Federal Court of Australia

Jara-Saba v MoneyMe Financial Group Pty Ltd [2021] FCA 1482

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| File number(s): | NSD 1156 of 2021 |
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| Judgment of: | **JAGOT J** |
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| Date of judgment: | 22 November 2021 |
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| Date of publication: | 25 November 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** — orders for removal of Court documents from Court file — proceeding settled almost immediately after filing — public interest in open justice — application granted |
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| Legislation: | *Fair Work Act 2009* s 368(3)  *Federal Court of Australia Act 1976* ss 37AE, 37AF(1), 37AG, 37AJ  *Federal Court Rules 2011* (Cth) r 2.28 |
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| Cases cited: | *Porter v Australian Broadcasting Corporation* [2021] FCA 863 |
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| Division: | Fair Work Division |
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| Registry: | New South Wales |
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| National Practice Area: | Employment and Industrial Relations |
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| Number of paragraphs: | 9 |
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| Date of hearing: | 22 November 2021 |
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| Solicitor for the Applicant: | Mr R Young of Holman Webb Lawyers |
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| Solicitor for the Respondents: | Ms K Mataraaratchi of Gilbert + Tobin |

ORDERS

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|  | | NSD 1156 of 2021 |
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| BETWEEN: | NAOMI JARA-SABA  Applicant | |
| AND: | MONEYME FINANCIAL GROUP PTY LTD ACN 163 691 236  First Respondent  PETER COAD  Second Respondent  CLAYTON HOWES  Third Respondent | |

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| order made by: | JAGOT J |
| DATE OF ORDER: | 22 NOVEMBER 2021 |

THE COURT ORDERS THAT:

1. Pursuant to rule 2.28 of the *Federal Court Rules 2011* (Cth), the originating application and statement of claim be removed from the Federal Court’s record and the Commonwealth Courts electronic portal.
2. The Applicant be given leave to file a Notice of Discontinuance in the form annexed to these orders and marked “Annexure A”.

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

“**Annexure A**”

Form 48

Rule 26.12(1)

**Notice of discontinuance**

No. NSD1156 of 2021

Federal Court of Australia

District Registry: New South Wales

Division: Fair Work

**NAOMI JARA SABA**

Applicant

**MONEYME FINANCIAL GROUP PTY LTD ACN 163 691 236 AND OTHERS**

Respondents

1. The Applicant discontinues the whole of the proceedings.
2. The parties consent to the discontinuance and agree to pay their own costs of the proceedings.

Date: November 2021

Signed by Robin Young

Lawyer for the Applicant

Date: November 2021

Signed by Dianne Banks

Lawyer for Respondents

REASONS FOR JUDGMENT

Delivered *ex tempore*, revised from transcript

JAGOT J:

1. I received short minutes of order by consent in this matter proposing that orders be made for removal of the originating application and statement of claim from the Court file under rule 2.28 of the *Federal Court Rules 2011* (Cth) (**Rules**) or, alternatively, for suppression of those documents under ss 37AF(1)(a) and (1)(b) of the *Federal Court of Australia Act 1976* (Cth) (**Act**). I required the matter to be listed for a case management hearing on the basis that orders of this kind should be the subject of close consideration given the public interest in open justice reflected in the following provisions of the Act:

**s 17**

1. Except where, as authorized by this Act or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court.

**s 37AE**

In deciding whether to make a suppression order or non‑publication order, the Court must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

1. After the matter was listed for a case management hearing, the applicant filed an interlocutory application seeking the proposed orders and an affidavit in support from the solicitor for the applicant. The affidavit in support explains that the proceeding was commenced on 8 November 2021. This was the 14th day after the issue of a certificate under section 368(3) of the *Fair Work Act 2009* (Cth), being the last day on which the applicant was entitled to commence the proceeding. After the filing of the proceedings, the parties reached a settlement agreement. They signed a deed of settlement on 9 November 2021. The terms of settlement are conditional upon the applicant filing a notice of discontinuance of the proceeding and the obtaining of an order to the effect of one or other of the orders sought in the interlocutory application.
2. According to the affidavit from the applicant’s solicitor, if one or other order as set out in the interlocutory application is not made, then the terms of the deed of settlement will not be satisfied and the matter would then proceed to hearing involving both expert and lay evidence and a hearing that would run for several days. According to the solicitor for the applicant, it is his view that the settlement of the matter is in the best interests of all of the parties,and, having regard to the very complex nature of the matter, it is also in the interests of justice as it will avoid both parties incurring significant legal costs and the likelihood of protracted legal proceedings.
3. The reason that orders such as those proposed require proper scrutiny is the public interest in the open administration of justice. I considered these issues most recently in ***Porter*** *v Australian Broadcasting Corporation* [2021] FCA 863.
4. There is a public interest both in members of the public being able to understand the processes of litigation in the Court and in the Court maintaining a complete record of Court files. This said, there is a capacity in the Rules for the removal of a document from the Court file either on the initiative of the Court or on an application by a party, but rule 2.28 contemplates that an application by a party will be limited to circumstances where the documents sought to be removed constitute some form of abuse of process. Alternatively, there is the power in the Act (s 37AF) to require a document to be suppressed, relevantly on grounds set out in s 37AG, which include in s 37AG(1)(a) that the order is necessary to prevent prejudice to the proper administration of justice.
5. There are competing interests in play in this matter. There is the private interest of the parties in ensuring that their settlement can be maintained. On that basis, one or other of the orders in the interlocutory application is sought. That private interest also supports a public interest in encouraging the settlement of litigation. There is also the public interest in members of the public being able to understand processes of litigation in the Court and in the maintenance of the integrity of Court files.
6. I am satisfied that in the circumstances of this case orders should be made requiring removal of the originating application and statement of claim from the Court file:
7. the proceeding was commenced on 8 November 2021;
8. the proceeding was commenced due to a statutory limitation period;
9. as far as I can ascertain, the proceeding has not been the subject of any hearing before today;
10. the matter settled very shortly after commencement of the proceeding;
11. the settlement by the parties includes a term by which the parties, by consent, will seek the making of one or other of the orders sought in the interlocutory application; and
12. examination of the nature of the proceeding as disclosed in the originating application and statement of claim discloses matters which, as a result of the settlement of the proceeding, would not serve the public interest to be placed in the public domain.
13. As indicated in *Porter*, I do not see why it would be appropriate to order removal of a document from the Court’s file unless it would also be appropriate for the document to be the subject of a suppression or non-disclosure order in accordance with the Act. Competing considerations as between the two procedures are that:
14. if an order for removal is made, then there is no risk in the future that the documents could be accessed by a member of the public, either by reason of accident or otherwise; and
15. if a suppression order is made, then it is necessary that the suppression order be limited in time as provided for in s 37AJ of the Act.
16. In circumstances where the proceeding has been effectively settled almost immediately upon its filing and that the file itself occurred only as a result of the expiry of the statutory limitation period, I consider that I should make an order for removal of the statement of claim and originating application from the court file as proposed in the interlocutory application under rule 2.28 of the Federal Court Rules. It would be wrong to assume, however, that I would endorse any routine inclusion in a settlement of a term providing for removal of documents from the Court file. In the present case, it is the circumstances to which I have referred above, particularly the almost immediate settlement of the proceeding after filing, which persuade me to make the order sought.

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| I certify that the preceding nine (9) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot. |

Associate:

Dated: 25 November 2021