Federal Court of Australia

Sydfran Pty Limited v Mansito Helena Nominees Pty Ltd, in the matter of Treelens Pty Ltd [2022] FCA 752

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| File number(s): | NSD 845 of 2021 |
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| Judgment of: | **GOODMAN J** |
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| Date of judgment: | 29 June 2022 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for non‑standard discovery – whether the making of an order is consistent with the overarching purpose – application dismissed |
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| Legislation: | *Australian Consumer Law*, Sch 2 of the *Competition and Consumer Act 2010* (Cth)  *Federal Court of Australia Act 1976* (Cth)  *Federal Court Rules 2011* (Cth) |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 18 |
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| Date of last submissions: | 21 June 2022 |
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| Date of hearing: | 20 June 2022 |
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| Counsel for the Applicants: | Mr C Freeman |
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| Solicitor for the Applicants: | Braddon Marx Lawyers |
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| Counsel for the First Respondent: | Mr E Moon |
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| Solicitor for the First Respondent: | Darrer Muir Fleiter Lawyers |
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| Counsel for the Second and Third Respondents: | Mr R A Parsons |
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| Solicitor for the Second and Third Respondents: | Hicks Oakley Chessell Williams |

ORDERS

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|  | | NSD 845 of 2021 |
| IN THE MATTER OF TREELENS PTY LTD ACN 083 135 219 | | |
| BETWEEN: | SYDFRAN PTY LIMITED ACN 084 281 943  First Applicant  BRISPLANTS PTY LIMITED ACN 624 174 796  Second Applicant | |
| AND: | MANSITO HELENA NOMINEES PTY LTD ACN 005 210 015  First Respondent  TREELENS PTY LTD ACN 083 135 219  Second Respondent  MICHAEL VERGE  Third Respondent | |
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| AND BETWEEN: | TREELENS PTY LTD ACN 083 135 219  Cross-Claimant | |
| AND: | SYDFRAN PTY LIMITED ACN 084 281 943 (and others named in the Schedule)  First Cross-Respondent | |

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| order made by: | GOODMAN J |
| DATE OF ORDER: | 29 JUNE 2022 |

THE COURT ORDERS THAT:

1. The applicants’ application for an order that the second and third respondents provide discovery is dismissed.
2. The applicants are to pay the second and third respondents’ costs of and incidental to that application.

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

REASONS FOR JUDGMENT

GOODMAN J

# INTRODUCTION

1. The first respondent, Mansito Helena Nominees Pty Ltd, is a franchisor. The franchised product is the Frenchams System, which concerns, broadly speaking, the installation and maintenance of indoor plants in commercial premises. The first applicant, **Sydfran** Pty Limited and the second applicant, **Brisplants** Pty Limited, are master franchisees in New South Wales and Queensland respectively and are companies under the control of Mr Gerard Verge (who is their sole director and member).
2. The second respondent, **Treelens** Pty Limited is a franchisee in Victoria and the third respondent, Mr Michael Verge, is the brother of Mr Gerard Verge and the sole director and member of Treelens. I will refer to Treelens and Michael Verge together as the **Treelens Parties**.
3. The brothers Verge and their respective companies are at issue on various fronts and in particular with respect to operations in Victoria. The pleadings include allegations and counter allegations of breaches of the statutory prohibition against unconscionable conduct in s 21 of the *Australian Consumer Law*.
4. Outlines of evidence have been filed and the proceeding is set down for hearing commencing on 18 July 2022.
5. Sydfran and Brisplants apply for an order that the Treelens Parties provide discovery of categories of documents. In support of the application, Sydfran and Brisplants rely upon an affidavit of their solicitor. The Treelens Parties rely upon a bundle of correspondence.

# LEGAL FRAMEWORK

1. Part 20 of the *Federal Court* ***Rules*** *2011* (Cth) concerns discovery and inspection of documents. Rule 20.11 provides:

A party must not apply for an order for discovery unless the making of the order sought will facilitate the just resolution of the proceeding as quickly, inexpensively and efficiently as possible.

1. Rule 20.14 concerns standard discovery and r 20.15 deals with non-standard and more extensive discovery. The discovery sought by the applicants is discovery by categories, so r 20.15 applies. Rule 20.15(3) provides:

(3)  An application by a party seeking more extensive discovery than is required under rule 20.14must be accompanied by an affidavit stating why the order should be made.

1. Paragraph 10.6 of Central Practice Note 1 (**CPN1**) provides:

10.6  The Court will not approve expansive or unjustified Requests and will generally only consider approving a Request in one or more of the following circumstances – where:

(a) the Request facilitates the just resolution of the proceeding as quickly, inexpensively and efficiently as possible;

(b) to do so will effectively facilitate a forthcoming mediation (or other ADR process);

(c) the Court and the parties are sufficiently informed of the nature of the case and issues in dispute so that the appropriateness of the Request can be properly considered (eg. possibly only after key evidence has been filed);

(d) the Discovery Applicant has adequately justified the need for the Request, including demonstrating:

(i) the utility of the Request and the appropriateness of discovery occurring at that time;

(ii) the relevance and importance of the documentation or information sought;

(iii) the limited and targeted nature of the Request; and

(iv) that the documents sought are, or are very likely to be, significantly probative in nature, or the documents materially support, or are materially adverse to, any party's case in the proceeding.

1. The applicants, as the parties seeking discovery, bear the onus of satisfying the Court that the order for discovery should be made.

# CONSIDERATION

1. The categories in respect of which discovery is sought are as follows:
2. any document containing, recording, evidencing or referring to any objection or approval by or of a Relevant Party to the applicants or either of them entering into the National Contracts (or any one or more of them) [as defined in the ASOC]

2. any document containing, recording, evidencing or referring to any objection or approval by or of a Relevant Party to the applicants holding themselves out as able to provide plantscaping services under the Frenchams Brand to any National Customer (as defined in the ASOC) in a state or territory other than New South Wales and/or Queensland;

4. any document containing, recording, evidencing or referring to any communications between a Relevant Party or either of them, in relation to:

(a) the servicing of the Victorian Sites (as defined in ASOC) by Treelens using equipment branded with ‘Melbourne Indoor Plants’ during the Relevant Period;

(b) Treelens’ provision of, or the refusal of Treelens to provide, Service Reports (as defined in the ASOC) in connection with the servicing of the Victorian Sites by Treelens during the Relevant Period;

(c) the email between Matt Willis and Oliver Madden dated 10 May 2021 pleaded at paragraph 61 of the ASOC;

(d) the email between Micah Jacobs and Alan Harrison dated 10 May 2021 pleaded at paragraph 63 of the ASOC, including but not limited to the purchase order referred to at paragraph 61(i) of the Defence;

(e) any Safe Work Method Statement in connection with the Southland Site (as defined in the ASOC);

(f) in so far as paragraph 70 of the ASOC is concerned:

(A) the purchase of a new harness by any Relevant Party;

(B) the inability to locate any Safe Work Method Statement for the Southland Site; and

(C) ceasing all services to the Southland Site, whether temporary or permanent;

(g) the use by Treelens of the Frenchams Array Pot in the Melbourne Indoor Plants business;

(h) the June 2021 Report (as defined in the ASOC) during the Relevant Period;

(i) any Treelens employee or representative working at heights above 2 metres without a harness or otherwise in breach of the Occupational Health and Safety Regulations 2017 (VIC) at the Westfield Shopping Centre, Southland Site in Victoria during the Relevant Period; and

(j) the incident that occurred between 6.00am and 7.00am on 21 January 2022 between Michael Verge, Jason Muscat and Mark Thompson at Westfield Doncaster;

7. any document containing, recording, evidencing or referring to any complaint, service difficulty, error, omission, neglect, oversight, received by or communicated to Treelens from a National Customer in connection with services provided (or not provided, but should have been) by Treelens during the period 1 July 2017 and the date of this letter;

8. any document containing, recording, evidencing or referring to any receipt, acknowledgement, agreement, objection or refusal of or to the “National Goodwill Policy” by you or anybody on your behalf during the Relevant Period;

1. *“Relevant Party”* is defined as: *“any employee or representative of Mansito Helena Nominees Pty Limited, Tony Gerraty, Matthew Gerraty, Peter Gerraty, any employee or representative of Treelens Pty Limited, Michael Verge or Matthew Willis or any or either of them, separately or collectively”*.
2. Prior to making an order for discovery, the Court must be satisfied that the making of the order would facilitate the just resolution of the proceeding, as quickly, inexpensively and efficiently as possible. This is implicit in r 20.11 and is consistent with the overarching purpose set out in s 37M of the *Federal Court of Australia Act 1976* (Cth). Rule 20.15(3) requires an affidavit stating why the order should be made.
3. I am not persuaded that the making of the order would facilitate the just resolution of this proceeding as quickly, inexpensively and efficiently as possible, for the following reasons.
4. *First*, the applicants’ evidence on this application did not address the critical question as to why the order should be made (i.e. why it would facilitate the just resolution of the proceeding, as quickly, inexpensively and efficiently as possible), beyond addressing the question of relevance. Whilst establishing relevance is necessary, it is not sufficient. As counsel for the Treelens Parties submitted, joinder of issue is an insufficient basis for an order for discovery in this Court.
5. For example, there is no evidence before the Court which addresses the importance of the documentation sought (CPN1, [10.6(d)(ii)]); or how the documents sought are or are very likely to be significantly probative; or materially supportive of, or materially adverse to any party’s case in the proceeding (CPN1, [10.6(d)(iv)]). In this regard, I note that outlines of evidence have been exchanged and the proceeding is set down for hearing commencing on 18 June 2022. In this framework, it was open to the applicants to seek to demonstrate that the documents sought might be used, for example, to contradict evidence of the respondents’ witnesses or to bolster the evidence of a witness for the applicant where it was expected that the respondents would seek to impugn that evidence. Other examples as to how consistency with the overarching purpose might have been shown are available. The point is that the applicants’ evidence and submissions did not seek to do more than demonstrate the relevance of the categories, in a general way, to the pleadings and to one paragraph of one outline of evidence.
6. *Secondly*, the categories are not limited or targeted (CPN1, [10.6(d)(iii)]) and instead call for *“any document containing, recording, evidencing or referring to”* particular things. The width of categories commencing with these words is self-evident.
7. None of the above should be taken as an acceptance that the documents sought are relevant. I have doubts as to the relevance of some of the documents caught by the proposed categories, however it is unnecessary to address the question of relevance further when, for the reasons set out above, the mere establishment of relevance would be an insufficient basis upon which to make the order sought.

# CONCLUSION

1. For the reasons set out above, the application should be dismissed, with costs.

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| I certify that the preceding eighteen (18) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Goodman. |

Associate:

Dated: 29 June 2022

SCHEDULE OF PARTIES

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|  | NSD 845 of 2021 |
| Cross-Respondents |  |
| Second Cross-Respondent | BRISPLANTS PTY LIMITED ACN 624 174 796 |
| Third Cross-Respondent | GERARD PATRICK VERGE |