Federal Court of Australia

Vulcan Energy Resources Ltd v Murray [2021] FCA 1506

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 30 November 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - non-party requests for access to court documents - where orders previously made restricting inspection of filed documents without leave - whether order restricting publication of court documents necessary to prevent prejudice to proper administration of justice - whether provision of access to court material exposes applicants to republication of material subject of applicants' complaints of misleading or deceptive conduct and defamation - whether irreparable harm to applicants' business reputation if orders restricting access not continued - requests for access to documents allowed |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth) ss 37AE, 37AF, 37AG |
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| Cases cited: | *Baptist Union of Queensland - Carinity v Roberts* [2015] FCA 1068; (2015) 241 CLR 135  *Central Equity Ltd v Chua* [1999] FCA 1067  *Conway v Fernandez (No 2)* [2018] FCA 1975  *Cummings v Fairfax Digital Australia and New Zealand Pty Ltd* [2018] NSWCA 325; (2018) 99 NSWLR 173  *Herald & Weekly Times Limited v Gregory D Williams (formerly identified as VAI)* [2003] FCAFC 217; (2003) 130 FCR 435  *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651  *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149; (2015) 241 CLR 397  *Rinehart v Welker* [2011] NSWCA 403; (2011) 93 NSWLR 311  *Rush v Nationwide News Pty Ltd* [2018] FCA 357 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: |  |
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| Number of paragraphs: | 17 |
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| Date of last submissions: | 18 November 2021 (Applicants)  23 November 2021 (West Australian Newspapers Ltd)  25 November 2021 (Mr M Roddan, Australian Financial Review) |
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| Date of hearing: | Determined on the papers |
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| Counsel for the Applicants: | Mr ML Bennett |
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| Solicitor for the Applicants: | Bennett + Co |
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| Counsel for the Respondents: | The Respondents did not appear |
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| Counsel for the Interested Party (West Australian Newspapers Ltd): | Mr AV McCarthy |
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| Solicitor the Interested Party (West Australian Newspapers Ltd): | Steedman Stagg Lawyers |
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| Counsel for the Interested Party (Mr M Roddan, Australian Financial Review): | The Interested Party appeared in person |
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| Counsel for the Interested Party (Ms C Fredenburg, Lawyerly): | The Interested Party did not appear |

ORDERS

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|  | | WAD 250 of 2021 |
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| BETWEEN: | VULCAN ENERGY RESOURCES LTD  First Applicant  FRANCIS EDWARD BARNABAS WEDIN  Second Applicant  GAVIN JOHN REZOS  Third Applicant  **THORSTEN WEIMANN**  Fourth Applicant  **HORST DIETER KREUTER**  Fifth Applicant | |
| AND: | TIMOTHY PATRICK MURRAY  First Respondent  J CAPITAL RESEARCH USA LLC  Second Respondent | |
|  | WEST AUSTRALIAN NEWSPAPERS LTD  Interested Party  MR M RODDAN, AUSTRALIAN FINANCIAL REVIEW  Interested Party  MS C FREDENBURGH, LAWYERLY  Interested Party | |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 30 november 2021 |

THE COURT ORDERS THAT:

1. The order made on 8 November 2021 to the effect that no document lodged or filed with the Court in the proceedings shall be made available for inspection without the leave of the Court is vacated.
2. Identified persons be allowed to inspect and make copies of the originating application and statement of claim in these proceedings.

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

REASONS FOR JUDGMENT

COLVIN J:

1. Vulcan Energy Resources Ltd (**Vulcan**) is a public company. Its securities are listed on the Australian Securities Exchange. Vulcan and certain of its officers (together, the applicants) have commenced proceedings in this Court against Mr Timothy Murray and J Capital Research USA LLC (**J Capital**). They complain about a report and other statements allegedly published by Mr Murray and J Capital concerning a lithium project in Germany in which Vulcan is engaged (**Project**). Vulcan claims that the publication of the report and other statements is misleading or deceptive contrary to various statutory provisions. The officers claim that the publications are defamatory of them.
2. On 8 November 2021, orders were made on the ex parte application of the applicants restraining Mr Murray and J Capital from publishing the report and from making any further publication of and concerning the responses by Vulcan to the report or otherwise of and concerning Vulcan in relation to matters the subject of the proceedings in this Court (**Orders**).
3. At the time that the Orders were made, a further order was made to the effect that no document lodged or filed with the Court in the proceedings shall be made available for inspection without leave of the Court (**Inspection Orders**). The Court has received requests to inspect the originating application, statement of claim and any interlocutory applications for ex parte relief filed in the proceedings. The applicants have been given notice of the request. They oppose any variation to the Inspection Orders that would allow such inspection. They have provided written submissions in support of their position. Written submissions have also been received from West Australian Newspapers Limited and a reporter at the Australian Financial Review in support of the request for access.
4. In determining whether to make any form of order that would restrict the publication of documents filed with the Court, the Court 'must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice': s 37AE and s 37AF(1)(b)(iv) of the *Federal Court of Australia Act 1976* (Cth). Relevantly for present purposes, the ground on which such an order may be made is that it 'is necessary to prevent prejudice to the proper administration of justice': s 37AG(1)(a). In such a context, 'necessary' is a strong word. As the High Court said in *Hogan v Australian Crime Commission* [2010] HCA 21; (2010) 240 CLR 651 at [31] of an equivalent provision conferring such a power to be exercised where it was necessary in the interests of the administration of justice to do so:

It is insufficient that the making or continuation of an order under s 50 appear to the Federal Court to be convenient, reasonable or sensible, or to serve some notion of the public interest, still less that, as the result of some 'balancing exercise', the order appears to have one or more of those characteristics.

1. Although the Court has made rules concerning requests for access to documents filed in proceedings, I agree with Wigney J that it is difficult to see why the principles concerning open justice that apply to s 37AF and s 37AG should not apply equally where there is a request made under the *Federal Court Rules 2011* (Cth): *Rush v Nationwide News Pty Ltd* [2018] FCA 357 at [199].
2. It has also been said that by reason of open justice principles, suppression orders will only be made in exceptional circumstances: *Rinehart v Welker* [2011] NSWCA 403; (2011) 93 NSWLR 311 at [27].
3. For the applicants, reliance is placed upon *Central Equity Ltd v Chua* [1999] FCA 1067 at [7]‑[11], [19]-[20] for the proposition that the Court may consider the potential for irreparable pecuniary loss or damage to reputation. They submit that the publications by the respondents on social media about which they complain were designed (if not intended) to be picked up by mainstream media and widely disseminated. It is said that to allow access to the application, statement of claim and interlocutory applications will facilitate this conduct which the applicants say is actionable and is the very conduct of which they complain in the proceedings. The officers of Vulcan complain further that any reproduction of the publications of which they complain will give further voice to the damaging imputations which they say are contained within them.
4. It is said that the circumstances of the present case are unique because the applicants seek to restrain publications that have occurred in circumstances where part of the alleged impropriety is seeking to stimulate broader dissemination of the information.
5. For the following reasons, I am not persuaded that access to the application and statement of claim should be the subject of ongoing restrictions in the manner proposed by the applicants. There was no separate interlocutory application for ex parte relief.
6. The submissions for the applicants elide the publication of court proceedings and the republication by the respondents (or others) of the material the subject of the claims by the applicants. They are not the same. Open justice requires the scrutiny of what occurs in court including by the publication of a fair report of those proceedings. To publish a report of what has occurred in proceedings is not the same as a republication of the report and other statements that the applicants seek to impugn. The publication of a fair report of the court proceedings is the means by which public attention and scrutiny may be brought to what is happening in the courts. It is a fundamental aspect of open justice. By its nature, a publication of claims made in court proceedings will place the content within that context. It will not be a mere republication. It will be in a form which will convey to the reasonable reader that it is a report of claims and allegations. The Court proceeds on that basis in considering whether to provide access to court documents in which the case of a party is articulated: see the authorities cited with apparent approval in *Cummings v Fairfax Digital Australia and New Zealand Pty Ltd* [2018] NSWCA 325; (2018) 99 NSWLR 173 at [126]‑[133] (McColl JA, Beazley P and Simpson AJA agreeing).
7. Therefore, provision of access to documents that have been relied upon in court hearings (as is the case with the documents to which access is sought) do not expose the applicants to mere republication of the material that is the subject of the applicants' complaints.
8. Further, generally speaking, open justice means that a non‑party is entitled to see those documents which will enable a party to understand what a proceeding is about and how the case for each party is framed: *Oldham v Capgemini Australia Pty Ltd* [2015] FCA 1149; (2015) 241 CLR 397 at [24]‑[28] (Mortimer J).
9. As to the complaint that provision of access to the documents would give further voice to the alleged imputations complained of by the officers of Vulcan, the risk of embarrassment and reputational damage from the publication of reports of defamation proceedings are not, of themselves, reasons for the issue of suppression orders: *Herald & Weekly Times Limited v Gregory D Williams (formerly identified as VAI)* [2003] FCAFC 217; (2003) 130 FCR 435 at [32]‑[37] (Merkel J, Finn and Stone JJ agreeing); and see the authorities collected by Wheelahan J in *Conway v Fernandez (No 2)* [2018] FCA 1975 at [25]. It is not said that the relevant publications concern matters that are private in nature: compare *Baptist Union of Queensland - Carinity v Roberts* [2015] FCA 1068; (2015) 241 CLR 135. Nor is it said they concern matters of such a character that it would be offensive to a reasonable person or risk the health or safety of any person if repeated publicly. Nor is it said that the information was of a kind that allowing access might act as a deterrent to those who seek to bring or defend court proceedings from raising such matters in court.
10. The present case does not concern trade secrets or other confidential information. Cases of that character relied upon by the applicants deal with different issues and must be distinguished from the present circumstances.
11. The claims concerning the publications have been relied upon to obtain ex parte orders.
12. The decision in *Chua* should be distinguished. It proceeded upon the basis of the correctness of the principles that have been addressed in these reasons and on the basis that cases restricting access to pleadings in defamation cases will be rare given the importance of principles of open justice: at [26]. Nevertheless orders were made on the basis that they would operate temporarily, would be lifted as the matter proceeded to trial and there would be 'irreparable harm' to the applicant's business reputation if they were not made: at [27]. I am not persuaded that the present case is similar in character. Further, this is not an instance where the matters are raised by way of defence. It is the officers of Vulcan who have chosen to bring the claims in respect of publications which, on their own case, have been made and disseminated.
13. For those reasons I am satisfied that the non-disclosure orders made on 8 November 2021 should not be continued and access should be allowed to identified parties who seek access to the originating application and statement of claim filed in these proceedings.

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| I certify that the preceding seventeen (17) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |

Associate:

Dated: 30 November 2021