FEDERAL COURT OF AUSTRALIA

Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 4) [2019] FCA 1229

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| File number: |  |
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| Judge: | **GLEESON J** |
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| Date of judgment: | 2 August 2019 |
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| Date of publication of reasons: | 7 August 2019 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application to set aside notice to produce insurance documents – oral application for production of the documents pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (Cth) – application granted  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 33ZF, 37M, 37P*Federal Court Rules 2011* rr 20.15, 30.28  |
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| Cases cited: |  *Construction, Forestry, Mining and Energy Union (CFMEU) v BHP Coal Pty Ltd (No 3)* [2012] FCA 61 *Kirby v Centro Properties Limited (ACN 078 590 682)* [2009] FCA 695*Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1*Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; (2019) 366 ALR 136 *Zantran Pty Limited v Crown Resorts Limited* [2019] FCA 641  |
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| Date of hearing: | 2 August 2019 |
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| Registry: | New South Wales |
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| Division: | General Division |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Category: | Catchwords |
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| Number of paragraphs: | 31 |
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| Counsel for the Applicant: | Stephen Finch SC with Rachel Francois  |
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| Solicitor for the Applicant: | Maurice Blackburn |
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| Solicitor for the First Respondent/Second Cross-Respondent: | Jack Pembroke-Birss of Norton Rose Fulbright Australia |
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| Solicitor for the Second Respondent/Cross-Claimant: | Darren King of Gillis Delaney |
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| Counsel for the Third Respondent/First Cross-Respondent: | Stuart Lawrance |
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| Solicitor for the Third Respondent/First Cross-Respondent: | Lander & Rogers Lawyers |

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| **Table of Corrections** |  |
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| 9 August 2019 | The catchwords have been amended to read:“ **PRACTICE AND PROCEDURE** – application to set aside notice to produce insurance documents – oral application for production of the documents pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (Cth) – application granted” |

ORDERS

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|  | NSD 448 of 2017 |
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| BETWEEN: | CASEY CHERYL SIMPSONApplicant |
| AND: | THORN AUSTRALIA PTY LTD T/AS RADIO RENTALS (ACN 008 454 439)First RespondentJAMES LESLIE MARSHALLSecond RespondentAIG AUSTRALIA LIMITED (ACN 004 727 753)Third Respondent |
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| AND BETWEEN: | JAMES LESLIE MARSHALLCross-Claimant |
| AND: | AIG AUSTRALIA LIMITED (ACN 004 727 753)First Cross-Respondent |
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| AND BETWEEN: | JAMES LESLIE MARSHALLCross-Claimant |
| AND: | THORN GROUP LIMITED (ACN 072 507 147)Second Cross-Respondent |

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| JUDGE: | GLEESON J |
| DATE OF ORDER: | 2 August 2019 |

THE COURT ORDERS THAT:

1. Pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (Cth), the second respondent is to produce to the applicant all documents responding to the categories of the applicant’s notice to produce dated 12 July 2019 to the extent that they have not already been produced.
2. The first respondent is to produce for inspection by the applicant the documents ordered to be discovered pursuant to category 3 of Annexure A to the orders made on 24 July 2019 redacted in the form requested by the third respondent.
3. The third respondent’s interlocutory application filed on 24 July 2019 is otherwise dismissed.
4. The costs of the application are the applicant’s costs in the cause.
5. Order 1 is stayed until 3 days after the delivery of reasons for making that order.

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

REASONS FOR JUDGMENT

GLEESON J:

1. By interlocutory process dated 26 July 2019, the third respondent (**AIG**) applied for relief directed to preventing the applicant from obtaining access to various insurance documents relating to policies that are not currently in issue in the proceeding.
2. In the course of the hearing of the application on 2 August 2019, the applicant applied orally for access to the documents pursuant to s 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**Act**).
3. After hearing argument, I made orders having the substantial effect of granting the applicant access to the documents.
4. These are my reasons for making those orders.

# Background

1. This proceeding has been listed for a three week hearing commencing 15 October 2019. I have previously been told that the estimated total claim made in the proceeding against Thorn exceeds $100 million: *Simpson v Thorn Australia Pty Ltd trading as Radio Rentals (No 2)* [2019] FCA 838 at [7] (***Simpson (No 2****)*).
2. In *Simpson (No 2),* I ordered the joinder of AIG to the proceeding noting, at [68], that there was a real possibility that, if judgment were obtained, the insureds, being the first respondent (**Thorn**) and the second respondent (**Mr Marshall**), would not be able to meet it. AIG has denied liability to indemnify Thorn and Mr Marshall.
3. On 21 June 2019, I ordered that a court-directed mediation held on 4 June 2019 be extended to include a further mediation date or dates prior to 19 August 2019. I also ordered that the mediation be attended by all parties, or a representative of the party with authority to make agreements binding the respective party.

# documents in issue

1. The disputed documents comprise:
2. The following documents, sought by the applicant to be produced by the second respondent (**Mr Marshall**) by a notice to produce in the form of Federal Court form 61:
	1. Insurance policies obtained by Thorn Group Limited (ACN 072 507 147) (**Thorn Group**) pursuant to cl 5 of the deed of access, indemnity and insurance.
	2. The contracts insuring the second respondent which were obtained by Thorn Group pursuant to cl 5 of the deed of access, indemnity and insurance.
	3. The directors and officers liability insurance policies, including excess policies, issued by any insurer or syndicate to Thorn Group or its subsidiaries for the periods:
		1. 30 April 2016 to 30 April 2017;
		2. 30 April 2017 to 30 April 2018; and
		3. 30 April 2018 to 30 April 2019.
	4. The civil liability or professional indemnity insurance policies, including excess policies, issued by any insurer or syndicate to Thorn Group or its subsidiaries for the periods:
		1. 30 April 2016 to 30 April 2017;
		2. 30 April 2017 to 30 April 2018; and
		3. 30 April 2018 to 30 April 2019,

(collectively, **Mr Marshall’s insurance documents**).

1. Documents discovered by the first respondent (**Thorn**) pursuant to category 3 in Annexure A to the Court’s orders made on 24 July 2019. Category 3 is in the following terms:

The Annual Renewal Reports provided by the insurance broker, Arthur J Gallagher & Co, from the period 1 April 2016 to 30 April 2019 …

(collectively, Annual Renewal Reports).

# Mr Marshall’s insurance documents

1. AIG submitted that there was no legitimate forensic purpose for the notice to produce and, accordingly, it should be set aside: *Construction, Forestry, Mining and Energy Union (CFMEU) v BHP Coal Pty Ltd (No 3)* [2012] FCA 61 at [6]. I accepted that submission.
2. The purpose of a notice to produce served pursuant to r 30.28 of the *Federal Court Rules 2011* (**Rules**) is to obtain production of documents or things in aid of a trial or hearing in the proceeding: see r 30.28(1). In this case, the applicant seeks the relevant documents for the following other purposes:
3. to review the excess layer policies to ensure that any issues surrounding the activation of those policies is addressed at the final hearing, to the intent that the policies are properly enlivened if the applicant is successful in her claims; and
4. for the purposes of mediation and prospective settlement approval.
5. Against the possibility that I would order that the notice to produce be set aside, senior counsel for the applicant, Mr Finch SC, applied orally for an order for the production of the documents covered by the notice to produce pursuant to s 33ZF of the Act.
6. The application was made without evidence from the applicant’s solicitor as to the necessity for inspection of the insurance documents. However, AIG did not dispute that the reasons put forward for seeking production of the documents, set out at [10] above, existed and were legitimate reasons.
7. Noting my earlier finding of the real possibility that, if judgment is obtained, Mr Marshall would not be able to meet it, I inferred that the insurance documents are likely to be of utility to the applicant for the purposes of its participation in the mediation and relevant to the reasonableness of any offer of settlement. In the absence of any argument to the contrary, I also accepted that the insurance documents are, or are likely to be, relevant to the matter set out in [10(1)] above.
8. Orders for the production of documents relating to the respondents’ insurance have been made by consent pursuant to s 33ZF or s 39P in proceedings no. NSD1983/2017 (*Excel Texel Pty Ltd (as Trustee for the Mandex Family Trust) v Quintis Ltd*) and NSD862/2018 (*Geoffrey Peter Davis & Anor v Quintis Ltd (Receivers and Managers Appointed) (Voluntary Administrators Appointed) (ACN 092200 854) & Ors*), and by orders not expressed to be by consent in proceeding VID1213/2016 (*Matthew Hall v Slater & Gordon Limited*). No reasons were published in respect of these orders.
9. In *Kirby v Centro Properties Limited (ACN 078 590 682)* [2009] FCA 695 (***Kirby***), Ryan J declined to give discovery of insurance policies in aid of a mediation of that class action proceeding, although without considering whether production should be ordered pursuant to s 33ZF. At [25], his Honour concluded:

I do not accept that a lack of knowledge by the applicant and his advisers of the existence and extent of insurance cover held by the respondents would, at this early stage, preclude the applicant’s advisers from forming, pursuant to s 33V of the Act, an opinion on the reasonableness of any proposed outcome of negotiations in a mediation. Nor do I accept that a mediation occurring in the absence of that knowledge would be “hollow” or inconsistent with the principles which this Court has developed for the mediation or case management of disputes like the present.

1. At [28], Ryan J concluded that it was not within the power or discretion of the Court to compel disclosure to the applicant of the presumptive insurance policies.
2. In *Kirby,* the Court did not consider whether s 33ZF confers power on the Court to compel the production of documents concerning the respondent’s insurance.
3. I also note that *Kirby* was decided before the commencement of Part VB of the Act, including s 37M, which sets out the overarching purpose of provisions (including, relevantly, s 33ZF), namely, to facilitate the just resolution of disputes:

(a) According to law; and

(b) As quickly, inexpensively and efficiently as possible.

1. Section 33ZF(1) provides:

In any proceeding (including an appeal) conducted under this Part, the Court may, of its own motion or on application by a party or a group member, make any order the Court thinks appropriate or necessary to ensure that justice is done in the proceeding.

1. Recently, in *Westpac Banking Corporation v Lenthall* [2019] FCAFC 34; (2019) 366 ALR 136 at [85]-[90], the Full Court explained the breadth of this power in the following terms:

85. … Pt IVA was a novel procedure (with its historical roots in equity). The expression of Wilcox J of the width and purpose of s 33ZF in *McMullin v ICI Australia Operations Pty Ltd (No 6)* [1998] FCA 658; 84 FCR 1 at 4 bears repeating:

Section 33ZF appears in Div 6 of Pt IVA which is headed “Miscellaneous”. It bears the marginal note “General power of Court to make orders”. These two features support the conclusion, that would in any event arise from its wording, that s 33ZF(1) was intended to confer on the Court the widest possible power to do whatever is appropriate or necessary in the interests of justice being achieved in a representative proceeding. It is understandable Parliament should have thought it appropriate to make such a provision. In enacting Pt IVA of the *Federal Court of Australia Act*, Parliament was introducing into Australian law an entirely novel procedure. It was impossible to foresee all the issues that might arise in the operation of the Part. In order to avoid the necessity for frequent resort to Parliament for amendments to the legislation, it was obviously desirable to empower the Court to make the orders necessary to resolve unforeseen difficulties, the only limitation being that the Court must think the order appropriate or necessary to ensure “that justice is done in the proceeding”.

86. This reflects the expression of the matter in wide terms by the Explanatory Memorandum for the Federal Court of Australia Amendment Bill 1991 and in the Minister’s Second Reading Speech. It is the widest possible power that extends to all procedures appropriate or necessary to deal with the matter on a just basis, see *Courtney v Medtel Pty Limited* [2002] FCA 957; 122 FCR 168 at 182 [48]; and *Johnstone v HIH Limited* [2004] FCA 190 at [104]–[105]. Having that wide character from its words, context and purpose, the injunction against reading down statutory powers given to courts, absent clear indication in terms or context (*The Owners of the Ship “Shin Kobe Maru” v Empire Shipping Inc.* [1994] HCA 54; 181 CLR 404 at 421), is of particular force.

87. The language of the section itself, far from hinting at restriction, denotes width, amplitude and flexibility. The power may be exercised on the Court’s own motion. “Any” order of the relevant kind is empowered. The view of the Court is for any order that is appropriate or necessary. The word “necessary” was discussed by the Full Court in [*Money Max Int Pty Ltd v QBE Insurance Group Ltd* [2016] FCAFC 148; (2016) 245 FCR 191] at 223–224 [161]–[165]. We do not repeat that discussion. We agree with it and with the conclusion at 224 [165]: that the expression “necessary to ensure that justice is done” requires that the proposed order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding.

88. The language of s 33ZF reflects an intention of Parliament that the Court would, over time, in individual cases, develop new procedures in form and contour as it responded to the practical and economic circumstances in which Pt IVA was to work. A wide and unstructured form to the section would permit the practical working out, over time, of available and appropriate procedures for individual Pt IVA cases. This reflects the common law process in its relationship with statute: the experience of the Court accumulated from individual cases applying the law to new facts as they arise: Gageler, “Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process” [2011] MonashULawRw 17; (2011) 37(2) *Monash University Law Review* 1 at 1. The application of s 33ZF will be affected and informed by practical experience, changing practices and the immanent, and to a degree evolving, values of the law as perceived by the Court to be relevant to the operation of s 33ZF’s fundamental normative standard: “appropriate or necessary to ensure that justice is done in the proceeding”. This does not involve personal intuitive assertion. It is an evaluation to be reasoned and articulated by reference to the values and norms recognised by the statute, equitable principle and the essential features of judicial power: cf *Paciocco v Australia and New Zealand Banking Group Ltd* [2015] FCAFC 50; 236 FCR 199 at 274–275 [296]–[302].

89. This was the clear intention of Parliament. It would be frustrated by a confined approach urged by Westpac. The purpose of s 33ZF was a wide power in which, using the techniques of judicial power, the Court would shape the procedures and principles applicable to representative actions against an assessment of all connected circumstances.

90. The construction propounded by Westpac was too narrow, in part from giving greater stringency to the word “necessary” than the discussion in *Money Max* suggests is appropriate, and by characterising the phrase “appropriate or necessary” as hendiadys. Whilst each word assists (as part of the same phrase in the section) in the understanding of the meaning of the other, we do not consider it right to say that there is a hendiadys and that the word “appropriate” has within it the word “necessary”. The conjunction is “or”, not “and”. A view as to appropriateness to ensure that justice is done may found an order. Westpac’s submission was also too narrow in restricting the order to the “metes and bounds” of the proceedings, which we took to mean the pleaded issues for resolution. It is not an order restricted to a particular issue requiring resolution. It is “justice” that is to be ensured in the proceeding. That is procedural or substantive justice; and the Court is to be satisfied that there is something in the proceeding that should be addressed in order to ensure that justice in the proceeding is done. There is no reason to limit that to the pleaded issues. There is every reason to view as wide enough to deal, in a fair way, with circumstances that will remove a risk to the prosecution and vindication of the group’s rights.

1. I am satisfied that s 33ZF empowers the Court to make an order for the production of documents concerning the insurance of a party if the Court thinks that such an order is appropriate or necessary to ensure that justice is done in the proceeding.
2. In this case, the proceeding involves claims by persons who entered into “consumer leases” regulated by consumer protection legislation. There is an issue about Mr Marshall’s capacity to meet any judgment that may be obtained against him and there is an imminent mediation. Any settlement that may be achieved will require Court approval including evidence that the applicant’s legal representatives are satisfied that the settlement is fair and reasonable and in the interests of group members as a whole: *Zantran Pty Limited v Crown Resorts Limited* [2019] FCA 641 at [146]. By para 14.4 of the Class Actions Practice Note (GPN-CA), one of the factors that material filed in support of an application for Court approval of a settlement will usually be required to address is “(g) the ability of the respondent to withstand a greater judgment”.
3. It is reasonable to think that the prospects of settlement will be reduced if the applicant’s legal representatives are required to assess any settlement offer without information about Mr Marshall’s insurance position.
4. In all these circumstances, the applicant will plainly be assisted by access to the documents sought, will be at a significant disadvantage in the mediation if she does not have such access and may otherwise be unable to demonstrate that a proposed settlement is fair and reasonable and in the interests of group members as a whole.
5. I also accepted that access to the excess insurance policies will assist the applicant by enabling her to ensure that those policies are properly enlivened, if appropriate.
6. I accepted that the production of Mr Marshall’s insurance documents will confer a tactical advantage on the applicant to the detriment of AIG and that the documents are not relevant to an issue in the proceeding. However, balancing those matters against the considerations in favour of production, I was satisfied that an order for production of the documents is appropriate (and likely necessary) to ensure that justice is done in the proceeding.

# Annual Renewal Reports

1. AIG submitted that the documents are not relevant to any issue in the proceedings and, by their nature, may be taken to include information concerning Thorn’s insurance arrangements that is confidential to both Thorn and its insurers.
2. AIG submitted that the Court would infer that inspection of the reports is sought because they are likely to disclosure Thorn’s D&O “tower”, which may be relevant to the depth of Mr Marshall’s pockets.
3. I permitted inspection of versions of the documents that will be redacted to protect information claimed by AIG to be confidential to it for the following reasons:
4. The documents have been discovered by Thorn pursuant to orders made by consent.
5. I did not accept that the documents were not discoverable. Documents may be discoverable where they contain information which could affect the manner in which a party may decide to conduct proceeding: *Mann v Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [19]. Categories of documents may be ordered to be discovered, although they are not directly relevant to the issues raised by the pleadings: r 20.15 of the Rules*.*
6. Thorn does not seek to protect any of its confidential information that may be contained in the documents from inspection by the applicant.
7. Any legitimate interest that AIG has in preventing inspection of the documents will be protected by affording them the opportunity to identify information in the documents in respect of which they claim confidentiality, and by requiring Thorn to produce to the applicant versions of the relevant documents redacted to protect that information.

# Conclusion

1. Costs should be the applicant’s costs in the cause because, although the application for production under s 33ZF was successful, it was made without notice to AIG and I accepted that the notice to produce issued under r 30.28 should be set aside.
2. I will stay the order for production for three days to enable the AIG to appeal from the order, bearing in mind the imminent mediation.

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| I certify that the preceding thirty-one (31) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gleeson. |

Associate:

Dated: 7 August 2019