breaches.
21. So the question becomes what orders, if any, should be made on the interlocutory application, insofar as it has been pressed? The applicants have each given the usual undertaking as to damages. For the present, they seek no more than the shortest of periods for interim relief, no longer than close of business on Thursday, at which time, a case management hearing will be held.
22. The applicants point to two earlier cases in the court in which interlocutory injunctive relief was granted restraining the use of particular confidential information and also prohibiting its destruction. Those cases are *TS & B Retail Systems Pty Ltd v 3fold Resources Pty Ltd* [2003] FCA 371 (***TS & B Retail Systems)*** and *APT Technology Pty Ltd v Aladesaye, in the matter of APT Technology Pty Ltd* [2014] FCA 966.
23. At least in the very short-term, and given that a *prima facie* case is disclosed, the balance of convenience does seem, to me, to favour the granting of interlocutory relief in terms of paragraphs 1 and 2, subject to exceptions of the kind, for example, that are specified in *TS & B Retail Systems* by way of permitting, as an exception to a restraint, use with the licence or authority of the applicants and, further, providing that nothing in order 1 shall prevent the respondents from activities of the kind specified in paragraph 1(c) of the orders made in *TS & B Retail Systems*. Those exceptions recognised the need for respondents to provide materials to legal, accounting or other expert advisers or witnesses, the need for making use of information so as to comply with the court order.
24. I will reserve the costs of today.
25. The proceedings are adjourned for case management to Thursday, 18 April 2019, not before 10.30 am. The applicants are to serve a copy of the orders forthwith upon the respondents. As to that service, the service should include the sending of a copy of an order by email to the email addresses identified in the email chain referred to in the reasons for judgment and on K&L Gates.

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| I certify that the preceding twenty-seven (27) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Logan. |

Associate:

Dated: 18 April 2019

SCHEDULE OF PARTIES

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|  | QUD 247 of 2019 |
| Respondents |  |
| Fourth Respondent: | ALEXANDER IHLENFELDT |
| Fifth Respondent: | RIPARIAN CAPITAL PARTNERS PTY LTD ACN 630 179 752 |
| Sixth Respondent: | PINNACLE INVESTMENT MANAGEMENT GROUP PTY LTD ACN 100 325 184 |