Federal Court of Australia

BSL22 v BSM22 [2022] FCA 558

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| File number: |  |
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| Judgment of: | **SNADEN J** |
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| Date of judgment: | 13 May 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – interlocutory applications for orders pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth) – orders sought to prevent prejudice to the proper administration of justice and to protect the safety of the parties by whom the applications made – necessity of relief sought – medical evidence as to consequences of disclosure for applicant’s safety – imbalance as between parties in the event that both interlocutory applications not granted productive of prejudice to the proper administration of justice – applications granted |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) pt VAA  *Sex Discrimination Act 1984 (Cth)* |
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| Cases cited: | *Hogan v Australian Crime Commission* (2010) 240 CLR 651 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 26 |
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| Date of hearing: | 13 May 2022 |
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| Counsel for the Applicant: | Ms S Kelly |
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| Solicitor for the Applicant: | Workplace Dynamic Australia |
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| Counsel for the First and Third Respondents: | Ms R Preston |
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| Solicitor for the First and Third Respondents: | Maddocks |
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| Counsel for the Second Respondent: | Ms F Knowles |
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| Solicitor for the Second Respondent: | Gilchrist Connell |

ORDERS

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|  | | VID 29 of 2022 |
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| BETWEEN: | BSL22  Applicant | |
| AND: | BSM22  First Respondent  BSN22  Second Respondent  BSO22  Third Respondent | |

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| order made by: | SNADEN J |
| DATE OF ORDER: | 13 May 2022 |

THE COURT ORDERS THAT:

1. Pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth)—and until determination of this proceeding or further order of the court (whichever is earlier):
   1. none of the parties is to make or, in the case of the first respondent, authorise the making of, any disclosure that identifies any party as being a party to this proceeding, other than:
      1. for purposes connected to the proper conduct of this proceeding, including giving or receiving legal advice;
      2. in connection with:
         1. the management of the second respondent’s former employment with the first respondent;
         2. the management of the applicant’s employment with the first respondent; or
         3. genuine administration purposes related to the first respondent’s business; or
      3. with the consent of the other parties.
   2. each of the parties is to be allocated a pseudonym for the purposes of this proceeding as follows, namely:
      1. in the case of the applicant: BSL22;
      2. in the case of the first respondent: BSM22;
      3. in the case of the second respondent: BSN22; and
      4. in the case of the third respondent: BSO22; and
   3. the parties’ pseudonyms are to be used in place of their names in all court documents available to non-parties as set out in r 2.32(2) of the *Federal Court Rules 2011*.
2. Order 1 is made on the grounds specified in s 37AG(1)(a) and (c) of the *Federal Court of Australia Act 1976* (Cth).
3. Pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth)—and until determination of this proceeding or further order of the court (whichever is earlier)—information that identifies or tends to identify any party:
   1. by name; and
   2. as being connected, in any way, with the subject matter of the proceeding,

must not be published.

1. Pursuant to s 37AF(1) of the *Federal Court of Australia Act 1976* (Cth)—and until determination of this proceeding or further order of the court (whichever is earlier):
   1. the information contained in the annexure to the applicant’s statement of claim (the “**Confidential Annexure**”) must not be published;
   2. the registry must not release the Confidential Annexure (or any copy thereof) to any person without prior order of the court; and
   3. to the extent that a document filed in this proceeding refers to the information contained in the Confidential Annexure, and does so in a way that discloses any of its content, the registry must not release that document to any person without prior order of the court.
2. Orders 3 and 4 are made on the grounds specified in s 37AG(1)(a) and (c) of the *Federal Court of Australia Act 1976* (Cth).
3. For the purposes of orders 3 and 4, “publish” carries the meaning assigned to that word by s 37AA of the *Federal Court of Australia Act 1976* (Cth).
4. The registry must take such steps as are reasonably necessary to ensure that any document filed in this proceeding to which public access is granted, or that is released to any person, is first redacted to any extent necessary so as not to identify by name any of the parties herein.
5. The costs of and incidental to the applicant’s and second respondent’s applications for suppression and non-publication orders are reserved.

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

REASONS FOR JUDGMENT

SNADEN J:

1. By an originating application dated 17 January 2022, the applicant moves for relief against the respondents in respect of conduct to which they are said to have subjected her in contravention of various provisions of the *Sex Discrimination Act 1984* (Cth). That application is supported by a statement of claim, to which is attached what has become known in the matter as a “confidential annexure”. That document contains details of the conduct to which it is said that the applicant was relevantly subjected.
2. By her originating application, the applicant also sought interlocutory relief pursuant to part VAA of the *Federal Court of Australia Act 1976* (Cth) (hereafter, the “**FCA Act**”) to protect against her being identified as a party to the proceeding and to restrain publication of the confidential annexure to her statement of claim.
3. On 11 May 2022, the second respondent filed a similar application under part VAA of the FCA Act, by which he too sought orders to protect against being identified as a party to the proceeding.
4. Both interlocutory applications were supported by solicitor’s affidavits: in the case of the applicant, by an affidavit of Ms Kathryn Dalton, affirmed 28 April 2022; in the case of the second respondent, by an affidavit of Ms Allana Jayde Smith, affirmed 10 May 2022. Both were read without objection. With minor exception (related to the form of the relief that was sought), neither application was opposed.
5. Attached to Ms Dalton’s affidavit was a psychiatric report prepared in respect of the applicant by a psychiatrist, Professor Louise Newman AM. It is unnecessary to recite in detail the content of that report. It suffices to note that Professor Newman has diagnosed the applicant as suffering from major and chronic depression, and from chronic and complex post-traumatic stress disorder. Specifically in relation to the impacts that might visit upon the applicant in the event that she were to be publicly identified as the applicant in the present matter, Professor Newman expressed the following opinion, namely that:

…there are very serious negative impacts of any public disclosure related to [the applicant]’s case or situation. These would have a particularly negative impact on her mental state and in my view would contribute to further deterioration of the fragile gains that she has made over the last several months. Specifically, [the applicant] in the event of any public disclosure is likely to experience increasing symptoms of depression and anxiety. She would be in her words “overwhelmed and distressed” by this and I would place her at risk of suicidal ideation and would expect that she would require at this time psychiatric hospitalisation.

1. Later, Professor Newman concluded that the applicant:

…would not tolerate any disclosure of her personal history or details of the matter. These would in my view contribute to a deterioration in her mental state and significantly increase the risk that she has an acute mental disturbance but also that she is more likely to have ongoing and chronic mental health problems.

1. Ms Smith’s affidavit was affirmed upon the strength of instructions that she had received from the second respondent. She deposed to his having attended upon his general practitioner on occasions and having been certified as unfit to work, apparently on account of stress related to this proceeding. Initially, he was affected by its having been filed to a point that he was unable to attend to various steps necessary in the service of its defence. He was referred for psychological assessment but that has not yet occurred. Instead, the second respondent has, to date, sought to self-treat the symptoms of stress (one of which he identifies as insomnia) that he attributes to his involvement in this matter, including by means of alcohol consumption. He considers that any disclosure of his identity as a respondent to this proceeding would visit various psychological and financial stresses upon him, which may render him unable to participate in the proceeding. He also considers that his self-treatment—including through means of excessive alcohol consumption—might expose him to risks to his health.
2. For the reasons that follow, I have determined to grant relief of the kind that is sought by each application. In each case, I shall reserve the parties’ costs.
3. Sections 37AF and 37AG of the FCA Act provide as follows:

**37AF Power to make orders**

(1) The Court may, by making a suppression order or non‑publication order on grounds permitted by this Part, prohibit or restrict the publication or other disclosure of:

(a) information tending to reveal the identity of or otherwise concerning any party to or witness in a proceeding before the Court or any person who is related to or otherwise associated with any party to or witness in a proceeding before the Court; or

(b) information that relates to a proceeding before the Court and is:

(i) information that comprises evidence or information about evidence; or

(ii) information obtained by the process of discovery; or

(iii) information produced under a subpoena; or

(iv) information lodged with or filed in the Court.

(2) The Court may make such orders as it thinks appropriate to give effect to an order under subsection (1).

**37AG Grounds for making an order**

(1) The Court may make a suppression order or non‑publication order on one or more of the following grounds:

(a) the order is necessary to prevent prejudice to the proper administration of justice;

(b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;

(c) the order is necessary to protect the safety of any person;

(d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

(2) A suppression order or non‑publication order must specify the ground or grounds on which the order is made.

1. In considering whether or not to make a suppression or non-publication order under s 37AF(1) of the FCA Act, or any other orders ancillary thereto, the court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice: FCA Act, s 37AE. The foundational importance of the court’s processes playing out in public cannot be overstated. The making of a non-publication order is unusual and is not a step that should lightly be entertained.
2. Presently, the relief that is sought is sought on the bases that it is necessary to prevent prejudice to the proper administration of justice, and to protect the safety of those who seek it. The word “necessary” is a “strong word”: *Hogan v Australian Crime Commission* (2010) 240 CLR 651 (“***Hogan***”), 664 [30] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). The court’s power to make orders of the kind that are now sought is not one that should be exercised merely because it is “…convenient, reasonable or sensible, or [because it] serve[s] some notion of public interest”: *Hogan*, 663 [31] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). Allied to that point of principle is this one: the power ought not to be made merely in order to assist a party to avoid embarrassment, opprobrium or some other mode of intellectual or emotional discomfort.
3. With those principles recited, I shall deal first with the applicant’s application. The evidence of Ms Dalton suffices to demonstrate that orders of the kind that are sought are necessary at least to protect against risks to the applicant’s safety. Professor Newman’s analysis is unambiguous: she maintains that any public association of the applicant with the present proceeding would “likely” result in her experiencing symptoms of depression and anxiety and place her at risk of suicide. Professor Newman’s “expect[ation]” in that eventuality is that the applicant would require hospitalisation. It is not difficult to see, then, that the relief for which the applicant moves might properly be described as “necessary to protect [her] safety”. Relief should (and will) be granted on that basis.
4. In the case of the second respondent, the evidence is less unambiguous. There is no expert opinion that suggests that he would be placed at risk of any personal harm in the event that he was to be publicly identified as the second respondent to this proceeding. Such evidence as there is rises no higher than to suggest that disclosures of that kind would cause him great embarrassment and stress, which may manifest in “hostility and loss of reputation”, a risk of financial distress caused by a potential loss of employment, and a risk that he might attempt to self-treat his situation through the excessive consumption of alcohol. It is said that those realities might accumulate to a point that he “may not be able to participate in the proceeding” or that there is some risk to his health or safety.
5. Were the matter to turn on that evidence alone, I would not be persuaded that there was a proper basis under s 37AG of the FCA Act to make orders of the kind for which the second respondent moves. However, there is another dimension to the application, related to the orders that I intend to make in favour of the applicant. If the applicant were to be extended the protection of anonymity but the second respondent were not, there would be a significant imbalance as between them, in that the applicant would be able to pursue her claim without the threat of embarrassment associated with public identification, whereas the same fate would remain one to which the second respondent was exposed. There is an obvious risk that that imbalance might unduly or unfairly influence the parties’ approach to the potential settlement of the matter, which would likely undermine the administration of justice.
6. That being so, I consider that there is a proper basis to grant the relief that the second respondent seeks. It is necessary to prevent prejudice to the proper administration of justice and I will grant it on that basis.
7. All that remains is to assess what form that relief ought to assume. The applicant and second respondent both advanced draft minutes of order to that end, which were both the subject of helpful oral submission. Much is agreed as between the parties. I shall begin by addressing what is not.
8. The first concerns declaratory relief that the applicant incorporated into the minute that she advanced. That does no more than to identify the bases under s 37AG pursuant to which relief should be granted. That reflects the requirement to which s 37AG(2) gives voice. Compliance with that requirement, however, does not mandate the making of declaratory orders and I do not consider it appropriate to make any. It will suffice that the orders that are made will, as they will, identify the two bases under s 37AG that are identified above.
9. Second, the second respondent’s proposed minute of order proceeds upon the basis that relief might be granted under s 37AI(1) of the FCA Act. That section confers a power to make interim orders. Having had the benefit of the parties’ submissions, the relief that I will grant need not be made under that power. It will, instead, be made pursuant to s 37AF(1) of the FCA Act.
10. Third, although it is agreed as between the parties that relief should be granted to restrain each of them from disclosing the identity of any of them as a party, there was a divergence as to how that might manifest in the case of the first respondent. The first respondent is a body corporate, which, like all bodies corporate, can act only via the agency of its human officers. The orders that have been proposed broadly contemplate that it should be restrained from authorising the making of any disclosure, on its behalf, as to the identity of the parties to this proceeding. That, though, is to be subject to exceptions. First, disclosures made for purposes connected to the proper conduct of the proceeding—including for the purposes of giving or receiving legal advice—are not to be covered. Second, there is to be some form of exception related to disclosures that concern the management of the first respondent’s business and its employment, or former employment, of the applicant and the second respondent.
11. It is in respect of the wording of that exception that the parties could not agree. The applicant seeks relief that has the effect of prohibiting the first respondent from authorising any disclosure that identifies her as the applicant herein unless “it is necessary to do so in connection with the management of the applicant’s employment with the first respondent or for genuine business administration purposes”. The first respondent takes exception to the words “it is necessary to do so”. It submits that they would require the making of fine judgments on a disclosure-by-disclosure basis, which would trespass beyond what is necessary to confer the relief that it is otherwise appropriate to grant.
12. I am not persuaded that the words “it is necessary to do so” add much in the present context. The first respondent should be at liberty to authorise the making, on its behalf, of disclosures that identify the applicant as a party herein if (and to the extent that) they are to be made in connection with the management of its business. I do not consider that there is any realistic possibility that any such authority will be such as to jeopardise the effect and intent of the relief that will otherwise be granted.
13. Three further issues warrant mentioning. The first concerns the period over which relief that is to be granted should extend. Because it trespasses upon what is otherwise the important aspiration of open justice, relief granted under part VAA of the FCA Act should not extend for any longer than is necessary to protect against the eventualities in respect of which it is considered necessary. Insofar as it is considered necessary in order to prevent prejudice to the administration of justice, such relief logically ought not extend beyond the determination of the matter. However, insofar as it is considered necessary to protect any person’s safety, it might be that a longer (or, indeed, shorter) period is appropriate. In the present circumstances, I consider that the relief that I will grant should extend until the determination of this matter. If, at that stage, there remains some need for it to continue, that can be brought to the court’s attention. If, in the meantime, the circumstances by reason of which I consider it appropriate to grant relief change (such that relief might no longer be necessary), the court’s expectation is that it will be informed as much.
14. The second issue concerns the use of pseudonyms. It is agreed that all parties should be assigned pseudonyms and that the matter should proceed henceforth by reference to them. That is said to be necessary not merely as an ancillary incident of the suppression and non-publication orders that are to be made; but also on account of the fact that the subject matters giving rise to the dispute in this matter are widely known amongst at least some of the first respondent’s employees, such that the identification by name of *any* party might suffice to identify the others. I will grant relief in the form of pseudonyms. If nothing else, doing so will assist in maintaining the confidence to which the other orders that are to be made are directed.
15. The third issue to address concerns the affidavit sworn by the second respondent’s solicitor, Ms Smith. It is suggested that the court should make orders to prevent that affidavit from being made publicly available. Respectfully, that should not occur. It is important that the evidential basis upon which the orders are to be made should, so far as is practical, remain a matter of public record. It is conceivable that those orders might, one day, be the subject of challenge. Were that to occur, I consider that it would be important for any would-be challenger to be able to verify the evidential basis upon which they were made.
16. Nonetheless, insofar as the affidavit material filed to date serves to identify, by name, the parties to the proceeding, any publication of them by the court would offend both the spirit and letter of the orders that I intend to make. That being so, I will also make orders requiring that the registry take such steps as are reasonably necessary to ensure that any document to which public access is granted is redacted so as not to disclose the identity of any of the parties herein.
17. Save to the extent already mentioned, the parties did not otherwise take issue with either of the minutes of proposed orders that were advanced. Nonetheless, some wordsmithing of them is appropriate so as to ensure precision and avoid duplication. Save to note that the orders that I will make do not wholly coincide with either of the drafts that were advanced, they do at least do so in effect (subject to the allowances explored above). To the extent that any party considers further alteration to the terms of the orders is warranted, they shall have liberty to apply by email to my chambers for that purpose.

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| I certify that the preceding twenty-six (26) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Snaden. |

Associate:

Dated: 13 May 2022