FEDERAL COURT OF AUSTRALIA

Mornington Peninsula Shire Council v Jardine Lloyd Thompson Pty Ltd [2017] FCA 1545

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| File number: |  |
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| Judge: | **ALLSOP CJ** |
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| Date of judgment: | 20 December 2017 |
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| Date of publication of reasons: | 22 December 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** –application for preliminary discovery – prospective applicant was member of mutual liability insurance scheme established for local authorities by Municipal Association of Victoria – prospective respondent had involvement in management and administration of scheme – prospective applicant sought copies of agreements between Municipal Association of Victoria and prospective respondent – whether prospective applicant had a reasonable basis for its belief that it may have a right to relief against the prospective respondent for breach of fiduciary duty – application granted |
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| Legislation: | *Federal Court Rules 2011* (Cth), r 7.23  *Audit Act 1994* (Vic), s 16AB  *Constitution Act 1975* (Vic), ss 73, 74  *Municipal Association Act 1907* (Vic), s 10CB |
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| Cases cited: | *Australian Securities Commission v AS Nominees Ltd* [1995] FCA 915; 62 FCR 504  *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; 160 FCR 35  *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522  *Daly v Sydney Stock Exchange* [1986] HCA 25; 160 CLR 371  *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41  *Laurance v Katter* (1996) 141 ALR 447  *Mees v Roads Corporation* [2003] FCA 306; 128 FCR 418  *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193  *Prebble v Television New Zealand Ltd* [1995] 1 AC 321  *Priest v State of New South Wales* [2006] NSWSC 12  *R v Jackson* (1987) 8 NSWLR 116 |
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| Date of hearing: | 13 December 2017 |
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| Registry: |  |
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| Division: |  |
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| National Practice Area: |  |
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| Sub-area: | Insurance List |
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| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 43 |
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| Counsel for the Prospective Applicant: | Ms S Gory |
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| Solicitor for the Prospective Applicant: | Quinn Emanuel Urquhart & Sullivan |
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| Counsel for the Prospective Respondent: | Ms C Harris SC |
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| Solicitor for the Prospective Respondent: | Clayton Utz |

ORDERS

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|  | | VID 985 of 2017 |
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| BETWEEN: | MORNINGTON PENINSULA SHIRE COUNCIL  Prospective Applicant | |
| AND: | JARDINE LLOYD THOMPSON PTY LTD  Prospective Respondent | |

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| JUDGE: | ALLSOP CJ |
| DATE OF ORDER: | 20 DECEMBER 2017 |

THE COURT ORDERS, WITHOUT ADMISSION BY THE PROSPECTIVE RESPONDENT AND BY CONSENT, THAT:

1. On or before 16 February 2018, the prospective respondent provide disclosure of the documents in paragraphs 1 to 4 and 8 to 13 of the originating application filed on 8 September 2017.

**THE COURT ORDERS THAT**:

2. The prospective respondent give the prospective applicant preliminary discovery under r 7.23 of the *Federal Court Rules 2011* (Cth) of the documents described in paragraph 7 of the originating application filed on 8 September 2017 on terms to be the subject of further orders.

3. On or before 12:00pm on 22 December 2017, the prospective applicant and prospective respondent, through their legal representatives, provide a joint minute of proposed orders (or competing minutes if there is disagreement) addressing:

* 1. the filing by the prospective respondent of any affidavit upon which it seeks to rely and written submissions of no more than five pages on the questions of confidentiality, costs and the form of orders.
  2. the filing by the prospective applicant of any affidavit upon which it seeks to rely and written submissions of no more than five pages on the questions of confidentiality, costs and the form of orders.
  3. the service of the reasons when published on the Municipal Association of Victoria and the filing of any written submissions by that Association of no more than five pages as to confidentiality and form of orders.
  4. the listing of the matter on a date to be fixed in February 2018 for further hearing as to confidentiality, costs and the form of orders.

4. The matter otherwise be stood over to a date to be fixed in February 2018 for further hearing if necessary as to confidentiality, costs and the form of orders.

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

REASONS FOR JUDGMENT

ALLSOP CJ:

1. This is an application for preliminary discovery under r 7.23 of the *Federal Court Rules 2011* by Mornington Peninsula Shire Council against Jardine Lloyd Thompson Pty Ltd (JLT). The contested application before me, although originally wider in scope, is for disclosure of certain documents relating to a liability insurance scheme for local authorities in Victoria and Tasmania called the Liability Mutual Scheme (the LMI Scheme), in which JLT has involvement and of which the Council was formerly a member. The argument on the application involved no fundamental question of principle, though the parties made reference to the recent decision of the Full Court in *Pfizer Ireland Pharmaceuticals v Samsung Bioepis AU Pty Ltd* [2017] FCAFC 193. The issue is whether the Council had a reasonable basis for its belief that it may have a right to relief against the prospective respondent.
2. The Council is the local authority responsible for delivering and administering local government services to the Shire of Mornington Peninsula in Victoria. In the course of its functions, the Council is required to obtain various insurances. One of these is public liability and professional indemnity insurance, and between 1993 and 2015 the Council obtained this cover through the LMI scheme. Another is cover for property loss and damage, or “industrial special risks” insurance. Between 1998 and 2016, the Council obtained its industrial special risks cover through another scheme, called the JLT Mutual Discretionary Trust Arrangement (the JMAPP scheme). The LMI scheme was established by the Municipal Association of Victoria (MAV), a statutory body. It is a mutual insurance scheme. The JMAPP scheme was established by JLT and is a discretionary trust arrangement. A related entity of JLT called Jardine Group Services Pty Ltd (JGS) acts as the trustee of the JMAPP scheme. JLT is an international insurance broker and advisor. Since at least 2001, it has provided a number of insurance services to the Council including broking and advisory services in relation to a number of lines of insurance. Whether it did so in relation to public liability and professional indemnity insurance was a matter of contested evidence on this application.
3. The Council says that it may have a right to relief against JLT for breach of fiduciary duty in relation to JLT’s involvement in both the LMI and JMAPP schemes.
4. On 8 September 2017, the Council commenced this application for preliminary discovery (VID985/2017) along with an application for access to trust documents concerned with the JMAPP scheme (VID984/2017). The application in this proceeding, as originally brought, sought preliminary discovery from JLT of a number of different documents that related to both the LMI and JMAPP schemes. The application for access to trust documents was confined to the JMAPP scheme and was brought against the trustee of that scheme, JGS. It broadly sought the same documents as were, at that stage, sought in relation to the JMAPP scheme in this application. Both applications were placed in the Insurance List and case managed together.
5. On the evening before the hearing, the parties advised that they had agreed on consent orders resolving the application concerning the trust documents (VID984/2017). I made those orders, providing for access to the documents sought in that application on or before 16 February 2018, at the hearing on 13 December 2017. As a consequence of that agreement, documents relating to the JMAPP scheme are no longer sought in this preliminary discovery application. It is now only concerned with documents relating to the LMI scheme.
6. At the hearing, the parties informed the Court that they had reached further agreement regarding the documents sought in respect of the LMI scheme, with JLT agreeing to disclosure of all but one category of documents. The category of documents for which the issue of disclosure remained in contention between the parties was the following:

7. Copies of any agreements between MAV and JLT (or its related entities) for the provision of brokerage or insurance-related services that concern or relate to the LMI Scheme during the period of 2011 to 2015 (inclusive) (including but not limited to any agreements to manage the LMI Scheme).

1. The Council pressed its application for preliminary discovery of this category of documents (the “category 7 documents”) at the hearing. These reasons address the issue of whether the Council is entitled to preliminary discovery of the category 7 documents. For the reasons that follow, the Council is entitled to preliminary discovery. As I indicated during the hearing, I will hear the parties as to an appropriate confidentiality regime and on the question of costs.

## The LMI scheme

1. The LMI scheme is a mutual liability insurance scheme established by MAV that provides public liability and professional indemnity insurance to a number of Victorian and Tasmanian councils and water authorities. MAV established the LMI scheme in 1993 pursuant to the statutory obligation to do so in s 10CB of the *Municipal Association Act 1907* (Vic). MAV is a licensed insurer.
2. In MAV’s Annual Report for 2014-2015, the LMI scheme is discussed from pp 69-70. It states that:

The Liability Mutual Insurance (LMI) scheme is operated entirely for the benefit of members.

1. Earlier in the report at p 63, the Chair of “MAV Insurance” states that:

MAV Insurance was created because Victorian Councils were simply unable to obtain public liability and professional indemnity insurance through the private market. The move to establish MAV Insurance not only delivered substantial premium savings for members, but an active management partnership, and a collegiate approach on behalf of the industry. The commitment to be there for our members through good times and bad, and through soft and hard markets, continues to be what underpins the LMI scheme.

1. Authority and responsibility for MAV Insurance is said in the Annual Report at p 65 to be delegated to the “MAV Insurance Board” or “MAVIB”.
2. The establishment of the LMI scheme is described at p 69 of the Annual Report:

The LMI scheme was formed under a deed of establishment, which is the official agreement between the MAV and members who agree to be bound by the terms of this deed. The deed confirms the terms, conditions, obligations and benefits of the membership of each individual member.

1. The roles of MAV, JLT and other entities in the LMI scheme are described on that same page:

The MAV manages the scheme **with the assistance of service providers Jardine Lloyd Thompson**, Taylor Fry Analytics and Actuary Consulting (actuary), Perennial Investment Partners (investment manager), MTA Consulting Pty Ltd (investment advisor), EY (auditor) and National Australia Bank Asset Servicing (custodian services).

(emphasis added)

1. There is a similar description, albeit with more detail as to the role of JLT, at p 65 of the Annual Report:

The MAVIB carries out oversight and management of the operational activities of MAV Insurance. **Jardine Lloyd Thompson Pty Ltd provides claims, risk management and reinsurance placement services to MAV Insurance.** Taylor Fry is the independent actuary; Ernst and Young is the independent auditor; and Perennial Investment Partners Ltd provides investment services and advice.

(emphasis added)

1. In a letter from Clayton Utz to Quinn Emanuel Urquhart & Sullivan dated 6 July 2016 that was in evidence, the following description was provided of JLT’s role in the LMI scheme:

JLT provides Administration, Claims Management, Reinsurance Broking, Risk Management and other incidental services to MAV in respect of LMI.

1. During the hearing, counsel for the prospective applicant directed me to the Financial Report of MAV Insurance for 2014-15, which formed part of the MAV Annual Report for that financial year. At p 116, the notes to the financial statements identified the expenditures for “Scheme Management Fees” for the LMI scheme of somewhat more than $3.1 million. Under the heading of “Scheme Management Fees” it was stated, “[i]ncluded within administration and general expenses are management fees for: Reinsurance placement and Risk management and administrative services”. “Reinsurance placement” totalled approximately $2.1 million and “Risk management and administrative services” approximately $1 million (making the total somewhat more than $3.1 million). It was submitted on behalf of the Council that these amounts were paid to JLT, and represented approximately 10% of a total premium revenue for the LMI scheme of approximately $30.1 million (as shown in the “Statement of Comprehensive Income” at p 110 of the Annual Report).
2. In 2015, the Victorian Auditor-General’s Office published a report into MAV that was entitled “Effectiveness of Support for Local Government”. I deal later with the question of Parliamentary privilege that was raised after the argument. It included a discussion of the insurance services provided by MAV. Pages 36-38 of that report addressed the LMI scheme, and stated at p 36:

Under its legislative mandate, MAV may arrange insurance for its members and receive commissions for arranging insurance contracts. Since 1993 MAV has been required to establish and manage a mutual liability insurance scheme for the purpose of providing public liability and professional indemnity insurance for the benefit of local government. MAV established the Civil Mutual Plus Scheme in 1993 following an amendment to the *Municipal Association Act 1907* and contracted an insurance service provider to provide public liability and professional indemnity insurance, claims and risk management services to local government – this is now known as Liability Mutual Insurance …

1. The Auditor-General referred to JLT as “the service provider” and commented that:

The service provider has administered the scheme continuously since 1993 under various contractual arrangements. Under the current agreement, the value of this procurement is around $2.03 million annually.

1. Then, under a heading of “Lack of competitive tendering for the provision of insurance services”, the report continued:

**Lack of competitive tendering for the provision of insurance services**

The service provider – and its predecessor organisation – have provided insurance services to MAV dating back to 1987. Since the original management agreement was established in July 1993 **no subsequent management agreements have been subject to a competitive tender process. This is despite an independent review in 2010 of risk management services raising concerns about the performance of the provider, and a recommendation for competitive tendering.** … In July 2012, MAV entered into a new 10-year agreement with the same service provider, with a possible five-year extension. … For a contract of this value councils are required to undertake a public tender or expression of interest process, unless an exemption is granted by the minister. Similar standards apply to all state government departments and agencies under Victorian Government Purchasing Board requirements.

With no market testing for the past 10 years, MAV cannot reliably demonstrate value for money from its insurance business activities **or that the arrangements with its service provider are appropriate for the needs of member councils**.

(emphasis added)

1. Reference was then made by the Auditor-General at p 37-38 to MAV’s independent review of risk management services provided by JLT:

**Independent review of risk management services**

In late 2010, MAV commissioned an independent assessment of the service provider’s performance in providing risk management services. While the review found that services compared favourably to similar schemes set up by local government associations in other Australian states, it highlighted significant issues concerning the performance of the service provider and its relationship with MAV.

The review report stated that in the early 1990s the service provider approached MAV with the idea of setting up a mutual liability insurance scheme. The service provider was providing similar services to local government in other jurisdictions around the same time. The report noted that:

‘MAVIC/MAV were initially ‘naive’ about the service provider and the scheme and were content to let them have their run of the Scheme without much oversight. The service provider drove the strategy and built up relationships with the councils. It became a very profitable business for the service provider.’

‘Over time MAVIC became much more knowledgeable about the Scheme and the strategic benefits of taking a more active role in its administration.’

This review pointed out concerns that MAVIC and MAV had with the performance of the service provider and its relationship with MAV at this time. It included recommendations for working together – Scheme members, MAVIC and MAV in strategy and planning sessions – MAV and its service provider jointly developing a strategic plan for risk management that encompasses broader MAV risk issues. In reference to verifying costs of service delivery, the report made a specific recommendation that the services provided be subject to competitive tendering as a whole or individually – i.e. risk management services only:

‘Concerns about value for money and quality of service are difficult to resolve in the current long-term arrangement. The presence of the service provider in every applicable local government mutual liability scheme (or equivalent) means that their respective services are likely to be similar making it difficult to assess best practice from a benchmarking approach. Subjecting the services to a competitive tender is the best way to assess the services against good practice and value for money.’

Despite the issues raised in the independent review, in July 2012, MAV entered into the new agreement for potentially 15 years without undertaking a competitive tender process.

1. Thus there is evidence that JLT is a service provider to the LMI scheme, and this may extend to management and administration services. It was contended by the Council that JLT acted as scheme manager and administrator. The financial information was also said to indicate that JLT’s services were significant to the scheme. Furthermore, the Auditor-General’s report provides some support, and context, for a belief that there may have been issues with the cost and quality of the services provided by JLT. The question of the extent of the fees and commissions extracted by JLT from the scheme and its work in relation thereto will be addressed by the production of other documents that have been sought, about which there is no dispute.

## The Council’s application

1. The Council’s application under r 7.23 of the *Federal Court Rules*, as pressed before me, related to service agreements between JLT and MAV in respect of the LMI scheme.
2. Rule 7.23 is in the following form:

**7.23 Discovery from prospective respondent**

(1) A prospective applicant may apply to the Court for an order under subrule (2) if the prospective applicant:

(a) reasonably believes that the prospective applicant may have the right to obtain relief in the Court from a prospective respondent whose description has been ascertained; and

(b) after making reasonable inquiries, does not have sufficient information to decide whether to start a proceeding in the Court to obtain that relief; and

(c) reasonably believes that:

(i) the prospective respondent has or is likely to have or has had or is likely to have had in the prospective respondent's control documents directly relevant to the question whether the prospective applicant has a right to obtain the relief; and

(ii) inspection of the documents by the prospective applicant would assist in making the decision.

(2) If the Court is satisfied about matters mentioned in subrule (1), the Court may order the prospective respondent to give discovery to the prospective applicant of the documents of the kind mentioned in subparagraph (1)(c)(i).

1. As was emphasised in *Pfizer* [2017] FCAFC 193 at [8], the foundation of r 7.23(1)(a) is that the prospective applicant reasonably believes that it **may** have a right to relief; “it is about something that **may** be the case, **not is** the case”. See also [101] and [108]. The rule is directed to the existence of a reasonable belief as to the possible existence of a right to obtain relief. It is not necessary for a party to establish a prima facie case. It is about whether there are reasonable grounds for the prospective applicant believing there **may** be a right to relief.
2. The key issue in contention before me in relation to the category 7 documents was whether the Council had demonstrated reasonable grounds for a belief that it **may** have a right to relief based on breach of fiduciary duties that may be owed by JLT to the Council.
3. The Council relied on an affidavit of its corporate counsel, Mr David Carrington, affirmed on 15 November 2017 as evidence of the Council having a reasonable belief that it may have a right to relief against JLT in respect of the LMI scheme. Mr Carrington stated that he had reasonable cause to believe that the Council may have the right to obtain relief, in the form of disgorgement of profits or equitable compensation, against JLT for breach of fiduciary duty in relation to the LMI scheme for:
   1. commission, fees or remuneration received by JLT that were not disclosed to the Council, including commission, fees or remuneration of a type that was not disclosed in MAV’s Annual Report or elsewhere; and
   2. commission, fees or remuneration received by JLT or its related entities in connection with the LMI scheme that may have been excessive or unreasonable.
4. It was submitted that the category 7 documents sought by the Council related to enabling the Council to decide the anterior question of whether JLT owed a fiduciary duty to it as a member of the LMI scheme. This, of course, would be a necessary prerequisite to determining whether to commence a claim for breach of fiduciary duty. It was submitted that on the information available to it, the Council had reasonable grounds for believing it may have a right to such relief.
5. Ms Harris SC, who appeared for the respondent, JLT, submitted that the LMI scheme was not a trust, and so the Council was not owed fiduciary duties by JLT as if it were a beneficiary of a trust (such as the JMAPP scheme). She submitted that there was no basis on the evidence for the Council to believe that there was or may be any fiduciary duty owed by JLT to the Council. Ms Gory, who appeared for the Council, submitted that there were two bases upon which JLT may have owed a fiduciary duty to the Council as a member of the LMI scheme. First, the Council asserted that JLT was its broker or at least its advisor in relation to the LMI scheme. Secondly, it was submitted that JLT may have owed a fiduciary duty to the Council on the basis of its alleged role as a scheme manager and administrator of the LMI scheme.
6. In relation to the first potential basis for a fiduciary duty, this was contested on the evidence. It was not in dispute that JLT was the Council’s broker in relation to a number of lines of insurance. In relation to public liability and professional indemnity insurance, the Council relied upon a letter sent in similar form in each of the relevant years to the Council by JLT. The letter in evidence was dated 19 March 2013. The relevant parts were as follows:

**Contracts of Insurance and Compliance with Section 186**

With your Council’s insurance renewal fast approaching, it is time to ensure that the purchase of your insurance programme is compliant with Section 186 of the Local Government Act 1989 (LGA).

…

The following points are still relevant today as they were 12 months ago and are repeated for your reference.

In summary:

* You are not required to undertake a public tender for your LMI liability policy. LMI is exempt from s. 186.

...

1. The Council submitted that this letter provided evidence that JLT gave advice to the Council each year in respect of liability insurance and was sufficient to give the Council a reasonable basis for its belief that the Council may have been owed a fiduciary duty by JLT on the basis that it was its broker or advisor in relation to that line of insurance. The giving of advice does not lead to a necessary conclusion that the parties are in a fiduciary relationship but it may be an aspect of the relationship that can be characterised as one of trust or fiduciary reliance: *Daly v Sydney Stock Exchange* [1986] HCA 25; 160 CLR 371 at 377. JLT disputed that it was the Council’s broker or advisor in relation to public liability insurance and relied upon an affidavit of the Council’s former Chief Executive Officer, Dr Michael Kennedy OAM affirmed on 8 November 2017, to the effect that the Council did not act in this capacity in relation to the LMI scheme. It is neither necessary nor appropriate to resolve this conflicting evidence as to JLT’s role for the purposes of this application for preliminary discovery: see *Pfizer* [2017] FCAFC 193 at [69], and at [180]. The fact is, there is some evidence supporting the proposition that JLT’s broking or at least its advisory role may have extended to public liability and professional indemnity insurance.
2. The second basis upon which the Council submitted it had reasonable grounds for believing it may have been owed a fiduciary duty by JLT was JLT’s role as scheme manager and administrator. The category 7 documents, being the agreements between JLT and MAV in relation to the LMI scheme, would be relevant to establishing JLT’s relationship with MAV, and through MAV the member councils. The Council made reference, as a basis for its belief, to the extracts from the Victorian Auditor-General’s report referred to above which provided evidence as to JLT’s role in the LMI scheme. Reference was also made to the descriptions of JLT’s role in the MAV Annual Report which are also extracted above. The Council relied upon the amount paid to JLT as evidence that its services are significant and this was said to provide a reasonable ground to believe that JLT’s involvement may lead to it owing fiduciary duties to scheme members.
3. The argument as to this potential basis for a possible fiduciary duty was put by Ms Gory as follows. As the LMI scheme is operated solely for the benefit of members, it is unlikely that JLT would not owe fiduciary duties to scheme members in its role as scheme administrator and manager. It was submitted that the agreements sought by way of preliminary discovery would be significant in determining whether fiduciary duties may be owed to scheme members such as the Council. As the Council has reasonable grounds to suspect fiduciary obligations to the members may exist, it was asserted that it was entitled to preliminary discovery of those documents, in order to determine whether to commence an action for relief.
4. The Council relied upon *Australian Securities Commission v AS Nominees Ltd* [1995] FCA 915; 62 FCR 504 at 520-521 where Finn J concluded that a manager acting on behalf of a trustee could owe fiduciary duties to the beneficiaries of the trust in providing management services, having regard to the awareness the manager must have been taken to have had in that case that the functions it was performing were for the benefit of the beneficiaries. In those circumstances, his Honour concluded that the beneficiaries were entitled to expect that the manager would not prefer its own interests to their own. Ms Gory submitted that the role of JLT in the LMI scheme was analogous to that of the managers in *AS Nominees* and so there were reasonable grounds to believe JLT may have owed fiduciary duties to the members of the LMI scheme. Whether that was the case could clearly be affected by the terms of the relationship between MAV and JLT.
5. Ms Harris submitted that JLT did not accept that it provided management services in respect of the scheme as MAV was the manager. Without resolving this factual disagreement, or preferring any aspect of the evidence, it can be said that there is evidence before me as to JLT role’s in the LMI scheme, in the form of the Auditor-General’s report, that renders it plausible that JLT may owe a fiduciary duty to the Council by virtue of its role in providing services to MAV. JLT provides services to MAV which acts under a statutory role for all member councils. There have been concerns cast by the Auditor-General’s report as to the conduct of the LMI scheme. The conclusions reached in that report may go some way towards the Council’s reasonable belief that it may have a right to relief more broadly. The relationship is potentially one in which members of the LMI scheme were vulnerable to any abuse by JLT of its position and, depending on the terms of the management agreement between MAV and JLT, it may also be one in which JLT has undertaken to act in the interests of the members of the LMI scheme: see *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64; 156 CLR 41 at 96-97 per Mason J and 68 per Gibbs CJ, respectively. These factors, together with the analogy drawn from *AS Nominees,* suggest that there are reasonable grounds for a belief that JLT may owe fiduciary duties to the Council as a member of the LMI scheme and a belief that it may have a right to relief.
6. Senior counsel for JLT quite properly sought to distinguish the LMI scheme from a trust relationship and to emphasise the role of MAV in the scheme, with JLT as a mere service provider to it. She submitted that there were no reasonable grounds to think that because JLT provided services to the manager of this mutual liability scheme it is a fiduciary to the members. This is a matter that will ultimately be resolved on the evidence. Rule 7.23 requires a reasonable belief that a prospective applicant **may** have a right to relief. The agreements sought in this application are significant to whether JLT owes fiduciary duties to members of the LMI Scheme. Such obligations can be affected (created or modified or excluded) by contract: *Australian Securities and Investments Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963; 160 FCR 35 at 76-77 [270]-[281]. Obtaining access to the category 7 documents is thus necessary for the Council to obtain sufficient information to determine whether it has a right to relief and whether it should bring proceedings for breach of fiduciary duty. The content of the agreements will be significant as to whether it can be concluded that a fiduciary duty is owed and what the scope of that duty is or may be.
7. There is a sufficient basis for the belief held by the Council for the purposes of an application under r 7.23. JLT provides services to MAV which is responsible for providing insurance to the members of the scheme. It is entirely likely that the professional assistance given by JLT to MAV and the scheme will involve trust being resided in JLT as to its skill, competence and honesty. Whether that translates into the creation of duties of loyalty in equity by JLT to member councils or only to MAV or to no-one at all will depend in part upon the terms on which JLT provides the services it does to MAV. It would not be inconsistent with any likely operative legal principle for JLT to provide insurance related services to the scheme in a way that meant it was acting on behalf of members of the scheme, and through that owe duties of loyalty to members. Though the language of the Auditor-General’s report is somewhat opaque, it provides a reasonable basis for the Council to believe that there may be a right to obtain relief from JLT concerning the levels of fees and costs if there be, as there may be, a fiduciary relationship between JLT and member councils. In all the circumstances the belief that the Council may have a right to relief is one that is reasonably held.
8. No objection was taken with the reference to, and reliance upon, the Auditor-General’s report at the hearing. An issue was later raised in correspondence about the privilege afforded to a report of the Auditor-General by operation of s 16AB of the *Audit Act 1994* (Vic) and ss 73 and 74 of the *Constitution Act 1975* (Vic). Such privilege may mean that the report cannot be used for truth of its contents, as opposed to the fact that the words in the report were published. However, the report has not been relied upon for the truth of its contents. It is the fact that the Auditor-General said this about the LMI scheme and the prospective respondent (not the truth of what was said) that helps to found a reasonable belief on the part of the Council that it may have a right to relief: see generally, *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 530-531; *R v Jackson* (1987) 8 NSWLR 116 at 118-121; *Priest v State of New South Wales* [2006] NSWSC 12 at [86]; *Prebble v Television New Zealand Ltd* [1995] 1 AC 321; *Mees v Roads Corporation* [2003] FCA 306; 128 FCR 418; *Laurance v Katter* (1996) 141 ALR 447. Ms Harris SC on behalf of JLT did not submit that the report could not be relied upon to prove that the Auditor-General, as an apparently credible source, had said these things in a serious context. In these circumstances it is unnecessary to explore the limits and content of the privilege.
9. Rule 7.23 also requires a prospective applicant to have made reasonable inquiries. JLT submitted that the Council had not done so in respect of the category 7 documents, as it had made inadequate attempts to obtain them from MAV. The Council wrote to MAV in January 2017 and requested access to these documents. MAV did not respond. The Council submitted that it was reasonable for the Council to consider that this was MAV’s considered response and it was not reasonable for the Council to continue to make requests to MAV. After MAV did not provide the documents, the Council brought the application against JLT. JLT’s submission was that the Council should have followed up when it did not receive a response in January, given that, when it did so on 14 November 2017, it received a response from MAV’s legal representatives on 22 November 2017. There was then correspondence between the Council’s lawyers and those acting for MAV between 11 and 13 December 2017. The Council has also sought these documents from JLT prior to bringing this application. There was a proposal that the documents be supplied, but only on condition (a condition apparently proposed by MAV) that they not be available for use in any representative proceedings brought on behalf of other councils. The Council refused that limitation. Considering the circumstances as a whole, I consider that the Council has made reasonable inquiries to obtain the relevant information.

## Disposition

1. Therefore, I propose to grant the relief sought and order that the category 7 documents be disclosed to the prospective applicant.
2. There is dispute amongst the parties and MAV as to the purposes for which these documents may be used if disclosed, amid concerns as to confidentiality. Agreement was reached in relation to the other documents that were originally sought, as noted above. The parties advised me at the hearing that the confidentiality terms governing disclosure of the documents in respect of which there is agreement permit the use of them in a representative proceeding, though it was originally a matter of contention. Such an agreement could not be reached in respect of the category 7 documents.
3. There may be legitimate confidentiality concerns and it may be that MAV itself needs to be heard about the disclosure regime. I will hear from the parties, and potentially MAV, on confidentiality and the form of orders.
4. As to the question of costs, they should not be dealt with as if the application is a standard contested application. Rule 7.23 is a beneficial provision and is to be construed with a view to providing access where a party reasonably believes it may have a right to relief. It is appropriate to acknowledge that such an application is an intrusion upon the rights of the prospective respondent that must be justified.
5. I will make the following orders:

THE COURT ORDERS, WITHOUT ADMISSION BY THE PROSPECTIVE RESPONDENT AND BY CONSENT, THAT:

1. On or before 16 February 2018, the prospective respondent provide disclosure of the documents in paragraphs 1 to 4 and 8 to 13 of the originating application filed on 8 September 2017.

**THE COURT ORDERS THAT**:

2. The prospective respondent give the prospective applicant preliminary discovery under r 7.23 of the *Federal Court Rules 2011* (Cth) of the documents described in paragraph 7 of the originating application filed on 8 September 2017 on terms to be the subject of further orders.

3. On or before 12:00pm on 22 December 2017, the prospective applicant and prospective respondent, through their legal representatives, provide a joint minute of proposed orders (or competing minutes if there is disagreement) addressing:

* 1. the filing by the prospective respondent of any affidavit upon which it seeks to rely and written submissions of no more than five pages on the questions of confidentiality, costs and the form of orders.
  2. the filing by the prospective applicant of any affidavit upon which it seeks to rely and written submissions of no more than five pages on the questions of confidentiality, costs and the form of orders.
  3. the service of the reasons when published on the Municipal Association of Victoria and the filing of any written submissions by that Association of no more than five pages as to confidentiality and form of orders.
  4. the listing of the matter on a date to be fixed in February 2018 for further hearing as to confidentiality, costs and the form of orders.

4. The matter otherwise be stood over to a date to be fixed in February 2018 for further hearing if necessary as to confidentiality, costs and the form of orders.

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| I certify that the preceding forty-three (43) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop. |

Associate:

Dated: 22 December 2017