Federal Court of Australia

Australian Competition and Consumer Commission v Google LLC [2021] FCA 1172

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| File number: |  |
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| Judgment of: | **YATES J** |
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| Date of judgment: | 27 September 2021 |
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| Catchwords: | **PRACTICE AND PROCEDURE** – application for discovery by categories pursuant to rr 20.13 and 20.15 of the *Federal Court Rules 2011* (Cth) (the **Rules**) – in the alternative, application for interrogatories pursuant to r 21.01(1) and 21.04(1)(c) of the Rules – where allegation in the primary proceeding is of misleading and deceptive conduct, and/or the making of false or misleading representations, in contravention of ss 18, 34, 29(1)(g), and 29(1)(m) of the *Australian Consumer Law* |
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| Legislation: | *Competition and Consumer Act 2010* (Cth) s 155  *Australian Consumer Law*, Schedule 2 of the *Competition and Consumer Act 2010* (Cth) ss 18, 34, 29(1)  *Federal Court Rules 2011* (Cth) rr 20.11, 20.13, 20.15, 21.01 |
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| Cases cited: | *Australian Competition and Consumer Commission v Google LLC* [2020] FCA 1563  *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 |
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| Division: | General Division |
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| Registry: | New South Wales |
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| National Practice Area: |  |
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| Sub-area: |  |
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| Number of paragraphs: | 22 |
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| Date of hearing: | 27 September 2021 |
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| Counsel for the Applicant: | Mr D Tynan  Ms A Garsia |
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| Solicitor for the Applicant: | Norton Rose Fullbright |
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| Counsel for the Respondent: | Mr R Yezerski |
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| Solicitor for the Respondent: | Corrs Chambers Westgarth |

ORDERS

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|  | | NSD 816 of 2020 |
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| BETWEEN: | AUSTRALIAN COMPETITION AND CONSUMER COMMISSION  Applicant | |
| AND: | GOOGLE LLC  Respondent | |

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| order made by: | YATES J |
| DATE OF ORDER: | 27 SEPTEMBER 2021 |

THE COURT ORDERS THAT:

**Discovery Application**

1. The applicant’s amended interlocutory application dated 2 September 2021 (**Discovery Application**) be dismissed.
2. The applicant pay the respondent’s costs of and incidental to the Discovery Application.

**Discovery**

1. Pursuant to rr 20.13 and 20.15 of the *Federal Court Rules 2011* (Cth) (**Federal Court Rules**) the respondent give discovery of documents in accordance with the document categories identified and timing stipulated in Orders 6 to 7.
2. Pursuant to rr 20.15(1)(d) and (2)(b) of the Federal Court Rules the respondent produce the discovered documents electronically in a searchable document format.
3. Where a document to be produced contains graphs, charts, diagrams or images, where colour is necessary to interpret the document, a colour copy of the document be produced.
4. By 8 October 2021, the respondent produce to the applicant the “Documents and/or versions requested” for categories 1 to 34 and 39 to 40 as described in Annexure A to these orders.
5. By 29 October 2021, the respondent produce to the applicant the “Documents and/or versions requested” for categories 35 to 38 as described in Annexure A to these orders.
6. The respondent use its best endeavours to produce documents responsive to categories 35 to 38 to the applicant at the date such documents are ready for production.
7. By 29 October 2021, pursuant to r 20.17(3) of the Federal Court Rules, the respondent serve a single verified list of documents discovered which identifies the date of each document and identifies the source document(s) to which each document is related.

**Production**

1. By 15 October 2021, the respondent produce to the applicant a document identifying the differences between the version of the notification that appears in the Annexure to the Statement of Agreed Facts filed on 4 March 2021, and the notification released in:
   1. the United States; and
   2. the United Kingdom.

**Timetable**

11 The applicant file and serve an updated list of documentary evidence by 8 November 2021.

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

**Annexure A**

For the purpose of this Annexure:

*Final Version* means a version of the relevant document as at 28 June 2016.

*Source Document* means, in respect of a category, the source document(s) identified in the Applicant’s amended interlocutory application dated 2 September 2021 for that category.

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| No | Category | Documents and/or versions requested |
| 1. | User testing of the “Narnia 2.0 consent bump” in the United States, as referred to in the Source Document. | In relation to the user testing conducted in the US as referred to in the Source Document, produce:   1. a version of the ‘Narnia 2.0 consent bump’, mock, and prototype at the time that the relevant research was undertaken; 2. a version of the script used in the user testing at the time that the relevant research was undertaken; and 3. a Final Version of any document recording the final results of the user testing. |
| 2. | *Not used* |  |
| 3. | Documents hyperlinked to the following displayed text: ‘**page title**’, ‘**go/n20-consent**’, ‘**N20 consent bump text**’ or **go/n20-consent** as referred to in the Source Documents. | For any documents hyperlinked produce a version of the document:   1. at the date of each of the Source Documents identified; 2. at the date that the user testing referred to in each of the Source Documents was completed; and 3. a Final Version of the document. |
| 4. | *Not used* |  |
| 5. | Documents hyperlinked to the following displayed text: ‘**prototypes**’ as referred to in the Source Documents. | For any documents hyperlinked produce:   1. a version of the document at the date of each of the Source Documents identified; 2. a version of the document at the date that the user testing referred to in each Source Document was completed; and 3. a Final Version of the document. |
| 6. | Documents hyperlinked to the following displayed text: ‘The mocks are ‘**here**’ as referred to in the Source Documents. | For any documents hyperlinked produce:   1. a version of the document at the date of each of the Source Documents identified; 2. a version of the document at the date that the user testing referred to in each Source Document was completed; and 3. a Final Version of the document. |
| 7. | *Not used* |  |
| 8. | Each of the documents hyperlinked to the following displayed text: ‘**go/n20-research-r4**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document:   1. at the date of the Source Document identified; 2. at the date that the ‘round 4’ of user testing referred to in the Source Document was completed; and 3. a Final Version of the document. |
| 9. | Documents hyperlinked to the following displayed text: ‘**go/cb2demo**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; 2. a version of the document at the date that the user testing referred to in the Source Document was completed; and 3. a Final Version of the document. |
| 10. | Documents hyperlinked to the following displayed text: ‘**this Sheet**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; and 2. a version of the document at the date that the user testing referred to in the Source Document was completed. |
| 11. | Documents hyperlinked to the following displayed text: ‘**can be found here**’ as referred to in the Source Documents. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; and 2. a version of the document at the date that the user testing referred to in the Source Document was completed. |
| 12. | Documents hyperlinked to the following displayed text: ‘**go/n20-research**’ as referred to in the Source Documents. | For any documents hyperlinked produce a version of document:   1. at the date of each of the Source Documents identified; and 2. a Final Version of the document. |
| 13. | Documents hyperlinked to the following displayed text: ‘**Research brief**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; and 2. a version of the document at the date that the user testing referred to in the Source Document was completed. |
| 14. | Documents hyperlinked to the following displayed text: ‘**Summary of debriefs**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; and 2. a version of the document at the date that the user testing referred to in the Source Document was completed. |
| 15. | Documents hyperlinked to the following displayed text: ‘**here**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; and 2. a version of the document at the date that the user testing referred to in the Source Document was completed. |
| 16. | Documents hyperlinked to the following displayed text: ‘**the partner problem**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at the date of the Source Document identified. |
| 17. | Documents hyperlinked to the following displayed text: ‘**script used for previous studies**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at the date of each of the Source Documents identified. |
| 18. | Documents hyperlinked to the following displayed text: ‘**https://cb2demos.appspot.com/verify**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; 2. a version of the document at the date that the user testing referred to in the Source Document was completed; and 3. a Final Version of the document. |
| 19. | Documents hyperlinked to the following displayed text: ‘**Learn more about the benefits these features provide**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document; 2. a version of the document at the date that the user testing referred to in the Source Document was completed; and 3. a Final Version of the document. |
| 20. | Documents hyperlinked to the following displayed text: ‘**Manage your data settings (Privacy Checkup)**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; 2. a version of the document at the date that the user testing referred to in the Source Document was completed; and 3. a Final Version of the document. |
| 21. | Documents hyperlinked to the following displayed text: ‘**Manage my security settings (Security Checkup)**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; 2. a version of the document at the date that the user testing referred to in the Source Document was completed; and 3. a Final Version of the document. |
| 22. | Documents hyperlinked to the text displayed as ‘**doc (go/n2-central)**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document:   1. at the date of the Source Document identified; and 2. a Final Version of the document. |
| 23. | Documents hyperlinked to the text displayed as ‘**Narnia 2.0 Exec Circle Deck**’ and ‘**Exec Circle Outline**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at 2 March 2016 (being the date of the email communication in the Source Document that included the hyperlinks); and 2. a version of the document at the date of the relevant Executive Circle meeting. |
| 24. | Document referred to as ‘**N20 Talking Points for Exec Circle**’ as referred to in the Source Document. | For any documents hyperlinked produce   1. a version of the document at 9 March 2016 (being the date of the email communication in the Source Document that included the hyperlinks); and 2. a version of the document at the date of the relevant Executive Circle meeting. |
| 25. | Document hyperlinked to the text displayed as ‘**summary here**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at 15 March 2016 (being the date of the email communication in the Source Document that included the hyperlinks). |
| 26. | Documents hyperlinked to the text displayed as ‘**check out the Town Hall where Ben Smith and I walked through this work and its context**’ and ‘**this overview document**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document identified; and 2. a version of the document at the date of the relevant Town Hall meeting referred to in the Source Document. |
| 27. | Documents hyperlinked to the text displayed as ‘(**1, 2**)’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document:   1. at the date of the Source Document identified; and 2. a Final Version of the document. |
| 28. | Document hyperlinked to the text displayed as ‘**deck**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document:   1. at the date of the Source Document identified; and 2. a version of the document as at the date of the relevant meeting referred to in the Source Document, being 8 November 2015. |
| 29. | Document hyperlinked in comment 7 and comment 10 to the text displayed as ‘**docs.google.com/presentation/d/1dUHR80Da6hfKlu5siKv4sB8FhOnBx\_cj8sk1Y-YG2Fg**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at the date of the Source Document identified. |
| 30. | Documents hyperlinked to the text displayed as the ‘**slide deck**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at the date of the Source Document identified |
| 31. | Documents hyperlinked to the text displayed as ‘**dory**’ as referred to in the Source Document. | For any documents hyperlinked produce the version of the document as at the date of the Source Document. |
| 32. | Document hyperlinked to the text displayed as ‘**in our comm doc**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at the date of the Source Document. |
| 33. | The document hyperlinked to the text displayed as ‘**Google-wide effort**’ as referred to in the Source Document. | For any documents hyperlinked produce a version of the document at 18 July 2016 (being the date of the email communication in the Source Document that included the hyperlink). |
| 34. | Document hyperlinked to the text displayed as ‘**Outline**’ and ‘**Slides**’ as referred to in the Source Document. | For any documents hyperlinked produce:   1. a version of the document at the date of the Source Document; and 2. the final version (not drafts) of each of the documents presented to or considered by the relevant Exec meeting. |
| 35. | ‘**Narnia 2.0 Steering Committee**’ documents. | Produce all final (not draft) documents:   1. submitted to, and considered by, the Narnia 2.0 Steering Committee that consider any Narnia 2.0 user testing or the text or format of the Narnia 2.0 ‘consent bump’; and/or 2. recording any decisions made by the Narnia 2.0 Steering Committee in relation to (a),   during the period from 1 July 2015 to 31 December 2016. |
| 36. | ‘**Narnia 2.0 Town Halls**’ documents. | Produce all final (not draft) presentation slides, speaking notes and/or documents presented to attendees in relation to any Narnia 2.0 Town Hall meetings held during the period from 1 July 2015 to 31 December 2016. |
| 37. | ‘**PAL**’ or ‘**PA Leads**’ committee documents. | Produce all final (not draft) documents:   1. submitted to, and considered by, the ‘PAL’ or ‘PAL Leads’ body or committee that consider any Narnia 2.0 user testing or the text or format of the Narnia 2.0 ‘consent bump’; and/or 2. that record any decisions, made by the ‘PAL’ or ‘PAL Leads’ body or committee in relation to the matters identified in response to (a),   during the period from 1 July 2015 to 31 December 2016. |
| 38. | ‘**GAIA council**’ documents. | Produce all final (not draft) documents:   1. submitted to, and considered by, the ‘GAIA Council’ that consider any Narnia 2.0 user testing or the text or format of the Narnia 2.0 ‘consent bump’; and/or 2. that record any decisions, made by the ‘GAIA Council’ in relation to the matters identified in response to (a),   during the period from 1 July 2015 to 31 December 2016. |
| 39. | Documents hyperlinked to: **go/N20commdoc**. | For any documents hyperlinked produce a Final Version of the document. |
| 40. | Documents hyperlinked to: **go/SignedInAds**. | A version of the document as at the date of the Source Document. |
| 42. | *Not used (in light of Order 10)* |  |

REASONS FOR JUDGMENT

YATES J:

# Introduction

1. The applicant, the Australian Competition and Consumer Commission, alleges that the respondent, Google LLC, mislead its account holders to obtain their consent to expand the scope of personally identifiable information that the respondent could collect and combine about the account holders’ Internet activity, which the respondent could then use, including for targeted advertising. The applicant contends that, by so doing, the respondent engaged in conduct contrary to ss 18 and 34, and made representations contrary to ss 29(1)(g) and (m), of the Australian Consumer Law (Sch 2 of the *Competition and Consumer Act 2010* (Cth) (the **Act**)).
2. The applicant alleges that the respondent purported to obtain the consent of its account holders to collect and combine this information by means of a notification. This notification was displayed electronically on the desktop and mobile devices used by those account holders in the period 28 June 2016 to at least 10 December 2018 (the **Notification**). The publication of the Notification constitutes the conduct, and the making of the representations, at issue in the proceeding.
3. The proceeding was commenced on 27 July 2020. On 8 February 2021, it was listed for trial on the issue of liability commencing on 29 November 2021, with an estimated duration of five days.

# The application for discovery

1. By an amended interlocutory application dated 2 September 2021, the applicant seeks orders for discovery by categories, pursuant to rr 20.13 and 20.15 of the *Federal Court Rules 2011* (Cth) (the **Rules**) or, alternatively, in relation to some categories (categories 41 and 42) an order for interrogatories, pursuant to r 21.01 of the Rules.
2. Commendably, the application for discovery has been substantially resolved save for one category—category 41. At the hearing of the amended interlocutory application, this category was further narrowed:

**Category 41**

For each Decision Making Body, a document (or documents) that:

(a) …;

(b) provide the full names and position titles of each member of the Decision Making Body, who was involved in or had oversight of the Narnia 2.0 project including user testing in relation to the consent bump, between 1 July 2015 and 31 December 2016, and the date range that each member held a position on the Decision Making Body during that period;

(c) describe or show the Decision Making Body’s involvement and oversight of the Narnia 2.0 project, including the text and/or format of the Namia 2.0 ‘consent bump’ and user testing conducted in relation to the consent bump during the period between 1 July 2015 and 31 December 2016.

The ACCC seeks all final (not draft) documents in the category.

**Decision Making Body** is defined in Annexure A to the Amended Interlocutory Application by reference to four bodies being the **Executive Circle; GAIA Council; Narnia 2.0 Steering Committee;** and **PAL** or **PA Leads**.

1. The applicant says that, on the face of the documents already produced to it under s 155 of the Act, the Decision Making Bodies were involved in, or had oversight of, the development of the Notification. The applicant contends that the documents sought in category 41 are relevant to what the respondent intended to convey to its account holders in Australia by publishing the Notification, and whether misleading or deceptive representations (or representations likely to mislead or deceive), or false or misleading representations, were made. The applicant contends that the documents will also assist the Court to understand the content and meaning of the documentary evidence on which the applicant relies.
2. The respondent objects to giving discovery of documents by reference to this category. It contends that the category seeks production, in broad terms, of a large number of documents of doubtful relevance. It contends that the burden of producing the documents is such that compliance could not occur before the listed hearing date (see below). For that reason, the respondent contends that it would be futile to order discovery as sought.
3. As to the question of relevance, the respondent submits that the central allegations in the proceeding are that it engaged in misleading or deceptive conduct, and made false or misleading representations, by publishing the Notification. The correctness of those allegations will turn on the terms of the Notification itself. The respondent accepts that anterior steps taken to develop the Notification are “not necessarily irrelevant” to the allegations, but it nevertheless submits that it is “not obvious … that those steps will meaningfully assist the Court in determining the principal allegations in the proceeding”.
4. The respondent says that it has agreed, in any event, to give discovery in relation to the anterior deliberative steps of the Decision Making Bodies: categories 35, 37, and 38 in relation to the GAIA Council, Narnia 2.0 Steering Committee, and PAL or PA Leads; categories 23, 24, 25, and 34 in relation to the Executive Circle.
5. As to the subparagraphs of category 41, the respondent submits that the involvement and oversight exercised by each body in respect of the Narnia 2.0 project (subparagraph (c)) is likely to be apparent from the documents produced in respect of the other categories noted above. The respondent submits that documents providing the full names and position titles of each member of each Decision Making Body who was involved in or had oversight of the Narnia 2.0 project within the stated date range (subparagraph (b)) are wholly irrelevant to any issue going to liability.
6. Further, the respondent submits that the burden of giving discovery will be very large. So far, the respondent has identified that there are at least 44 members of the Decision Making Bodies. It has collected email correspondence and documents for five members. It estimates that the collection of email correspondence and documents for the remaining custodians will take four weeks. It will then need to review the collected documents for relevance, and consider questions of privilege and confidentiality—a task that will involve the respondent’s United States lawyers (to consider questions of privilege under United States law). The respondent says that this process is likely to take at least two months to complete, and perhaps four months, depending on the quantity of the documents collected, thereby jeopardising the listed hearing.
7. The respondent also says that the appellant’s request for discovery according to category 41 is belated. According to the respondent, the request was only made when the applicant filed its amended interlocutory application on 2 September 2021. The respondent questions why the information sought to be provided by discovery according to this category was not obtained as part of the s 155 information gathering process (which commenced in December 2018), if it was so important to determining liability.
8. For its part, the applicant says that, on 29 June 2021, it requested information as to the composition and operation of each Decision Making Body, and the role that each body played in considering and approving the Notification.
9. In response, the respondent says that the applicant’s request on 29 June 2021 was an informal request, which did not seek documents. Moreover, on 15 July 2021, it declined to accede to that request. The respondent says that, thereafter, the applicant gave no further indication that it would be seeking the production of documents on that topic, until 2 September 2021.
10. As an alternative to giving discovery of documents by reference to category 41, the applicant seeks an order for interrogatories. The proposed interrogatory has also been narrowed:

**Proposed interrogatory**

1. In respect of the following groups referred to in the ACCC’s Documentary Evidence:

(a) Executive Circle;

(b) GAIA Council;

(c) Narnia 2.0 Steering Committee; and

(d) PA Leads or also referred to as PAL, (each a **Decision Making Body** and collectively **Decision Making Bodies**),

For the period between 1 July 2015 and 31 December 2016, for each Decision Making Body, identify:

(e) …;

(f) the full names and position titles of each member of the Decision Making Body;

(g) the date range that each member identified in response to paragraph (f) above held a position on the Decision Making Body;

(h) the Decision Making Body’s involvement and oversight of the Narnia 2.0 consent bump and user testing conducted in relation to the consent bump;

(i) in relation to the PA Leads, or the PAL Decision Making Body, and explanation of the acronyms “PA” and/or “PAL”.

1. The respondent also opposes an order for interrogatories in these terms, essentially on the same grounds that it opposes giving discovery of documents by reference to category 41.

# Analysis

1. I am not satisfied that discovery by reference to category 41 will facilitate the just resolution of the proceeding as quickly, inexpensively, and efficiently as possible: r 20.11 of the Rules.
2. The applicant’s submissions were directed, primarily, to the proposition that the antecedent deliberations of each Decision Making Body is adjectivally relevant because, although an intention to mislead or deceive is not an element of conduct that contravenes ss 18(1) or 34, or ss 29(1)(g) or (m), of the Australian Consumer Law, it is nevertheless a relevant consideration which assists in forming a conclusion as to whether the conduct in question does have the proscribed character: *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* [2013] HCA 54; 250 CLR 640 at [55]; *Australian Competition and Consumer Commission v Google LLC* [2020] FCA 1563 at [29] and [31].
3. So much can be accepted. But it does not address the adjectival relevance of the documents sought by category 41. Category 41 is, perhaps, more limited than the parties think. It contemplates the existence of a document or documents that provide(s) the full names and positions of each member of each Decision Making Body within the stated period (in effect, a list of such information) (subparagraph (b)), and a document or documents that describe(s) or show(s) each Decision Making Body’s involvement in, and oversight of, the Narnia 2.0 project (subparagraph (c)).
4. As to the former, I am unable to see how a list of names and positions materially advances the applicant’s case on liability. Of course, if contravention is established then it is likely that the possible involvement of the respondent’s senior management in that conduct will be a relevant consideration in granting the relief that is sought. However, that is not the issue to be considered at the hearing listed to commence on 29 November 2021. I should add that the appellant’s submissions in the present application show that it already knows that the respondent’s senior management was involved in at least one of the Decision Making Bodies in relation to the Narnia 2.0 project.
5. As to the latter, the respondent has already agreed to provide documents concerning the anterior deliberations of each Decision Making Body. It can be expected that these documents will, themselves, show the actual involvement of the relevant Decision Making Bodies, and the actual oversight exercised by those bodies, in the Narnia 2.0 project. The possibility that discrete documents exist that provide, for example, a narrative of each body’s involvement and oversight would seem to add little to establishing a case on liability, in circumstances where, by the now agreed discovery categories, the applicant will have the very documents that show that involvement and oversight. I am certainly not persuaded that the task of providing discovery by reference to category 41—as explained in the affidavits of the respondent’s solicitor Mr Johnson (16 September 2021 and 23 September 2021)—is warranted in the circumstances.
6. The same observations can be made about the proposed interrogatory. As to subparagraph (i) thereof (the meaning of the acronyms PA and PAL), the respondent informed the applicant of their meanings in the course of submissions, obviating any need for an interrogatory on that topic.

# DISPOSITION

1. The amended interlocutory application will be dismissed, with costs.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Yates. |

Associate:

Dated: 27 September 2021