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CASENOTE: Artcraft Pty Ltd v Passingham [2022] VSC 20

The Applicant, Artcraft Pty Ltd (also '**Employer'**) sought urgent *ex parte* relief compelling the Respondent, Mr Passingham ('**Employee**') to either destroy or return its confidential information. The Employer claimed that the Employee had taken the information to his new employment with De Neefe Signs. The application came before Justice Riordan of the Supreme Court of Victoria on 22 December 2021. The urgent application was refused.

In the transcript of the initial application, the solicitor for the Applicant was questioned by Riordan J as to whether service of the application would have put the employee on notice of it, to the detriment of the Applicant. It appeared that the Employee already had notice of the basis for the Applicant's injunction, from a letter dated 7 December 2021; as the solicitor for the Applicant stated in response to the Court:

> *we wanted to, you know, give him the benefit of the doubt, and the opportunity to, you know, undertake to not deal with that information and to return it or destroy it as the case may be. And we have not had a response from him*

On 31 January 2022, the application came before John Dixon J, for a further hearing, as to whether an interlocutory injunction should be granted. Issues arising from the previous hearing were also ventilated.

At the 31 January 2022 hearing, the presiding judge pressed the solicitor for the Applicant concerning statements made to Riordan J. In answer, his Honour learned that:

- the solicitors for the Respondent wrote to the Applicant's solicitor on 14 December. This letter explicitly stated, among other things, the Employee's response in respect of two matters about which Riordan J had sought information; and
- in particular, the Employee's solicitors stated (and the Employee later deposed) that the Employee sent the disputed documents to his personal email address and that of his wife to meet obligations to his employer to complete particular work, and that the Employee had since deleted the documents sought.

In response to questions about the 7 December letter and the 14 December response, the solicitor for the Employer stated that he

a. had not brought the correspondence to the attention of the Court when questioned by Riordan J, as it was his impression that the solicitors, Destra, acted only for De Neefe and not the Respondent; and
b. did not consider correspondence with a 'third party' relevant to the Court's consideration.

Dixon J found that the response to Riordan J on 22 December was misleading in response to direct queries from the prior judge, and further dismissed this response in (a)-(b) above as inadequate in the circumstances.

His Honour found that, even if there was no other indication, as to for which party or parties Destra acted, Dixon J found that the nature of the communication (and the detailed response relating to the information obtained from the Employer) would have indicated to the reader that this had only come from the Employee.

The presiding judge found that there was a want of competence or diligence evident in the Employer's solicitor's failure, on behalf of his client, to disclose material correspondence to the Court.

His Honour noted that the Employee sought indemnity costs. Unusually, (given the usual rule in respect of failed injunctive relief is that costs be in the cause) Dixon J ordered indemnity costs and also ordered that those costs be taxable immediately. Noting that this was an unusual course, Dixon J found that the lack of candour warranted this unusual step and found there was no basis for the *ex parte* injunction to be issued.

Significance of the decision

This application (with its attendant costs penalty) is a reminder that *ex parte* injunctions are the exception rather than the rule. In other words, treating such injunctions as a mere formality was perhaps the first mistake of several in this proceeding.

Next, the lack of candour with the judge is a transgression which is not easily forgiven, both as a part of the administration of justice but also in dealing with the Court in discharging the duties which a practitioner owes to the Court.

In this case, the lack of candour robbed the Applicant of the very basis to issue that initial application and created in the judge's mind the probability that the misrepresentation was a cynical ruse designed to facilitate the making of orders to the Employer's advantage. This is most probably the reason behind the special costs order.

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